A&O SHEARMAN

Restructuring across borders
Belgium

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | SEPTEMBER 2024

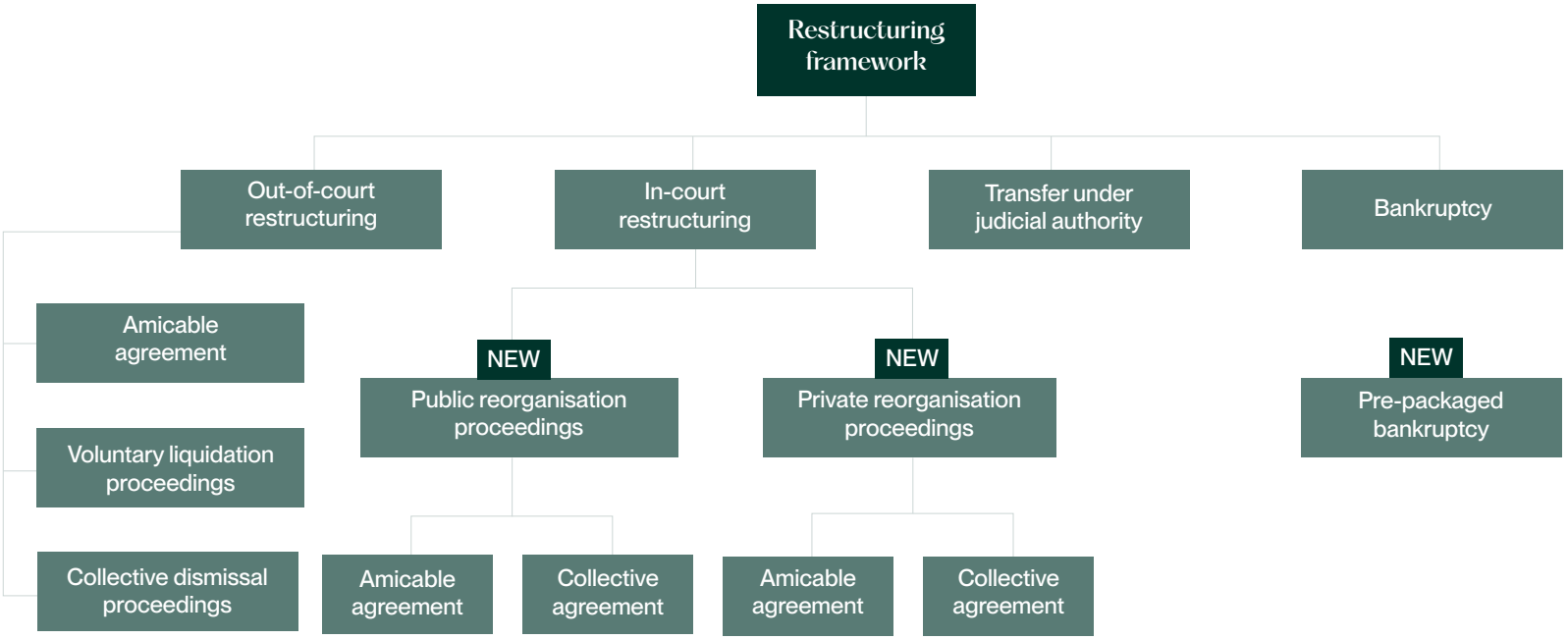
Contents

Introduction

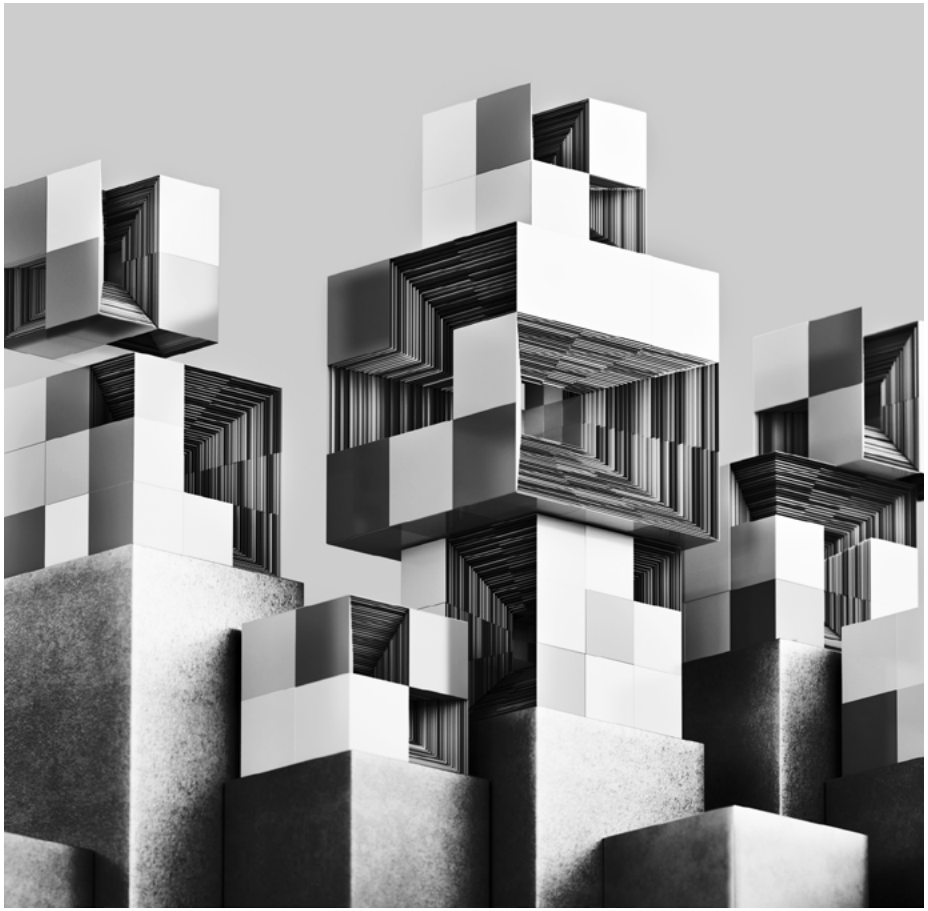
Belgian insolvency laws provide debtors with a variety of restructuring options, both in-court and out-of-court, as shown on the below overview. The following provides a brief description of the principal restructuring and insolvency regimes available under Belgian law:

- out-of-court amicable agreement;
- public/private judicial reorganisation proceedings through amicable agreement
- public/private judicial reorganisation proceedings through collective agreement
- transfer under judicial authority; and
- bankruptcy, including the new pre-packaged bankruptcy proceedings.

Although Belgian law also allows for voluntary/judicial liquidation and collective dismissal proceedings, these will not be discussed in greater details below.



Out-of-court amicable agreement



A debtor wishing to restructure its business can choose to negotiate an out-of-court amicable agreement (*accord amiable hors reorganisation judiciaire/minnelijk akkoord buiten gerechtelijke reorganisatie*) with at least one of its creditors. This option has the benefit of keeping the negotiations and the resulting amicable agreement confidential (even if the agreement is later sanctioned by the court). An out-of-court amicable agreement is also very flexible, with no legal restrictions on content. However, an amicable agreement is necessarily based on consent, meaning that it only binds the parties to the agreement and does not affect the rights of other (dissenting) creditors or stakeholders.

If the parties reach an amicable agreement, they can ask the court to sanction it. If the amicable agreement is sanctioned, actions made in execution of the amicable agreement are protected against certain claw-back provisions that could potentially apply in the event of a later bankruptcy of the debtor. The court may also declare the claims included in the amicable agreement to be enforceable. Such a court order ensures that, if on a later date the debtor fails to fulfil its contractual obligations under the amicable agreement (i.e. fails to pay its creditors) a creditor can take any enforcement measures necessary without further court involvement (e.g. instructing a bailiff to seize the debtor's assets). The court will refuse to sanction the agreement if the debtor has manifestly no economic chance of survival or if the agreement can manifestly not be executed without detrimental effects for the rights of third parties on the assets of the debtor.

Judicial reorganisation proceedings in a nutshell

Judicial reorganisation proceedings (*réorganisation judiciaire/de gerechtelijke reorganisatie*) are proceedings aimed at preserving, under court supervision, the continuity of a company in distress, while seeking a solution to its financial difficulties. These proceedings are open to debtors for which the continuity of their business is at risk, whether immediately or in the future. Book XX of the Belgian Code of Economic Law provides the debtor with two options for judicial reorganisation proceedings: (i) an amicable agreement between the debtor and one or more of its creditors, or (ii) a collective agreement (see further).

During the judicial reorganisation proceedings, the board of directors and management of the debtor generally continue to exercise their management functions, albeit under the limited supervision of the court. Nonetheless, upon request of the debtor or any other interested party (such as creditors), the court can appoint a restructuring expert to assist the debtor during the reorganisation proceedings. Such involvement of a restructuring expert is mandatory in private restructuring proceedings (see further).

Before 1 September 2023, judicial reorganisation proceedings were necessarily public proceedings. This entails that the court's decisions in the framework of the restructuring proceedings are published and that the reorganisation file is accessible for creditors and other interested parties who obtained access from the court. The public nature of the reorganisation proceedings may, however, lead to business disruption, negative press, loss of trust by customers, suppliers or employees, damage to reputation, etc. and may therefore be detrimental to a successful restructuring. The opening of public judicial reorganisation proceedings leads to the granting of a temporary suspension period (moratorium) during which enforcement measures against the company's assets (for debts incurred before the opening of the judicial reorganisation proceedings) are suspended (with limited exceptions).

Since 1 September 2023, private reorganisation proceedings are available as an alternative to public reorganisation proceedings. It allows the debtor to seek an amicable agreement or a collective agreement with its creditors without the (negative) publicity and stigma of public reorganisation proceedings, therefore facilitating confidential negotiations with the relevant stakeholders. In private reorganisation proceedings, hearings are conducted behind closed doors, decisions are not published and access to the reorganisation file is limited. The downside is that the debtor does not enjoy an automatic stay on enforcement measures in private reorganisation proceedings, although this can be granted on a case-by-case basis for certain creditors. Private reorganisation proceedings are currently not automatically recognized across the EU, which might impede cross-border restructurings.

Judicial reorganisation proceedings through amicable agreement

The first judicial reorganisation option is to negotiate an amicable agreement (*accord amiable/ minnelijk akkoord*) with one or more creditors, with the oversight by a supervisory judge and the potential assistanceof a restructuring expert. Such proceedings offer a high degree of flexibility, as there are no strict limitations on the content or the scope of the amicable agreement. The debtor can also choose which creditors to involve in the negotiations. However, like an out-of-court amicable agreement, an in-court amicable agreement is necessarily voluntary and does not have a cram down effect.

If an amicable agreement is reached, it is sanctioned by the court after a marginal public order review of the agreement. As a result of the sanctioning of the agreement, the amicable agreement and the transactions performed in implementation thereof are protected against claw-back actions, i.e. actions taken by a bankruptcy trustee to challenge transactions that occurred during the hardening period (unless these transactions are under value or fraudulent). The main difference with the out-of-court amicable agreement is that during public judicial reorganisation proceedings the debtor benefits from a moratorium against its creditors during which it can negotiate an amicable agreement with (some of) its creditor(s).

Judicial reorganisation proceedings through collective agreement

The second option is judicial reorganisation by way of a collective agreement (*réorganisation judiciaire par accord collectif / gerechtelijke reorganisatie door een collectief akkoord*), in which the creditors agree to a reorganisation plan drawn up by the board of directors of the debtor (potentially with the assistance of a restructuring expert), which is thereafter sanctioned by the court. A reorganisation plan can include various measures, such as a haircut, a differentiation in payment terms, a debt-to-equity swap, or a transfer of all or part of the assets or activities of the debtor.

Since 1 September 2023, separate regimes of judicial reorganization by collective agreement exist for small and medium-sized enterprises (SMEs), and large companies. The main differences between the two regimes are limited to (i) the voting procedure and (ii) the measures to protect dissenting creditors. The following description of the voting procedure and sanctioning requirements applies only to large companies.

The approval of the plan by the creditors follows a voting procedure in classes. Creditors can and to a certain extent must be placed in different voting classes if (i) their rights in a hypothetical liquidation scenario or (ii) their rights obtained under the reorganisation plan, are so dissimilar that there is no comparable position. In most cases, this will result in (at least) a class of secured creditors and of unsecured creditors. Shareholders can also be involved in the voting procedure and form a separate class if they are affected by the plan (e.g. if the plan includes a debt-to-equity swap).

In principle, a restructuring plan is adopted if every class has voted in favour of the restructuring plan, i.e. if a simple majority (50% in debts or interests) is obtained within each class. If one or more classes vote against the plan, the court can still decide to sanction the reorganisation plan if the conditions for a 'cross-class cram down' mechanism are met (see further).

The sanctioning of the plan by the court is the final step that makes the plan binding on all creditors, including those who voted against or did not participate in the voting. The court has significant powers to review the plan in case the plan is contested by one or more creditors or involves a cross-class cram down.

The court will in any case verify that (i) the formalities of the classification and voting procedure have been met, and (ii) the new financing provided for the execution of the plan is necessary and does not excessively disadvantage the interests of the creditors.

If one or more creditors vote against the plan, the court will also verify whether the creditor's best interest is met, i.e. whether the dissenting creditor is not manifestly worse off with the plan compared to a bankruptcy scenario.

In case one or more classes voted against the plan, the court will only sanction the plan if the conditions for the "cross-class cram down" are met. These include the following requirements:

- a minimum approval rate of the plan, requiring the approval of the plan by at least one of the two classes, or, if there are more than two classes, a creditor class "in the money" (i.e. a class of creditors that would receive payment in a liquidation scenario);
- the absolute priority rule, requiring that each dissenting creditor receives its fair share (in accordance with the legal or contractual ranking of its debt) in the reorganisation value of the company (i.e. the value of the company after the reorganisation plan comes into effect); and
- the inverse absolute priority rule, requiring that no class receives or retains under the reorganisation plan more than the full amount of their claims or interests.

Finally, even if all the above tests are met, the court can still refuse homologation at the request of any interested party if the restructuring plan offers no reasonable prospect of averting the liquidation or bankruptcy of the debtor or of ensuring the viability of the company.

The assessment by the court of the above tests requires the debtor to produce financial reports setting out the liquidation value and the reorganisation value of the company.

Transfer under judicial authority

Aside from the in-court restructuring options described above, the debtor can also request a transfer under judicial authority, i.e. a court-ordered transfer of all or part of the debtor's business. Since 1 September 2023, this possibility no longer constitutes a judicial reorganisation proceeding as such, but rather a liquidation. These proceedings aim to ensure an efficient liquidation of the legal entity (or, for a physical person, the business' assets) while preserving the value of the business, for the benefit of the creditors and, if possible, the employees. Upon the request of the public prosecutor, a creditor or any interested third party, the court may also order a forced transfer.

The debtor and creditors have only limited participation rights. The court will appoint a liquidation expert to organize and implement the court-ordered transfer, i.e. conducting the negotiations with the bidders and selecting the best bid. The price of the transferred assets should at least be equal to the liquidation value/assets to be transferred. In case of comparable offers, priority will be given to the offer guaranteeing employment by way of a social agreement. Under certain conditions, the transferee may choose which employees (not) to take over.

After the completion of the court-ordered transfer, the court will order the liquidation or bankruptcy of the debtor (depending on whether the conditions for bankruptcy are met).

Bankruptcy and pre-packaged bankruptcy

The Belgian Insolvency Law (Book XX of the Code of Economic Law) governs the bankruptcy of enterprises, which is a liquidation procedure for companies that have ceased paying their debts and are unable to obtain credit.

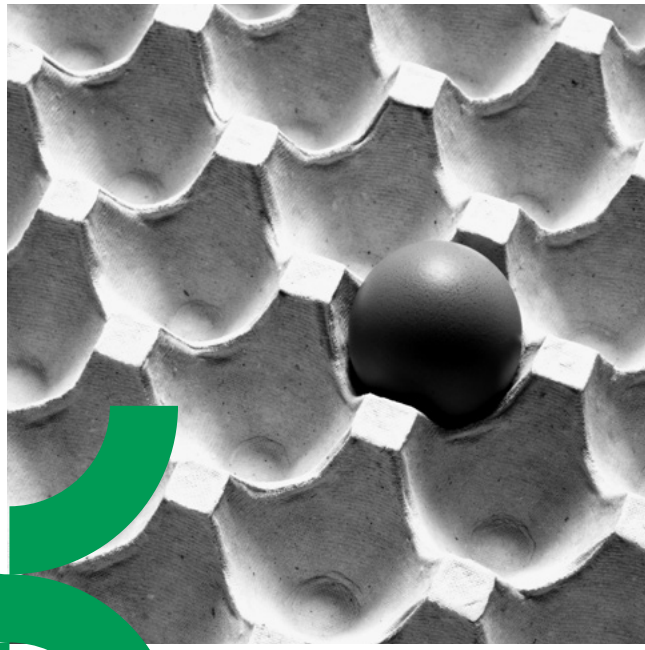
This procedure involves the Business Court appointing a bankruptcy trustee (*curateur/curator*) to:

- take control of the company;
- collect and realise its assets, including the initiation of proceedings to maximise the company's assets (e.g. liability proceedings); and
- distribute the proceeds of the assets among creditors based on the legal ranking of each creditor.

The bankruptcy procedure's aim is to liquidate the assets of the bankrupt company. The bankruptcy will essentially lead to the company's business being dismantled.

Since 1 September 2023, Belgian law allows insolvent companies to confidentially prepare for bankruptcy. The purpose of this new procedure is to avoid the negative publicity that results from (public) bankruptcy and facilitate a transfer of assets or activities as a going concern.

This procedure can only be initiated by the debtor that demonstrates that (i) the preparation of the total or partial sale of activities or assets before bankruptcy will facilitate the smooth liquidation of the estate, and (ii) is in the interest of creditors and employees .If the court grants the debtor's request, a liquidation practitioner (*vereffeningsdeskundige/praticien de la liquidation*) is appointed for a maximum of 30 days (with possible extension to a total of 60 days). Following the confidential preparation procedure, formal bankruptcy proceedings are opened.



European insolvency regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the Recast Regulation) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the Original Regulation) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings which are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/ territorial proceedings, but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, bankruptcy (*la faillite/het faillissement*), and judicial reorganisation proceedings (*la réorganisation judiciaire/de gerechtelijke reorganisatie*) were available as main proceedings under the Original Regulation. It should be noted that not all types of judicial reorganisation proceedings qualified as main proceedings under the Original Regulation. An out-of-court amicable agreement and a court-supervised amicable agreement were not available as main proceedings. Bankruptcy was also available as secondary proceedings under the Original Regulation.

Under the Recast Regulation both bankruptcy and (public) judicial reorganisation proceedings are listed in Annex A (and, therefore, both procedures are available as main and secondary proceedings). As noted above, the transfer under judicial authority is no longer a reorganisation proceeding and is, as a result, no longer formally listed in Annex A. Furthermore, one drawback of private reorganisation proceedings is that they fall out of scope of the Recast Regulation, which might impede cross-border cross-border restructurings.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at A&O Shearman, or email **rab@aoshearman.com**.

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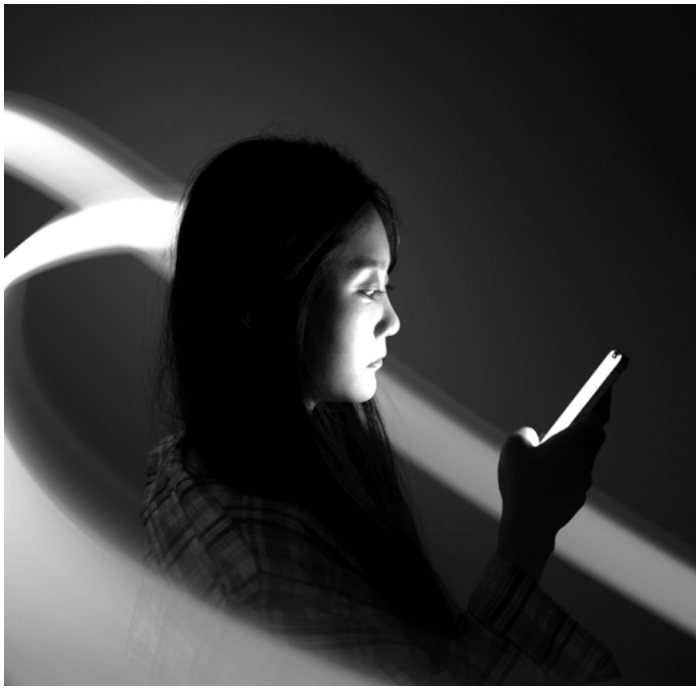
Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here.**



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