

EDITORIAL—THE FORTIS SAGA

In the last few months the case of FORTIS has been hitting the headlines in both Belgium and abroad. In autumn of last year, like many other governments, the Belgian and Dutch governments were obliged to step-in at very short notice and inject capital into FORTIS in order to save the Belgo-Dutch banking and insurance group from bankruptcy. The deal that was eventually struck involved the transfer to a Dutch company of certain insurance assets and, ultimately, a nearly 100 % stake in Fortis Bank Belgium, the Belgian banking subsidiary of FORTIS, for the Belgian government. Subsequently the Belgian government agreed to sell 75% of this stake to BNP. The whole arrangement was challenged before the courts by minority shareholders of FORTIS, who, having lost in first instance, were partially successful in their action on appeal. The Brussels Court of Appeal ordered, inter alia, that the deal be suspended and that its terms be submitted to a specially convened extraordinary general meeting of shareholders of FORTIS. The meeting in question was held on 11 February 2009 and the shareholders voted by a 50, 26 % majority to reject the parts of the deal involving the purchase of the stake by the Belgian government with the result that the resale to BNP is now called into question.



The case is interesting because it is a striking illustration of the rights of the minority shareholders who successfully obtained a number of interim measures on the grounds that the decision of the Board of Directors to proceed with the restructuring was contrary to certain provisions contained in the company's articles which required the general meeting of shareholders to be consulted. Further grounds justifying the interim measures were that there was evidence that the Board of Directors had been pressurized into adopting the decision by the Government and that there were prima facie indications that the decisions adopted were not in the best interests of the company and amounted to a misuse of power. For all these reasons the Court ordered that the decisions adopted by the Board of Directors be suspended and that the extraordinary general meeting of shareholders be convened for the purpose of approving or rejecting the proposed decisions. Other interim measures that were successfully obtained included the appointment of a panel of experts for the purpose of establishing the value of the assets and reporting to the general meeting of shareholders on same.

*At the time of writing, following the negative vote of the shareholders, the future of FORTIS remains as uncertain as ever and the Belgian Government's plans to sell FORTIS BANK BELGIUM to BNP continue to be contested by the shareholders who are now lobbying for a so-called stand alone solution involving the creation of an independent Belgian owned bank. Matters are further complicated by the threat of the Chinese insurance group, Ping An, which has a nearly 5% stake in FORTIS and which has seen the value of its shares reduce by over 90%, to introduce an international arbitration damages claim against the Belgian state on the basis of the Belgian-China investment treaty. **Charles Price**, Editor*

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CHANGES TO COMPANIES ACT EASE THE RULES FOR CONTRIBUTIONS IN KIND, SALE OF SHAREHOLDERS' ASSETS, ACQUISITIONS OF OWN SHARES AND FINANCIAL ASSISTANCE

The Belgian Royal Decree of October 8, 2008 has introduced several changes to the Companies Act that will make it easier for shareholders to make contributions in kind or sell assets to their companies or for companies to acquire and hold their own shares or to provide financial assistance to purchasers of their shares. The changes relate to the most common types of company: NV/SA, BVBA/SPRL and CVBA/SCRL. They are the implementation in Belgian law of EU Directive 2006/86/EC amending the Second Company Law Directive and they became effective as of January, 1, 2009.



luc.vancaneghem@cew-law.be

The first change concerns contributions in kind. Whereas till now every contribution in kind required the prior and written assessment by an external auditor of the value of the contribution, this will no longer be required under the following conditions:

- for a contribution of stocks or shares, if they are valued at their average weighted price on any regulated market where they are traded during three months preceding the date of the contribution;
- for a contribution in kind of any other assets, if they have been valued by an external auditor less than 6 months before the date of the contribution, using generally accepted standards and principles;
- for a contribution in kind of any other assets which are valued on the basis of the statutory annual accounts of the previous book year, on the condition that these accounts have been subject to control by a statutory auditor, whose opinion is not qualified.

Shareholders jointly holding at least 5% of the issued capital on the day the decision to increase the capital against a contribution in kind is taken can still demand an external auditor's valuation up to the date that the actual contribution in kind is made.

Contributions in kind without prior and written assessment by an external auditor (subject to the above conditions) are also allowed when the capital increase is decided on by the Board of Directors within the limits of the authorised capital. In this case additional information obligations apply.

Belgian company law treats any purchase by a company, within two years of its incorporation, of assets worth 10% or more of its subscribed capital from a founding shareholder or a director as a contribution in kind ("quasi-contributions"). Such purchases are subject to rules which are very similar to the rules which apply to contributions in kind and from January, 1, 2009 they will benefit from the same exceptions.

CHANGES TO COMPANIES ACT EASE THE RULES FOR CONTRIBUTIONS IN KIND, SALE OF SHAREHOLDERS' ASSETS, ACQUISITIONS OF OWN SHARES AND FINANCIAL ASSISTANCE (CONT'D)

The rules for the acquisition by a company of its own shares has also been relaxed:

- acquisitions of own shares require the prior approval of the general meeting of shareholders. Whereas previously this approval was valid only for 18 months, this has now been extended to 5 years;

- the number of own shares that can be held has been increased from 10% to 20% of the capital shares.

Finally, the Companies Act will from now on allow "financial assistance" (loans, advances, guarantees) given by the company to third parties for the acquisition of its own shares. This financial assistance will be allowed subject to the following conditions:

- the financial assistance must be provided at fair market conditions, especially with regard to any interest rate and the required solvency;

- fair market conditions also must apply (to the acquisition price) if the third party acquires the shares directly from the company itself or as a result of a capital increase;

- the Board of Directors must prepare a report justifying the transaction;

- a prior decision of the shareholders meeting is required, deciding with a 3/4th majority and a quorum of 50%;

- the advances or loans can only be granted using capital which is freely available for distribution; in addition a frozen reserve equal to the amount of the aggregated financial assistance must be set up. **Luc Van Caneghem**



luc.vancaneghem@cew-law.be

INTERNATIONAL TRANSFERS OF EMPLOYEES

The transfer of an employee to go to work in another country than the home base will inevitably complicate the relations between the parties. Indeed the transfer will involve not only very practical but also legal questions, most notably in relation to the applicable law and the applicable social security system.



olivier.langlet@cew-law.be

The parties may decide to terminate the existing employment contract and to enter into a new contract with the company based in the country to which the employee is transferred. This solution has the merit of being clear cut since there will be a change of employer and thus a change of applicable law both in relation to the employment contract and with regard to the applicable social security system.

However, more often, the parties will allow the existing contract to continue. In such a case it is highly advisable to enter into an addendum to the contract setting out the precise terms that will govern the change of the place of work. This addendum should indicate the law that is applicable to the contract and in this respect all the international and European rules provide for a priority in favour of the law chosen by the parties.

In the absence of any explicit choice of law, the rules systematically provide for the application of the law of the place where the employee normally works, even if he is temporarily transferred to another country. If the work is performed simultaneously in several countries the relationship will in principle be governed by the law of the country where the company office that hired the employee is situated, unless it is shown that the employment contract has closer links with another country, in which case the law of this latter country is applicable.

A European directive issued in 1996 guarantees in favour of the transferred employee the benefit of the minimum social rules of the EEA country to which he is temporarily transferred.

As far as concerns social security, most international and European rules provide for the application of the rules of the country where the work is performed, except in the case of an authorised temporary transfer. If the contract is performed simultaneously in several countries in principle the applicable system will be that of the place of residence of the employee. If it is a non-EEA country it is possible that both systems apply at the same time on the basis of the activities carried out in each country.

*The addendum to the contract can also determine the financial terms relating to the temporary transfer to the other country. Indeed in the case of a transfer which is for other than a very short period it is useful to spell out the additional benefits to which the employee will be entitled. These can include matters such as an expatriation allowance, a cost of living allowance, an allowance for school fees, a home leave allowance, a housing allowance, a relocation allowance, a tax equalization allowance, living costs, travel expenses, including air tickets, administrative costs allowance etc. In general it is advisable to draft such an addendum so as to clearly define the parties' respective rights following the transfer to the foreign country. It is also necessary to take advice on the employment law rules applicable in the country to which the employee is transferred. **Olivier Langlet***

EUROPEAN PATENT PROTECTION - ARE INNOVATING COMPANIES IN DANGER?

In an economy based on knowledge and innovation, the exclusive ownership of a technology is of a major importance. Invention patents are typically a good way to give value to an innovation (a product, the use of a product, or a process) but they also generate unhealthy interest from competitors. It is therefore not surprising that invention patents are the heart of an increasing number of litigations with major financial implications.



melanie.vanham@cew-law.be

Over the past 20 years, the number of patent filings (as well as the volume of information contained in applications) has increased in such a proportion that today patent systems are facing many difficulties. Most notably, delays in the grant processes have become significant and give rise to legal uncertainty.

The increased complexity of inventions as well as the emergence of new technological sectors has led companies to file very broad applications in order to make sure that they cover all the potential applications for their invention. Moreover, companies are themselves not keen to accelerate the decision-making process because it allows them to adapt their applications to changing circumstances. The main effect of this new strategic trend is to extend the examination period. This may create legal uncertainty as to the ownership and utilisation of the relevant inventions. It also has political implications.

The evolution of companies patent strategies has significantly increased the work of the European Patent Office – more than 140.000 applications filed in 2007 -, leading to backlogs and grant delays which become longer and longer: Currently it takes today more than 5 years for an inventor to know whether or not his invention will get a patent.

Considering that an application, once filed, confers exclusive rights on the applicant during the examination process, there is a high risk of abuse of the process. Indeed it can be very profitable to benefit from exclusive rights during 5 years, even though the relevant invention is not – at the end of the process – recognised as such.

The risk is that the European patent system ceases - at least in part - to act as a stimulator for innovation. Legal uncertainty is indeed one of the main obstacles to the development of innovating companies. Some fear that this legal uncertainty could lead to a fall in R&D investments and development and could jeopardize the ambitions of the European Union to promote innovation. This uncertainty may also generate commercial conflicts which can be extremely damaging for small and medium-size companies, compromising their development.

The current patent system should be reviewed in order to increase legal certainty and take into account the legitimate needs of innovating companies. Such review could consist in an adjustment of the price policy to discourage blocking and other strategies, a strengthening of the creative level which is requested by the EPO, an adaptation of the duration of the patents in certain technological areas, better means to allow investigators to definitively refuse non deliverable applications, as well as the introduction of a mechanism allowing creators to differ the filing or the publication of their applications when their inventions are not yet sufficiently defined. **Mélanie Van Ham**

For further reading see N. van Zeebroeck, « Développements et impact des stratégies de dépôt de brevets », CEB Working Paper n°08/041, 2008.

NEW "BUSINESS CONTINUITY ACT"

Parliament has adopted a new Act, the "Business Continuity Act" to replace the existing act on "General Arrangements" (Gerechtigd Akkoord/Concordat Judiciaire). General Arrangements used to be the Belgian equivalent of Chapter 11 in the U.S., and similar concepts in most other jurisdictions, aiming at the temporary protection of companies from their creditors to allow them to restructure and obtain a new lease of life. General Arrangements, introduced in 1946 and modernised in 1997 have never been a big hit. In 2006 91 have been registered compared to 7692 bankruptcies. They are often considered as the waiting room for straight-forward bankruptcy.



luc.vancaneghem@cew-law.be

The new Act undertakes another attempt at modernisation and simplification. Instead of a single mould for all, it offers failing businesses a wider range of possible restructuring plans with a varying degree of court involvement, from an amicable agreement to a court ordered transfer of the business. All these plans may be accessed under less stringent conditions. It should also be less burdensome in terms of paperwork and less costly since the new Act abolishes the need for a so-called "suspension commissioner". Under the 1997 Act it was required to appoint to this function an external auditor or accountant and it is widely believed that the costs of appointing this commissioner held back many smaller businesses from applying for a General Arrangement. Finally, the new Act is also more flexible in giving increased freedom to the debtor and his creditors to work out solutions and in allowing for solutions that concern only part(s) of the business.

The Act allows a business in difficulty to come to an "amicable" agreement with one, some or all of its creditors to obtain additional credit or any other facilities that allow it to improve its financial situation. This agreement is not binding on third parties but if it stipulates that it has been entered into for the purpose of improving the financial situation of the business and if it is filed with the commercial court it will not be open to challenge under the bankruptcy law in case of bankruptcy, even if entered into during the six month "suspect" period prior to bankruptcy. Third parties will not have access to the agreement except with the authorisation of the company or business.

In principle the amicable agreement is entered into without court interference but if this is not possible, a request may be submitted for judicial reorganisation aimed at obtaining an amicable agreement with some of its creditors. This will normally increase the pressure on the other creditors since they will face the possibility of the court stepping in and imposing payment delays or conditions.

The aim of the judicial reorganisation, which is at the core of the new Act, is to safeguard the continuity of the business or parts of it, independently of the fate of the legal entity or natural person owning the business. The judicial reorganisation is initiated by a request filed with the court by the debtor business. This request contains notably a description of the difficulties the business experiences, a list of the creditors, the amount of each debt and, if possible, a proposal for either (1) an amicable settlement under court supervision as referred to above, (2) a judicial reorganisation to be approved by the creditors, or (3) the transfer to third parties of all or parts of the business. In the latter case the parts of the business need to be structured in such a way that allows them to operate as a going concern. The proposal can be changed during the proceedings.

NEW "BUSINESS CONTINUITY ACT" (CONT'D)

As already mentioned, the judicial re-organisation can result in an "amicable", i.e., voluntary agreement that will be binding only on the parties to the agreement. The amicable agreement will normally grant a grace period to the debtor for the re-imbursement of its debt.



luc.vancaneghem@cew-law.be

The judicial re-organisation can also result in a "general arrangement" between the debtor business and its creditors. This general arrangement is at the core of the new Business Continuity Act and at the same time it is the part that is most reminiscent of the 1997 Act. The general arrangement, to be proposed by the debtor, may contain any measures useful for restructuring. These measures need to be reasonably justified, especially when they distinguish between different categories of creditors.

The so-called "Privileged" creditors, i.e., creditors with a statutory security (mortgage, lien, charge) may be required to forego the exercise of their rights for a maximum term of 18 months, unless they voluntarily consent to further concessions. A novelty of the new Act is that the tax authorities are no longer considered to be a statutory privileged creditor.

Another novelty is the maximum duration of the term during which the re-organisation needs to be carried out. The term is now five years from the approval of the plan, as compared to the previous term of two years.

The plan will be approved and binding on all creditors if accepted by a majority of the voting creditors holding at least 50% of the debt.

Finally, the judicial re-organisation can result in the transfer of all or part of the business. This can be the case either when authorised or approved by the debtor in its application for judicial reorganisation or, in case of failure of the judicial reorganisation, on request of the public prosecutor or of any interested third party. In these latter cases, the debtor can be obliged to transfer its business. A court attorney can also be charged with finding a purchaser for the business. This forced transfer comes very near to plain bankruptcy followed by a sale of the business on a going-concern basis. The Act contains specific provisions with regard to the transfer of employees and the liability for outstanding claims from employees, preceding the date of the opening of the proceedings. The terms of employment should in principle remain the same, except if different conditions are agreed between the employer/acquirer and the individual employees or their representatives. **Luc Van Caneghem**

INTERNATIONAL CHARITIES AND NON-PROFIT COMPANIES

The importance of Brussels as the location of the headquarters of many international organizations, including most notably the EU and NATO, has meant that many charitable and non-profit organizations have set-up here. The activities carried out include political and other lobbying, grant and subsidy applications and aid and contract work.



Belgian law provides an ideal vehicle for the structuring and organization of these activities in the shape of the international ASBL (IASBL). This is a variation of the non-profit company that exists under Belgian law (the association sans but lucrative or ASBL) but which is specifically conceived for organizations that are active on the international stage and which have members from around Europe, or indeed from around the world.

charles.price@cew-law.be

The IASBL has all the advantages of the ASBL, including the ability to contract in its own name and for its own account as well as limited liability for its members. It also shares the favourable tax status of the ASBL, meaning that no company income tax is due and that taxation on investment income is generally speaking limited to tax withheld at source and does not give rise to any additional taxation in the hands of the ASBL or the IASBL.

The IASBL differs from the ASBL in that it must be incorporated by notarial deed and in that, in order to qualify as a person at law, it must be recognized by the Belgian Government. However, provided the IASBL has a genuine not for profit character and is not designed to generate profit for its members, the approval process is not problematic and takes no more than 6 to 8 weeks.

IASBL have proved a popular vehicle for international charities. They are also used by international scientific organizations and are a commonly used in order to structure international federations that represent the general interests of a particular industry on a European or world wide basis. The IASBL has also been used by some international sporting federations.

Charles Price