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## A Flexible and Debtor-friendly Restructuring Tool: The Belgian Business Continuity Act

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### Introduction

The Business Continuity Act of 31 January 2009 (*Loi relative à la continuité des entreprises/Wet betreffende de continuïteit van de ondernemingen*, hereinafter the 'BCA') entered into force on 1 April 2009. The BCA replaced the unsuccessful Act of 17 July 1997 on judicial composition with creditors which had the same objective, namely to give struggling debtors<sup>1</sup> an opportunity to restructure and recover by temporarily suspending creditors' rights. The BCA has been very successful, as evidenced by the fact that between 1 April 2009 and 30 November 2010, more than 1,760 restructuring proceedings were opened in Belgium, which is in excess of the total number of composition proceedings opened over the course of ten years under the old legislation.

In enacting the BCA, the Belgian legislature was highly sensitive<sup>2</sup> to the existence of foreign legislation enabling struggling debtors to restructure,<sup>3</sup> especially in light of the very broad interpretation of the concept of 'centre of main interest' (COMI) under Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. The BCA's crowning achievement is undoubtedly the provision of *flexible* tools to facilitate business recovery. Indeed, debtors can choose from a range of out-of-court and in-court options and switch from one option to another with relative ease.

### General overview of the main restructuring options under the BCA

The three main options for struggling debtors are now:

- (a) the conclusion of an agreement with two or more creditors with a view to restructuring the debtor's liabilities; unlike the other two options mentioned below, such an agreement can be concluded either in court or out of court;
- (b) the conclusion of a reorganisation plan, which must be approved by the debtor's creditors and the court; or
- (c) the court-supervised sale of the debtor's business, or a viable portion thereof, as a going concern.

Two years after the entry into force of the BCA, practice indicates that, in most cases, debtors prefer to propose a restructuring plan to their creditors but sometimes have to subsequently adapt their strategy and sell off all or a portion of their business.

Out-of-court agreements between a debtor and at least two creditors,<sup>4</sup> without court involvement, with a view to facilitating the debtor's recovery or the reorganisation of its business, are generally kept confidential, even if filed with the competent court. Therefore, it is difficult to get an idea of the number of such agreements that have been concluded. In any case, this option is attractive owing to its discretion (the agreement is not made public so it will not adversely

### Notes

- 1 This article briefly describes restructuring proceedings for so-called commercial companies. It does not deal with other types of insolvency proceedings which may be available to such companies or to other types of companies or individuals who are also merchants within the meaning of the Belgian Commercial Code. For the scope of application of the BCA, reference should be made to Articles 3 and 4 of the act. For more information on other types of insolvency proceedings under Belgian law, see the Bankruptcy Act of 8 August 1997, the Collective Debt Settlement Act of 5 July 1998, and the Belgian Company Code of 7 May 1999, as amended. For a more detailed analysis of the BCA, see A. Zenner, *La loi sur la continuité des entreprises* (Brussels, Anthemis, 2009); Conférence du Jeune Barreau, *La loi relative à la continuité des entreprises* (Brussels, Larcier, 2009); *La Loi relative à la continuité des entreprises/De Wet betreffende de continuïteit van de ondernemingen* (Brussels, Anthemis, 2010); S. Brijs, 'De wet betreffende de continuïteit van de ondernemingen' (2009) *TRV*, 667-708.
- 2 Bill on business continuity (House of Representatives Doc. 52160/008) and bill amending the Judicial Code with respect to business continuity (House of Representatives Docs. 1692/003 and 1692/001).
- 3 For a more detailed analysis, see S. Jacmain, 'La continuité des entreprises dans le cadre des groupes transnationaux', Vanhamme & Vanhamme seminar, 2009.
- 4 It would indeed appear unacceptable to be able to benefit from the BCA by concluding an agreement with a single creditor, Brussels Commercial Court, 3 July 2009, *RDC*, 2009, 712

affect the debtor's ability to obtain financing) and flexibility (creditors have room to negotiate the proposed measures). Moreover, whilst such contractual solutions have always been possible, the BCA now provides for an important added benefit in that payments made under agreements with creditors cannot be undone in the event of subsequent bankruptcy, on the basis of clawback provisions, on the ground that the creditor was aware of the debtor's poor financial situation at the time of payment.

Court-supervised agreements are also possible. While such agreements have the same effects as out-of-court agreements, they are obviously not confidential.

### Opening of restructuring proceedings and the consequences thereof for third parties

The BCA has considerably eased the requirements to open restructuring proceedings and, on the other hand, restricted the courts' discretion.<sup>5</sup>

The debtor must file a petition to open workout proceedings (*verzoekschrift/requête*) accompanied by various documents and information (including a list of all creditors) which in essence allow the court to form an opinion of the debtor's financial situation.<sup>6</sup> The debtor must demonstrate that the continuity of its business is threatened but is not obliged to prove that its financial situation can be remedied.

Moreover, even if the debtor is bankrupt (i.e., it has stopped paying its debts and is no longer able to obtain credit), it can still open or continue restructuring proceedings, which is the most important innovation and a major advantage of the BCA.<sup>7</sup>

Upon the filing of a petition, (i) the debtor cannot be declared bankrupt or be involuntarily dissolved and (ii) the debtor's creditors are no longer entitled to take any foreclosure measures against the debtor's movable or immovable property.

The thresholds to open restructuring proceedings are very low and, in most cases, the court will grant the debtor a suspension of payments (*opschorting/sursis*) in order to allow it to propose a restructuring plan

to its creditors and/or to organise the sale of its business. The duration of the suspension of payments is 6 months (or less),<sup>8</sup> possibly extended to 12 months (plus an additional six months in the event of extraordinary circumstances).

The impact of the opening of workout proceedings on creditors and the various decisions and measures that the debtor can take at this stage of the proceedings are undoubtedly the major advantages of the BCA compared to similar foreign legislation. Some of the most important effects of the suspension of payments are the following:

- Enforcement measures against the debtor's movable or immovable property cannot be maintained or initiated and the debtor cannot be declared bankrupt or be involuntarily dissolved;
- Preventive attachments made prior to the suspension of payments are maintained, unless the court rules, in light of the circumstances, to lift them, which it cannot do if lifting the attachment would have a manifest adverse effect on creditors;
- Existing agreements are not affected by the filing or opening of BCA proceedings and cannot be terminated due to the filing a petition to open or the opening of workout proceedings. Moreover, a breach of contract by the debtor prior to the suspension of payments does not entitle the creditor to terminate existing agreements if the debtor remedies the breach within fourteen days after being notified thereof by the creditor;
- Penalty clauses (*strafbedingen/clauses pénales*) and clauses providing for increased interest to cover damage sustained as a result of non-compliance with an obligation are suspended for the duration of the suspension of payments, until completion of the workout in full.

However, it should be noted that:

- a pledge of receivables in favour of a third party will remain enforceable: the pledgee's enforcement rights are not affected by the suspension of payments;<sup>9</sup> and

### Notes

5 There is already a major split in the case law in this regard: some courts open proceedings practically automatically while others take a closer look at the debtor's situation; see E. Felten, 'La loi du 31 janvier 2009, sur la continuité des entreprises: le concordat judiciaire est ainsi revu mais est-il pour autant corrigé?' (2009) *Cah. Jur.*, 2; see also Antwerp Commercial Court, *RW*, 2009-2010, 1322; M. Grégoire, 'La réorganisation judiciaire aux mains des juges, premières récoltes' (2009) *RDC*, 637-648; Mons Court of Appeal, 2 June 2009, *RDC*, 2009, 649; Antwerp Court of Appeal, 27 July 2009, *RDC*, 2009, 655; Liège Commercial Court, 28 April 2009, *RDC*, 2009, 675.

6 Certain documents must be filed or the petition will not be admissible. See Antwerp Court of Appeal, 12 November 2009, *RW*, 2009-2010, 1309; Charleroi Commercial Court, 10 April 2009, *RDC*, 2009, 658.

7 Compared to the former act on composition with creditors, which imposed on companies very strict conditions in order to qualify for restructuring proceedings

8 The courts usually open restructuring proceedings quite easily, but if they are not convinced of the debtor's chances of recovery, they will limit the duration of the suspension of payments.

9 Except in the event of abuse of right by a creditor; see President Brussels Commercial Court, 15 June 2009, *RDC*, 2009, 717. This decision is contested by a majority of scholars.

- existing financial collateral and netting arrangements remain unaffected if they fall under the Belgian Financial Collateral Act of 15 December 2004.<sup>10</sup>

Moreover, it is important to keep in mind that:

- the debtor has the right to voluntarily pay certain creditors during the suspension of payments and these payments will not be affected by clawback provisions in the event of subsequent bankruptcy;
- the debtor has the right to suspend performance of any existing agreements (with the exception of employment contracts) during the suspension of payments, if this is necessary to its recovery. Compared to other legal systems, this measure gives the debtor a great deal of flexibility to restructure.

### The most popular court-supervised workouts: restructuring proceedings and the sale of all or part of the debtor's business

As mentioned above, the purpose of restructuring proceedings is to safeguard the debtor's business, allowing it to continue its activities, including employment, while it settles its debts. The debtor's board of directors maintains its rights to manage the company<sup>11</sup> and its business, known as DIP or debtor in possession, similar to Chapter 11 bankruptcy proceedings in the US (with some differences in the case of a court-supervised sale of the debtor's business, as discussed below).

Through a restructuring plan, the debtor can survive as a legal entity but, if this is not possible, the BCA permits survival through a sale of all or part of the debtor's business to a related or unrelated third party.

#### (a) Restructuring plan<sup>12</sup>

During the suspension of payments, the debtor may draft a restructuring plan, which must be approved by its creditors and the competent court.

The plan must set out the debtor's financial situation, the difficulties it faces and the means it intends to use to remedy its situation, namely the measures to be taken to satisfy creditors (such as debt reductions, voluntary sale of all or part of the debtor's business, debt-equity swap, etc.).

With respect to preferred creditors,<sup>13</sup> the plan can provide for the suspension of their rights, without their express consent, for a period of up to 24 months from the filing date of the petition. The court can extend this period, during its initial term, for an additional 12 months under certain conditions, without prejudice to the creditors' right to receive interest on their claims. No other measures can be provided for in the reorganisation plan without the preferred creditors' express consent.

With respect to other creditors, the restructuring plan can be implemented over a five-year period from the time of its ratification by the court (see below). The impact on creditors of such a plan is one of the specificities of the BCA designed to facilitate the recovery of companies in financial difficulty.

The plan must be approved by (i) a majority of the debtor's creditors (ii) representing at least 50% of the outstanding principal amount of debt.<sup>14</sup> In determining whether these criteria are met, neither creditors who are not entitled to vote nor their claims are taken into account. The clerk's office will notify the relevant creditors of the meeting date and of the fact that they can submit comments on the plan at that time. The creditors are also informed that the plan is being examined by the court, that they can review the plan at the clerk's office and that only those creditors whose rights will be affected by the plan are entitled to vote on it. If the creditors approve the plan, the court will ratify it unless it is contrary to public policy, meaning the court has little discretion in this regard.<sup>15</sup> Once ratified, the plan is binding on all creditors.

The debtor must comply with its restructuring plan. If it fails to do so, creditors may petition the court to revoke the plan.

### Notes

- 10 For a more detailed analysis, see V. Biernaux, 'Wet betreffende de continuïteit van de ondernemingen: close out netting en vereenvoudigde pandverzilvering' (2009) *TRV*, 509.
- 11 Without prejudice to the possibility to appoint a mediator (*ondernemingsbemiddelaar/médiateur d'entreprise*), a legal representative (*gerechtelijk mandataris/mandataire judiciaire*) or a temporary receiver (*voorlopig bestuurder/administrateur provisoire*), as the case may be.
- 12 For a more detailed analysis of this procedure, see S. Brijs and S. Jacmain, 'De reorganisatie van een onderneming in het kader van een collectief akkoord', in *La loi relative à la continuité des entreprises* (Brussels, Anthemis, 2010), 77.
- 13 The BCA distinguishes between two types of creditors, namely preferred creditors with security in the form of land or other property (*sûreté réelle*), a special lien or a specific type of asset (*buitengewone schuldeisers in de opschorting/créanciers sursitaires extraordinaires*), on the one hand, and regular creditors (*gewone schuldeisers in de opschorting/créanciers sursitaires ordinaires*). The tax authorities and the Social Security Administration are considered regular creditors (see e.g. Brussels Court of Appeal, 11 March 2010, *JLMB*, 2010, 1385).
- 14 Ghent Court of Appeal, 26 April, 2010, *TGR-TWVR*, 2010, vol., 4, 268.
- 15 See also Tongeren Commercial Court, 15 March 2010, *RDC*, 2010, 549.

*(b) Sale of the debtor's business*<sup>16</sup>

A court-supervised sale of all or part of the debtor's business or its activities in going concern<sup>17</sup> can be either the debtor's first choice when restructuring or a remedy of last resort (failing an agreement with creditors or court approval of the restructuring plan). In addition to the debtor, each individual creditor, the public prosecutor's office and any third party with a legitimate interest in acquiring the business can request the (forced) sale of the debtor's business if certain conditions are met. In its decision ordering the sale of the debtor's business, the court will appoint a legal representative (*gerechtsmandataris/administrateur judiciaire*) to carry out the sale in the name and on behalf of the debtor. Therefore, the debtor's powers are, to a certain extent, restricted as the court-appointed representative controls the sale process. The court-appointed representative shall compare the offers of all potential buyers and, in doing so, shall aim to safeguard all or part of the debtor's activities, taking into account creditors' rights. If there are *similar* offers, the court will usually approve the one which best safeguards employment. Upon the

sale of the debtor's movable and immovable property, the rights of creditors are transferred to the proceeds of the sale, which are distributed amongst them in accordance with the applicable rules of priority, and the restructuring proceedings are closed.<sup>18</sup>

## Conclusion

The BCA introduces more debtor-friendly measures, similar to those found in US insolvency law, while allowing management to stay in control (debtor in possession) with the aim of saving anything that can be saved, i.e. not only the debtor as a legal entity but also its business (and jobs). The BCA provides for less costly restructuring options compared to the former composition with creditors and has proven to be a success these past two years. However, over half of all debtors that attempt to restructure and recover are ultimately declared bankrupt. This indicates that the BCA can still be improved upon and that the success of restructuring or workout proceedings still largely depends on the goodwill and cooperation of creditors, especially preferred creditors such as banks.

## Notes

- 16 For more details on this procedure, see L. Bihain, 'La continuité des entreprises: la réforme: la réorganisation judiciaire par transfert d'entreprise', Vanhamme & Vanhamme seminar, 2009.
- 17 Bruges Commercial Court, 22 March 2010, *RW*, 2010-2011, 680.
- 18 This means of reorganisation has become the most popular as a result of a new provision on the transfer of employees. Whilst the new provision reflects the usual delicate and hard-fought balance between employees' and employers' rights, it clearly recognises the principle that the purchaser can choose the employees it wishes to have transferred along with the business. Such a choice must be based on technical, economic or organisational criteria applied in a non-discriminatory manner. As the costs of implementing employment-related measures in Belgium often hinder restructuring, the ability to control the transfer of employees is crucial to ensuring the sale of the debtor's business as a viable reorganisation tool.

## **International Corporate Rescue**

*International Corporate Rescue* addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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