The Belgian Chapter 11 proceedings two years on

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The Law on the Continuity of Enterprises (the Continuity Law) dated January 31, 2009 provides companies in financial difficulties with a safeguard procedure during which they are protected from creditors in order to attempt to restructure their business. At a glance the Continuity Law provides better protection for companies in financial difficulties. The main purpose of this article is to examine case law and to establish whether the Continuity Law has redeemed the high expectations of the Belgian legislator two years ago.

The Continuity Law

The aim of the Continuity Law is to support the continuity of a business as far as economically possible by presenting more options for recovery. There are flexible solutions either under the supervision of the judge of the Commercial Court or out of court. The transfer of all or some of the assets should be much easier to accomplish under the Continuity Law. The Continuity Law should, in principle, provide more opportunities for investors to invest in viable businesses without having to carry the burden of the historical debts of a company. Further in this article a distinction will be made between out-of-court and court restructurings.

Out-of-court restructurings

A debtor may opt for an amicable settlement out of court, whereby he freely concludes agreements with one or more creditors in order to restore the financial situation of the company. This agreement cannot be challenged, even in the event of a subsequent bankruptcy proceeding, if it is explicitly mentioned in the settlement agreement that the agreement is reached to enable the debtor to improve its financial situation and reorganise its business. The agreement is filed at the clerk's office at the Commercial Court of the registered seat of the debtor. This agreement remains confidential and is only accessible to third parties with the explicit approval of the debtor. Because of the confidentiality here, we have very little information on the frequency with which this has been used.

Court proceedings: two main conditions

Article 23 of the Continuity Law stipulates that if the continuity of a company is at risk, without necessarily having ceased paying its debts, a debtor may request a judicial reorganisation, whereby the debtor's business is reorganised under the supervision of a judge. The debtor does not have to prove that "the continuity of the company is at risk" and a declaration may be sufficient[1]. Furthermore, a judge may not reject the judicial reorganisation request based on any allegedly wrongful acts: the absence of bad faith is not a condition stipulated in the Continuity Law and may therefore not be decisive when granting the permission[2]. However if the only reason for requesting the judicial reorganisation is to become protected against creditors, the judicial reorganisation should not be granted because it would not be in accordance with Article 16 and 23 of the Continuity Law, which state that the judicial reorganisation is mentioned to (partially) maintain the continuity of the company[3].

Article 17(2) of the Continuity Law lists the documents which must be deposited with the request at the competent commercial court. A distinction has been made between documents which must be provided immediately together with the request, and documents which may be provided within 14 days after the filing of the request. However, no sanction has been explicitly inserted in the Continuity Law in the case of non-deposit of required documents. Various courts have therefore ruled that the request to file for a judicial reorganisation where there is a deficiency of documentation has to be dismissed[4], while other courts have been of the opinion that they only had a marginal control[5]. As a result, according to the vast majority of requests examined by judges, and in accordance with Article 23 of the Continuity Law, it was confirmed that a judicial reorganisation must be granted once the continuity of a company is threatened and a request has been filed. Nevertheless, Article 41(2) of the Continuity Law states that, if the required documents have not been deposited within 14 days after the filing of the judicial reorganisation request, the court may, of its own initiative, decide to terminate the judicial reorganisation procedure after having heard the debtor and the delegated judge[6]. As a result, a deposited request which has not been (sufficiently) accompanied by the required documents may be considered to be admissible, but unfounded in

a case where there are no documents which can prove that the continuity of the company is threatened[7].

The Continuity Law makes a distinction between three types of judicial reorganisation i.e., the judicial reorganisation through (i) amicable settlement; (ii) a collective agreement; and (iii) a transfer under judicial supervision. The proceeding is very flexible and one can change from one type of judicial reorganisation to another, or combine the different elements.

Main characteristics of the judicial reorganisation

The three types of judicial reorganisation mentioned, result in a standard suspension period of no longer than six months. However, in exceptional circumstances that relate to the size of the company, the complexity of the case and the continuation of employment, the term may be extended by another six months. However, it must be noted that no extension can be granted to a negligent debtor[8]. Third parties often request the court for suspension periods of less than six months, the period during which they do not have the right to ask for payment by the debtor. However, even if the intervening third party is a well known financial institution, we note that the court has often granted a maximum payment suspension for six months in favour of the debtor[9], which may be considered to be a support for the Continuity Law.

Nevertheless, the creditor who has a pledge on any of the debtor's goods may still execute his pledge if the company does not fulfil his obligations regarding this pledge and in so far as this execution by the creditor may not be considered an abuse of the law[10].

In addition, there can be no seizure of goods of the debtor who has been granted a judicial reorganisation. Seizures prior to the granting of the judicial reorganisation remain valid, but the court may, depending on the circumstances, lift the seizure after having heard the report of the delegated judge, the creditor and the company itself as long as the lifting of the seizure does not cause any disadvantage for the creditor. Based on current case law, priority is often given to the creditors who already have an existing seizure in place before the granting of the judicial reorganisation. The reason often given by the courts is that the debtor is not able to prove that the lifting of the seizure does cause a disadvantage for the creditors[11]. One could agree with the general view expressed by the courts, but it certainly decreases the chances of a successful judicial reorganisation of the company. Therefore, some legal practitioners have suggested a more pragmatic approach whereby the interest of the creditor with a security must be balanced with the general interest of the reorganisation procedure and whereby the position of that creditor is compared with the position of the other creditors (in case of subsequent bankruptcy of the debtor). It is clear that the lifting of a seizure on immovable goods would bring serious negative consequences for the creditor concerned, but this would certainly not always be the case when lifting the seizure of movable goods, such as stock which are essential for the continuity of the company[12].

From the moment a request for a judicial reorganisation is filed pursuant to Article 22 of the Continuity Law, a debtor in Belgium cannot be declared bankrupt and none of his goods can be sold without a court ruling.

Throughout the judicial reorganisation, the debtor retains the power to take decisions. Upon his request or with his approval, a corporate mediator can be appointed to advise him with regard to the decisions necessary to stabilise the company and help it recover. This was, for example, the case in a judgement of the Commercial Court of Turnhout whereby the bankruptcy conditions were fulfilled and there was little public interest in saving the debtor. However, the court was still willing to grant the appointment of a corporate mediator who could quickly provide an objective view on the survival chances of the debtor under a judicial reorganisation[13].

Another novelty provided under Article 35(2) of the Continuity Law introduces the possibility for debtors to terminate existing contractual agreements (excluding employment agreements) prematurely, regardless of whether or not those agreements contain a provision in this regard, if this is necessary for the reorganisation proposal or to facilitate a transfer under judicial supervision. Therefore, a debtor could terminate its financing agreements because they are detrimental to the survival of the business.

The three types of judicial reorganisation

i. *The judicial reorganisation through amicable settlement* allows the debtor to come to an individual agreement with his creditors. If an agreement is reached, it is acknowledged by the court by means of a judgement. A consequence of the amicable settlement is that creditors that were not parties to such a settlement will not be bound by it, and once the judicial reorganisation has been terminated, they can use their execution rights again. If a company opts for a collective agreement, every creditor would be bound by it and the execution by an individual creditor could not threaten the continuity of the company[14]. As a result, the debtor requesting a judicial reorganisation should remember this difference when considering whether to propose a collective agreement that binds all creditors, or only an amicable settlement with creditors with whom

the debtor has reached an agreement.

ii. *In a judicial reorganisation through a collective agreement*, the debtor has to draw up a reorganisation proposal. This type of judicial reorganisation also existed under the Law on the Judicial Composition. Various measures under the reorganisation proposal are admitted, including rescheduling of debts, debt-to-equity swaps, write-offs of portions of debts and interest etc., insofar as these measures do not infringe the rules of public policy. The reorganisation proposal is accepted if the majority of the creditors representing at least half of the value of the debt contained in the proposal, votes in favour at the creditors' meeting. There are no classes of creditor meetings or any special bondholders' regime.

A good example of a successful judicial reorganisation can be found in the judgement of the Commercial Court of Liège on May 12, 2009 whereby a relatively large and complex company requested a judicial reorganisation through a collective agreement. In this case, the board of directors came to the conclusion at the end of February 2009 that the company had a negative equity and no other financing means. Approximately two months later, a request for judicial reorganisation was filed, including a reorganisation plan. The competent Commercial Court finally homologated this reorganisation plan, which enabled the company to survive its dire financial situation.

Although not all details of this judgement have been published, a key factor of this successful reorganisation plan was the nomination of a judicial trustee who could objectively reorganise the company in all serenity with the parties concerned. A current problem regarding the judicial reorganisation through a collective agreement is that the public authorities that also have a claim *vis-à-vis* the debtor, often do not want to cooperate with this reorganisation plan, as was the case under the old system. This often happened for example with the social security authorities.

According to the law dated June 27, 1969, a company that has a delay in paying its social contributions finds its name published on the website of the Belgian social security department and the debtors of the company are obliged to directly pay 35% of the company's invoices to the social security authorities. This may seem contradictory to one of the main principles of the Continuity Law which grants the company an initial suspension period of maximum six months. However, Article 33, second paragraph of the Continuity Law stipulates that the joint debtors are not granted any suspension period[15]. As a result, those companies that have received a judicial reorganisation but which also have delays in paying their social contributions often still find themselves in a very difficult situation to reorganise their business because 35% of their revenue has to be wired directly to the social security authorities. This severe state of mind of the social security authorities has raised some very critical reactions[16].

iii. *In a judicial reorganisation through the transfer under judicial supervision*, the Commercial Court orders, or at least supervises, the voluntary transfer of (a part of) the debtor's business. The mandatory transfer takes place, under certain conditions, upon the request of the Public Prosecutor, a creditor or an interested third party, who wishes to make an offer against normal market prices. This type of judicial reorganisation is one of the most important innovations of the Continuity Law. It also expressly takes the rights of the employees into account. Cherry-picking of employees is admitted to the extent that it is required for technical, economic and organisational reasons and is not discriminatory *vis-à-vis* the protected employees. As a result, if there is a public interest involved in the continuity of a company, namely the employment that it offers, a transfer under judicial supervision can be granted. The filing of a judicial reorganisation by a transfer under judicial supervision cannot be approved when the only reason for this transfer is the shareholders' interest[17].

Conclusion

The first court rulings rendered under the Continuity law give the impression that if the formal requirements have been met, judges are willing to grant a judicial reorganisation. The Commercial Court of Liège dated April 28 and 29, 2010 granted a six-month suspension in order to establish whether any positive perspectives would resolve the debtor's problems. In another case the court, after verification of the formal requirements, ruled that the company had a two-week period to provide the court with a reorganisation plan. Despite the initial judicial reorganisation that was granted, the company was unfortunately unable to provide the court with a feasible reorganisation plan and was therefore declared bankrupt[18]. The Commercial Court of Namur[19] granted a judicial reorganisation although the initial indications were not positive.

The Commercial Court of Antwerp granted a judicial reorganisation on April 28, 2009, although the judge was of the opinion that the company should file for bankruptcy due to several bad investments. However, Article 23 stipulates that even if a company is in a position to file for bankruptcy (but has not yet

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Nora Wouters

Ms. Wouters has a wealth of experience in assisting international banks, companies and private equity clients in complex financing activities and corporate restructurings throughout Europe, securitization structures, collateral arrangements and public or private issues of financial instruments. She is appointed liquidator in Belgian companies and frequently acts as advisor to foreign restructuring and recovery specialists.

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been declared bankrupt[20]) a judicial reorganisation may be granted. In this case, the judge ruled that granting the judicial reorganisation (and adding a director ad hoc) could give the company's creditors the possibility to retrieve some of their claims[21]. Another judgement did not share this optimistic view regarding the positions of the company's creditors and therefore did not grant the judicial reorganisation[22].

We can therefore conclude that although the outcome of the judicial reorganisation may still be uncertain and depends on the discretionary power of the judges, the fact that a court at least gives the opportunity for the company to propose a judicial composition gives hope for the future. This was recently demonstrated in a publicised bankruptcy filing of Brink's Ziegler, a cash-in-transit company whereby the company was given a chance to obtain a judicial reorganisation but where finally the company had to file for bankruptcy due to the lack of new investors. However it must be noted that a court will not automatically grant a judicial reorganisation if all circumstances lead towards a bankruptcy, and the continuity of the company will only bring along more uncertainty for the company's creditors[23]. Filing for a judicial reorganisation without having any possibility to (partially) maintain the continuity of the company would therefore not be in accordance with the main goal of the Continuity Law and can only be considered to be an abuse of law[24].

Notes:

1 Commercial Court of Liège April 23, 2009, TBH 2009, 668-670 and Commercial Court of Antwerp April 28, 2009, TBH 2009, 673-674.

2 Court of Appeal of Liège on June 18, 2009, TBH 2009, 652-654, overruling a prior judgement of the Commercial Court of Liège May 11, 2009, TBH 2009, 694-695.

3 Commercial Court of Antwerp January 5, 2010, RW 2009-10, 1444-1445 and Commercial Court of Antwerp February 9, 2010, RW 2010-11, 587.

4 Commercial Court of Nivelles July 9, 2009, TBH 2009, 713; Commercial Court of Hasselt June 2, 2009, RW 2009-10, 118; Court of Appeal of Antwerp November 12, 2009, RW 2009-10, 1309.

5 Court of Appeal Mons June 2, 2009, TBH 2009, 649-651.

6 Court of Appeal of Brussels February 23, 2010, TBH 2010, 542-544.

7 Commercial Court of Antwerp December 3, 2009, TBH 2010, 540-541.

8 Commercial Court of Hasselt September 15, 2009, RW 2009-10, 1091-1092.

9 Commercial Court of Brussels April 21, 2009, TBH 2009, 666-667.

10 Commercial Court of Brussels June 15, 2009, TBH 2009, 717-721 and similarly Commercial Court of Antwerp December 29, 2009, RW 2009-10, 1401-1402.

11 Commercial Court of Antwerp July 30, 2009, TBH 2009, 500-502 and Court of Appeal Antwerp September 10, 2009, TBH 2009, 498-499.

12 E. DIRIX, "De opheffing van beslagen onder geding van de Wet Continuïteit Ondernemingen", RW 2009, 499-500.

13 Commercial Court of Turnhout October 27, 2009, RW 2009-10, 970-971.

14 Commercial Court of Dendermonde November 2, 2009, RW 2009-10, 1093.

15 Labor Court of Liège June 24, 2009, TBH 2010, 268-271 and Labor Court of Namur, September 7, 2009, TBH 2010, 276-277.

16 T. BOSLEY and M. AIHADEFF, "L'obligation de retenue impose par l'ONSS en execution de l'article 30bis de la loi du 27 juin 1969: codébition ou mesure d'exécution force", TBH 2010, 271-275.

17 Commercial Court of Dendermonde July 30, 2009, RW 2009, 502-504.

18 Commercial Court of Turnhout May 19, 2009, TBH 2009, 704-706.

19 Commercial Court of Namur May 18, 2009, TBH 2009, 702-703.

20 Commercial Court of Dendermonde November 30, 2009, RW 2010, 206.

21 Commercial Court of Antwerp, April 28, 2009, TBH 2009, 673-674.

22 Commercial Court of Dendermonde, July 7, 2009, RW 2009-10, 332-334.

23 Commercial Court of Turnhout May 25, 2009, RW 2009-10, 331-332.

24 Commercial Court of Antwerp May 26, 2009, TBH 2009, 709-711.

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