INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 6F - Guidance Text

Belgium

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN BELGIUM

Welcome to **Module 6F**, dealing with international insolvency law in **Belgium**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Belgium;
- a relatively detailed overview of Belgium's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Belgium.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2022**. Please consult the Foundation Certificate in International Insolvency Law web pages for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2022 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Belgium:

- the background and historical development of insolvency law in Belgium;
- the various pieces of primary and secondary legislation governing Belgian insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Belgium;
- the rules relating to the recognition of foreign judgments in Belgium.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Belgian insolvency law; and
- be able to answer questions based on a set of facts relating to Belgian insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO BELGIUM[1]

Belgium came into existence as an independent State in 1830, when the southern part of the then United Kingdom of the Netherlands, seceded. The 1830 Belgian revolution gave birth to an innovative legal document – the Belgian Constitution. This document has been a source of inspiration for several other countries (such as Spain, Greece, Italy and the Netherlands).

Belgium was occupied by Germany during World Wars I and II. The country prospered in the past half century as a modern, technologically advanced European state, and is a member of the North Atlantic Treaty Organisation (NATO) and the European Union (EU).

In recent years, acute political divisions between the Dutch-speaking Flemish of the north, and the French-speaking Walloons of the south, have led to constitutional amendments granting these regions increasing autonomy in various fields, such as social security and justice and health, to name but a few.

The capital city of Brussels is home to numerous international organisations, including the EU and NATO.

The Belgian State has 10 provinces, three regions (the Flemish Region, the Walloon Region and the Brussels Capital Region), and three official linguistic communities (the Flemish Community, the French Community and the German Community).

The Belgian constitutional system is particularly known for its complexity, and even perhaps its inconsistency on several points.

Similar to other European countries such as France and the Netherlands, Belgium has a civil law legal system based on the French Civil Code of 1804.

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[1] The information referred to in this paragraph has mainly been obtained from the CIA Factbook website, available at https://www.cia.gov/the-world-factbook/countries/belgium/. Also see M Kruithof and W De Bondt, *Introduction to Belgian Law* (Wolters Kluwer, The Netherlands, 2017).

Belgium's central geographic location and highly developed transport network have helped develop a well-diversified economy, with a broad combination of transport, services, manufacturing, and high-tech available. Typically, service and high-tech industries were concentrated in the northern Flanders region, while the southern region of Wallonia is historically home to industries such as coal and steel manufacturing. An increasing number of outstanding biotechnology companies are however now headquartered in the southern part of Belgium.

Belgium is mainly reliant on foreign sources of fossil fuels and the planned closure of its seven nuclear plants by 2025 should increase its dependence on foreign energy.

Belgium's gross domestic product (GDP) grew by 1.7% in 2017 and the budget deficit was 1.5% of GDP.

Belgium is part of the Eurozone and, as a result, its monetary policy mainly relies on, and is mainly controlled by, the European Central Bank.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Legal system

As discussed above, Belgium is a federal State that was formed in 1830 as a constitutional monarchy with a civil law system (historically) and mainly influenced by French law.

Communities and regions have their own legislative and governing bodies and are entitled to enact several rules in various fields. There is no hierarchy between national statutes and the statutes enacted by the communities and regions are of equal authority.

There are several sources of officially binding legal instruments, such as the Constitution and legislation issued by Belgian or European bodies with legislative competence.[2] Other sources, such as court decisions or legal scholars' writings, are nevertheless of significant importance. Case law precedents have no legal binding force, but in practice, however, decisions rendered by the highest courts have very strong persuasive authority.

Belgium is also a member of the European Union (EU) and, as a result, it is subject to European legislation. In a nutshell, European legislation can take on two distinct forms, namely regulations or directives. The latter require the member states to amend their domestic legislation to implement the European rules, sometimes with a slight leeway. By contrast, European regulations are legal instruments that are directly applicable throughout the EU without any need to implement its content into domestic legislation. European legislation covers a wide range of topics, such as recognition or enforcement of judgments rendered by courts located in the EU, state aid and labour law, to name but a few. In the field of insolvency, European legislation (the European Insolvency Regulation) is the main instrument for cross

[2] Other sources include international treaties that have been ratified by Belgium.

border cases, while the substantive local laws of each member state still apply to matters not provided for under European legislation.

Insolvency law in Belgium was long governed by the 1851 Bankruptcy Act, which was amended and co-ordinated in 1946. The main purpose of this piece of legislation was merely to provide for the payment of creditors out of the proceeds resulting from the liquidation of the debtor's property. In other words, this legislation did not properly deal with the debtor's rehabilitation.

Under the 1851 Bankruptcy Act, as amended in 1946, there were two main insolvency regimes, namely bankruptcy (*faillite / faillissement*), and judicial composition (*concordat judiciaire / gerechtelijk akkoord*). Bankruptcy aimed at selling off the assets of the distressed company in order to distribute the proceeds among its creditors. In contrast, judicial composition could pursue two different objectives – it could consist of a debt restructuring scheme accompanied by a moratorium without the liquidation of the ailing company, or the judicial composition could consist of a transfer of assets, namely the sale of the debtor's assets to distribute the proceeds among the creditors. This is discussed in further detail in paragraph 6.1.1.1 below.

Over the past few years, there has been strong focus on developing a rescue regime as part of the Belgian insolvency regime and, as a result, Belgian insolvency law moved from a creditor-focused regime to a more debtor-friendly regime.

Until very recently, Belgium had no codified legislation on the restructuring of distressed enterprises. Therefore, the legal framework consisted of a combination of codes and laws covering different disciplines such as commercial law, corporate law, social law, civil law and criminal law and, therefore, required a multidisciplinary approach. Even though there is not (yet) a genuine insolvency code in Belgium, the Belgian legislator attempted to merge significant parts of the Belgian insolvency regime into Book 20 of the new Belgian Economic Code.[3] As a result, the main insolvency laws of Belgium are laid down in Book 20 of the Belgian Economic Code.

4.2 Institutional framework

4.2.1 Court system

As has already been pointed out, Belgium has a civil law-based system.

Civil and commercial procedures are governed by Belgian and European legislation. Belgian procedures in court are mainly governed by the Belgian Judicial Code. This code contains rules pertaining to, among others, the service of the writ of summons, the exchange of submissions, the hearing, the judgment and its (potential) appeal.

[3] Book 20 was inserted into the Belgian Economic Code by Act of 11 August 2017.

Given the fact that Belgium is a federal State with several official languages (French, Dutch and German), additional rules are set out in a separate statute regarding the use of language in Belgian procedures.[4] These rules are extremely stringent and if not followed, it may lead to the invalidity of the procedure.

In addition, European regulations play a significant role. Most notably for civil and commercial procedures, Council Regulation (EC) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The Belgian judiciary consists of 12 judicial districts spread out among the different regions. Specialist courts exist for several matters, such as commercial matters, insolvency matters, employment matters, real estate matters (such as leases) or attachments. In addition, several courts have an appointed president who has jurisdiction in *ex-parte* proceedings and in summary proceedings.

The Belgian civil court system is typically divided into several layers. This structure originates from the French three-tier system: the justice of peace, the first instance courts and enterprise courts.

4.2.1.1 Justice of peace

There are 162 justices of peace in Belgium. As a general rule, the justice of peace deals with specific matters regardless of the value of the dispute (such as leases) and small value disputes (less than EUR 5,000).

4.2.1.2 First instance courts

There are 13 (civil) first instance courts.

The court of first instance has a general jurisdiction in all disputes with a value exceeding EUR 5,000, subject to exceptions where specific matters are expressly reserved by law for other Belgian courts.

In addition to its general jurisdiction, the first instance courts have exclusive jurisdiction in specific matters of enforcement of arbitral awards and act as an appellate court for judgment rendered by the justice of peace (for cases exceeding a value of EUR 5,000).

It is worth noting that a section of the court of first instance is dedicated to enforcement and attachment issues (*juge des saisies / beslagrechter*).

4.2.1.3 Enterprise courts

There are nine *enterprise courts*.

[4] Act on the use of language of 15 June 1935.

Historically, enterprise courts were known as commercial courts (*tribunal de commerce / handelsrechtbank*) and had general jurisdiction in all disputes between merchants (persons carrying on a business with a view to obtaining a profit).

The historical notion of "merchants" has recently been abandoned to give way to the broader notion of "enterprise".

An enterprise court now has a general jurisdiction in all disputes involving enterprises, which is a contentious notion under Belgian law. In short, enterprises may refer to, among others, a wide range of persons, such as commercial companies, individuals acting as entrepreneurs / self-employed or even associations without legal personality.

On top of its general jurisdiction, the enterprise court has exclusive jurisdiction in several matters, including insolvency law. Specific sections of the court are specialised and exclusively deal with insolvency matters.

The composition of the enterprise court is another noteworthy aspect. Cases that are brought before such a court are dealt with by three judges: one professional judge who permanently serves as a judge, and two lay judges. These lay judges are typically involved in general business matters and they can analyse a case through a different lens.

4.2.1.4 The courts of appeal

There are five courts of appeal in Belgium, located in Liège, Brussels, Mons, Antwerp and Ghent. These courts are competent to hear any case already dealt with by the first instance courts and the enterprise courts, subject to limited exceptions. In addition, specific courts of appeal have dedicated jurisdiction with respect to certain disputes.

4.2.1.5 The Belgian Supreme Court (Cour de cassation / Hof van cassatie)

As a general rule, decisions handed down by courts of appeal can be struck down by the Belgian Supreme Court. The Belgian Supreme Court is competent provided that all (domestic) appeals have been exhausted.

As opposed to representation before the lower courts, appeals with the Belgian Supreme Court can only be filed in civil[5] and commercial matters by one of the 20 lawyers admitted to the Belgian Supreme Court's bar.

The Belgian Supreme Court does not review the facts of each case, even though these facts are duly reported by the Belgian Supreme Courts' lawyers. Its main task is to verify whether or not the rule of law (domestic laws, international laws or previous case law set by the Belgian Supreme Court) has been complied with.

[5] With the exception of tax matters.

In terms of possible outcomes, the Belgian Supreme Court may either confirm the judgment under review, or strike it down with or without a request to refer the dispute to another court to judge the case again on the merits.

The case law of the Belgian Supreme Court is, as such, not binding on lower courts but in practice it remains extremely rare that a lower court deviates from decisions handed down by the Supreme Court.

As a general rule, the Belgian court system is accustomed to hearing litigation of an international nature, and to the English language, especially in Brussels.

The court system is perceived as efficient and that it delivers judgments of high standards. Belgian judges are also regularly trained by way of internal training or conferences, especially in the field of insolvency law where, in addition, several judges are renown legal authors of several legal journals.

Nevertheless, even though the Belgian court system is perceived as efficient, this efficiency is sometimes replaced by significant slowness. For instance, the Brussels Court of Appeal has a backlog of several years.

4.2.2 Enforcement system for creditors' rights inside and outside insolvency

The position and the rights of creditors in Belgium are clear and transparent. The *pacta sunt servanda* principle[6], which is also contained in the Belgian Civil Code,[7] is one of the key principles under Belgian law.

No distinction is made between local and foreign parties to a contract.

Initially, Belgian insolvency law focused on creditors and their own interests, and the main purpose of insolvency law was to realise the assets of the insolvent entity and to distribute the proceeds among creditors. Belgian insolvency law thus tended to be a creditor-friendly regime.

However, over the past few years the Belgian legislator has devoted its energy to reinforcing the preventive approach in the Belgian insolvency landscape. One of the key elements of this preventive approach is a moratorium can be imposed on creditors (even secured creditors, with limited exceptions) without their individual consent, but under the control and with the prior approval of the insolvent enterprise.

The result is a nuanced approach where the interests of the debtor tend to take precedence over those of (unsecured) creditors for a relatively long time (see the discussion below on the rescue regime in Belgium), in cases where the debtor can benefit from the rescue regime, which is particularly protective towards debtors.

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6 *Pacta sunt servanda* literally means "agreements must be kept" or, as the maxim goes, "honour your obligations".

7 Belgian Civil Code, Art 1134.

In this nuanced approach taken by Belgium, secured creditors are preferred over other creditors. As a general rule, secured creditors can either require payment within a reasonable timeframe, or they can enforce (with some limitations) their claim against the secured assets, regardless of the insolvency of the debtor.

Outside of insolvency, creditors are able to enforce their claims not only by way of quite lengthy proceedings but also, in many cases, by way of short *ex-parte* proceedings.

Typically, a creditor has two options at its disposal. Firstly, if a creditor has an enforceable title (for example a judgment on the merits or a notarised deed), the creditor can directly request the attachment judge to attach a wide array of goods (such as real estate, movable goods, shares, dividend and wages) in an *ex parte* proceeding.[8]

Secondly, if the creditor does not have any enforceable title at his disposal such creditor will typically launch proceedings to seek authorisation from the attachment judge to attach a wide array of goods on a conservatory basis.[9] These proceedings will be followed immediately by the service of a writ of summons to initiate proceedings on the merits in order to obtain a genuine enforceable title.

These proceedings are quite efficient and fast as the proceedings before the attachment judge are treated as summary proceedings. However, debtors acting in bad faith could prolong the proceedings by initiating appeals. These appeals will also be treated as summary proceedings.

Enforcement of rights, either though courts or out-of-court proceedings, is no more complicated for foreign creditors than it is for any other creditor located in Belgium. Evidentiary documents must, in principle, be in the language of the proceedings at hand (thus French, Dutch or German as the case may be). However, the court has a discretion to accept documents in other languages, in English in particular.[10]

4.2.3 Efficiency of the court system in the context of enforcement of debtor and creditor rights inside and outside insolvency

The Belgian court system is generally viewed as efficient in terms of the rate of return outside of insolvency proceedings, costs and duration. Proceedings on the merits usually take a year or even less, depending on the complexity of the case and opposition by the debtor.

Once the debtor enters insolvency proceedings, enforcement against unsecured claims is stayed. In this scenario, even though they are not always allowed to enforce their rights, (especially in the case of judicial reorganisation, which is the Belgian rescue regime), secured creditors are in a better position.

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8 These proceedings are, of course, subject to an appeal by the debtor once the attachment is made.

9 With the notable exception of conservatory attachment by garnishment, where there is no requirement of an enforceable title and a mere private title (such as contracts and invoices) will suffice.

10 Documents are usually translated by lawyers either in full or in excerpts.

In the case of judicial reorganisation, the principle remains that any enforcements, whether against secured or unsecured assets, are stayed (with a few limited exceptions).

In the case of bankruptcy, every creditor (even a secured creditor) must file its claim with the trustee in bankruptcy, as any enforcement is in principle prohibited as from the declaration of bankruptcy. After a certain period of time (that is, after the filing of the first minutes of verification of claims by the trustee in bankruptcy), secured creditors[11] may however decide not to wait for the sale organised by the trustee, and enforce their rights. In addition, creditors with a financial security (for example, share pledge) under the Belgian Financial Collateral Act of 15 December 2004, are still authorised to enforce their rights, regardless of the insolvency of the debtor.

Secured claims may thus be enforced despite bankruptcy, to a fair extent.

4.2.4 Insolvency regulator

There is no insolvency regulator in Belgium. Nevertheless, the enterprise court or the Public Prosecutor have the authority to initiate bankruptcy proceedings under certain circumstances.

In the framework of insolvency proceedings, a plethora of insolvency practitioners may step in. Insolvency practitioners' details are usually or necessarily (depending on their exact purpose) on official lists held by the courts or by the professional organisation that they belong to. Insolvency practitioners need to prove their qualifications before they are placed on such a list. Belgian law does not contain detailed qualification requirements for insolvency practitioners, although most courts or professional organisations set quite high educational standards.

Self-assessment Exercise 1

Study the aspects dealt with in the previous section.

Question 1

Briefly describe the different layers of courts in Belgium. Is there a court that handles insolvency cases, and if so, where is it located?

Question 2

Which court(s) is / are, in your opinion, typically involved in insolvency matters / recovery matters? Briefly explain its / their role and its / their position in the typical layers of courts in Belgium.

[11] See the exact rules hereinafter.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

5.1 Real security

5.1.1 Assets that can be secured

Under Belgian law, real security can be created over all assets that are transferable or assignable. This signifies that any asset that is identifiable and transferable as a separate unit and that is not of a personal nature (which is, in principle, not transferable) may be subject to a real security.

The most frequently secured asset classes are immovable property, inventory or machinery, bank accounts, shares, receivables or the commercial business as a whole (by way of a floating charge).

Under Belgian law, there are different forms of security. This module will however only focus on the types of security that are mainly used, being mortgages and pledges. These types of security also play an important role in insolvency proceedings. In addition, this module will briefly touch upon the reservation of title clause and the right of retention that also play a significant role in the event of insolvency.

Usually, Belgian law establishes a *summa divisio* between security over movable property and security over immovable property.

5.1.2 Immovable property

5.1.2.1 Description of the security and its formalities

The typical form of security over immovable property is a mortgage (*hypothèque / hypotheek*), which constitutes a right *in rem*. A mortgage can be legal[12] or contractual.

Such a mortgage can be created over land, buildings, or other immovable properties[13] located in Belgium.

Mortgages are perfected by inscribing the mortgage at the mortgages' record office.

Prior to being inscribed, the mortgage deed must be registered, which will lead to a registration duty fee amounting to a percentage of the amount of the mortgage secured. As the costs associated with a mortgage can be significantly high, creditors (especially banks)

[12] Under certain circumstances, Belgian tax authorities have the right to create a legal mortgage.

[13] Aircrafts and vessels are also subject to mortgages under Belgian law. This module will not outline the regimes of these specific mortgages.

usually agree to combine both a genuine mortgage on a part of the asset and a mortgage mandate on the remainder of the asset. As the mortgage mandate is not a security interest but a mere irrevocable power of attorney to create additional mortgages (as the case may be), it does not entail the same cost.

Between the parties a mortgage exists independently of any registration, but with regard to third parties, it only has effect when registered in the relevant district mortgages' registry.

A mortgage registration is valid for a duration of 30 years, regardless of the duration of the loan secured by the mortgage.

5.1.2.2 The effects of a mortgage

A mortgage creates both a consequential right and a preferential right. It is an accessory right assigned to discharge a principal obligation and is indivisible.

Two periods of time must be distinguished: (i) before the debt becomes due and payable, the owner of the property retains ownership, rights and possession; and (ii) when the debt becomes due and payable, the creditor can attach the encumbered property if the debtor is in default of payment of its debt. In such a case, the secured creditor will enjoy a priority in respect of the proceeds of the sale of the property.

Prior to enforcing its claim, a secured creditor must have an enforceable title. As discussed above, it is not only court decisions that are enforceable, but notarial deeds can also be an enforceable title if they meet the necessary requirements. In order to be deemed an enforceable title, the notarial deed must, apart from certain formal requirements, clearly determine all mutual rights and obligations of the parties and indicate how these will be enforced in case of default. The notarial deed further has to precisely define the debt and must therefore contain all necessary information and conditions to determine the exact amount of the total debt (including interest, etcetera), without further discussion between the parties being required.

As highlighted above, the mortgage must be registered in the appropriate mortgages' registry. The date of registration is of the utmost importance in order to rank creditors, should there be several mortgages over the same property. In such a case, the creditor whose mortgage was registered first will be entitled to receive payment before all other mortgagees.

5.1.2.3 Enforcement outside and inside insolvency proceedings

Outside insolvency proceedings

If the notarial deed is not an enforceable title, the secured creditor will firstly need to obtain a final court decision ordering payment under the loan agreement before it can enforce the mortgage. Such a final court decision grants the mortgagee an enforceable title, which is required in order to foreclose.

If the debt is undisputed / undisputable, the creditor can request that the case be heard at the introductory hearing (or at a postponed hearing shortly thereafter). In that case, a judgment can be obtained in a few months. The debtor can however easily block these abbreviated proceedings by (even formally) disputing the claim in written submissions. In that case, fully-fledged litigation, with the exchange of submissions between parties, cannot be avoided. Such a procedure can easily take up to a year or even more in complex cases (or due to the bad faith of the debtor). In the case of an appeal, it can even take additional months (or even years depending on the backlog of the court) before a final judgment can be obtained.

If the notarial deed is an enforceable title, the enforcement procedure can be directly initiated by the secured creditor.

The procedure of enforcing a mortgage is conducted according to the rules of executory attachments on immovable properties, some of which can be briefly described as follows:

- before the creditor can levy an executory attachment on the mortgaged property, an order for payment must be served upon the debtor. This is a last formal notice to pay the debt;

- the writ of executory attachment must be served after a period of 15 days but within six months after the order for payment has been served. This writ of seizure has to be copied in the mortgage registry;

- within one month after the entry of the seizure in the mortgage registry, the mortgagee must file a request with the court to appoint a notary, who is responsible for the auction. This delay of one month is not binding and is generally not adhered to as the mortgages' registries usually do not return the copied writs in time;

- the next step in the enforcement procedure is the public auction for which the notary drafts the sales conditions (according to the law and notarial practice); and

- finally, the notary will proceed to distribute the proceeds.

The debtor can oppose each of the aforementioned steps in the enforcement procedure. Therefore, the length of this procedure will largely depend on the debtor's attitude.

Inside insolvency proceedings

Bankruptcy

In the case of the bankruptcy of the borrower, the mortgagee (as well as all other creditors), must file its (their) claim against the bankrupt estate within the period specified in the bankruptcy judgment (this is usually a one-month period). The trustee in bankruptcy appointed by the court will verify the claims and will either accept or reject them. If the trustee in bankruptcy deems that the mortgagee has an enforceable title, the bankruptcy receiver must accept the claim.

However, the following should be noted:

- A bankruptcy trustee's decision to accept the mortgagee's claim does not create an enforceable title as such. However, in practice it is generally accepted that the mortgagee can enforce its mortgage based on its notarial mortgage deed at the decision of the bankruptcy trustee;

- If the trustee in bankruptcy does not accept the mortgagee's claim, the dispute is automatically referred to the enterprise court. After regular litigation with exchanges of submissions (and possibly appeal procedures), the court will hand down a judgment. Based on this final judgment, the mortgagee can enforce its mortgage according to the procedure set out above (outlining the enforcement outside of insolvency proceedings) and by taking into consideration the rules of enforcement during the bankruptcy procedure as described below;

- A problem arises, however, when the trustee in bankruptcy accepts the claim in principle, but only for a provisional amount. If so, the case is not automatically referred to the enterprise court to decide upon the claim. The mortgagee cannot enforce its mortgage based on the trustee's decision, as it is only provisionally accepted.

Assuming that the mortgagee is deemed as having an enforceable title, the following distinctions have to be made:

- if the enforcement procedure was initiated, a notary was appointed by a final judgment of the court[14] and if the attachment of the immovable property by the mortgagee was entered in the official mortgages' register before the bankruptcy judgment was handed down, the mortgagee may continue with the sale of the immovable property. The trustee in bankruptcy may only in certain limited circumstances suspend the sale; and

- if the enforcement procedure was not yet initiated by the mortgagee and if a notary was not yet appointed, or if the attachment of the immovable property was not entered in the official mortgage register before the bankruptcy judgment was handed down, only the first ranked mortgagee can proceed with the sale of the immovable property, but only after the filing of the first minutes of verification of claims by the trustee in bankruptcy. The trustee in bankruptcy may nevertheless request an additional suspension of the mortgagee's rights for a maximum of one year, starting from the date of the bankruptcy judgment.

The court will decide whether such additional suspension can be granted, taking into account the interests of the bankrupt estate.

Upon a sale of immovable property, the following rules apply to the allocation of the mortgage proceeds:

[14] And that its decision is no longer subject to appeal.

- The first-ranked mortgagee will be entitled to the amount of the proceeds that corresponds with that part of its claim (principle amount and interest) guaranteed by the mortgage;

- Usually the mortgaged property will be foreclosed before the allocation of bankruptcy proceeds among all the creditors. If the mortgagee is not fully reimbursed after sale of the mortgaged property, it will be considered as an ordinary creditor for the remainder of its claim; and

- If, prior to the sale of the mortgaged property proceeds from other assets have already been distributed, the mortgagee can participate in the distribution in proportion to its claim. This may however not result in more favourable treatment of the mortgagee than it would have if the mortgaged property had been sold before the other assets. Therefore, whatever the mortgagee may have received before the sale of the mortgaged property will be deducted from the proceeds of the mortgaged property that he is entitled to.

The trustee in bankruptcy deals with the foreclosure of the mortgage without any involvement from the mortgagee, mainly when the mortgaged property has not been attached, when a notary has not been appointed by way of a final judgment (no longer subject to appeal) and when it is entered in the official mortgage registers, or in the event of the first ranked mortgagee, when the receiver seeks court authorisation to deal with the foreclosure procedure alone.

Judicial reorganisation

In the case of judicial reorganisation, any enforcement measure is stayed due to a moratorium. The mortgagee will however benefit from the following specific rights:

- The interest on the mortgagee's claim must be paid in any event and the suspension of its rights due to the moratorium cannot last more than 24 months (this can be extended by another 12 months under certain circumstances), from the date of the approval of the reorganisation plan; and

- The mortgagee qualifies as an extraordinary creditor, which means that it cannot be subject to any forced reduction ("haircut") of its claim in the framework of the reorganisation plan, without its individual consent.

5.1.3 Movable property

5.1.3.1 Description of the security and its formalities

A pledge (*gage / pand*) confers on the secured creditor the right to be paid from the encumbered assets.

A pledge may be created over either tangible or intangible assets. It is made by agreement between the pledgor and the secured creditor. Since 1 January 2018, a pledge must be

perfected by registration in the pledge register. The pledge agreement must be proven by a written document containing an accurate description of the secured claims and of the asset to be covered by the pledge. This is a major change to the Belgian security landscape as this registration replaces the former dispossession which was, subject to limited exceptions,[15] a condition of validity of pledge. It is no longer required to transfer the possession of the secured asset to the creditor. As a result of this significant change in law, it is much easier to create and perfect a pledge under Belgian law. The pledgor will retain possession over its assets (unless there is an agreement to the contrary) and may sell the asset in the ordinary course of its business.

A pledge may in fact cover any and all assets that compose the business of the pledgor, such as, *inter alia*, the inventory, the goodwill, the commercial names, trademarks, patents, equipment and machinery. Land and buildings are excluded as they can only be subject to a mortgage.

It is worth noting that in the case of a pledge over receivables, the pledge will not be enforceable against the debtor of the receivable until it has been duly notified of it, or until it has acknowledged it.

5.1.3.2 The effects of a pledge

A pledge gives the creditor a preferential right over an encumbered asset. The pledge will only be enforceable against third parties if several formalities are fulfilled – either by registration in the pledges' registry or by dispossession.

As discussed above, a pledge over receivables can only be enforced following the notification to the debtor of the receivable or its acknowledgment thereof.

The registration of the pledge will have an impact on any competition between creditors as the first registered creditor will rank above other subsequent registered creditors.

5.1.3.3 Enforcement outside and inside insolvency proceedings

Outside insolvency proceedings

The process of enforcement has been significantly facilitated over the past few years.

Before the new regime became effective on 1 January 2018, the enforcement of a pledge required, in most cases, the prior authorisation of the court, with the notable exception of a pledge over financial instruments (see the discussion below) and, in practice, over receivables as well. This authorisation prerequisite is no longer necessary when the pledgor is not a consumer. The pledgee will be able to immediately move forward with the sale of the pledged assets.

[15] Exceptions concerning pledge over a commercial business, which is a floating charge.

The pledgee will nevertheless have to notify the pledgor at least 10 days in advance (three days if the assets are perishable) of its intention to enforce the pledge. Where the parties agree, the pledgee can also appropriate the pledged assets on the basis of an expert-set price, or on the basis of the market price (where the asset is traded on a market).

Despite this, courts will of course have the right to continue to oversee the process when difficulties arise whilst enforcing the pledge.

Inside insolvency proceedings

Enforcement measures for movable goods (belonging to the bankrupt estate) on the basis of privileged claims are suspended until the first verification of the claims (the date indicated in the court's bankruptcy decision and is usually set at one month following the bankruptcy judgment).

This implies that after the filing of the first minutes of the verification of the claims, the pledgee regains the right to enforce its rights. The trustee in bankruptcy can, however, request the enterprise court to suspend this right for a period of up to one year as of the date of the bankruptcy judgment, if required in the interest of the bankrupt estate.

Specific situation of security subject to the Belgian Financial Collateral Law

Pledges or security assignments of bank accounts and financial instruments (for example, shares) that are subject to the Belgian Financial Collateral Law of 15 December 2004, as well as close-out netting agreements, will not be affected by the opening of insolvency proceedings. Such security interests can in principle thus be enforced at any time, despite any insolvency proceedings.

5.1.4 Reservation of tile and rights of retention

A right of retention authorises the creditor to suspend the performance of its obligation to surrender a movable item to the debtor until the claim relating to the item has been fully settled.

A retention of title clause is a contractual clause by which the seller of goods stipulates that ownership of the item only passes to the buyer once the latter has fulfilled its contractual obligations or, in other words, once the purchase price has been fully paid.

Before the entry into force of the law on movable securities of 11 July 2013, both the retention of title clause and the right of retention were partially organised and enforceable in the event of bankruptcy (and insolvency in general).

The new regime now provides a statutory basis for both the retention of title clause and the right of retention, making them genuine (*quasi*) security interests under Belgian law.

5.2 Personal security

5.2.1 Types of personal security

The Belgian legal framework provides for several types of personal security.

There are three types of personal security that are regularly used in practice:

Personal guarantor (*caution / borgtocht*)

A person may be jointly and severally liable for the debt of the main debtor.[16]

In other words, the guarantor assumes the same responsibility for payment of the debt as the debtor himself, and can be sued by the creditor as well as, or instead of, the debtor (as the case may be).

An independent guarantee at first demand

Under this kind of personal security, the guarantor (usually a bank) commits itself to pay a defined amount at the very first request of the beneficiary, provided that the conditions stated in the guarantee have been met. The guarantor is not entitled to make any assessment on the merits of the debt(s) owed by the debtor.

The conditions to be met are usually rather effortless (for example, communication of several documents) so that, as a general rule under Belgian law, only fraud and wilful misconduct can undermine the independence of such a guarantee.

A comfort letter

A comfort letter can take various forms and be drafted in various ways.

Typically a comfort letter is requested from a parent company to provide some comfort to a party entering into a contractual / financial relationship with its subsidiary.

This comfort letter may take the form of a guarantee of some undertakings or may be in a weaker form. Such a comfort letter can, for instance, be drafted as a best effort commitment to bring sufficient financing and support to its subsidiary so that it may continue trading and avoid bankruptcy. At the other end of the spectrum, it could be a comfort letter where the parent company binds itself to pay the debts of its subsidiary in the event that the subsidiary does not pay. The parent company can also bind itself jointly and severally to pay any debt of its subsidiary.

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[16] Please note that there are various consequences attached to a personal guarantor, depending on the content of the clause describing the effects of such a guarantee. For instance, a personal guarantor may simply be jointly liable without being severally liable (he may first refer the creditor to the main debtor and commit himself to pay, only if the main debtor is unable to pay).

5.2.2 Creation of personal security

As already emphasised, contractual freedom is one of the key principles under Belgian law. There are no specific legal requirements directly applicable to personal security.

However, should the personal security be granted to or by a company, one should pay attention to several legal principles, being those relating to corporate interest, financial assistance, conflicts of interests or merely the legality of the operation based on the content of the articles of association.

5.2.3 Enforcement of personal security inside and outside insolvency

Outside insolvency proceedings, a creditor can usually enforce its rights out of court, unless the guarantor is reluctant to voluntarily perform its obligations. In this case, a court order may be required to obtain a judgment against the guarantor.

The main concern for a secured creditor will, of course, be whether or not it is able and entitled to enforce the personal security despite the insolvency of the co-debtor (in other words, the main debtor). In reality, the mere fact that a secured creditor has personal security at its disposal does not qualify it as a preferred creditor (in the event of a bankruptcy or a winding-up) or as an extraordinary creditor (in the event of a judicial reorganisation).

Nevertheless, creditors benefiting from personal guarantees are *de facto* in a better position compared to ordinary creditors, as personal security referred to above are fully[17] enforceable without limitations, should the main debtor be declared insolvent.

Amounts paid by the co-debtor / guarantor to the creditor will provide the co-debtor / guarantor with a right or recourse against the main (insolvent) debtor, which will, in principle, have the same unsecured / unpreferred, ordinary ranking as the creditor's claim. Accordingly, unless the debtor was able to have its whole claim paid by the co-debtor / guarantor, it may experience competition for distribution in the event of insolvency and the reduction of its proceeds. To prevent this kind of situation from happening, personal security in Belgium typically includes a contractual prohibition on the co-debtor / guarantor from making competing claims of recourse until the creditor has been repaid in full.

Furthermore, the secured creditor may have the benefit of double-dipping: in the event of default, the creditor may be able to take recourse against the assets of both the debtor and each co-debtor. Under Belgian law, double-dipping is authorised to the extent that it does not result in payments of more than the total sum of the claim. In other words, a creditor can file its full claim in the insolvency proceedings of the debtor and at the same time demand payment by the co-debtor / guarantor or file its full claim in the insolvency of the latter as well, should it be declared insolvent.

[17] With specific rules applying to personal security granted by natural persons without consideration. These persons may request, under certain circumstances, to be discharged from their obligations under the personal security.

In any case, the amount paid by the co-debtor or guarantor will be deducted from the final distribution, and *vice versa*.

Self-assessment Exercise 2

Study the aspects dealt with in the previous section.

Question 1

Consider yourself a Belgian lawyer approached by an international company. This company is about to lend some money to a Belgian company.

Write a short essay (two pages maximum) regarding real and personal security under Belgian law. What kind of security would you recommend to this international company, and for what reasons?

Question 2

What is the status of real and personal security in the case of insolvency under Belgian law? To what extent can they be enforced despite insolvency?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

6.1.1 Legislative framework

6.1.1.1 Historical background of insolvency laws in Belgium

First wave of reforms

Insolvency law in Belgium was long governed by the 1851 Bankruptcy Act which was modified and co-ordinated in 1946. The main purpose of this legislation was to pay the creditors out of the proceeds resulting from the liquidation of the company's property. In other words, this legislation did not properly deal with the company's rehabilitation.

Under the 1851 Bankruptcy Act, as amended in 1946, there were two main insolvency regimes, namely bankruptcy (*faillite / faillissement*) and judicial composition (*concordat judiciaire / gerechtelijk akkoord*).

Bankruptcy aimed at selling off the assets of the distressed debtor in order to distribute the proceeds among its creditors.

In contrast, judicial composition could pursue two different objectives. The judicial composition could firstly consist of a debt restructuring scheme accompanied by a moratorium without the liquidation of the ailing debtor. Secondly, it could consist of a transfer of assets, being the sale of the debtor's assets to distribute the proceeds among the creditors. This procedure was comparable to the bankruptcy procedure.

In reality, both bankruptcy and judicial composition relied on the same premise: only debtors that were in a state of bankruptcy could benefit from them. The main difference between the regimes was that in order to be eligible for a judicial composition, the debtor should also be unfortunate and of good faith,[18] which was a subjective condition.

The original judicial composition was rarely used and failed to deal with distressed companies, for the following reasons:

- The company that applied to the court for the opening of a judicial composition procedure was automatically recognised as being in a state of bankruptcy;

- The requirement that the company should be unfortunate and of good faith was a difficult condition to fulfil as, in most cases, the company (or its directors) were responsible for the company's difficulties;

- The high costs entailed by the procedure; and

- The fact that, if the company was restored to profitability after the judicial composition was implemented, it had to fully pay off its creditors (even though rebates had been agreed during the procedure).

The petroleum crisis of the 1970s and the increased number of bankruptcies in Belgium prompted a reflection on the need for reforms. In 1987, a commission chaired by General Prosecutor Krings was set up to reform bankruptcy and judicial composition. Following such reform, two new statutes were finally adopted by the Belgian Parliament: the 1997 Bankruptcy Act and the 1997 Judicial Composition Act.

Although these acts were complementary, they were intended to provide for two separate regimes, depending on the financial health of the company.

The judicial composition, which was inspired by the German insolvency regime and by Chapter 11 of the United States Bankruptcy Code (US Chapter 11), was in line with the global trend towards a rescue ideology. Judicial composition was in fact designed to rescue companies whose financial difficulties were not irremediable. The reform of judicial

[18] "Unfortunate and of good faith" in this context means that the insolvency of the debtor was merely the result of bad luck and that there was no fraud or intention on the part of the debtor that lead to the insolvency.

composition tended to prioritise the interests of the creditors and the interests of the distressed company, including those of employees.

To be eligible for judicial composition, a company had to face temporary difficulties without being in a state of bankruptcy. Moreover, the company should not have been of obvious bad faith and should have some chance of recovery.

As to the procedural aspect of judicial composition, it should firstly be noted that upon the filing of the application for the opening of judicial composition, the company enjoyed a moratorium that prevented any enforcement measures against its property.

Judicial composition composed of two main stages. The first stage was the so-called temporary stay (*sursis provisoire / voorlopige opschorting*), which was the stage opened when the court was satisfied that the above-mentioned conditions were fulfilled. During this period (which could last up to six months, or other under extraordinary circumstances up to nine months), the company had to draw up a recovery plan (*plan de redressement / herstelplan*) in collaboration with a court-appointed administrator (*commissaire au sursis / commissaris inzake opschorting*). Notwithstanding the appointment of the administrator, the management of the company remained in the hands of its directors, subject to certain exceptions.

Once drawn up, the recovery plan had to be submitted to the creditors to obtain their consent. The plan was considered as approved if a majority of creditors in number, representing a majority of creditors in value, voted in its favour.

The plan then had to be approved by the court, provided that it was not contrary to any public policy rule. The approval of the plan by the court opened the second stage of the procedure, the so-called final stay during which the company had to carry out the plan as agreed with its creditors. The performance in terms of the plan under the supervision of the administrator could take up to 24 months (and 36 months with the approval of the creditors).

One of the underlying objectives of the 1997 reform was to focus on the prevention of corporate insolvency. In light of this, the Belgian legislator introduced a procedure to monitor and to detect companies in distress. In terms of this procedure, the chamber of commercial investigation (*chambre des enquêtes commerciales / kamer voor handelsonderzoek*), which is a section of the commercial court, had to investigate and collect several warning indicators "to detect financial distress undertakings at an early stage and then [to] prompt the distressed entities to implement effective restructuring measures".

At the other end of the spectrum introduced in 1997, and in contrast to judicial composition, was bankruptcy. This was a procedure the objective whereof was to realise the company's assets in order to distribute the proceeds among the creditors when any hope for a successful turnaround was lost (which required a durable cessation of payments and the loss of trust of the creditors).

Second wave of reforms

Judicial composition turned out to be disappointing soon after its entry into force. The number of judicial composition procedures never met expectations and has significantly decreased over the years. In addition, it became clear that not only did judicial composition fail to reduce the number of bankruptcies, but also that the majority of judicial composition procedures were converted into bankruptcies.

A working group was set up to identify the causes of such a failure. Several main reasons were identified, being the:

- late identification of the financial difficulties by the company's directors and the late filing for the opening of the procedure;
- lack of out-of-court instruments;
- high costs entailed by the procedure;
- negative perception of the parties involved in the procedure;
- lack of awareness regarding the existence of judicial composition; and
- aggressive behaviour of the institutional creditors.

To address these weaknesses, the Belgian legislator enacted an ambitious Act partially inspired by the rescue laws of France and the United States, namely the 2009 Continuity Act, introducing the judicial reorganisation procedure (the Continuity Act).

The Continuity Act attempted to achieve four goals, namely to:

(1) make the law more understandable and attractive to company directors;

(2) make the procedure more flexible, especially by offering several restructuring tools;

(3) reduce the costs incurred by the distressed company throughout the procedure; and

(4) put an end to the juridical controversies of the former regime.

It is worth pointing out that the Continuity Act also aimed at reinforcing the preventive approach in the Belgian corporate rescue landscape. In fact, by way of illustration, the Continuity Act significantly increased the number of warning indicators to be collected by the chamber of commercial investigation with a view to better and earlier detecting of distressed companies.

At the time the Continuity Act was enacted, it was argued that its purpose was to establish a fair balance between the interests of the parties involved, especially between the interests of the distressed company and its creditors. However, in reality the Belgian legislator placed a strong emphasis on the rescue of the enterprise, which thus takes precedence over the creditors' interests. This approach was also confirmed, to a certain extent, by the courts. This approach, combined with the fact that the Continuity Act was too flexible (for instance, as to its commencement requirements), led to numerous abuses from distressed debtors.

In this context, the 2013 Act amending several laws concerning the continuity of enterprises was predominantly enacted to facilitate the discovery and the punishment of debtors' abuses, to better inform the creditors and limit the inadequate filings for the opening of judicial reorganisations.

The further codification of insolvency laws in Belgium in 2018 also tended to reinstate a fair(er) balance between the interests at stake, at least in the field of corporate (enterprise) rescue.

Current framework

Until very recently, the Belgian framework for insolvency proceedings consisted of a combination of disparate sets of codes and laws in various fields. The legal framework thus consisted of a combination of codes and laws covering different disciplines such as commercial law, corporate law, social law, civil law and criminal law and, therefore, required a multidisciplinary approach.

Even though there is not a genuine insolvency code in Belgium, the Belgian legislator tried to merge a significant part of the Belgian insolvency regime into Book 20 of the new Belgian Economic Code.[19] As a result, the main insolvency laws of Belgium are laid down in the abovementioned book of the Belgian Economic Code (hereinafter the BEC).

The BEC provides for two types of insolvency proceedings serving different objectives. Firstly, bankruptcy, which is aimed at liquidating the debtor's estate in order to distribute the proceeds to its creditors.[20] Bankruptcy proceedings may apply to companies as well as to natural persons. The second type of insolvency proceedings set forth in the BEC is judicial reorganisation, which is aimed at protecting the debtor's assets from assaults of its creditors by granting it a moratorium.[21] Judicial reorganisation proceedings are also available to both companies and natural persons. In fact, both regimes are applicable to enterprises[22] in terms of the BEC.

Apart from these main insolvency proceedings, two other regimes are to be noted, even though they are not provided for under the BEC.

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19 Book 20 was inserted into the Belgian Economic Code by Act of 11 August 2017. Also see the discussion above.

20 See the discussion in para 6.4 below.

21 See the discussion in para 6.5 below.

22 This notion is a contentious one, as any corporation and natural person who is self-employed are covered by this notion, subject to several exceptions (eg, a corporation with a public service purpose, the Belgian State, the Belgian regions, etc).

The first regime worth noting is the "collective debts settlement" that is provided for under the Belgian Judicial Code. These proceedings are reserved for natural persons who do not qualify as entrepreneurs under the BEC.[23] In other words, the BEC's regimes and collective debts settlement are exclusive of each other. The key concept of this regime is human dignity. In fact, the main purpose of collective debts settlement is to allow the debtor to live a life in accordance with human dignity.

The second regime not provided for under the BEC is corporate liquidation. Corporate liquidation is only available to companies (or associations) with a legal personality. This regime is provided for by the Belgian Code of Companies and Associations. It is aimed at liquidating the debtor's estate in order to distribute the proceeds to its creditors. Corporate liquidation is a "soft landing", especially for directors who do not face the same liabilities as in the event of bankruptcy. In addition, even though liquidation of loss-making companies is theoretically possible, a recent judgment of the Belgian Supreme Court significantly reduces the possibility of opening a liquidation under such specific circumstances.

Most of the insolvency proceedings are public proceedings and are contained in public registers,[24] namely the Belgian Official Gazette and the Central Solvency register (*Regsol*).

All these insolvency proceedings discussed above are the only proceedings recognised as such in Belgium. Accordingly, while Belgian courts will recognise foreign proceedings and their effects in Belgium (either based on European Regulation 2015/848 or on the Belgian Code of Private International Law), a party or a person in need of insolvency measures in Belgium is limited to the abovementioned options.

Prior to initiating any insolvency proceedings, debtors often make an attempt at an informal, out-of-court restructuring. This kind of restructuring may be facilitated by the appointment of several insolvency practitioners (sometimes on a confidential basis).

Towards a third wave of reforms?

A temporary recent law[25] introduced the possibility of pre-packaged amicable agreements or pre-packaged plans, which may also facilitate out-of-court restructurings. In this case, the out-of-court part will nevertheless be immediately followed by some court involvement.

In addition, Belgium is in the process of implementing the EU Restructuring and Second Chance Directive (2019/1023).

6.1.2 The Belgian insolvency system: creditor or debtor-friendly?

Over the past few years, there has been strong focus on developing a rescue regime as part of the Belgian insolvency regime and, as a result, Belgian insolvency law moved from a creditor-focused regime to a more debtor-friendly regime. The Belgian insolvency system is however

[23] See the discussion in para 6.2 below.
[24] Several exceptions will be discussed below.
[25] Until the end of June 2021. This law will, most likely, be prolonged (perhaps with a few changes).

nuanced and cannot be qualified (as a whole), as being either creditor-friendly or debtor-friendly.

The answer to this question depends on the regime in question. In a nutshell:

- bankruptcy is a creditor-friendly regime as the main purpose[26] of these proceedings is merely to liquidate the debtor for the benefit of creditors;

- judicial reorganisation is a debtor-friendly regime as the main purpose of these proceedings is to rescue the debtor, who remains in possession during the proceedings. This being said, and as already discussed, several successive reforms have balanced the interests of the debtor and those of the creditors in order to avoid any abuse of distressed debtors;

- the collective debts settlement procedure is a debtor-friendly regime as the main purpose of these proceedings is to allow individuals to live in accordance with human dignity; and

- corporate liquidation is a more creditor-friendly regime, given the objective that it shares with bankruptcy proceedings.

In addition to what has been outlined above, for secured creditors Belgian insolvency proceedings are creditor-friendly. Secured creditors are usually quite well protected and are able to enforce their rights (or, are at least entitled to not have their rights infringed or erased). In addition, the creditor-friendliness of Belgian insolvency laws is reinforced by the overall validity and enforceability[27] of preferential mechanisms, being retention of title clauses;[28] the right of retention; set off; and the *exceptio non adimpleti contractus* that allows the creditor to suspend the performance of the contract while the debtor is in breach thereof.

6.1.3 Key actors

6.1.3.1 Debtor

The only insolvency regime where the debtor remains in possession is judicial reorganisation, which is a debtor-in-possession procedure. This signifies that the debtor itself or the company's directors is / are not displaced and retain the managerial powers.

In contrast, in bankruptcy proceedings the debtor or the company's directors are displaced and a trustee in bankruptcy will be appointed. This trustee in bankruptcy will take over all the managerial powers.

In the same vein, the mediator of debts appointed in a collective debts settlement, and the liquidator appointed in a liquidation, will also displace the debtor or the company's directors.

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[26] Even though the Belgian legislator recently introduced several rules to allow a "fresh start" for the debtor.

[27] Subject to several conditions.

[28] Its enforceability under Belgian judicial reorganisation proceedings may nevertheless be hindered in certain circumstances.

With the exception of the collective debts settlement procedure, the debtor can be forced to enter into any insolvency proceedings. Creditors, the Public Prosecutor and sometimes any interested party may file for a forced bankruptcy, judicial reorganisation or liquidation.

Furthermore, in the case of bankruptcy proceedings there is a duty to file for bankruptcy, provided that the legal conditions are met (being durable cessation of payments and loss of trust of its creditors).

6.1.3.2 Insolvency practitioners

In every Belgian insolvency proceeding one or several insolvency practitioners are appointed by the relevant court (being the enterprise court for bankruptcy, liquidation or judicial reorganisation; or the labour court for collective debts settlement).

Insolvency practitioners' details are usually or necessarily (depending on their exact purpose) on official lists held by the courts or by the professional organisation that they belong to. In principle, the court needs to approve their qualifications before they are placed on such a list.

Belgian law does not contain detailed qualification requirements for insolvency practitioners, although most courts or professional organisations set quite high educational standards.

Belgian insolvency practitioners may be entrusted with a wide array of powers, from mere assistance to the debtor to its displacement. Some insolvency practitioners may have a hybrid role as well.

This module will outline the powers of the main insolvency practitioners.

6.1.3.3 The courts

Belgian courts are involved in insolvency proceedings in numerous ways from the opening to the closing of the proceedings.

The courts also play an important role in appointing the various insolvency practitioners in charge of the insolvency proceedings.

6.1.3.4 Creditors

Belgian law does not differentiate between Belgian creditors and foreign creditors.[29] The role of creditors is important in any insolvency proceeding as they can facilitate or hinder the proceedings.

[29] With the exception of the *cautio judicatum solvi*, which may require foreign creditors to provide a guarantee. The objective of this mechanism is to protect the defendant from possible pecuniary losses that he or she may suffer as a result of an unfounded lawsuit brought by a foreign creditor who does not offer guarantees in Belgium to ensure payment of the costs and damages that may be ordered against him or her at the end of the proceedings.

Moreover, as already discussed, secured creditors may usually enforce their rights, or will at least be paid in a reasonable timeframe, even in the case of insolvency proceedings.

6.1.3.5 Directors and shareholders

While shareholders in general meetings only have specific and limited powers conferred on them by virtue of the law or the articles of association of the company, directors are responsible for all other matters and they are, as a result, the main decision-making body of the company. Directors therefore bear the main responsibility for managing the company's response to difficulties and (potential) insolvency.

Directors must consider possible changes in the future financial stability, resource availability, cash flow, solvency and general continuity of the business. Where appropriate, the company's short- and long-term strategy, financing policy and dividend policy will need to be reviewed in the light of a possible significant reduction in business activity, possible loss of financing and disruptions in the supply chain.

In certain circumstances, the board of directors must take specific measures. When the company's net assets are, as a result of losses, reduced to less than half of the capital, the board of directors must draw up a special report and must convene a general meeting of shareholders to resolve on special measures to be taken or to decide on whether or not to wind up the company.

Directors should be careful not to continue a loss-making activity that would appear unreasonable to reasonably diligent and prudent directors.

In particular and in summary, in an insolvency scenario, directors may be held liable for: (i) the absence or the delay in filing for bankruptcy; (ii) their gross and manifest negligence having contributed to bankruptcy (for example, conducting a commercial activity without having the required financial means); (iii) wrongful trading (in the event of bankruptcy of a company and shortfall of its assets); and (iv) failure to pay the company tax prepayments or value-added tax (VAT) in a timely manner.

6.2 Personal / consumer insolvency

6.2.1 Who, when and where

Under Belgian law, natural persons may benefit from insolvency proceedings. Natural persons may qualify as entrepreneurs and, as a result, be subjected to bankruptcy or judicial reorganisation.[30] For natural persons who do not qualify as an enterprise, the collective debts settlement procedure may be utilised.

Collective debts settlement is a procedure that was introduced by the law of 5 July 1998. The legislator's main purpose by enacting this law was to restore the financial situation of an over-

[30] These two regimes are further discussed below.

indebted person by enabling them, to the extent possible, to pay their debts and guaranteeing that they will be able to lead a life in accordance with human dignity. Human dignity is, therefore, the main principle of this insolvency regime.

Persons who are permanently unable to pay their due and payable debts and insofar as they have not been formally placed under insolvency, can file a petition with the relevant labour court for collective debts settlement.

In order for persons to benefit from the collective debts settlement procedure, they must meet several conditions. In this respect, specific attention is paid to the conditions concerning the debtor's over-indebtedness, as the applicant must no longer be able to pay their debts and this inability must be permanent.

6.2.2 Effects of the collective debts settlements and ensuing procedure

Following the initial application, the labour court will appoint a debt mediator. It is important to note that the debt mediator can be a lawyer, a ministerial officer, a judicial representative or even a public or private institution. The labour court must appoint an independent and impartial debt mediator.

The first task of the mediator is to draw up an amicable settlement plan.

If an amicable settlement cannot be reached with the creditors (either due to a refusal or a delay), the collective debts settlement will be judicial and therefore determined by the relevant labour court.

The court decision opening collective debts settlement proceedings creates a situation of *concursus* between the creditors, which has several consequences.

On the one hand, the situation of *concursus* leads to the suspension of any enforcement rights against the debtor's assets. This means that creditors can no longer proceed with garnishments, debt collection or forfeitures. This suspension lasts until the settlement plan is rejected or revoked.

On the other hand, it leads to a prohibition, on the debtor, from carrying out certain acts relating to the management of the estate since the mediator will exclusively manage the assets and liabilities. As a result, the debtor will no longer be able to alienate movable or immovable property, assign claims, receive payments or pay a creditor.

The debt mediator appointed by the judge has to draw up an amicable debt settlement plan within a period of six months, starting from the date of their appointment. This six-month period can, however, be extended.

The aim of the amicable settlement plan drawn up by the debt mediator is to obtain a collective agreement between the creditors and the debtor. This plan is submitted to a judge

for approval and must determine the measures that will enable the debtor to satisfy the claims of the various creditors.

It is mandatory to undergo an amicable settlement attempt.

In order to know the financial situation of the applicant and to reach an amicable settlement plan, the debt mediator must collect all the necessary information from the creditors. This is done by means of a declarations of claim by the creditors. The creditors must send their declarations of claim to the debt mediator within one month from the notification of the opening of the proceedings.

The content of an amicable settlement plan may vary from case-to-case so that the debt mediator has the possibility of providing for tailor-made measures in each specific case. The duration of the plan is also left to the mediator's discretion, as long as all the parties agree on the content of the plan.

In order to draw up an amicable settlement plan, the debt mediator will ensure that the debts that jeopardise the human dignity of the applicant and their family are paid first.

If all parties agree on the amicable settlement plan, it will be recorded by the judge. As soon as the plan has been recorded the parties, with the help of the debt mediator, will implement the measures provided for in the amicable settlement plan.

It is up to the discretion of the debt mediator to determine whether a collective debts settlement procedure should be initiated at judicial level. In the framework of judicial settlement, the judge convenes the hearing that the parties (debtor and creditors) and the debt mediator will attend. The judge's decision will, in this case, consist of imposing a judicial settlement plan on the parties. The court may, for instance, decide to free the debtor form any debt or just part thereof. The judge may also decide to terminate the collective debts settlement proceedings on the grounds that the judicial plan is not desirable.

Self-assessment Exercise 3

Study the aspects dealt with in the previous sections.

Question 1

Consider yourself as a Belgian lawyer being consulted by a natural person who is not self-employed nor carrying on any commercial activities. This person tells you that she or he is no longer able to pay her or his debts as they fall due and payable and that there is no prospect of that changing any time soon. Would you advise her or him to make use of bankruptcy, judicial reorganisation or collective debts settlement? Explain your answer.

Question 2

Would your answer to question 1 above change, if the natural person in question is active as an entrepreneur?

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

6.3 Corporate liquidation

Belgian law usually distinguishes between two regimes that aim at liquidating an enterprise: corporate liquidation, which is generally available to corporations; and bankruptcy which is available to both corporations and individuals that qualify as an enterprise.

There are two main differences between the two regimes.[31] Firstly, in a corporate liquidation scenario, the directors' liability regime is less stringent and offers less possibilities to creditors willing to hold the directors liable, as the specific rules provided under the bankruptcy regime are not available. Secondly, as opposed to a bankruptcy, any form of corporate liquidation requires the support or consent of (a majority of) creditors. A company in liquidation failing to maintain such a support must be declared bankrupt.

This section will deal with corporate liquidation, and the next section will deal with bankruptcy.

6.3.1 Filing: who, when and where

There are three main types of corporate liquidation under Belgian law, namely judicial liquidation ordered by the enterprise court; voluntary liquidation decided by the shareholders of the company; and *de iure* liquidation which occurs automatically under certain circumstances.

6.3.1.1 Judicial corporate liquidation

A judicial liquidation may be requested by several persons. The Public Prosecutor or any interested party; or the chamber of companies in difficulties (who can decide that the company is not viable) may mainly request the opening of a corporate liquidation in the relevant enterprise court.

A judicial liquidation may be requested or forced on several occasions, and mainly under the following circumstances:

- absence of filing of the annual accounts (even for a single financial year). An action for liquidation can be filed only seven months after the closing date of the accounting year;

[31] Apart from the technicalities and procedures that will be discussed further below.

- if the company was struck off the Crossroads Bank for Enterprises *(Banque-carrefour des entreprises / Kruispuntbank van Ondernemingen)* due to, among others, non-filing of its annual accounts);

- if the company's representatives failed to appear before the chamber of companies in difficulties (which forms part of the enterprise court), following a request to appear in court;

- a fair reason (under the Belgian Code of Companies and Associations) provided by any interested third party (that is, in a nutshell, anything that irremediably prevents the company from reaching or pursuing its corporate purpose);

- if a company's net assets (as defined under the Belgian Code of Companies and Association) fall below the minimum authorised registered capital. However, certain types of companies do not operate with a capital under Belgian law since the new Code of Companies and Associations entered into force. In such a case, a company may be put into liquidation (i) should the company no longer be able to pay its debts as they fall due and payable within the next 12 months; and / or (ii) if the company has negative net assets or if the net assets are about to become negative; and

- the failure of a judicial reorganisation formalised by a request to put a premature end to the moratorium granted by the enterprise court.

As already pointed out, a judicial liquidation must be opened by the enterprise court. Following a request for liquidation, the court (if it finds that the legal conditions are met) appoints a liquidator who will be accountable to it. This liquidator displaces the board of directors who will have no (official) say in the winding-up process.

The main aim of corporate liquidation (akin to other forms of liquidation) is to realise the company's assets to distribute the proceeds among creditors, having regard to their possible preferential status or security. Moreover, at the end of the liquidation process, if there are any net liquidation proceeds, they are to be paid to the shareholders of the company.

Once the liquidator is of the opinion that the liquidation is completed as the assets have been duly realised, the liquidator reports to the court. The liquidator must also prepare a plan for the distribution of the assets to the different creditors and submit this plan to the court for approval. The court then confirms closure of the liquidation procedure. For a period of five years following the closing of the liquidation, the liquidator may still be held liable by third parties for mismanagement.

Finally, it should be noted that any form of liquidation (judicial, voluntary or even *de iure*) entails a *concursus*[32] between creditors. This concursus is not provided for by statutory rules,

[32] In fact, a liquidation will only entail a *concursus* provided that there are not enough assets to pay the creditors in full. This is quite difficult to assess from the outset. As a result, as long as it is not certain that the creditors will all be paid in full from the proceeds of the realised assets, a *concursus* is in place.

as opposed to bankruptcy (or to a lesser extent, judicial reorganisation[33]). As a result, the effects of a liquidation on creditors' rights are subject to the main principles of a *concursus* under Belgian law, namely equal treatment of creditors without prejudice to legal privileges, surety or liens; and the prohibition of any individual's enforcement rights as it is, as a general rule, a breach of the equality between creditors.

6.3.1.2 Voluntary liquidation

As opposed to a judicial liquidation, a voluntary liquidation is the mere result of a decision of a shareholders' meeting to dissolve a company. The court does not take the initiative but will be involved later on in the process.

A shareholders' meeting of a company can decide at any time to voluntarily dissolve the company. As a general rule, there is no specific conditions[34] to be met for a company to decide to liquidate itself.

Before suggesting a voluntary liquidation, the board of directors must prepare a special report in which it justifies its proposal to liquidate the company. The board of directors must attach to its report a balance sheet of the company that is no more than three months old at the date of the shareholders' meeting convened to decide on a potential liquidation.

The statutory auditor of the company also has an important role in the process as it must carefully review the abovementioned balance sheet and indicate in a special report whether or not the balance sheet gives a complete, true and fair view of the company's financial situation.

Subsequently, the board of directors must send out a convening notice to the company's shareholders to convene an extraordinary general shareholders' meeting of the company to be held before a Belgian Notary Public. At this meeting, the shareholders will decide to liquidate the company and will appoint one liquidator or several liquidators.

Thereafter, the appointment of the liquidator(s) must be confirmed by the relevant enterprise court where the company has its registered office. The request for confirmation is formalised through an *ex parte* request filed with the court, along with several documents (among others a certified copy of the decision of the shareholders' meeting, the balance sheet and a good behaviour certificate in regard to the liquidator).

The main criterion of the court to confirm the appointment of the liquidator is the integrity of the liquidator(s). Should the court be convinced that the liquidator(s) does not meet the integrity requirements, it will appoint another liquidator, possibly upon the proposal of

[33] A judicial reorganisation does not lead to a *concursus* unless part or whole of the business is sold off under a transfer of enterprise.

[34] Specific types of voluntary liquidation may however require specific conditions. In addition, quorum and majority conditions usually apply as well and are set forth in the Belgian Code of Companies and Associations. The company's articles of association must be carefully analysed as it can contain specific conditions, such as specific quorum and majority conditions.

another general shareholders' meeting. Once the appointment has been confirmed, the liquidators can start exercising their powers.

As for any kind of liquidation, during a voluntary liquidation process the liquidator(s) must sell off the assets and pay off the debts of the company. Any net liquidation proceeds remaining thereafter are paid to the shareholders of the company.

It is worth noting that it is possible to voluntarily liquidate a company and close its liquidation process on the same day. Specific conditions are required to make this succinct liquidation possible – specifically the absence of outstanding debts and a unanimous resolution of the shareholders' meeting.

6.3.1.3 De iure liquidation

A *de iure* liquidation is a liquidation that take place automatically without the intervention of the court or any third parties. A *de iure* liquidation is quite exceptional under Belgian law.

It may take place under certain circumstances, the most important of which is when the company was set up for a limited period of time only (which is quite rare in practice).

6.3.1.4 Loss-making liquidation

The question as to whether a loss-making / deficit liquidation (in which the debts exceed the value of the assets to be realised) is possible, arose before Belgian courts. Case law allows for such a liquidation but under certain conditions only – the majority of creditors must show confidence towards the liquidator and the liquidation process as a whole. To put it differently, as long as the creditors remain confident overall that the liquidator is prudently and honestly performing its duties, the court may not declare the company bankrupt, even when it has stopped making payments.

This should, however, be qualified since a recent judgment of the Belgian Supreme Court ruled that even though the (majority of) creditors had not expressed their dissenting voice against the liquidation, a loss-making liquidation is not possible if the liquidation process is not transparent, or if it merely intends to hinder creditors from holding the company's directors liable based on the specific liabilities set forth in the bankruptcy legislation.

In other words, it may become quite difficult in practice to carry out a loss-making liquidation following this judgment of the Belgian Supreme Court.

6.3.2 Impacts on creditors' rights

As in bankruptcy, the liquidation of a company gives rise to a situation of *concursus* between creditors. The *concursus* arises when competing rights are exercised on the same assets, which assets are insufficient to pay off each of the creditors in full.

In fact, a liquidation will only entail a *concursus* if there are not enough assets to pay the creditors in full. As may be imagined, this is quite difficult for the liquidator to assess from the outset. As a result, as long as it is not certain that the creditors will be all be paid in full from the proceeds of the realised assets, a *concursus* is in place.

This *concursus* will affect the creditors' rights. As a result, creditors may not take any individual enforcement action as their individual enforcement rights are suspended. This of course extends to mere conservatory attachments, even if they were launched before the liquidation.

As a general rule, the agreements in place remain unaffected by the liquidation subject to any contractual provision to the contrary.[35]

Self-assessment Exercise 4

Study the aspects dealt with in the previous sections.

Question 1

Imagine that you are the chief executive officer (CEO) of a listed Belgian company and that, after several failed attempts with your financiers, you come to the conclusion that the company will be in default of payment soon. What would you do, and why?

Question 2

As a director, what is the less stringent insolvent scenario in terms of potential liabilities? Explain your answer.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Bankruptcy

6.4.1 Who, when and where

6.4.1.1 Purpose and conditions of bankruptcy proceedings

In contrast to judicial reorganisation that is discussed below, the Belgian bankruptcy regime (similar to the liquidation regime) prioritises the recovery of value from the underlying business or assets over the continuity of the company. The underlying goal is clear: realising the assets for the benefit of the creditors.

The protection of creditors' interests is, therefore, paramount in Belgian bankruptcy.

[35] Which happens extremely frequently in practice.

Under Belgian law, any enterprise[36] that (i) is in a lasting state of insolvency / cessation of payments (which is defined as the inability to pay the debts as they fall due and payable); and (ii) has lost the trust of its creditors; is in a state of bankruptcy. Both conditions must be met.

Cessation of payments is where a debtor can no longer meet its liabilities. It is not necessary that the debtor has stopped all payments – it is sufficient that certain important debts remain unpaid. A cessation must be durable: if the debtor can still turn things around or still has access to sufficient credit, it is not in a state of bankruptcy.

6.4.1.2 Bankruptcy proceedings

Initiating bankruptcy proceedings

Bankruptcy proceedings can be initiated in the enterprise court at the request of a debtor or any interested third party (including the Public Prosecutor).

Under Belgian bankruptcy law, a debtor who satisfies the bankruptcy conditions must file a petition in bankruptcy, together with certain accounting and other documents, within one month of the date of cessation of payments. The obligation to file is, however, suspended if the company has filed for judicial reorganisation.

Failure to make a timely filing may entail not only the personal liability of the directors for, among others, any increase in the level of indebtedness resulting from the delay in filing the petition, but also criminal liability if there was an intention to postpone the bankruptcy.

A third party with the necessary legal standing, such as a creditor with a due and (reasonably) certain claim, or the Public Prosecutor, can initiate bankruptcy proceedings by means of a writ of summons served on the debtor. As discussed below, third parties also have the right, as an alternative to bankruptcy proceedings, to request a supervised transfer of all or part of the business of the company under the judicial reorganisation regime, should the bankruptcy conditions be met.

If a recovery appears possible, the court can adjourn its decision for 15 days in order to allow the debtor time to file for judicial reorganisation.

A company in judicial reorganisation can, however, be declared bankrupt if (i) it is established that the company is obviously not in a position to ensure the continuity of all or part of its activities in accordance with the aims of the judicial reorganisation proceedings; (ii) the bankruptcy conditions are met; and (iii) such bankruptcy has been requested.

[36] The notion of an enterprise is a contentious one. However, bear in mind that any corporation and natural persons who are self-employed are covered by this notion, subject to several exceptions (eg, a corporation with a public service purpose, the Belgian State or the Belgian regions, etc).

Board of directors and appointment of the trustee(s) in bankruptcy

If the enterprise court makes an order in bankruptcy, the board of directors is relieved of its powers of management over the assets of the company as from the day of the bankruptcy order.

The court will appoint one or more trustee(s) (*curators / curateurs*), chosen from a list comprising specialised lawyers, to liquidate the bankrupt estate and a bankruptcy judge (*rechter commissaris / juge commissaire*) to supervise the bankruptcy proceedings.

Bankruptcy proceedings as such

When appointed, the trustee(s) in bankruptcy must take all necessary steps to preserve the bankrupt estate. An inventory of all assets is firstly made.

At the request of the trustee in bankruptcy or any third party with relevant interest (and if it is not prejudicial to the creditors), the court may allow the company to temporarily continue any part of its business. The trustee in bankruptcy is entitled to continue the business pending such a court order.

Claims must be filed in due course[37] and in the form of a written statement setting out the nature and amount of the claim, accompanied by documentary evidence and a statement as to whether or not the claim is guaranteed or secured by a personal surety, a pledge, a mortgage or a lien. The trustee in bankruptcy will in the presence of the bankrupt debtor verify the claims received. At the session at which the minutes of verification of the claims is finalised, the claims will be accepted, deferred or contested.

If the trustee in bankruptcy finds that the assets of the company are not sufficient to cover the administration and liquidation costs, the court can close the bankruptcy at the trustee's request. The company is considered wound-up, and its liquidation closed.

If, however, the company's assets are sufficient, the trustee in bankruptcy will continue to manage the bankrupt estate by liquidating the company's assets and distributing the proceeds in accordance with the rights of the creditors.

After selling all the assets, the trustee must call a final meeting of creditors to approve the accounts, including the remuneration of the trustee and other costs. Once all challenges to the proposed accounts have been settled, the commercial court will close the bankruptcy and discharge the trustee in bankruptcy. The company will be considered wound-up, and its liquidation closed.

[37] The timing is set by the court in the initial bankruptcy order – it is usually 30 days as from the bankruptcy judgment.

6.4.2 Impact on creditors' rights

Suspension of individual creditors' rights

A bankruptcy order has the effect of suspending the enforcement of individual creditors' rights.

Nevertheless:

(1) for creditors holding secured interests on specific movable assets and for first rank mortgagees, suspension will normally be lifted when the first minutes of the verification of the claims are finalised and filed with the court. At the request of the trustee in bankruptcy, however, the suspension relating to the enforcement on movable assets may be extended by up to one year from the date of the bankruptcy order; and

(2) pledges or security assignments of bank accounts and financial instruments that are subject to the Belgian Financial Collateral Law of 15 December 2004, as well as close-out netting agreements, will not be affected by the opening of bankruptcy proceedings and can, therefore, be enforced immediately.

Existing agreements

Existing agreements are not automatically terminated by the bankruptcy of one of the parties, unless otherwise agreed or if the agreement is *intuitu personae*. The trustee must decide whether to continue with any existing agreements, or not.

If the trustee fails to exercise this election right, the other party can require the trustee in bankruptcy to take a position. If such a request is made and no decision is taken by the trustee in bankruptcy within 15 days, the agreement will be considered terminated.

Overall ranking

The process of liquidating the assets under bankruptcy and the allocation of the proceeds is a very specialised and intricate area of Belgian law.

As a general principle of Belgian bankruptcy law, all creditors are to be treated equally which entails the distribution of the proceeds of the bankrupt estate in proportion to the size of their respective claims.

However, there are three groups of preferred creditors to whom this principle does not (directly) apply, namely:

(1) creditors of the bankrupt estate (mainly for management costs of the bankrupt estate);

(2) creditors with special preferred rights, with a right of recovery, pledgees and mortgagees; and

(3) creditors with general preferred rights.

Debts of a bankrupt estate broadly refer to expenses incurred by the trustee in bankruptcy to manage the bankrupt estate (administration expenses). Such debts will be paid ahead of other debts although there is some debate as to what extent they should prevail over the claims of special secured creditors.

Creditors with a special preferred right (such as the unpaid seller or supplier of services that have preserved certain movable assets, pledgees and mortgagees) have a legal right to the proceeds of those specific movable or immovable assets. They rank ahead of creditors with general preferred rights, who are only entitled to have their debts settled out of the general pool of assets, before ordinary creditors.

The law also recognises several classes of creditors with general preferred rights, including social security, the tax authorities and employees. These preferred rights are ranked by law.

Clawback period

At the request of the trustee in bankruptcy, the enterprise court can (and will sometimes be obliged to) render certain acts of the bankrupt debtor unenforceable against the body of creditors.

Certain acts must or can be declared unenforceable if they were carried out by the debtor at a time when it had already ceased its payments, in other words, during the so-called "suspect period".

The day of cessation of payments is assumed to be the date on which the debtor is declared bankrupt. This can, however, be back-dated by a court order at the request of the bankruptcy trustee or any interested third party, up to six months before the date of the bankruptcy order, if solid and objective evidence clearly shows that the debtor had already ceased payments before the date of the declaration of bankruptcy.

If a company has been legally and effectively wound-up more than six months before the bankruptcy order, the court can decide that the genuine date of cessation of payments was in fact the date of its *de facto* winding-up, if there was an intention to prejudice the creditors.

The following actions will, for example, be declared unenforceable against the body of creditors if performed during the suspect period:

(1) disposal of assets without consideration and any act or agreement in terms whereof the value of an asset and / or services transferred / rendered by the bankrupt debtor is substantially more than the value received in consideration;

(2) all payments made by the bankrupt debtor, other than in cash or trade paper, such as bills of exchange or cheques (*handelspapier / effets de commerce*);

(3) all payments made for debts that have not matured; and

(4) security interests (mainly pledges or mortgages) granted to secure pre-existing debts.

The court can also declare other acts unenforceable if they took place during the suspect period and if the beneficiary was aware of the cessation of payments by the company.

Finally, any acts or payments, whenever performed, that are to the fraudulent detriment of the creditors, can be declared unenforceable (*actio pauliana*).

Self-assessment Exercise 5

Study the aspects dealt with in the previous sections.

Question 1

What are the conditions to be met in order to be declared bankrupt? How do they differ from the conditions in order to be placed under liquidation?

Question 2

Write a short essay (one page) about loss-making liquidation and its connection with bankruptcy. In this essay, give your opinion about the most recent case law of the Belgian Supreme Court dealing with loss-making liquidations.

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

6.5 Judicial reorganisation

6.5.1 Who, when and where

6.5.1.1 Purpose and conditions for judicial reorganisation

Contrary to bankruptcy, the purpose of judicial reorganisation proceedings is to preserve, under court supervision, the continuity of all or part of an enterprise[38] in distress, or all or part of its activities.

Judicial reorganisation affords a distressed debtor protection against its existing creditors by allowing it to negotiate either an amicable arrangement or a collective reorganisation agreement, or by providing for a transfer of all or part of the company's activities to one or more third parties.

[38] As discussed above, both bankruptcy and judicial reorganisation apply to enterprises as defined by the BEC.

A judicial reorganisation can be obtained if the continuity of the debtor is under short- or medium-term threat. The going concern basis of a company is in any event considered threatened if, as a result of its losses, its net asset value has fallen below half of the authorised share capital.

The fact that the debtor may already be in a *de facto* state of bankruptcy does not preclude it from benefiting from judicial reorganisation proceedings.

6.5.1.2 Judicial reorganisation proceedings

Initiating judicial reorganisation proceedings

Judicial reorganisation proceedings are opened by the enterprise court, at the request of the debtor in distress.

Judicial reorganisation proceedings cannot be opened at the request of third parties, such as creditors, or even the Public Prosecutor, subject to limited exceptions, however, concerning the transfer of part or all of the enterprise, discussed below.

Along with its petition, the company must submit certain documents, including, but not limited to:

(1) a description of the events on which its petition is based and from which it can be deduced that the continuity of the company is threatened;

(2) the two most recent annual accounts and a balance sheet dated no more than three months before the date of the petition;

(3) a budget containing an assessment of the revenues and expenses during the suspension period;

(4) a list of creditors; and

(5) a description of the purpose of the request and the measures and proposals envisaged for restoring the company's financial situation, implementing a social plan and paying its creditors in full.

Once a petition is filed by a debtor in distress, the enterprise court appoints a delegated judge (*juge délégué / gedelegeerd rechter*) to investigate and advise on the request. If the debtor is allowed to pursue judicial reorganisation proceedings, the delegated judge will keep the court informed of the company's situation by way of several reports that must be filed with the court during the proceedings.

Board of directors

Judicial reorganisation proceedings, as opposed to other insolvency proceedings in Belgium, are debtor-in-possession proceedings.

The board of directors remains in charge of the management of the company, albeit under the supervision of a judge appointed by the enterprise court.

However, at the request of an interested third party, including the Public Prosecutor and based on general principles of Belgian law or on specific rules provided for under the judicial reorganisation regime, a temporary director can be appointed by the enterprise court to replace the existing board. This appointment is usually granted if the board has made obvious and major mistakes, or is blatantly acting in bad faith.

If the debtor so requests, the enterprise court may appoint a judicial mediator (*médiateur d'enterprise / ondernemingsbemiddelaar*) to assist the company's board of directors before and during the judicial reorganisation proceedings. The exact scope of the mediator's mandate is determined by the court on the basis of the debtor's application.

Reorganisation measures

The judicial reorganisation regime provides a moratorium that mainly stays creditors' enforcement rights in order to enable the debtor to opt for various types of reorganisation without being subject to an "assault" by the creditors. The various types of reorganisation includes the following: amicable arrangement, collective agreement, and the transfer of all or part of the activities of the debtor.

A distressed debtor is, in principle, free to choose which of these three options to adopt and may even opt for a different approach for each of its activities.

During judicial reorganisation proceedings, the approach initially chosen can even be amended and a proposed amicable arrangement can be transformed into a collective agreement, to finally be in a transfer under court supervision.

A. Amicable arrangement

This kind of amicable agreement can take place either out-of-court or in-court. If out-of-court, no petition for the opening a judicial reorganisation is required.

The main difference between an in-court and an out-of-court amicable agreement under the judicial reorganisation regime is that:

- an amicable agreement concluded outside genuine reorganisation proceedings does not benefit from any moratorium; and

- an amicable agreement concluded outside of a genuine judicial reorganisation proceeding remains confidential (there is even no official publication of its existence in the Belgian Official Gazette).

An amicable arrangement consists of seeking a solution to the debtor's difficulties by entering into negotiations with (at least) two or more of its creditors[39] in the framework of a judicial reorganisation procedure, that is, under the supervision of a delegated judge.

The advantages of an amicable settlement in the context of a judicial reorganisation are that:

(1) the arrangement, once it is sanctioned by the court, will be protected against certain claw-back provisions;

(2) management retains control; and

(3) the legal formalities required are greatly simplified.

However, there are possible disadvantages being the following:

- it does not bind those creditors who are not party to the arrangement;
- there will be supervision by the court and the delegated judge; and
- it will be public knowledge that the debtor is distressed as, amongst others, the opening and the closing of the proceedings are made public through official announcements in the Belgian Official Gazette.

B. Collective agreement

During the protection period (the moratorium), a distressed debtor that opted for a collective agreement must draft a detailed reorganisation plan describing its situation; the difficulties that it is confronted with; how it proposes to resolve those difficulties (including any proposed transfer of all or part of its activities); how it plans to return to profitability; and what sacrifices it will request from its creditors (for example grace periods, waiver of interest or even of principal debt (with, as a general rule, a maximum of 80% in principal and 100% in interest), and / or conversion of debt into equity).

The implementation period for the reorganisation plan may not exceed five years as from the date of approval of the plan by the enterprise court.

The reorganisation plan is subject to the approval of a meeting of creditors and approval by the court. The reorganisation plan is approved by the meeting of creditors if:

[39] The Belgian legislator considers that by requiring the presence of two creditors, it reduces the risk of fraud or agreement to the detriment of the creditors as a whole. This is, of course, wishful thinking as both creditors may, for example, belong to the same group of companies as the debtor.

(1) it is approved by the majority of the creditors; and

(2) the creditors present represent at least one half of the outstanding principal debt.

If creditors do not vote, their respective claims will not be taken into account for the purpose of determining the required quorums and majorities.

The reorganisation plan can bind creditors who have a security interest or who can be qualified as so-called creditor-owners,[40] provided that:

- interest is paid on the principal amount of their outstanding debts; and
- their rights are not suspended for more than 24 months as of the date of the approval of the plan by the court (under certain circumstances this time period can be extended by another 12 months).

No other measures can be imposed on such creditors without their individual consent.

The court can only refuse to approve the plan if:

(1) any one of the formalities laid down by the Law on the Continuity of Enterprises has not been complied with; and / or

(2) there has been a breach of public policy (mainly in case of arbitrary discrimination between different classes of creditors).

An approved reorganisation plan can be revoked if it is not punctually performed, or if it is established that it will not be punctually performed.

Some main advantages of a collective agreement are that:

(1) in principle, the management retains control; and

(2) the plan is binding upon minority (dissenting) creditors, even if they benefit from security and certain liens, subject to certain limitations.

Possible disadvantages of collective agreement are:

- the need for legal proceedings;
- supervision by a court and a delegated judge; and
- that it will be public knowledge that the debtor is distressed.

[40] These creditors qualify as extraordinary creditors and may thus not be subject to any haircut of their claim without their individual consent.

C. Transfer of all or part of the activities under court supervision

To rescue the economic activities of a debtor (which, again, is the main purpose of Belgian judicial reorganisation proceedings), the transfer of all or part of the activities can also be envisaged.

With the exception of the general principle according to which a debtor in judicial reorganisation remains in possession, a transfer can take place with or without the approval of the distressed debtor. It can be initiated, for example, at the request of the Public Prosecutor, a creditor or even a third party interested in the acquisition of all or part of the company's activities.

The court can order a court-supervised transfer, if (i) the company is in a state of bankruptcy and has not filed for judicial reorganisation proceedings; or (ii) the judicial reorganisation proceedings have failed (for example if they are not approved, approval is refused, the reorganisation plan is revoked, or the judicial reorganisation proceedings are terminated before term).

If all or part of the activities of the debtor company are transferred under court supervision, a judicial administrator (*gerechtsmandataris / mandataire de justice*) will be appointed by the enterprise court to organise and effect the transfer in the name and for the account of the distressed debtor. Such a sale leads to a *concursus* between creditors.

The court takes the final decision on the transfer. The preservation of jobs will be the guiding principle for such a transfer. In this respect, the Belgian judicial reorganisation statutory rules expressly state that if several comparable offers are made, the court will give priority to the offer that guarantees employment on the basis of a negotiated social plan.

Certain advantages of a transfer of enterprise are that:

(1) it can be restricted to specific assets;

(2) it will be binding on all creditors, including secured creditors, subject to certain exceptions; and

(3) contracts (that are non *intuitu personae*) may be transferred even though the counterpart is not willing to, provided that the outstanding debt is paid by the purchaser of (part of) the debtor's enterprise.

Possible disadvantages are:

- the need for legal proceedings;

- the partial loss of management control: the court will determine which offer to accept (taking into account employment issues) and offers will be collected and eventually accepted by the judicial administrator on behalf of the debtor; and

- that it will be public knowledge that the debtor is in difficulty.

6.5.2 Impact on creditors' rights

Before the opening of the judicial reorganisation proceedings

Pending a reorganisation order, a debtor cannot be declared bankrupt or be judicially wound up.

With a few exceptions,[41] enforcement procedures against the company's assets are suspended (meaning no realisation of assets).

A conservatory attachment obtained by a creditor on the debtor's assets is, however, possible until such time as the court makes an order for judicial reorganisation. Such conservatory attachments can be lifted by the court if it would not result in substantial harm to the relevant creditor(s).

Once the judicial reorganisation proceedings are opened

The enterprise court can suspend payments for up to six months (which can be prolonged to 12 months and, in extraordinary circumstances, for a further six months). This moratorium, aimed at protecting debtors from their creditors during a limited period of time, is the cardinal feature of judicial reorganisation.

Co-debtors and guarantors are not protected by the opening of judicial reorganisation proceedings.

During this suspension period, enforcement measures against the debtor's assets for debts incurred before the judgment opening the judicial reorganisation proceedings (pre-existing debts) will be suspended.

However:

(1) pledges on receivables that have been specifically pledged to the benefit of third parties will not be affected by a judicial reorganisation; and

(2) pledges or security assignments of bank accounts and financial instruments that are subject to the Belgian Financial Collateral Law of 15 December 2004, as well as close-out netting agreements, will not be affected by the opening of judicial reorganisation proceedings and can, therefore, be enforced.

Attachment orders to secure pre-existing debts are no longer possible.

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[41] Mainly if the date of the sale of the movable or immovable asset following the executory attachment has already been set and is scheduled no later than two months after the filing of the petition in judicial reorganisation. The court may, however, decide to suspend such a sale in any event.

Existing agreements

Despite any contractual provision to the contrary, existing agreements cannot be terminated by virtue of the filing for, or the opening of, judicial reorganisation proceedings (with the exception of a close-out provision in the framework of a netting agreement).

No contractual default that occurred before the reorganisation order can be relied upon by a creditor if the default is remedied within 15 days of the notice of default.

Nevertheless, the debtor will have the right, even if it is not contractually expressed, to decline to perform in terms of an existing agreement during the suspension period if such non-performance is necessary in the context of the proposed reorganisation plan, or to enable a transfer under judicial reorganisation. Any damages for such non-performance will be considered a pre-existing debt. The right not to perform, however, is excluded if a reorganisation is achieved by means of an amicable settlement. It also does not apply to employment contracts.

Voluntary payment

As discussed above, judicial reorganisation proceedings are debtor-in-possession proceedings. This means, for instance, that the debtor is perfectly able to make any payment it deems fit. Such payment must, however, be justified in light of the continuity of the debtor.

Status of debts incurred during the suspension period

New debts incurred during the suspension period are not subject to suspension.

To encourage third parties to continue doing business with the distressed company, new debts have first rank status for payment (subject to certain limitations), if the judicial reorganisation proceedings end in bankruptcy or winding-up and liquidation of the company.

Self-assessment Exercise 6

Study the aspects dealt with in the previous sections.

Question 1

What are the main striking features of judicial reorganisation in Belgium?

Question 2

Write a short essay in answer to the following question: is judicial reorganisation a debtor- or a creditor-friendly regime in your opinion? Provide practical examples to illustrate your opinion.

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

7.1 General overview

In situations where the insolvency of a debtor or a group of companies involves several jurisdictions, the same private international law questions arise as in other general civil law matters, such as jurisdiction, recognition, applicable law and the scope of insolvency proceedings.

The main framework in Belgium in the field of cross-border insolvency is the Recast European Insolvency Regulation EU 2015/848 (EIR). In fact, all cross-border insolvency proceedings that are opened in the EU (with the exception of Denmark[42]) are governed by the EIR.

If the EIR is not applicable due to the insolvency proceedings have been opened outside of the EU or in Denmark, the Belgian Code of Private International law (COPIL) applies. Nevertheless, the COPIL refers to the same principles as those contained in the EIR.

Belgium has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and is not expected to do so in the short- or medium-term.

7.2 Cross-border EU insolvencies: European Insolvency Regulation (EIR)

7.2.1 Jurisdiction

Under the EIR, cross-border insolvency is governed on the basis of a distinction between main and secondary insolvency proceedings.

Main proceedings may be opened in Belgium if the debtor has its centre of main interests (COMI) located in Belgium. These proceedings have a universal effect aiming at encompassing all of the debtor's assets whether located in the member state where the COMI is situated, or anywhere else.

Secondary proceedings may be opened in Belgium if main proceedings are opened in another member state, but where the debtor has an establishment located in Belgium. As opposed to main proceedings, secondary proceedings have a territorial effect that is limited to the debtor's assets located in the member state where the establishment is found.

[42] Bear in mind that the EIR no longer applies to the United Kingdom and domestic laws will therefore apply within the United Kingdom.

The location of the COMI depends on several factors that must be ascertainable by third parties. It is (broadly) defined in the EIR as the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
To facilitate the location of the COMI, the EIR provides for several presumptions that can be rebutted:

- In the case of a company or legal person, the place of its registered office is presumed to be the COMI in the absence of proof to the contrary;

- In the case of an individual exercising an independent business or professional activity, the COMI is presumed to be that individual's principal place of business in the absence of proof to the contrary; and

- In the case of any other individual, the COMI is presumed to be the place of the individual's habitual residence in the absence of proof to the contrary.

Also note that in contrast to the EIR, the Model Law does not directly deal with jurisdiction issues. Nevertheless, the Model Law rests on the same basic principles of COMI and establishment, but these principles are construed (at least partially) differently and play different roles within the context of recognition of foreign proceedings.

To reiterate, the Model Law has not been implemented in Belgium.

7.2.2 Applicable law

Under the EIR, the basic principles for EU cross-border insolvencies are that the law applicable to the insolvency proceedings and its effect is that of the member state in which the proceedings[43] have been opened (*lex fori concursus*).

Nevertheless, the EIR provides for several exceptions to this general rule. Notable exceptions include the law applicable to employment contracts, third parties' right *in rem*, the right to set-off, reservation of title, contracts pertaining to immovable goods, detrimental acts and the protection of third-party purchasers.

7.2.3 Recognition and scope

Once insolvency proceedings have been opened in an EU Member State, these proceedings are automatically recognised in all other Member States. As a result of this automatic recognition, the insolvency proceedings have the same effects in all other EU Member States as under the *lex fori concursus*, subject of course to the exceptions listed in the EIR and the secondary proceedings which have territorial effect.

One significant feature of this automatic recognition principle is that it includes the automatic recognition of the legal authority of the foreign insolvency practitioner.

[43] Main or secondary.

Turning to territorial proceedings (secondary proceedings), the main proceedings are recognised in the EU member state in which territorial proceedings have been opened, but the assets located in the territory where the secondary proceedings are opened remain unaffected by the main proceedings. Those assets are only affected by the territorial proceedings.

7.3 Cross-border non-EU insolvency proceedings: Belgian Code of Private International Law (COPIL)

As mentioned above, any cross-border insolvency relating to a debtor that has its COMI outside the EU or in Denmark, will not be subject to the EIR. Instead, the COPIL is applicable.

7.3.1 Jurisdiction

The Belgian courts may have jurisdiction in the following cases:

- principal proceedings: if the main establishment or statutory seat of the body with separate legal entity is located in Belgium, or if the domicile of a natural person is located in Belgium; and

- territorial proceedings: if the debtor has an establishment in Belgium.

If a Belgian court considers that it has jurisdiction, it will apply domestic insolvency law to the request for the opening of insolvency proceedings.

As a result, the rules relating to the requirements for the allowance of an insolvency request and to the ability to file such a request, are the same as those which apply to purely Belgian insolvencies.

7.3.2 Applicable law

As under the EIR, the basic principle for cross-border non-EU insolvencies is that the insolvency proceedings and their effects are governed by Belgian law if the insolvency proceedings have been opened by a Belgian court.

Nevertheless, the COPIL provides for several exceptions to this general rule. These exceptions are generally the same as those set forth under the EIR, namely the law applicable to employment contracts, reservation of title clauses, rights of set-off, rights *in rem*, etcetera.

7.3.3 Recognition and scope

In situations where the EIR does not apply, the COPIL provides that foreign judgments concerning the opening, the conduct or the closure of insolvency proceedings may be recognised or declared enforceable as a judgment in:

- principal proceedings, if the judgment was given by a judge in a state where the debtor had its main establishment at the time when the action was introduced; and

- territorial proceedings, if the judgment was given by a judge in a state where the debtor had another establishment than its main establishment at the time when the action was introduced. In this event the recognition and enforcement of the judgment may only relate to assets located in the territory of the state where the proceedings were opened.

A foreign judgment that is enforceable in the state in which it was handed down, will be recognised and declared enforceable in whole or in part in Belgium, in accordance with a specific procedure set out in the COPIL, which is the same procedure applicable to any foreign judgments[44] not subject to bilateral / multilateral treaties or regulation.[45]

A foreign insolvency judgment will not be recognised or declared enforceable if certain conditions are met (for example, if the judgment constitutes, or is a result of, breach of fundamental rights – such as the rights of defence – ; the judgment contravenes public policy rules; or the judgment is contradictory with another judgment previously handed down in Belgium).[46]

7.4 Case law

With regard to the EIR, Belgian case law is quite limited.

However, over the past years, Belgian courts have been increasingly confronted with cross-border cases.

7.4.1 The predominance of the presumption: the registered seat is the debtor's COMI

At first, Belgian courts were very reluctant to consider that Belgium had jurisdiction to deal with cross-border insolvencies involving foreign debtors whose corporate (registered) seat was located abroad. By way of illustration, a decision from the Court of Appeal in Liège gives a good overview of the Belgian courts' former interpretation of the EIR.

In a judgment of 10 November 2010, the Commercial court of Verviers opened judicial reorganisation proceedings by way of collective agreement in favour of Delos France SARL. The Public Prosecutor on appeal challenged the competence of Belgian courts on the basis that the registered office of the company was located in France (Lille) and its activities were mainly conducted in France.

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[44] Except that in the case of insolvency judgments, the enterprise court is the relevant court to hear the case instead of the first instance court.

[45] Such as the EU Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[46] See paragraph 8.2.2 below for further details.

On appeal, Delos France SARL claimed, among others, that it had no staff in France and that it was in fact managed by a management committee located in Belgium and that, as a result, its COMI was located in Belgium.

By stating that the presumption that the COMI is situated in the member state where the registered office is located, can only be rebutted by factors that are both objective and ascertainable by third parties, the court confirmed the reasoning given by the European Court of Justice in the *Eurofood*[47] judgment.

Consequently, the court relied heavily on this presumption to finally decide that the factual elements brought forward by Delos France SARL were insufficient as, amongst others, the factors were not sufficiently established / proven and not necessarily ascertainable by third parties.

On this occasion, the court stressed that the facts that the company had a bank account in Lille and that the company's letterhead only contained its French address details, were objective elements from which third parties could obviously conclude that the COMI was situated in France and not in Belgium. The court therefore ruled that the Belgian courts had no jurisdiction.

7.4.2 The confirmation of the head office function test

The 2011 *Interedil* case[48] provided additional arguments to lawyers and insolvency practitioners to temper the harshness of the Belgian courts' case law.

It can be argued that in recent years Belgian courts have adopted a pragmatic and flexible approach based on the "head office function" theory.

The head office functions test is a theory designed to locate the COMI. In particular, this test has been developed to address the issue of groups of companies.

In short, it aims at locating the COMI of a debtor where activities such as making strategic, executive and administrative decisions regarding the accounting, information technology (IT), corporate marketing, branding etcetera, are performed.

In other words, the head office corresponds to the company's centre of management and supervision of its interests, which must be established by several factors that are ascertainable by third parties.

This approach has been recently confirmed in the *Parfip*[49] and the *Maxi Toys*[50] cases.

The *Parfip* case involved companies active in the financial sector located in France, Spain, Luxembourg and Belgium.

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47 European Court of Justice, *Eurofood IFSC Ltd*, case C-341/04.
48 European Court of Justice, *Interedil Srl*, case C-396/09.
49 Brussels commercial court, 7 June 2017.
50 Mons enterprise court, 18 May 2020.

The enterprise court of Brussels agreed to open Belgian judicial reorganisation proceedings in Belgium based on several factors, such as the fact that:

- the management and control bodies of the subsidiaries were located in Belgium;
- all of the group's IT tools (servers and software) were located in Belgium;
- all of the group's IT tools (servers and software) were managed in Belgium and belonged to the Belgian entity of the group, whose head office is located in Brussels, where it employs staff for this purpose;
- the holding company located in Belgium was not only the holding company of the group but also an operating company;
- the negotiation of contracts with all the business providers of the companies in the group were carried out by the representatives of the holding company from Belgium, which also defined the commercial policy of the whole group;
- the bank accounts of the group were held in Belgium; and
- the financial means of the group were located in Belgium.

This approach was recently endorsed by Belgian courts in the *Maxi Toys* case. This case involved retail companies active in the field of children's toys and located in Belgium, France, Luxembourg and Switzerland who benefited from a judicial reorganisation in Belgium.

The elements taken into account by the court in this case were similar to the ones referred to above in the *Parfip* case.

Self-assessment Exercise 7

Study the aspects dealt with in the previous sections.

Question 1

Briefly explain how cross-border insolvencies are dealt with in Belgium.

Question 2

Assume that you are contacted by a debtor corporation headquartered in Spain, with substantial assets and activities in the United States and Belgium. Some activities are also dealt with in Luxembourg and Italy.

Regardless of substantive law issues and requirements, what would be the best option to have as few as proceedings as possible, in order to obtain as much recognition as possible? Write a short essay (one page maximum).

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

8. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

8.1 Recognition and enforcement of foreign insolvency judgments

As already mentioned, under the EIR, insolvency proceedings opened in an EU member state are automatically recognised in all other member states.

Regarding judgments rendered outside the EU or in Denmark, the COPIL applies and a specific procedure must be put into motion for the insolvency judgment to be recognised and enforced.

Please also note once again that Belgium has not implemented the Model Law and that there is no expectation for that to change in the near future.

8.2 Recognition and enforcement of other judgments

8.2.1 In the EU

EU regulations apply to the recognition and enforcement of foreign judgments from EU member states. In the case at hand, the EU Council Regulation (EC) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies to, among others, the recognition and enforcement of judgments in civil and commercial matters.

Under the abovementioned regulation, an enforceable judgment rendered in an EU member state is recognised and enforceable in another member state without any declaration of enforceability or any special procedure. In other words, such judgments will be enforced in another member state in the same way as domestic judgments.

Enforceable judgments rendered in EU member states may however not be recognised and / or enforced if they meet one of the grounds of refusal set forth in the applicable regulation.

In short, on the application of any interested party, the recognition or the enforcement of a judgment will be refused if:

- recognition or the enforcement is manifestly contrary to public policy in the member state addressed;

- the judgment was given in default of appearance and the defendant was not served with the document that instituted the proceedings, or with an equivalent document, in sufficient time and in a way that enables it to arrange for its defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible to do so;

- the judgment is irreconcilable with a judgment given between the same parties in the member state addressed;

- the judgment is irreconcilable with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the member state addressed;

- the judgment conflicts with several rules of jurisdiction set forth in the regulation where the defendant was the policyholder insured or beneficiary of the insurance contract, the injured party, a consumer, or an employee; or

- the judgment conflicts with the exclusive jurisdiction of another member state.

8.2.2 Outside the EU

For judgments rendered in a non-EU member state, the COPIL applies unless both states are parties to a bilateral or multilateral convention or treaty on the recognition and the enforcement of foreign judgments. To be declared enforceable,[51] a foreign judgment must be subject to specific proceedings filed with the first instance court or the enterprise court (for insolvency matters).

The grounds for refusal of recognition or enforcement are exhaustively listed in the COPIL.

The grounds for refusal are mandatory, meaning that if the court holds that the foreign judgment infringes one or more of the grounds for refusal, it must refuse recognition or enforcement.

A foreign judgment will be refused recognition or enforcement if it infringes on one or more of the following grounds for refusal:

- the consequences of recognition or enforcement are manifestly contrary to Belgian public policy. On determining this incompatibility, the court must consider the extent to which the matter is connected to Belgian public policy and the seriousness of the consequences if the foreign judgment is recognised or enforced;

[51] Note that recognition, as such, does not require any specific proceedings and may be requested in the course of any Belgian ancillary proceedings.

- the court proceedings in the foreign state violates the rights of either of the parties to the proceedings before the foreign court. The right to a fair trial and due process comprises the various requirements that are spelled out in article 6, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights);
- if in a matter in which the parties cannot freely dispose of their rights, the judgment has been obtained only to evade governing law as designated by the COPIL;

- the judgment is not enforceable and can still be challenged[52] in the foreign country, according to the local civil procedural law of the foreign court;

- the foreign judgment is irreconcilable with a Belgian decision or an earlier foreign decision that could be recognised in Belgium;

- the claim was brought before the foreign courts after a claim had been brought in Belgium that is still pending between the same parties and is based on the same cause of action;

- the Belgian courts have exclusive jurisdiction to hear the claim (for example, because of an exclusive forum selection clause that would award sole jurisdiction to the Belgian courts); and / or

- the competence of the foreign judge was founded on the mere presence of the defendant or assets located in the foreign country, but without any direct relationship with the dispute.

Even though a Belgian court must verify whether or not the foreign judgment breaches one of the above-mentioned grounds, it cannot review the judgment on the merits. In other words, a Belgian judge cannot render another decision on the merits, nor decide to strike down the foreign judgment.

Nevertheless, this is not to say that the Belgian judge cannot take into account all the elements of the case. In fact, pursuant to case law of the Belgian Supreme Court, in its analysis, the Belgian judge needs to take into account and carefully analyse the whole foreign proceedings as well as all the factual elements of the case.

Self-assessment Exercise 8

Study the aspects dealt with in the previous sections.

Assume that you are contacted by a foreign corporation that has assets in Belgium and that has lost a trial in a non-EU member state.

[52] By means of any right of ordinary recourse.

The opposing party is trying to enforce its judgment in Belgium. Nevertheless, your client told you that it was not able to submit any arguments in court as the foreign judge refused to hear any written or oral arguments from it.

Is this judgment automatically recognised and enforceable in Belgium? If not, is there any refusal ground(s) that your client could raise?

For commentary and feedback on self-assessment exercise 8, please see APPENDIX A

9. INSOLVENCY LAW REFORM: INTRODUCTION OF BELGIAN PRE-PACKS

A recent reform was enacted in Belgium. This reform was requested by insolvency practitioners for several months (if not years) with a view to finetuning and expanding the range of tools available to companies in distress.

The amendments to the Belgian insolvency landscape entered into force on 26 March 2021.

The main and more interesting changes were, in a nutshell, the following:

- admissibility of a request in judicial reorganisation, even though (all) of the mandatory exhibits had not been filed along with the request; and

- it is now possible to draw up preparatory agreements prior to the official and public judicial reorganisation, which is a real breakthrough and presents a genuine practical interest;

- in practical terms, debtors in distress may now seek from the enterprise court the appointment of a judicial representative (which can even be proposed by the debtor itself) to facilitate the subsequent reorganisation. Both the simplicity and the confidentiality of the procedure are attractive – the appointment of the representative is not made public so the company's stakeholders will not be made aware of it;

- the representative then enters into negotiations with one or several creditors with a significant leverage: the representative may seek the intervention of the enterprise court to obtain payment terms and suspension of enforcement rights;

- once an amicable settlement has been reached, or a reorganisation plan that appears to be acceptable to creditors has been drawn up, the representative may ask the court to immediately order the opening of the official reorganisation procedure;

- this procedure is streamlined and follows a faster pace than a regular judicial reorganisation. This is a significant tool to limit (to the extent possible) the stigma attached to insolvency proceedings.

The changes were initially temporary but have already been extended once. Practitioners however expect that these new rules will become a permanent part of the Belgian insolvency regime.

Finally note that, as is the case in many other EU member states, Belgium is in the process of drafting one or several Acts to implement the EU Restructuring and Second Chance Directive (2019/1023).

10. USEFUL INFORMATION

Here is a non-exhaustive list of useful websites about insolvency or Belgian law:

- Belgian Official Gazette: https://justice.belgium.be/fr/service_public_federal_justice/organisation/moniteur_belge;

- Summary of Belgian bankruptcy law by French Speaking judges of enterprise's courts : https://www.rechtbanken-tribunaux.be/sites/default/files/te_hainaut/docu/new-vade mecum-de-la-faillite-version-31-01-2021.pdf;

- Site of the Unions of lay judges: http://www.jugesconsulaires.be/home/;

- Site of several Belgian university's lecturers on insolvency and corporate law in general: https://corporatefinancelab.org/.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-assessment Exercise 1

Study the aspects dealt with in the previous section.

Question 1

Briefly describe the different layers of courts in Belgium. Is there a court that handles insolvency cases, and if so, where is it located?

Question 2

Which court(s) is / are, in your opinion, typically involved in insolvency matters / recovery matters? Briefly explain its / their role and its / their position in the typical layers of courts in Belgium.

Commentary and feedback on Self-assessment Exercise 1

Question 1

For this question, you should be able to briefly describe the three-tier system of Belgian courts with a succinct description of their jurisdiction.

Question 2

The enterprise courts are typically involved in insolvency and recovery matters as they have general jurisdiction to handle disputes among enterprises as well as insolvency proceedings.

In addition, the attachment judge, which is a judge of the court of first instance, is also typically involved as this judge has jurisdiction to deal with attachment and enforcement issues.

Self-assessment Exercise 2

Study the aspects dealt with in the previous section.

Question 1

Consider yourself a Belgian lawyer approached by an international company. This company is about to lend some money to a Belgian company.

Write a short essay (two pages maximum) regarding real and personal security under Belgian law. What kind of security would you recommend to this international company, and for what reasons?

Question 2

What is the status of real and personal security in the case of insolvency under Belgian law? To what extent can they be enforced despite insolvency?

Commentary and Feedback on Self-Assessment Exercise 2

Question 1

Your essay should cover the following security:

- Real security: pledge and mortgage
- Personal security: personal guarantor, independent guarantee at first demand, comfort letter

Your essay should also clearly set out that the best possible option is to obtain personal security as it is all fully enforceable, regardless of the insolvency of the main debtor.

However, alternatively or additionally, real security is also recommended as it is also enforceable despite insolvency (although with some drawbacks and delay, depending on the type of insolvency).

Question 2

You should be able to describe the main enforceability issues regarding real and personal security in the event of insolvency proceedings.

Self-assessment Exercise 3

Study the aspects dealt with in the previous sections.

Question 1

Consider yourself as a Belgian lawyer being consulted by a natural person who is not self-employed nor carrying on any commercial activities. This person tells you that she or he is no longer able to pay her or his debts as they fall due and payable and that there is no prospect of that changing any time soon. Would you advise her or him to make use of bankruptcy, judicial reorganisation or collective debts settlement? Explain your answer.

Question 2

Would your answer to question 1 above change, if the natural person in question is active as an entrepreneur?

Commentary and Feedback on Self-Assessment Exercise 3

Question 1

The only option available to this individual is collective debts settlement as he / she cannot qualify as an enterprise. Bankruptcy and judicial reorganisation (both applicable to enterprises) and collective debts settlement regimes are exclusive of each other.

Question 2

Yes, it would as the main options available would then be bankruptcy or judicial reorganisation. The choice between these two regimes will firstly be made depending on the final purpose to be achieved: continuity of the activities (judicial reorganisation) or not. (Take note that bankruptcy involves the mere realisation of the assets with potential specific liabilities for directors.)

Self-assessment Exercise 4

Study the aspects dealt with in the previous sections.

Question 1

Imagine that you are the chief executive officer (CEO) of a listed Belgian company and that, after several failed attempts with your financiers, you come to the conclusion that the company will be in default of payment soon. What would you do, and why?

Question 2

As a director, what is the less stringent insolvent scenario in terms of potential liabilities? Explain your answer.

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

As seen in this module, directors have the knowledge as to whether or not a company should continue trading. As a general rule, directors must consider possible changes in the future financial stability, resource availability, cash flow, solvency and general continuity of the business.

In this respect, they should decide whether it is appropriate to opt for insolvency proceedings and they should be careful not to continue trading, should the situation of company be hopeless (wrongful trading).

As a result, the CEO and the directors must (preferably with the help of external consultants, accountants and lawyers) carefully analyse the situation to decide which option would be the best fit.

If the situation is not hopeless, a judicial reorganisation would in principle be the best option. Otherwise, a liquidation or a bankruptcy should be decided on. If the situation is hopeless and in order to avoid genuine insolvency proceedings in court (or at least to limit the involvement of the court and the publicity related thereto), a liquidation could be the preferred option.

Question 2

Liquidation or judicial reorganisation. In the event of bankruptcy, specific liabilities may apply and directors may be willing to avoid them.

Self-assessment Exercise 5

Study the aspects dealt with in the previous sections.

Question 1

What are the conditions to be met in order to be declared bankrupt? How do they differ from the conditions in order to be placed under liquidation?

Question 2

Write a short essay (one page) about loss-making liquidation and its connection with bankruptcy. In this essay, give your opinion about the most recent case law of the Belgian Supreme Court dealing with loss-making liquidations.

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

This is a straightforward question. The conditions for both regimes have been dealt with in this module. Students should also bear in mind that a loss-making company may benefit from both bankruptcy proceedings and liquidation proceedings. However, a company in liquidation may be declared bankrupt, and in some circumstances a bankruptcy must be declared (in the absence of trust and support of the (majority) of the creditors).

Question 2

In this essay, students should be able to refer to the evolution of the question as to whether a loss-making company may opt for liquidation instead of a bankruptcy under Belgian law. Students should also discuss the most recent case law of the Belgian Supreme Court and give their opinion in this regard. Is it too stringent, or not?

Self-assessment Exercise 6

Study the aspects dealt with in the previous sections.

Question 1

What are the main striking features of judicial reorganisation in Belgium?

Question 2

Write a short essay in answer to the following question: is judicial reorganisation a debtor- or a creditor-friendly regime in your opinion? Provide practical examples to illustrate your opinion.

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

The main striking features are, in a nutshell:

- DIP proceedings
- Mainly voluntary proceedings with the notable exception of the transfer of and enterprise (for example should the debtor be in a (virtual) state of bankruptcy)
- Three entry routes: amicable agreement, collective agreement and transfer of enterprise
- Moratorium and effects on creditors' rights: overall suspension of creditors' enforcement rights
- Role of the court: control of the rescue process and approval of the reorganisation plan

Question 2

Judicial reorganisation tends to be a more debtor-friendly regime (compare the moratorium, aim of the proceedings, effects of the reorganisation plan, absence of specific liability regime for the directors, etc). However, if one cannot say that this regime is creditor-friendly for every creditor, it can be submitted that judicial reorganisation is creditor-friendly (or at least more mindful of their interests) for secured creditors as they are more protected than ordinary creditors.

Self-assessment Exercise 7

Study the aspects dealt with in the previous sections.

Question 1

Briefly explain how cross-border insolvencies are dealt with in Belgium.

Question 2

Assume that you are contacted by a debtor corporation headquartered in Spain, with substantial assets and activities in the United States and Belgium. Some activities are also dealt with in Luxembourg and Italy.

Regardless of substantive law issues and requirements, what would be the best option to have as few as proceedings as possible, in order to obtain as much recognition as possible? Write a short essay (one page maximum).

Commentary and Feedback on Self-Assessment Exercise 7

Question 1

This question should deal with in terms of the EIR and the COPIL.

Question 2

As the EIR allows for an automatic recognition of insolvency judgments across the EU member states, the best option available would be to have insolvency proceedings opened in Spain (benefiting from the presumption that the registered office corresponds to the COMI) or Belgium (where substantial activities and assets are located (provided that the abovementioned presumption can be rebutted)). Afterwards, territorial proceedings (if necessary) could be opened elsewhere.

Students should also be able to briefly discuss the notion of COMI and its interpretation under Belgian law.

Self-assessment Exercise 8

Study the aspects dealt with in the previous sections.

Assume that you are contacted by a foreign corporation that has assets in Belgium and that has lost a trial in a non-EU member state.

The opposing party is trying to enforce its judgment in Belgium. Nevertheless, your client told you that it was not able to submit any arguments in court as the foreign judge refused to hear any written or oral arguments from it.

Is this judgment automatically recognised and enforceable in Belgium? If not, is there any refusal ground(s) that your client could raise?

Commentary and Feedback on Self-Assessment Exercise 8

A foreign non-EU judgment is not automatically recognised and enforceable in Belgium.

As to the recognition, it does not, as such, require any specific proceedings and can be requested in the course of ancillary proceedings in Belgium.

Enforcement will entail specific proceedings, either before the first instance court (general matters) or before the enterprise court (insolvency matters).

Both the recognition and enforcement may be refused on the basis of grounds listed in the COPIL.

In the case at hand, it could be argued that the fact that the foreign judge refuses for obscure reasons to hear any argument of your client is a breach of the fundamental rights of defence. As a consequence, this may lead to a refusal of recognition and enforcement in Belgium.

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