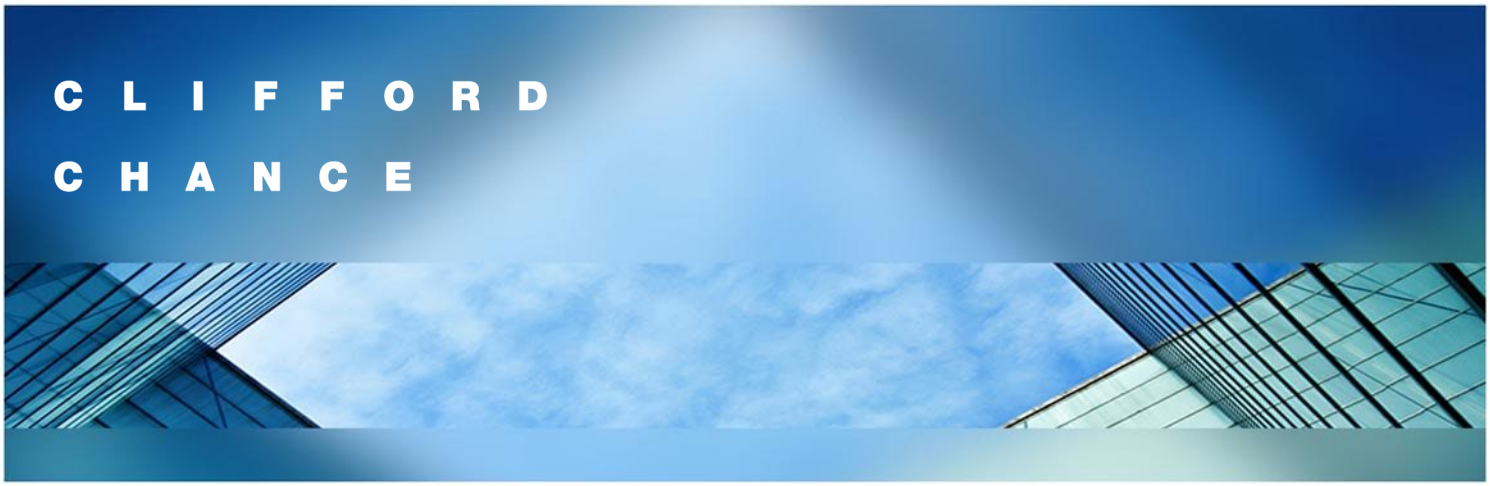

JUDICIAL REORGANISATION PROCEEDINGS, VERSION 2.0: BELGIUM FINALLY IMPLEMENTS THE EUROPEAN RESTRUCTURING DIRECTIVE.

Introduction

On 7 June 2023, the Belgian parliament adopted a long-awaited bill amending the Belgian insolvency provisions to implement the European Restructuring Directive. The bill will enter into force on 1 September 2023.

The new bill significantly alters the Belgian restructuring framework and will entail substantial changes for lenders and distressed companies alike.

Under the former insolvency rules, a restructuring under Belgian law could take the form of either (i) an amicable agreement concluded between a distressed debtor and two or more creditors, (ii) a collective agreement, and/or (iii) a court-authorised transfer of a business.

The new bill distinguishes between "private" and "public" reorganisation proceedings, aimed at reaching either an (i) amicable agreement (which can now be concluded with one single creditor), or (ii) a collective plan. In addition, and to address concerns which had arisen regarding the compliance of the Belgian regime with the Transfers of Undertakings Directive, a court-authorised transfer of business is now classified as a liquidation procedure, and no longer as a procedure aimed at preserving the "continuity" of the business.

The new law also creates a new "pre-pack" bankruptcy procedure which will allow a distressed debtor to "silently" prepare for bankruptcy proceedings.

Finally, the new law increases the means for the enterprise courts to proactively monitor distressed companies, and for distressed debtors to ask the court to convene their creditors with a view to reaching a settlement or to appoint a restructuring professional to mediate between the company and its creditors.

Key issues

- The new bill implementing the European Restructuring Directive is set to enter into force on 1 September 2023
- It will significantly alter the Belgian restructuring framework
- Key changes include the introduction of:
  - new private pre-pack restructuring options and a pre-pack bankruptcy regime;
  - a differentiated regime between SMEs and large companies;
  - the formation of classes and a cross-class cram-down mechanism (based on the absolute priority rule) for the restructuring of large companies through a collective agreement;
  - additional tools for the insolvency courts and distressed debtors to intervene at an early stage.

The reorganisation regime by "collective agreement" revisited

One of the key features of the new law is the creation of a twofold regime for (public) judicial reorganisation proceedings by means of collective agreement: one for large companies, and one for SMEs.

For SMEs, the current proceedings will largely continue to apply, and the proposed plan must be approved by a majority of the creditors (in headcount and in value of their outstanding claims).

For large companies (i.e. companies which, for a period of two consecutive years, have either (i) 250 or more employees, (ii) an annual turnover exceeding EUR 40 million, or (iii) a balance sheet total exceeding EUR 20 million), a new reorganisation regime will apply for collective agreements. SMEs can voluntarily opt-in to this regime.

In the more complex reorganisation regime for large companies, creditors are divided into separate classes based on their respective rights in a liquidation scenario and/or the rights conferred on them in the proposed reorganisation plan. Equity holders form a separate class. The plan is approved if a majority of each class (in value of the claims in principal and interest) approves it.

There is a double test to "cramdown" dissenting (classes of) creditors.

- First, the "*best-interest-of-creditors test*" applies, meaning that no dissenting creditor can be manifestly worse off under the reorganisation plan than in a liquidation scenario.
- Second, a "*cross-class cramdown*" to impose the plan on non-consenting classes is only possible if additional criteria are met, more particularly:
  - (i) if there are two classes, one of the two classes must approve the plan;
  - (ii) if there are more than two classes, a majority of the classes of parties affected by the plan must approve it (including at least the class of secured creditors or a class ranking ahead of the class of ordinary creditors, or if that is not the case, at least one class of creditors who could reasonably be expected to receive payment if the normal order of priority in liquidation were to be applied); and
  - (iii) the plan cannot derogate to the detriment of any of the dissenting categories from the existing legal or contractual priority that would apply in the context of a liquidation, unless there would be a reasonable basis for such a derogation and the relevant creditors or equity holders are not manifestly disadvantaged as a result of such derogation.

The creation of classes and new voting mechanics imply that valuation discussions will become increasingly important in the context of reorganisation proceedings. Distressed debtors and their creditors may hence need to involve financial advisors at an early stage to avoid challenges and/or protect their interests.

New private pre-pack procedures

Another key change is the introduction of a new framework for private or "*pre-pack*" reorganisation proceedings having as ultimate objective to reach an amicable or a collective agreement without the reputational damage and value destruction which the opening of public reorganisation proceedings may entail.

A restructuring practitioner ("*herstructureringsdeskundige*"/"*praticien de la reorganisation*") is appointed by the court at the outset of these procedures to facilitate the negotiation of an agreement with the company's creditors. If successful, the 'pre-packed' restructuring will be validated through expedited formal restructuring proceedings.

Private proceedings, as opposed to public reorganisation proceedings, do not involve a general stay on individual enforcement action. The restructuring practitioner can, however, request the court to impose a stay of enforcement

action of maximum four months. Conversely, in public reorganisation proceedings, creditors will –in certain specific circumstances– henceforth be able to request for the moratorium to be lifted.

The bill also introduces a new regime of private preparation for bankruptcy proceedings. During this procedure, a liquidation practitioner ("*vereffeningsdeskundige*"/"*praticien de la liquidation*") will monitor the procedure representing the interests of the creditors, who will generally be appointed as the liquidator in the ensuing bankruptcy procedure.

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