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INSOLVENCY SERIES

PUBLIC & PRIVATE REORGANISATION PROCEDURES

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An undertaking in financial distress can consider judicial reorganisation as a means of restoring its financial stability.

The judicial reorganisation procedure ("JRP") is the Belgian pre-insolvency procedure, whose purpose is indeed to safeguard the continuity of the undertaking facing financial difficulties.

INTRODUCTION

Belgian law provides for two JRPs:

- JRP by **mutual agreement**, which aims to reach an agreement between the debtor and one or several of its creditors, and
- JRP by **collective agreement**, which aims to adopt a reorganisation plan, subject to the vote of the undertaking's creditors and equity holders.

The present episode will briefly address the main provisions applicable to those two kinds of JRPs both from the debtor's and the creditors' points of view.

(NEW) It is already worth noting that the **Law of 7 June 2023** introduced a few significant changes to the JRP regime, especially:

- The confirmation of the possibility of conducting a **private, completely confidential JRP** (either by amicable agreement, or by collective agreement).
- The new system for **class-voting** on the reorganisation plan, for **large undertakings** undergoing a JRP by collective agreement.

For a more comprehensive list of the relevant changes implemented by the Law of 7 June 2023, see our previous newsletter "***The Law transposing the Directive 2019/1023 on Restructuring and Insolvency finally out!***" **[here]**.

COMMON FEATURES

JRPs by mutual and collective agreement are subject to several common provisions (**1**). It is important to note that some of these rules do not apply to private reorganisations* (**2**).

1. Common features of JRPs by mutual and collective agreement

	Debtor's point of view	Creditor's point of view
Statutory stay	From the opening of the JRP, the debtor enjoys a **stay of enforcement measures*** for a period determined by the court ((**NEW**) **maximum 4 months**, renewable to a maximum of **12 months in total**). Throughout the stay, the debtor is **protected from**: • Any enforcement measures on its (im)movable assets for "*claims in the stay*"(i.e. that have arisen before the opening of the proceedings). • Bankruptcy petitions.	Creditors must **abide by the stay** of enforcement measures*. Hence, they **cannot**, during the period of the stay: • Initiate or execute enforcement measures against the debtor for "*claims in the stay*" (enforcement measures initiated prior to the opening of the proceedings still enjoy a protective effect). • Summon the debtor in view of having the court declare its bankruptcy.
	The debtor **may** make **voluntary payments** of the "*claims in the stay*" that are necessary for the undertaking's continuity, and must continue to pay new debts arising after the opening of the JRP.	The stay does not affect pledges on specifically pledged claims (n.b.: a pledge on a business is not a specifically pledged claim). The stay does not either affect creditors' right to: • Receive **payment** for their **claims arising during the JRP**, and, if necessary for the undertaking's continuity, **voluntary payment** of "*claims in the stay*". • Establish a **legal or contractual security**. • Invoke **set-off** of their own debt towards the debtor, under certain conditions.
Debtor remains in charge	The debtor is not divested of the management of its business and thus **remains in charge**.	Creditors may request the appointment of a **provisional administrator** to replace the debtor in the management of its business in case of the debtor's gross misconduct.
Ongoing contracts	The opening of a JRP does not terminate **ongoing contracts**.	Creditors **may not terminate** a contract merely because a JRP has been initiated. Creditors may still terminate the contract on the grounds of a **contractual breach** that occurred **prior to the opening of the JRP**, subject to formal notice and provided that the breach is not remedied within 15 days.
	If required for the undertaking's reorganisation, the debtor **may unilaterally suspend performance*** of its obligations during the stay, subject to notification to the other party. In such case, contractual indemnity clauses do not apply.	If the debtor has suspended performance of its obligations, creditors may not apply contractual indemnity clauses. Creditors may only claim **damages** for the harm actually suffered.
Termination	The debtor may, at any stage of the proceedings, **waive all or part of its petition** for JRP.	Creditors may request **early termination** of the JRP in certain cases.
**** Not applicable to private reorganisation proceedings.***		

2. Some specific features of private JRPs

Private JRPs are initiated at the debtor's **unilateral request**, and are conducted fully **confidentially**. Accordingly, the hearings are closed and the court decisions are not published.

In private JRPs, the court will automatically appoint a **reorganisation practitioner**, with the task to negotiate an amicable settlement with one or several creditors or a collective agreement. **In public JRPs**, the appointment of a reorganisation practitioner is **optional**.

The debtor ongoing a private JRP **does not automatically enjoy a stay of enforcement measures**. The reorganisation practitioner **may request** the court to grant such a stay, subject to certain conditions.

SPECIFIC FEATURES OF JRPs BY MUTUAL AGREEMENT

JRPs by mutual agreement aim to reach **an agreement with one or several** creditors.

If an agreement is reached, it will be submitted to the court for **homologation**. As soon as it is homologated, the agreement becomes **enforceable**.

If no agreement is reached (with one or more of the creditors concerned), the court may still grant the debtor additional **terms of payment**.

SPECIFIC FEATURES OF JRPs BY COLLECTIVE AGREEMENT

JRPs by collective agreement involve the drafting and enactment of a **reorganisation plan**. Creditors and equity holders will be invited to **vote** on the plan before it is submitted to the court for homologation.

The plan may:

- Include **debt reductions** of up to 80% of the principal amount, or even more under certain conditions (**NEW**).

  Such debt reductions **may not affect extraordinary outstanding creditors**[1] except if they have individually agreed to the reduction.
- Include a **suspension of the extraordinary outstanding creditors' rights** (effective after the homologation of the plan) for up to 24 months.
- Provide for the **sale** of all or part of the debtor's assets or business.
- (**NEW**) Provide for the **conversion of claims into shares**.

(**NEW**) Since 1 Sept. 2023[2], voting on the reorganisation plan has become subject to different rules depending on whether the debtor is considered a "**large undertaking**"[3] or not. In the latter case, the debtor will now have to **define classes of creditors and equity holders** for the purpose of voting on the reorganisation plan. Small undertakings may also voluntarily elect to apply this class voting system.

1. Any creditor affected by the stay of enforcement measures whose claim is secured by a security *in rem* as defined in article 3.3 of the Belgian Civil Code (BCC), i.e. special liens (such as the lessor's lien), pledges, mortgages and rights of retention.
2. Date of entry into force of the law of 7 June 2023.
3. ***Which undertakings are "large undertakings"?*** Larger undertakings are those exceeding at least one of the following thresholds for two consecutive accounting periods:
   - average annual number of employees 250
   - annual turnover excluding VAT 40.000.000 EUR
   - balance sheet total 20.000.000 EUR

   All related undertakings must be taken into account in order to assess whether any of these thresholds is met.

After the reorganisation plan has been drafted, it will be submitted to the creditors for a **vote**:

Non-class voting system	(NEW) Class voting system
The plan is considered **approved** if it receives the favourable vote of a **majority of creditors**, whose claims represent, together, **half of all amounts owed** by the debtor in principal and interest.	• The plan is considered approved if a **majority** is achieved in **each class** of creditors or equity holders. • The plan is deemed to be approved by a class of creditors or equity holders if creditors or equity holders representing half of the amounts owed by the debtor in principal and interest approve it. • Under certain conditions, the plan may be submitted for homologation even if it does not achieve a majority in all classes.

Once the plan has been approved, it is **submitted to the court for homologation**. Once homologated, the plan becomes **enforceable**. It must be **executed** by the debtor within a maximum period of 5 years.

Creditors may petition for the plan to be **revoked** if it is not implemented, or if they demonstrate that it cannot be implemented in any other way and that they will suffer prejudice as a result.

STAY TUNED

Insolvency is and remains a hot topic, particularly during the economically troubled times we are going through.

You want to learn more about insolvency issues, whether you are an undertaking currently facing financial difficulties, or a creditor wishing to protect itself against the risk of insolvency of its debtors, or to know more about the impact of such insolvency, stay tuned for the next episodes of this "fascinating" insolvency series.

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