CLIFFORD
CHANCE

Briefing note May 2012

Modifications to the Belgian liquidation procedure

On 7 May 2012 the laws of 19 March and 22 April 2012 modifying and simplifying certain aspects of the procedure for liquidating Belgian companies, were published (Law of 19 March 2012 on the amendment of the Company Code with respect to the liquidation procedure (hereafter "**Law of 19 March**") and Law on the amendment of the Judicial Code with respect to the liquidation procedure (hereafter "**Law of 22 April**"), together the "**Laws**").

In 2006, the Belgian legislator amended the rules on liquidation procedures (hereafter the "**Law of 2006**") in an attempt to prevent the most obvious forms of abuses. The Law of 2006 imposes stricter monitoring by and transparency requirements to the Commercial Court. Practice quickly showed that the Law of 2006 had left many gaps in the procedure and uncertainties on its interpretation.

The Laws therefore implement some clarifications and simplifications of the Law of 2006, most importantly with respect to (i) the conditions for a dissolution and liquidation in one day (see section 1. below); and (ii) the confirmation of the appointment of a liquidator and the interim acts by the liquidator (see section 2. below). Other modifications are mainly procedural (see section 3. below).

The new provisions are applicable to all Belgian companies and will apply as of 17 May 2012, it is however not specified if they will only apply to newly dissolved companies or also to ongoing liquidation procedures.

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Concrete changes

1. Dissolution and liquidation in one day

Prior to the implementation of the Law of 2006, there was a wide-spread practice to decide on the dissolution and closing of the liquidation of a company in one day. The Law of 2006 has cast doubts on the legality of this practice which in fact allowed to by-pass the judicial control on the liquidation procedure. The Law of 19 March now confirms that the dissolution and closing of the liquidation of a company may be carried out in one notarial deed if the following conditions are met; *(i)* no liquidator is appointed, *(ii)* the

Key issues

- The practice of the dissolution and liquidation in one day is confirmed
- Clarification with regards to the appointment procedure of the liquidator and the interim acts by such liquidator

statement of assets and liabilities demonstrates that there are no liabilities, and *(iii)* all shareholders are present and have decided unanimously in favour of the dissolution and liquidation.

Consequently, the liquidation status report and the asset distribution plan are no longer required. However, all corporate documents on the dissolution of the Company still have to be drawn-up; i.e. the proposal to dissolve, the report of the board, the statements of assets and liabilities not older than three months, and the auditor report.

In practice it may not always be easy to meet the "no liability" condition. If after the closing any unpaid debt would be claimed from the company, the directors of the company will be held liable as no liquidator has been appointed, the company has been dissolved and the liquidation has been closed.

2. Appointment procedure of the liquidator and the interim acts by such liquidator

a) *Interim acts by the liquidator*

Under the regime as brought about by the Law of 2006, the Commercial Court had to ratify all acts by the liquidator which it had carried out between its appointment and the confirmation/homologation of this appointment by the Commercial Court. Pursuant to the Law of 19 March, an explicit confirmation of the validity of the interim acts of the liquidator at the moment of the confirmation of his appointment is no longer necessary.

Note that persons subject to the homologation procedure (persons that do not comply with the list of guarantees of probity can only be appointed as liquidator if the President of the Commercial Court approves their appointment) may not act on behalf of the company prior to the homologation of their appointment. The Court can still invalidate all acts committed by the liquidator since its appointment by the meeting of shareholders if such act is accomplished in breach of any third party's rights.

b) *Clarification of the procedure in connection with the confirmation or homologation of the appointment of the liquidator*

The Laws implement some simplifications and clarifications of the confirmation and homologation procedure:

i. Rather than having all three judges of the Commercial Court decide on the appointment of the liquidator, the President of the Commercial Court is competent to decide solely on such matter.

ii. In addition to the explicit list of guarantees of probity already provided for in article 184 of the Company Code (*e.g.* exclusion of persons who have committed theft, forgery, extortion, fraud or abuse of trust, persons who have been declared bankrupt without being discharged, or who have incurred a prison sentence, even with suspension, for certain misdemeanours (including breaches of tax law)), the President has the competence to assess the probity of the liquidator on the basis of other circumstances as well.

iii. If a legal person is appointed as liquidator both the appointment of the legal entity and its permanent representative will have to be confirmed/homologated by the President of the Commercial Court.

iv. The shareholders can, in addition to the appointed liquidator, nominate several candidates to be appointed as liquidator in order of preference, if deemed necessary. In the event that the Court would refuse to confirm or homologate the appointment of the first on the list, it will appoint another liquidator in accordance with the preferences proposed by the shareholders.

v. The Laws clarify that the unilateral petition on the confirmation/homologation of the appointment can be submitted by either the liquidator himself, a manager or director of the company, a lawyer or a notary. Note however that liquidators whose appointment has to undergo the stricter homologation procedure cannot submit the unilateral petition themselves. Finally, it is no longer necessary to add a statement of assets and liabilities to the unilateral petition.

vi. The President has to decide on the appointment of the liquidator within five days from the submission of the petition, and no longer within 24 hours. If the 5 day period has lapsed, the appointment of the liquidator will be deemed to be confirmed and, were required, homologated. If the confirmation or homologation procedure is not followed the general prosecutor or every interested party may request the replacement of the liquidator.

3. Miscellaneous provisions

Other clarifications made by the Laws are that the Commercial Court is the only competent court for liquidations (i.e. both for commercial and non-commercial (civil) companies), the asset distribution plan has to be submitted by unilateral petition to the Court, the first liquidation status reports have to be drafted at the end of the sixth and twelfth month of the first year of liquidation and submitted in the seventh and thirteen month after the shareholders' decision on the dissolution of the company.

Finally, the Law specifies that the "liquidation file" is part of the company file, i.e. the file held at the clerk's office of the Court in accordance with article 67 § 2 of the Code, and that there is no need to publish a statement in the Belgian State Gazette each time a document is filed in that " liquidation" file.

Click here to see the Laws of 19 March 2012 and 22 April 2012

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