# Concordat and bankruptcy in Belgium

by
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## ***Chapter 1. The Legal Framework***

Until 1997, Belgian bankruptcies were governed by an statute from 1851. Bankrupt individuals were treated severely, remaining responsible for unpaid debts. Punishment involved a loss of rights, including the ability to be appointed to the board of a company.

In addition to strict penalties, the bankruptcy procedure was rather inquisitorial. The bankrupt individual or the owners of the bankrupt company enjoyed little input, the assets of the company were sold under less than acceptable conditions, the liquidation process was slow, expensive and ordinary creditors had very little chance to receive a dividend. Moreover, the court could declare a company bankrupt *ex officio*; in many cases this led to numerous abuses by the judge.

In fact, the entire system was poorly suited for large companies. The difficulties they encounter often demand preventive measures, which the statute largely failed to provide. It was therefore essential to provide preventive measures in new legislation, given the huge economic and social consequences that bankruptcy could have for a large company. In this vein, the outmoded procedure of judicial concordat governed by a decree of September 25, 1946 was inefficient.

For those reasons I have mentioned, it was necessary to formulate new law governing concordat, enacted on July 17, 1997 and new law governing bankruptcy, enacted on Aug. 8, 1997 (Official Journal, Oct. 28, 1997). A clear-cut distinction was established between the two procedures: the objective of the concordat is to save the company. If this proves impossible and the company's situation is desperate, it shall be declared bankrupt.

The reformed bankruptcy legislation adopts a more rigorous approach in the interests of both the bankrupt individual company and the creditors. Areas of improvement include procedural speed, transparency, better control of the liquidation of the company at the various steps, as well as of the activity of the receiver in bankruptcy.

Bridges have also been built between bankruptcy legislation and the concordat statute:

- The cessation of payments, a condition of the bankruptcy, must be persistent, while the concordat may be granted to a businessperson or company who is *temporarily* not in a position to pay their debts ;
- Bankruptcy may be declared by the court in the context of a concordat procedure at various stages while the court which has to decide on a request of bankruptcy may suspend its decision for 15 days to permit the businessperson or the company concerned to file a request for concordat.

## ***Chapter 2. Commercial Inquiries (enquêtes commerciales)***

### Section 1. Genesis of the Institution

In the early 1980's, an informal initiative was spearheaded by the President of the Commerce Court of Brussels to start a procedure called "*dépistage*." Its purpose was to control companies in difficulty and help them redress their situation if possible. From its inception in Brussels, the initiative spread all over Belgium.

The "*service de dépistage*" worked as follows:

A file was created at the Commerce Court in the name of each company for which information was received showing that the company concerned was facing difficulties : late payment to social security or the tax administra-

tion, attachment of assets, condemnations for unpaid invoices, etc.

The troubled company was then requested to appear before a judge of the Commerce Court to explain the situation and its plans for redressment. If the plans were deemed too desperate, the court could declare the company bankrupt *ex officio*.

## Section 2. Data Collection

Data collection is now governed by Sections 5 through 8 of the judicial concordat statute.

Section 5, para.1, provides that all pertinent data concerning businesses with an imperilled future are to be collected at the clerk's office of the Commerce Court where the business has its domicile or main office.

The statute demands collection of the following data:

1. The protests (*protêts*) showing that a bill of exchange or a cheque has not been paid by its date of maturity (Section 6) ;
2. The judgements pronounced against the businessmen who have not disputed the principal amount (Section 7.1) ;
3. Defaults of payment to the social security administration for at least two trimesters (Section 7, al. 2) ;
4. Defaults of payment to the tax administration with respect to the VAT or the advance on income tax, during two trimesters (Section 7, para.3) ;
5. Any decisions of suspension or withdrawal of a procurement contractor's certification (Section 7, para.4).

All of these notifications are to be made by the relevant authorities and administrations.

Other legislation provides for the transmittal of information by other authorities such as bailiffs who proceed to an attachment (Sections 1390 and 1391 of the Judicial Code). The information may also come from the annual accounts or from a report filed by the controller of the company who, during its control, discovers serious facts of such a nature as to jeopardise the continuity of the company. If after notification to the board adequate measures are not taken within one month, the controller may send a report to the President of the Commerce Court (Section 138 of the Company Code).

In addition to these requirements, the clerk of the court will also file all the data which he may receive from other sources: judgements of condemnation, information from the district attorney to the effect that a company has financial difficulties or does not function properly, complaints for unpaid cheques or absence of filing of the annual accounts, complaints from creditors such as members of the personnel or unpaid suppliers.

The businessperson or company concerned may have access to the file at any time and is also entitled to revision of incorrect information (Section 5, para.2). The district attorney also has access to the file.

## Section 3. The Chambers of Commercial Inquiry (*chambres d'enquête commerciale*)

Section 84, para.3, of the Judicial Code provides that one or more chambers of commercial inquiry shall be set up in each Commerce Court. They are presided over by a professional judge assisted by two consular judges (layman who are appointed judges for a renewable period of five years). Section 10, para.1, of concordat law further provides that analysis of the debtor's situation is entrusted either to a judge of the Commerce Court, or to a consular judge.

From the moment the court is informed that a businessperson or company is temporarily unable to pay its debts, it is called by the court and is required to give all relevant information concerning the state of business and any measures intended to remedy the situation (Section 10, para.1, point 2). The businessperson or, if it is a company, its officers, must appear in person. They may be assisted by a lawyer, an expert accountant or an auditor. The hearing is then transcribed and appended to the file (Section 10, para.2, point 3). The company or businesspeople concerned and the district attorney may access the report at any time.

After the inquiry, the court may :

- Close the file if it considers that the continuity of the company is not in peril ;
- Determine that the conditions of the concordat are fulfilled. This will be noted in the report and it will belong to the businessperson or company (Section 11, para.1) or to the district attorney (Section 11, para.2) to file a request for concordat ;
- Find that the conditions for bankruptcy are fulfilled and either advise the businessperson or company to make a declaration of bankruptcy or transmit the file to the district attorney for the same purpose (Section 11, para.3).

Notably, the decision to close a file connotes no finality. It may be reopened at any time. Further, the court which receives a request to pronounce a bankruptcy may do so notwithstanding the fact that the file had been closed after the commercial inquiry by the court.

## ***Chapter 3. The Concordat Procedure***

## Section 1. Underlying Principles of the 1997 Legislative Reform

The 1997 concordat legislation is grounded in 5 main objectives:

- A genuine concern for prevention: in the old legislation, a businessperson or company who applied for a concordat was considered to be in a situation of bankruptcy. If the concordat was not granted, he was declared bankrupt. Under the new law, the lawmaker organises a collection of data and the new legislation is designed to allow the detection as early as possible of the difficulties of a company which is temporarily not in a position to continue paying its debts, in order to initiate its rescue if possible ;

- A desire to prioritise payment to the creditors as well as rescue the company in difficulty and avoid sanctioning the businessperson or company ;

- Remove the sole power to initiate concordat from the debtor by giving rights of initiative to the district attorney's office. Although quite unusual, the district attorney may initiate concordat in cases where the management stalls and the district attorney's office is approached by the representatives of the employees and workers ;

- The organisation of a generalised moratorium: this will be analysed in more detail below. One of the reasons the former legislation failed was that the preferred creditors who generally represented a majority kept their preferential rights; therefore most concordat initiatives were doomed to failure. Today, in the context of the provisional stay, the law organises a quasi-total suspension of the attachment and other enforcement procedures (Section 21) ;

- A genuine desire for flexibility in the regulation of the payment or rehabilitation plan: this too is examined in greater detail below.

## Section 2. The Concordat Procedure

### *I.* The Conditions to be Fulfilled

### *A.* To be a Businessperson or Company

The law is available for sole businesspersons or companies (*commerçants*) (Section 2). It is therefore unavailable to those engaged in non-commercial activity.

### *B.* The Continuity of the Company is Threatened

The purpose of the statute is to help companies and businesspersons in *temporary* financial difficulty avoid bankruptcy. The word temporary is used to contrast the term 'persistent cessation of payments,' use of which connotes initiation of

bankruptcy proceedings.

Section 9, para.2, point 1, further determines that the continuity of a company is to be considered imperilled if the losses have reduced the net assets to less than one-half the value of the capital.

### *C.* Chances of Recovery

The concordat procedure is only available to businesspersons or companies which may be rescued. Therefore Section 9, para.2, provides that a concordat may be granted only if the financial situation of the company may be resolved and economic recovery seems feasible. In order for the court to determine whether this condition is fulfilled, the debtor will attach to their request provisions of profitability based on objective data (Section 11).

### *D.* Absence of Obvious Bad Faith

Bad faith will be present, for example, if the company has intentionally forged its accounts. In spite of this, Section 15, para.3, provides that under such conditions, a concordat may nevertheless proceed if the court is presented with sufficient evidence that those managers who have misbehaved will be excluded from the management.

## *II.* Introduction of the Procedure

### *A.* Territorial Jurisdiction

According to Section 53 of the 1997 statute, the court having territorial jurisdiction is the Commerce Court of the domicile or main office of the businessperson or company concerned at the inception of the concordat proceedings. If the company does not have in Belgium or abroad a known domicile, the court of its principal establishment is deemed to have jurisdiction.

### *B.* Submission to the Court

#### 1. By the Businessperson or the Company

When initiated by the businessperson or company, either they or their counsel file a request with the appropriate court. The following documents must be appended to the request (Section 11, para.1):

1) A statement of the events on which the request is based, ensuring that the conditions of Article 9 are satisfied (continuity of the company is threatened and possibilities of recovery exist) ;
2) A statement of the assets and liabilities and a profit and loss account as well as estimations of accounting prospects for the following six months ;
3) A list of all creditors by name, address, the amount of their claim as well as the mention of their quality and of any preferential status, i.e., mortgagee, lien holder or pledgee ;
4) Proposals and any other useful documents relating to revitalisation of the company or the payment of its creditors.

The clerk of the court must inform the District Attorney's office and summon the businessperson or company to a court hearing. The court is required to decide on the request within 15 days of its filing.

At the hearing, the court hears the businessperson or the company's representative, the District Attorney and eventually the auditor (*commissaire réviseur*) in addition to any creditors requesting to be heard.

#### 2. By the District Attorney

The concordat procedure may be initiated by the district attorney (Article 11, para.2) if the businessperson or company does

not initiate and the district attorney believes concordat is a viable option.

This reservation protects and respects the vital interests of the workers and employees.

## *III.* Effects of the Introduction of a Concordat Procedure

1. From the moment the request for concordat is filed, the businessperson or company may not be declared bankrupt so long as the court has not rendered a decision on its request (Article 12).

2. No measure of enforcement of claims or judgements is authorised until the decision granting a provisional stay has been rendered (Article 13, para.2). Conservatory attachments are however authorised.

## *IV.* The Observation Period and the Provisional Stay (Sursis Provisoire)

### A. The Granting of the Provisional Stay and the Appointment of a Temporary Administrator

The law provides
that if the court determines that the continuity of the business is assured in whole or in part, it grants a provisional stay for a period which may not exceed six months (Article 15, para.1) but which may be extended to nine months under exceptional circumstances (Article 23). The court also appoints an independent and impartial temporary administrator (*commissaire au sursis*) who must have experience in the management of companies and accounting procedures and whose profession is governed by a code of ethics. Therefore, those who may be appointed include auditors, expert accountants and members of the Bar. The professional liability of the temporary administrator must also be insured.

Notwithstanding the appointment of the temporary administrator, the management of the business remains with the debtor. The role of the temporary administrator is to assist the debtor in his management under the control of the tribunal.

However :

- The court may, in consideration of the debtor's lack of competence or apparent dishonesty, decide that the debtor may not perform certain categories of transactions without authorisation of the temporary administrator (Article 15, para.1, al. 3 and Article 20) ;
- Where the sale of all or part of the company is considered, the temporary administrator is authorised to act alone on various initiatives.

The temporary administrator may be replaced if he is no longer in a position to pursue his duty or if he does not perform it properly (Article 19, last alinea).

### B. Publication of the Judgement

The judgement granting the provisional stay requires the creditors to declare their claims within a specified period, as well as the place, day and hour of the hearing where a decision will be made on the final stay. It is published in the Official Journal and in two regional newspapers (Article 17, para.1). Creditors are also informed individually by the temporary administrator (Article 17, para.2).

All the documents relating to the stay are kept in a file at the clerk's office (Article 18). It may be consulted by all creditors, and also non-creditors who establish a legitimate interest: in this case, the approval of the temporary administrator is requested.

### C. Declaration of Claims

The procedure is governed by Articles 25, 26 and 27. The creditors must report to the clerk's office the amounts of their

claims and any securities. The claims are examined by the temporary administrator. If the claims are contested, the final decision will be rendered by the court (Article 27).

## D. Effects of the Provisional Stay

Vis-à-vis the creditors, all provisional attachments and enforcement measures are suspended. However, the following exceptions apply to preferred creditors:

- The debtor must pay the interests and charges which have run since the concordat has been granted. Otherwise, these creditors may pursue the enforcement of their rights (Article 21, para.2) ;
- Various categories of preferred creditors may obtain additional securities from the Commerce Court if they prove that their property or security could suffer an important diminution in value (Article 21, para.1, al. 3).

The stay does not confer benefit on the co-debtors and sureties (cautions)(Article 21, para.1, al. 2). It does not have any effect on the existing contracts (Article 28) unless they have been concluded in consideration of the specific person of the debtor (*intuitu personae*) and the trust between the parties does no longer exists.

Under Article 28 alinea 1 and 2, clauses providing that the contract may be terminated by a request for concordat are invalid. Liquidated damages clauses are also suspended.

Finally, the debts incurred during the concordat with the approval of the temporary administrator are considered debts of the concordat (*dettes de la masse*) (Article 44), al. 2) and will therefore be considered priority debts.

## E. The Rehabilitation Plan

The plan is constructed by the debtor with the assistance of the temporary administrator. It contains a descriptive section which analyses the company's existing circumstances and details its difficulties (Article 29, para.2). The second half is prescriptive (Article 29, para.3), and details the organisational and financial measures to be installed for the company's revitalisation.

In a departure from the previous law, the debtor now has great deal of freedom to determine the measures to be implemented. Creditors no longer have to be treated equally (Article 29, para.3, al. 2 and Commerce Court of Namur, 5 November 1998, JLMB, 1999, 1001). The plan may include, alternatively or cumulatively; flexible terms of payment, release of debts, conversion of claims in shares, the restructuring of payment of interest (Article 29, para.3, al. 2), and/or the replacement of directors if such replacement has been previously approved by the general assembly of shareholders (Article 30, last alinea).

The plan may be imposed by the court to preferred creditors (mortgagees, pledgees and those holding a special lien) with the exception of the public treasury, as well as to the creditors who benefit from a reservation of property, under the condition that it provides for payment of the interest accruing on their claims, and that the reimbursement of the latter is not suspended for more than 18 months (Article 30, al. 1). But if those creditors consider that their property or security risks to suffer a diminution in value (Article 30, al. 2), they may apply to the court for additional security.

If the two conditions required of Article 30, alinea 1, are not met, the debtor must obtain the consent of these preferred creditors individually (Article 30, al. 3).

Finally, if the plan provides for a reduction in the number of employees, the workers must be heard during the period of the plan's deliberation and formulation (Article 29, para.3, al. 4). While their input is sought, their approval is not required.

## *V.* The Final Stay (sursis définitif)

Once the plan is finalised, the temporary administrator makes its contents available to the company's personnel (Article 32, al. 3). The creditors are also invited to consult the plan at the clerk's office (Article 32, al.1), formulate comments and vote on the final stay (Article 31). The date of the hearing is determined in the judgement granting the provisional stay (Article 16). At the hearing, the temporary administrator, the debtor and the creditors are heard (Article 31). No later than 15 days after the hearing, the court may then render a judgement authorising the final stay or the sale (in whole or in part) of the

company (Article 31). If it refuses to grant the stay, the court may instead declare the debtor bankrupt after having heard it on the conditions of the bankruptcy (Article 33).

The court may only accept or refuse the plan. It may not amend it.

## F. Conditions to Obtain the Final Stay

Concordat is an agreement. Therefore, the creditors must approve it. Consent of only one-half of the creditors is required so long as they also represent half the total figure of the claims which have been registered and accepted (Article 34).

Of course, the plan may not violate rules of public policy such as the rules of European antitrust law.

The court must also be assured that the debtors' honesty of management is guaranteed.

## G. Duration of the final stay

The duration of the final stay is 24 months. An extension of 12 months may be granted with the approval of the creditors. The normal duration of a concordat is therefore 30 months which may be extended to 45 months under special circumstances.

## H. Effects of the final stay

The debtor performs the plan but ultimately remains under the control of the temporary administrator. The latter files a progress report with the court every six months (Article 36).

When the plan has been successfully performed, the debtor is freed from the payment of the claims as they have been registered within the concordat (unless the plan provides otherwise: Article 35, al.3).

The plan does not run to the benefit of co-debtors or sureties (cautions) of the debtor (Article 35, al.4).

## I. Amendments to the Plan, Revocation and End of the Final Stay

1) Amendments

The plan may be amended:
- In the interest of the company, at the request of the debtor or of the temporary administrator, if such amendments are needed in consideration of unforeseen circumstances and are of such a nature as to facilitate its performance. If these amendments potentially affect the rights of the creditors, a new vote is required (Article 38);
- In the interest of a creditor, if the latter (as long as he has not participated in the vote) establishes that the performance of the plan may expose him to serious difficulties. The temporary administrator must present a report to the court which then hears the debtor. If the amendments affect the rights of other creditors, a new vote will be needed (Article 38).

2) Revocation

If the plan is not successfully performed by the debtor, the temporary administrator may request revocation of the stay (Article 37, para.1). A creditor may also make such a request if he proves that his claims have not been paid according to

the plan.

When the court declares the revocation of the stay, it may, after hearing from the debtor, declare the debtor bankrupt at the same time (Article 37, para.3).

Even if the stay is revoked, it cannot affect a sale – total or partial – of the company which would have already taken place (Article 43).

3) End of the plan

One month before the stay terminates, the temporary administrator prepares a final report on the performance of the plan. The court will then declare the end of the stay and give discharge to the temporary administrator.

## ***Chapter 4. Bankruptcy***

## **Section 1. The Bankruptcy Procedure**

### I. The Conditions for a Bankruptcy

Only businesspersons and companies (*commerçants*) can be declared bankrupt (Article 2). The exception allowing an individual to declare bankruptcy arises if he was but is no longer in business, as long as the cessation of his business' payments goes back to a period where he was in business and the bankruptcy is declared within six months of the termination of the business' activity (alinea 2).

Two other conditions are needed before an individual or a company may be declared bankrupt:

- A persistent cessation of payments (Article 2) (*cessation persistante des paiements*) ;
- The inability to secure additional lines of credit or to access existing credit (*l'ébranlement du crédit*).

### II. Submission to the Commerce Court

Article 6 of the bankruptcy law empowers creditors, the district attorney, and temporary administrators to initiate proceedings in bankruptcy against a debtor.

In addition, the debtor himself may acknowledge his condition of bankruptcy. He is obligated to do so within one month of having met the bankruptcy requirements (Article 9). While he may acknowledge ripeness of bankruptcy, it nevertheless lies with the court to determine for itself whether the conditions for bankruptcy are met.

Concordat law also permits the court to declare a debtor bankrupt under the following conditions:

- When the request for concordat has been rejected (Article 15, para.2) ;
- When the court determines that the debtor can no longer sustain the conditions required of the concordat and the judge orders the end of the provisional stay (Article 24, alinea 2) ;
- When the court refuses the final stay of payment (Article 33) ;
- When the court revokes the stay by finding the debtor in non-compliance with the rehabilitation plan (Article 37, para.3).

Article 7 of the new bankruptcy statute provides that the court may suspend its decision for a period of 15 days to allow the debtor or the district attorney to file a request for concordat.

The bankruptcy of a company may in some cases be extended to the owner (non-businessman) where the owner's own finances are intermingled with the finances of the company.

### III. Territorial Jurisdiction of the Court

Jurisdiction lies with the Commerce Court that has jurisdiction over the main office of the individual businessman or the company when the bankruptcy procedure is initiated or acknowledged (Article 631 Judicial Code).

## IV. Appeal of the Bankruptcy Judgement

The bankruptcy judgement may be appealed within 15 days from the date of notification of the judgement by the receiver in bankruptcy (Article 30). For all those who have not been parties to the original procedure, the delay begins from the date of publication of the judgement in the Official Journal.

## V. The Date of Cessation of Payments

According to Article 12 alinea 1 of the new law, the cessation of payments begins as of the date of the bankruptcy judgement. However, it is possible to start an action to alter the date from which the payments are tolled. Such an action must be introduced within a period of six months (Article 12, alinea 5). Moreover, Article 12 alinea 6 provides that the date of cessation of payments may not be fixed at a date which is more than six months before the judgement of bankruptcy.

## VI. The Production of the Claims

Article 62 of the law requires all creditors who wish to obtain payment or invoke a preferential right, to file a statement of claim (*declaration de créance*) with the clerk's office. This obligation is particularly important to mortgagees, lien holders, pledgees and tax administrations.

The creditors are individually informed of the ultimate deadline for filing a claim and of the place, date and hour of the closing of the inventory of the claims. When this closing takes place, the "*juge-commissaire*" in charge of the bankruptcy operation will determine the date and hour when the court will render its decision on the disputed claims. The creditors concerned with these claims will be informed by registered letter (Article 68). Creditors late in filing a claim may initiate an action at their expenses to have their claims admitted. They are however not entitled to share in the amounts which have already been distributed. Finality and closure are important aspects of bankruptcy. The law therefore provides for a three-year statute of limitations running from the date of the bankruptcy judgement (Article 72, al. 3).

## VII. The Liquidation of the Bankrupt Business

Article 75, para.1, provides that the receiver in bankruptcy liquidates the bankrupt business after all claims have been finally admitted or rejected.

When the assets are minimal, the receiver may choose an accelerated procedure, with the previous authorisation of the court (Article 75, para.2).

Article 75, para.3, provides that when sale of an asset by the receiver is of such a nature as to cause damage to the creditors or the bankrupt debtor, the latter may oppose the sale by requesting appointment of an ad hoc receiver with authority to request prohibition of the sale.

Is the receiver authorised by law to pursue the activities of the bankrupt company after the bankruptcy? It should be considered that such an initiative must remain exceptional, since it is linked to the introduction of a concordat procedure. Article 47 of the new law gives the court a broad discretionary power. It may authorise, upon request of the receiver or of any interested person, i.e., the bankrupt debtor or the creditors, the pursuit of the activities, as long as it does not prejudice the creditors.

# Section 2. The Role of the Receiver and the "juge-commissaire" in Bankruptcy

## I. The "*juge-commissaire*"

He is appointed in the declaration of bankruptcy. In accordance with Article 11 of the law, he is chosen among the judges of the Commerce Court, with the exception of the president.

The judge is appointed to control the operations, management and liquidation of the bankruptcy. He reports at a hearing on all disputes that have arisen after the bankruptcy with the exception of disputes concerning the claims. He may not however intervene in the management of the bankruptcy, which lies within the exclusive competence of the receiver.

He must however take all urgent measures which are necessary for the security and the conservation of the assets of the bankruptcy. To that end, he chairs the meetings of the creditors (Article 35).

The judge's orders are immediately enforceable, but may be appealed before the Commerce Court.

Among the measures that he is authorised to take, the following are noteworthy :

- Article 48: permit the bankrupt debtor or his family to take back furniture and effects necessary for personal use ;
- Article 49: sell those assets which are perishable or likely to immediately depreciate ;
- Article 50: permit the bankrupt debtor to open letters and messages which are addressed to him ;
- Article 51: permit the receiver in bankruptcy to keep the money necessary for the performance of its mandate ;
- Article 58: permit the receiver to settle all disputes which concern the assets and liabilities of the bankruptcy ;
- Article 76: convocation of the assembly of creditors ;
- Article 100: order the sale of real estate at the request of the receiver or a mortgagee.

## II. The Receiver in Bankruptcy

### 1) The Status of the Receiver

Article 27 provides that receivers are appointed from among persons who register on a list provided by the general assembly of the Commerce Court. This list is limited to the members of a Belgian Bar with relevant educational background, professional practice and competence in terms of liquidation procedures. In large bankruptcies, the court may appoint with the receiver a non-member of the Bar chosen in consideration of particular circumstances, such as an accountant (Article 27 alinea 4).

The receiver is sworn under oath in accordance with Article 30 of the law. He may be replaced in certain circumstances, as provided in Article 31.

The candidate is not authorised to accept the position if he has a conflict of interest, for example if he has been previously the lawyer of the debtor or of a creditor who has played a substantial role in the opening of the bankruptcy.

The receiver's fees are determined on the basis of the importance and complexity of his role. They are not proportional to the amount of the assets which are sold. The fee schedule is determined by royal decree (Article 33).

### 2) The Function of the Receiver

The judgements of bankruptcy are immediately enforceable. Article 38 provides that the receiver is responsible for ensuring that the judgements of bankruptcy are published within five days in the Official Journal and in at least two regional newspapers.

The receiver's responsibility is to sell the assets of the bankrupt (Article 51) and if necessary, to initiate all relevant court actions and distribute the moneys which come from the realisation of these assets, taking into consideration the preferential rights of various creditors. The receiver first proceeds to the premises of the bankrupt individual or company (Article 42). Under the control of the "*juge-commissaire*", he inventories the assets of the bankrupt (Article 43). For this, he may request the assistance of an expert (Article 43, 3rd alinea). The debtor must be present or at least must have been summoned. The

inventory is then filed at the clerk's office at the Commerce Court.

The receiver has a judicial mandate, and consequently never represents individual creditors. He may however represent rights which are common to all creditors, in addition to all rights held by the bankrupt debtor, who no longer controls the administration of his assets.

According to Article 46 of the law, the receiver has also the duty to determine the continuance the contracts entered into before the bankruptcy.

The law also provides that :

- The receiver may settle with the authorisation of the "*juge-commissaire*" (Article 58) ;
- The receiver is authorised to employ the bankrupt to facilitate management of his assets. This assistance may be remunerated with the agreement of the "*juge-commissaire*" (Article 59) ;
- The receivers must within two months of their appointment prepare a memorandum on the state of the bankruptcy, its main causes and circumstances (Article 60) ;
- The receiver must also give the "*juge-commissaire*" a detailed statement of the liquidation in the 6th and 12th month of the first year (Art. 34).

3) The Liability of the Receiver

The receiver is to manage the bankruptcy as judged by the reasonable man standard (*en bon père de famille*), under the ultimate authority of the "*juge-commissaire*" (Article 40, alinea 2).

Article 57 also provides that the receivers have the duty to perform all formalities required for the conservation of the rights of the bankrupt against its debtors (such as the renewal of the registration of a mortgage). The receiver is personally liable for failure to fulfil their duties. Since the receiver is not an agent of the bankrupt or its creditors, his liability lies in tort rather than contract. It is the liability of a remunerated agent. For example, his liability surfaces if he sells an asset at a too low price or if he has sold perishable goods too late.

His liability may also be engaged vis-à-vis third parties, for example, if he sells assets which do not belong to the bankrupt.

## Section 3. The Creditors

Six important issues must be addressed to understand the creditor's role and status :

1. Competition Between Creditors

By virtue of the bankruptcy, the creditors enter into a competition. It is at that moment that their rights are fixed forever. In other words, the liquidation of the assets of the debtor must lead to the same result as if it had been instantaneous at the moment of the declaration of bankruptcy.

All the debts of the bankrupt become payable from the date of the judgement of bankruptcy (Article 22, alinea 1). Moreover, the claims no longer generate interest (vis-à-vis the bankruptcy only) unless they are guaranteed by a special lien, pledge or mortgage (Article 23, alinea 1).

2. The Debtor is No Longer in Charge of the Management of the Assets

From the moment bankruptcy is declared, the receiver manages the liquidation (Article 16). He must draw up the inventory of the assets of the bankrupt (Article 43), determine the reality of the claims (Article 65) and of the securities whose declaration is made by the creditors, represent the latter and proceed to the liquidation. In this respect, he must look after and obtain payment of all claims and sums due to the bankrupt debtor (Article 51) and draw up a distribution scheme for these sums to the creditors of the bankruptcy after payment of the debts.

3. The Debts in the Bankruptcy (*dettes dans la masse*) and the Debts of the Bankruptcy (*dettes de la masse*)

For the purposes of the management of the liquidation, the receiver will have to incur debts. These are "debts of the bankruptcy" (*dettes de la masse*). Included in this category are debts which result from the performance of the contracts assumed

by the receiver (Article 46).

Debts in the bankruptcy (*dettes dans la masse*) are those claims declared by the creditors immediately after judgement of bankruptcy.

4. Ordinary Claims and Preferred Claims

The assets of the bankrupt debtor are distributed with consideration given to the preferred rights of certain categories of creditors : mortgagees, pledgees, and lien holders. These sureties must be respected by the creditors of the bankrupt as long as the formalities provided by the law have been complied with prior to the declaration of bankruptcy (Article 88 et seq.).

The creditor/holder of a security may renounce his right to sell the secured asset and instead leave the initiative to the receiver. Further, the creditors' right of individual performance is restricted by the law.

For chattels (movable objects), the execution of securities is suspended until after the closing of the final inventory of the claims. This suspension does not however prohibit the creditor from initiating an attachment.

After the final claims inventory is closed, the creditors holding a security on chattel may exercise their rights on these assets. The court may however, upon request of the receiver, suspend the measures of execution for a maximum period of one year starting from the judgement of bankruptcy, if the interests of the latter request it and as long as one may finally expect a sale of the chattel which will not prejudice the secured creditors (Article 26, alinea 3).

Where mortgages on real estate are involved, the first registered mortgagee is authorised to sell the mortgaged property but must wait for the claims inventory to close. The court may also suspend the execution for a maximum period of one year from the date of the bankruptcy judgement if the court determines suspension to be in the best interests of the creditors as long as one may expect a sale of the mortgaged goods which will not prejudice the mortgagees (Article 100, alinea 2).

5. Owners of Assets in the Bankruptcy

Those assets found among the assets of the bankruptcy but which in reality are the property of third persons, may be claimed by their owner. This procedure is governed by Articles 101 through 108 of the law.

6. The Seller Benefiting From a Reservation of Ownership

Under the previous legislation, a clause of reservation of ownership, valid between parties, could not be opposed to third parties in case of bankruptcy unless the clause had been invoked by its beneficiary before the declaration of bankruptcy. The new law has modified this rule. Under Article 101, the owner of goods hold by the debtor may file a claim with the receiver. However, the clause of reservation of ownership must have been put in writing no later than the time the goods were delivered. Moreover, these goods must be found "in nature" in the bankruptcy. They may not have become immovable by incorporation or have been confused with another movable good.

However, Article 108, alinea 2, provides that in the interest of the bankruptcy, the receiver may oppose the claim and pay the seller the price agreed upon with the bankrupt debtor. According to the legislative history, it would be the case for example of goods which are necessary to the manufacturing process.

## Section 4. Existing Contracts and the Continuation of Activity

1. Existing Contracts

According to Belgian common law, an *intuitu personae contract*, that is a contract that is concluded in consideration of the individual co-contractor, is terminated *ipso iure* by the bankruptcy, at the date of the judgement.

However, the parties are free to derogate from this rule and provide that an agreement *intuitu personae* remains valid, even in case of bankruptcy. Conversely, they may agree that an agreement which is not concluded *intuitu personae* will be terminated *ipso ure* in the event that one of the parties becomes bankrupt.

If the contract is not *intuitu personae* and does not include a provision to the effect that it is *ipso ure* terminated in case of bankruptcy, the receiver must decide immediately after his appointment whether he will pursue the performance of these contracts. When he chooses to pursue the contract, the co-contractor will be paid by priority. His claim is a "claim of the bankruptcy" (*créance de la masse*).

If on the other hand the receiver refuses to pursue the contract, it is terminated by virtue of Article 46, alinea 2. If the co-contractor claims damages based on the non-performance of the contract, his claim is a "claim in the bankruptcy" (*créance dans la masse*).

2. The Continuation of the Activities

Article 47 of bankruptcy law provides that the business of the bankrupt may be continued in whole or in part by the receiver if it is in line with the creditors' interests; that is, if it does not prejudice the creditors' legitimate interests. According to the legislative history of the law, the idea is to maintain in life a going concern, either to improve the chances to transfer the company in good financial conditions or to transform raw materials in finished products or in consideration of specific human and social aspects.

On the basis of Article 47, the continuation of the activities may be requested by any interested person, including the bankrupt debtor, the personnel or a creditor holding a special lien. The court makes its decision after having heard a report from the "*juge-commissaire*," the receiver and the representatives of the company's personnel. The law however authorises the receiver to immediately pursue the activity while the request is pending before the court (Article 47, alinea 2). The judgement of the court is immediately enforceable.

It remains that in case of bankruptcy, the continuation of the activities should remain exceptional. It is indeed normally associated with the introduction of a concordat procedure.

What then, are the powers conferred upon the receiver in the event that the company's activities are continued? Subject to the court's decision, they are generally very broad. They include not only the right to terminate work in progress but also the right to initiate new productions. It remains that the receiver must act with the utmost prudence to limit himself to what is indispensable and to abstain from any risky transaction which might trigger his own personal liability.

The debts which arise from the continuation of the activities of the bankrupt company are considered debts of the bankruptcy.

**(Footnotes)**

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