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An Entrepreneur's

Guide to seizing M&A opportunities

In a (post-) COVID-19 context, a pan European overview

30 June 2020

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Table of Contents

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A. THE GENERAL CONTEXT

The pandemic linked to the COVID-19 virus is having a significant impact on entire sectors of our economies, whether local, national, European or global. The main stock market indices have fallen and the financial markets are highly volatile. The public authorities are announcing numerous rescue plans for the benefit of so-called strategic companies or companies of national interest. On a micro-economic level, the cash position of many companies is tightening, without taking into account the restructurings and redundancy plans announced recently by several companies.[1]

These difficulties are generating - or will generate as soon as the temporarily granted moratoria expire - a cascade of bankruptcies, liquidations or restructurings, with their fair share of harmful consequences on the economy. However, they will also create various opportunities, both with regards to certain ongoing operations and possible future takeovers, whether these are intended to strengthen an existing business, its growth or diversification policy, or serve as pure risk-taking. This economic context therefore raises the question as to the effects of COVID-19 on business M&A operations and the possible opportunities generated by this current health crisis.

In this period of uncertainty, coupled however with the massive support of central banks, the "cash is king" principle has never been more true. Candidate buyers with cash, or who are able to secure credit lines in the short term, will be able to adjust current operations or seize good opportunities that were (too) expensive in the past.

In this note, we present some thoughts of the ebl corporate group on the current market for business transfers and discuss some of the legal leverages that can be used in the context of current and potential M&A transactions in the short term. In line with our vision of business life, this note is intended for lucid and dynamic business partners who know how to be creative in allocating risks between participants.

[1] The author wishes to aknowledge the primarily human and personal impact of this crisis. Our gratitude goes to those who have worked and continue to work daily to preserve health and maintain the tasks essential to our collective well-being. Keeping this in mind this article has its focus on the economic consequences on the situation.

B. REVIEW OF ONGOING OPERATIONS

There are as many different valuation formulas as there are different transactions, whether it is the sale of assets or company shares. Thus, the valuation of a company that was, with the agreement of the seller and the buyer, based - in part - on its financial results for the year 2020 (via, for example, an earn-out clause) may no longer correspond to the parties' initial intention, a fortiori if that company has had to undergo a complete shutdown of its activities imposed by COVID-19.

So how should ongoing operations be approached in the current context? With respect to transactions under discussion, potential acquirers and potential sellers will be able to re-examine the appropriateness of the fundamentals used to determine the sale price and decide unilaterally to terminate negotiations. In any event, this withdrawal will have to be adequately justified and take place in a timely manner (i.e. without delay as soon as the trigger for the withdrawal decision is known or deemed to be known) in order to avoid incurring extra-contractual civil liability for wrongful termination of the talks.

For transactions concluded (i.e. after signature of the binding transfer agreement) but not yet executed (e.g. because of an outstanding condition precedent), certain legal mechanisms may allow ,provided they have been expressly provided for, the acquiring party to either withdraw from the transaction (Material Adverse Change or Material Adverse Effect clause) or impose the adaptation of the economic conditions of the transaction, allowing a renegotiation of the initial conditions (Hardship clause). It is also necessary to ensure that the conditions precedent are fulfilled, which may in particular be linked to financial performance, such as EBITDA or turnover to be achieved. If no contractual provision has been made for the occurrence of an event affecting the economic balance of the transaction, it is necessary to check what the applicable law allows or does not allow. In the absence of termination by mutual agreement, a specific contractual clause or a regulatory framework authorizing the rebalancing of the transaction, or a "walk away" right, the unilateral withdrawal of the unsatisfied party before performance - which cannot be excluded – may give rise to litigation with an uncertain outcome.

Furthermore, it is not impossible that potential acquirers may use the crisis as an opportunity to revive discussions that had previously failed.

Finally, the balance of certain transactions that have been executed, but for which certain obligations remain due, thus put under pressure by the current crisis, may also be re-examined. Beyond the existing contractual provisions and the specificity of each case, positive law provides for certain mechanisms to rebalance the rights and obligations of the parties, which can be summarized as follows in relation to French, German, English and Belgian law:

Legal mechanisms for renegogiating the contracts in the event of a change in the economics of the agreement according to the law in Belgium, France, Germany and the UK:

Belgium

Belgian contract law is mainly governed by regulations from the Civil Code and, depending on the field in which the contract is concluded, other laws. When entering into a contractual relationship, the two parties must observe the terms of their agreement, as well as the imperative and/or supplementary provisions of the Belgian legislation.

The sanctity of contract is one of the most fundamental principles of civil law. “Pacta sunt servanda”: the contract has to be respected. Therefore, contract reviewing is in principle not allowed, subject to some exceptions or ad hoc contractual provisions.

Force majeure - Force majeure is generally understood as an unforeseeable and inevitable event occurring after the conclusion of a contract that renders the performance of the contractual obligations of a party to the contract impossible. The definition of impossibility is being discussed. If the event is of a temporary nature (as is the case for Covid-19), it can only be used to temporarily relieve a party of its contractual liability for the duration of the event characterized as force majeure. Therefore, force majeure clauses are not likely to allow contract reviewing.

Hardship - Belgian courts have traditionally rejected the doctrine of hardship (imprevisie/imprévision), pursuant to which contracts should be adapted where unforeseen circumstances render their performance more onerous (rather than impossible, as is the case for force majeure). This being said, in the framework of a potential reform of the Civil Code, a bill has been submitted to Parliament in order to introduce the doctrine of hardship into the Civil Code (Article 5.77 of the envisioned Civil Code). However, this draft provision will not apply to the current coronavirus situation. In the absence of legal recognition, some courts have attempted to use related concepts to move towards an application of this doctrine, i.e. the abuse of right theory or the concept of good faith (see below).

MAC clauses - Share purchase agreements may however validly provide that the closing can be made subject to the condition that no “material adverse change” has occurred between signing and closing, allowing the potential purchaser to walk away in case of a material change occurring. Such a clause indirectly allows for the reopening of negotiations. The definition of such a “material change” may either use broad and generic wording, or be limited to restrictive events. Other clauses may force the parties, in case of a material change, to renegotiate the agreement in good faith. Such a commitment is only a best effort obligation, where the achievement of the result cannot be guaranteed absolutely.

Good faith - In order to obtain (in the absence of any contractual stipulation) the revision of certain conditions of a contract in the event of a material change, the party may invoke the principle of performance of contracts in good faith (Article 1134 para. 3 of the Civil Code). This principle enables the court to verify the initial intentions of the parties at signing and, if necessary, to supplement the provisions of the contract or even to modify some of them. This adapting or modifying function is supported by some scholars. Several courts have also admitted the adjustment of a contract following a change of circumstances during its execution via the concept of good faith. However, the Belgian Supreme Court generally dismisses this type of reasoning.

Abuse of right - The concept of abuse of right allows the judge to prohibit the beneficiary of a right from exercising his rights in a manner that clearly exceeds the limits of a normal exercise by a prudent and diligent

person. According to some case law (e.g. Court of Appeal of Ghent, 3 February 2014, NjW 2015, 202), refusing to modify a contract can qualify as an abuse of rights in certain circumstances, such as the outbreak of a crisis. Thus, this moderating function of abuse of right could allow the Court to modify certain terms of contracts if they prove to be abusive in the light of the specific circumstances of the contract.

Combination - By the combined application of these principles, a judge could order the revision of the terms of a share purchase agreement. The outcome of such actions remains however very uncertain and may take years, sometimes a decade, since the other party will refer to the basic principle of "pacta sunt servanda", stressing that contained clauses are law between the parties, which implies that nonfulfillment of respective obligations is a breach of the pact.

Alternative Dispute Resolution clauses - Last but not least one shall not forget about the impact of compulsory conciliation, arbitration and/or ADR clauses. Indeed, a compulsory pre-conciliation or mediation clause may force the parties, with the assistance of experienced mediators, to better understand the situation faced and to find a sustainable way forward. These pre-trial phases offer the speed and flexibility that courts typically cannot. On the other hand, arbitrators may be vested with the powers of "amiables compositeurs", where they may have to decide ex aequo et bono. Amiable composition can depart from the strict provisions of the contract on the grounds of equity. Thus arbitrators can grant relief whenever they feel it fair to restore the balance between both parties' obligations, which has been disturbed by a material adverse change in circumstances.

France

The French Civil Code defines a contract in Article 1101 as "*an agreement of wills between two or more persons intended to create, modify, transmit or extinguish obligations*".

According to Article 1103 (former 1134) of the French Civil Code, a contract is the law of the parties. The entire performance of the contract is governed by this search for the common will of the parties.The interpretation, modification and revocation of the contract thus presupposes in principle the search for or gathering of a common will.

However, even if unilateralism on the part of one of the parties or interventionism on the part of the court is not widely accepted under French law, exceptions to this principle and/or *ad hoc* contractual provisions exist and could apply regarding the current health crisis.

Force majeure - Commercial agreements usually provide for a so-called "force majeure" provision, which may apply to the current circumstances due to the health crisis. If a company is unable to perform its obligations due to a force majeure situation (requiring 3 conditions to be met: the event must be external, unforeseeable and irresistible), it would not be held liable as long as the said situation lasts. In other words, this company is protected, since its contractor would not be entitled to claim damages for non-performance.

Although the current health crisis cannot systematically be categorized as a force majeure situation, it should be noted that the Paris Commercial Court handed down a specific decision on 20 May 2020 (No.2020016407) regarding covid-19 as a force majeure situation: "*the spread of the virus is clearly external to the parties, that it is irresistible and that it was unpredictable as evidenced by the suddenness and scale of its appearance.*"

Hardship (*Révision pour imprévision*) - Article 1195 of the Civil Code allows, in certain circumstances, the revision of the contract for unforeseen circumstances. It should be noted that contractual provisions dealt with this before its introduction in the French Civil Code in October 2016 This (new) provision of the French Civil Code applies when three conditions are met:

- firstly, there must be a change of circumstances unforeseeable at the time of the conclusion of the contract;
- the change of circumstances must then render the performance of the contract excessively onerous, witha mere more difficult performance being insufficient;
- and finally, the party affected by the change in circumstances must not have accepted to assume the risk.

This mechanism could most likely be applicable to the current coronavirus situation provided that the above conditions are met (except for (i) where contracts were concluded before October 1, 2016, (ii) bonds as a result of transactions in securities and financial contracts and (iii) where the contract shows an express or necessary acceptance of the risk of unforeseeability).

The revision for the unforeseeable circumstances mechanism is based on a three-step process:

(i) Firstly, the party suffering from the unforeseeable circumstances may ask the other party to renegotiate the contract.

(ii) Secondly, in the event of refusal or failure of the negotiations, the parties, if they agree, may agree to terminate the contract or refer the matter to the court to have the contract adapted. However,

if one of the parties refuses to renegotiate the contract, it is likely that this party will refuse to join the other party in requiring the judge to adapt the contract.

(iii) And thirdly, if at the end of a reasonable period of time, the contract has not been adapted by mutual agreement or by the court jointly asked by the parties, a party may ask the court to revise or terminate the contract.

MAC clauses - Share purchase agreements may validly provide that the closing can be made subject to the condition that no “material adverse change” has occurred between signing and closing, allowing the potential purchaser to walk away in case of a material change occurring. Such a clause indirectly allows for the reopening of negotiations. The definition of such a “material change” may either use broad and generic wording, or be limited to restrictive events. Other clauses may force the parties, in case of a material change, to renegotiate the agreement in good faith. Such a commitment is only a best effort obligation where the achievement of the *result* cannot be absolutely guaranteed.

Good Faith - The obligation to perform the contract in good faith is provided for by article 1104 of the Civil Code. Today the case-law, in addition to requiring the contracting parties to refrain from any attitude of bad faith, sometimes places on their shoulders a real duty of cooperation, the performance of which implies initiatives on their part.

The binding force of the contract prohibits the court from interfering too much in the act of forecasting made by the parties. Nevertheless, the considerations of good faith and equity constitute powerful justifications for the intervention of the court in the contract.

Disputes Review Boards - DRB and other monitoring and steering mechanisms in long-term contracts are a useful means of dealing with misunderstandings and contractual tensions as early as possible. These tools limit the risks of blocking, suspending or freezing execution. The latter are particularly disastrous in major projects (especially construction or engineering projects), which generally involve a very tight schedule, multiple stakeholders and high stakes.

Alternative Dispute Resolution clauses - Incorporating a mediation clause in a contract and more generally using alternative dispute resolution methods costs nothing and can be very profitable. ADR clauses have the well-known advantages of speed, flexibility, limited costs, predictability and the search for "win-win" solutions, while making it possible to preserve the contractual relationship between the parties.

Germany

German contract law is primarily governed by the German Civil Code, which in principle gives the parties to the contract a wide range of options.

German law also permits contracts which are wholly or partly subject to foreign substantive law.

In principle, priority contractual provisions agreed between the parties to the contract must be observed and the statutory provisions apply in addition, either due to express reference in the contract or, in the absence of contractual provisions, in addition.

The principle that once contracts have been concluded, they must be observed ("**pacta sunt servanda**" - contracts must be observed) also applies in German law.

Subsequent, unilateral contractual amendments by one of the contracting parties are therefore only possible in exceptional cases.

Amicable changes to the contract after conclusion of the contract are of course possible at any time.

According to German law, the following types of default are of particular importance - insofar as no contractual provisions have been made:

Delay - The untimely, incomplete or otherwise non-contractual performance may result in the contract creditor being able to assert claims for damages and possibly even withdraw from the contract altogether.

Impossibility - If one party to the contract is not able to fulfil its contractual obligations on a permanent basis, the other party to the contract may be entitled to claim damages and may also be entitled to withdraw from the contract altogether.

Omission of the basis of the contract - German law is dominated by the principle that contracts must be fulfilled in good faith.

According to well settled case law, it follows from this that if the parties to a contract agreed at the time of conclusion of the contract that certain conditions existed - which either did not exist unknowingly at the time of conclusion of the contract or ceased to exist after conclusion of the contract -, contractual clauses must be adapted to what the parties would have reasonably agreed in the event that they had noticed their mistake at the time of conclusion of the contract or had foreseen the subsequent changes in circumstances.

This may give rise to claims for adjustment of the contract and, in extreme cases, to claims for withdrawal by the parties.

In the case of contracts that were concluded before the outbreak of the Corona pandemic became known, there is little doubt that contracts have to be adapted according to the mechanisms described above and in extreme cases there may also be a right of withdrawal for the contracting parties, unless clear contractual provisions to the contrary have been agreed.

More difficult to assess, however, are those cases in which the consequences of the corona pandemic were already apparent and where there was possibly only uncertainty about the actual extent of the disruption to our economic system.

In this respect, the legal advisors of the parties to the purchase agreement will be much more strongly called upon to work out the basis of the contract and to critically reassess whether it can remain unchanged.

United Kingdom

The UK law of contract is based upon common law principles, grounded in custom and judicial precedent going back many centuries, as amended over time by legislation (for example, the Unfair Contract Terms Act 1977) and interpreted by the courts.

It starts from the premise that a contract, freely entered into, is binding on the parties and should be interpreted using the natural meaning of the words. Courts have an important role in interpreting such contractual provisions, however, they will rigorously avoid "re-writing" contracts in any way. That has to be done by the parties themselves, either as a result of specific contractual provisions or because they value their long term relationship to such an extent that they are willing to compromise the existing contractual arrangements.

Some of these specific contractual provisions, especially in the financial world, envisage the possibility of significant change in **'material adverse change' (MAC) clauses**. The construction of those clauses and their applicability will fall within normal principles of interpretation.

In addition, there may be **alternative dispute resolution (ADR) clauses** in certain types of contract which may permit the parties to raise certain issues regarding performance, cost or value in defined circumstances.

In the absence of such contractual routes to amendment of terms, the fact that life changes after a contract has been signed and that the performance of the contract might therefore become less financially viable for a party, or more difficult to perform, is a risk which just has to be accepted, with a few very limited exceptions.

In this context there are 3 general concepts under UK law which may be worth considering in the light of the Covid-19 pandemic and the associated sudden and, in many sectors, extreme economic and commercial disruption. These concepts are force majeure, frustration and supervening illegality.

Force Majeure - Many contracts contain a force majeure clause (whether actually using that expression or not) and, if so, that should be the starting point. Force majeure clauses can provide a degree of certainty by being expressly set out in the contract, in contrast with the concepts of frustration and illegality which are common law doctrines and rely on general legal principles and detailed case law. Such a clause should be interpreted in the same way as any other clause i.e. "what did the parties intend to cover by this wording?"

The interpretation is always restrictive, such that the courts will limit their application if there are implied limitations. For example, in the case of Notcutt v Universal Equipment Co (London) ltd (1986) the Court of Appeal was faced with an employment contract which included a force majeure clause that suspended salary when the employee was absent from work for sickness or incapacity. The court held that this clause was not engaged where the employee had a heart attack leading to permanent disability. The court felt that the contract was actually frustrated at common law, leading to different consequences than the mere suspension of salary which the force majeure clause envisaged.

In order to take advantage of a force majeure clause, the following should be considered:

(i) The burden of demonstrating that the facts in question constitute a force majeure event fall upon the party seeking to rely upon it. Some force majeure clauses use the expression an "Act of God" for natural disasters such as floods or earthquakes and similar 'one off' events which involved "no human agency". It is entirely possible that the Covid-19 pandemic might, in the appropriate contractual context, be deemed to be a force majeure event on this basis. In some standard modern clauses the words "epidemics and pandemics" are specifically included.

(ii) The non-performance must have been beyond the control of that party, and be a risk which it had not assumed.

(iii) There must have been no reasonable steps open to the party which would have enabled it to avoid or mitigate the force majeure event or its consequences.

(iv) There is particular difficulty with clauses which seek to exclude "foreseeable" events, because clearly the question of foreseeability is debatable. There have been wars, natural disasters and pandemics in the past so, on one level, they are foreseeable to those of a cautious and historically reflective nature. But to take such an extreme interpretation would be to more or less eliminate any possible application of force majeure (in the absence of, say, Alien invasion which most people, but perhaps not all, believe has never happened!).

In the present case of the Covid-19 pandemic, we would contend that the sheer speed and scale of the lockdown and effect on certain countries and industries should give reasonable scope for arguing the applicability of a force majeure clause in some cases. In other cases, however, such as contracts entered into after the virus started to cross international boarders, parties may find it more difficult to rely on a force majeure clause. In any event, it must be noted that much will depend on the precise drafting of the force majeure clause itself.

The effects of a force majeure clause, if applicable, will also depend on construction of the contract. Not all force majeure clauses have the effect of completely terminating or discharging the contract. In many cases, the effect of the clause will be the suspension of performance of some or all of the parties' obligations under the contract, or to act as an excuse for non-performance by the concerned party. Sometimes a longstop date may be included, after which suspension may eventually become termination. It is also always open to the parties to negotiate an agreed termination.

Frustration - The concept of frustration addresses the situation where a supervening event renders the contractual obligation (without the fault of either party) incapable of being performed, or the mutually agreed purpose of the contract impossible.

If the purpose of the contract becomes impossible for one party, that will not be enough to support a claim of frustration if, on an analysis of the allocation of the risk within the contract, that purpose was not accepted by the other party as being fundamental to the contract.

For example, there has been an interesting case involving Brexit – the political decision of the UK to leave the EU. In Canary Wharf (BP4) T1 Limited v European Medicines Agency(2019) the European Medicines Agency (EMA) unsuccessfully sought to escape a 25-year lease on a London office block by arguing that the lease would be frustrated when the UK ceased to be an EU member state. Brexit, it claimed, represented a frustration of common purpose. But the lease itself contemplated that the EMA's headquarters might not remain in Canary Wharf for the duration of the lease. That was because the lease expressly permitted the EMA to assign or sublet the property in part or in its entirety. Thus the EMA took the risk of its purpose for taking the lease vanishing, because it had bargained for the right to transfer it to another party.

Whereas an effective force majeure clause usually merely suspends a contract, where frustration occurs it discharges the contract from that point in time. Actions taken before the frustration are still valid, and claims for damages or otherwise could still apply for that period, but the contract ceases to be binding going forward.

Supervening illegality - Finally, under UK law, a contract is discharged if its performance becomes illegal. This could happen, for example, as a result of legislation brought in to fight the Covid-19 outbreak. If it were to be illegal to import certain goods into a country, for example, or to move specified persons from one area to another, then a contract for such goods or services might be discharged by virtue of illegality, especially if a particular timescale was "of the essence" in the contract. But, as ever, performance does have to be impossible on the precise terms of the contract. If the goods or services could be substituted by others from non-affected areas, even at much greater cost or inconvenience, it is unlikely that illegality as a concept will work.

It should be noted that the illegality might not be caused only by UK legislation or regulations, the laws applicable in the place of performance of the contract will also be relevant.

In conclusion, it is likely that the Covid-19 pandemic will create many situations in which commercial contracts are reviewed with a view to seeing if they can be amended, suspended or treated as discharged in their entirety. Those cases will depend upon a careful analysis of the drafting of the contract itself, the fundamental purposes of the contract as accepted by both parties, and the extent to which performance has become genuinely impossible due to unforeseen events.

What obviously can be said for all jurisdictions is, that when the transaction is not yet executed (i.e. the SPA has been signed but not yet executed or is being executed), it appears impossible to draw general rules. Instead. it is all a matter of specifics, whether it is a question of the type of transaction, the contractual terms already agreed, the intentions and mutual understanding between the parties and, finally, the law in force. Only a detailed study can identify the effective mechanisms for revising the current framework and their respective chances of success.

C. NEW OPERATIONS

While it is clear that the pandemic is having an impact on ongoing transmission operations as mentioned above, it is equally clear that, on the one hand, business transfers will return to a more favorable period, and on the other hand, transferors, transferees and their respective advisers will have to adapt to new realities.

For example, we can already see the concern of potential acquirers to apprehend the target in the context of an extended due diligence based on an approach linked to the risk(s) of the sector in which it operates (e.g. is the target directly or indirectly impacted by the effects of the current pandemic or its possible resurgence?). For example, the candidate acquirer will seek to examine the extent to which the target can adapt to crisis situations, its dependence (or not) on its suppliers, the robustness and integrity of its IT system, compliance with the conditions of state aid or subsidies from which the target has benefited from in the context of the pandemic, etc.

Another important change concerns the financial fundamentals on the basis of which company valuations will be carried out and the payment methods of the price to allow risk allocation in line with the general economic situation, and the situation of the target and the parties involved in the deal. As the impact of the health and economic crisis on the target's activities is not easily measurable to date, a potential acquirer could legitimately consider that a sale price defined within the framework of a "locked box" (i.e. with no possibility of price adjustment after completion of the transaction on the basis of financial statements at the closing date) does not sufficiently protect it, since the target's financial position at the time of the transaction may not reflect the actual situation of its activities. Conversely, potential acquirers may wish to provide for pricing mechanisms that allow for post-closing adjustments based on targets in terms of debt levels, working capital requirements or net assets at closing.

For his part, the potential seller will ensure that a ceiling is placed on the reduction of the sale price in the context of an adjustment.

If the parties cannot agree on a price adjustment mechanism in the context of the COVID-19 crisis, they may use other risk allocation techniques, such as a price accompanied by an earn-out, a right for the seller to benefit from a portion of the sale proceeds received by the buyer in the event of a subsequent resale (anti-embarrassment clause), tranches of the price to be paid deferred in time, a reinvestment of part of the sale price by the seller in the capital of the target company (rollover clause), or by recourse to a vendor loan (vendor loan clause).

Finally, it is particularly important for the parties to agree precisely on the criteria to be taken into account in the calculation of the earn-out (e.g. EBITDA, turnover, etc.) and on the associated period(s) of time.

D. THE DISCOVERY AND IMPLEMENTATION OF BUSINESS OPPORTUNITIES

Since the crisis, some capital has been pooled in different forms, such as by sector, by family or by degree of risk. Some of these investment pools pre-existed the crisis or were even resurrected by it. Likewise, healthy companies or those that, through their activity or innovative business model, have been able to take advantage of the crisis, are planning to invest their surplus cash in new opportunities. Finally, the containment has provided other players with a useful period of reflection, for example by implementing a management buy-out that had long been envisaged or by anticipating a generational transfer.

To be efficient, the market for the sale of distressed companies must put sellers in contact with potential buyers. To this end, business opportunities can be communicated by the Courts or agents appointed by them (in particular bankruptcy receivers), banking institutions and specialized private or (semi-)public intermediaries. Start-ups are a special case: many do not hesitate to publicly state their need for additional financing. From this perspective, business lawyers are, depending on their scope of activity and their professional rules, useful intermediaries in the sense that they "feel" their market.

Sellers of companies in difficulty and potential buyers can agree on a range of measures, which they will determine according to their needs, interests and risk appetite.

With regard to the financing structure, such as short, medium or long-term credits, the granting of remunerated financial guarantees or credit lines to be used (e.g. in the event of a second wave of COVID-19), the issue of bonds, various forms of capital increases, can be contemplated. These private refinancing hypotheses will also depend on the banking credit market, whose dynamism in the light of the crisis is still uncertain.

Above all, the parties will be able to agree on a takeover operation either amicably in the form of an asset or share deal, or in court via takeovers at the helm. The number of such transactions for the judicial sale of distressed businesses, which are likely to increase, depends on the legal context in force:

Judicial takeovers ("at the bar") according to the law in Belgium, France, Germany and the UK:

Belgium

Belgium has taken numerous measures to mitigate the economic impact of the COVID-19 crisis, including, but not limited to, temporarily protecting debtors affected by the crisis from creditors by imposing a stay on creditors' right to, inter alia, initiate bankruptcy proceedings. According to this moratorium, which runs until (and including) 17 June 2020, a business affected by the coronavirus crisis cannot be declared bankrupt or, if it is a legal entity, be dissolved by a court or a transfer of the whole or part of its activities be forced. This extraordinary moratorium will not be extended.

The sale of assets of a distressed company can take place via various legal schemes.

Bankruptcy - Once a company has been declared bankrupt by the Business Court of its registered seat, the bankrupt automatically loses control and management. The receiver in bankruptcy (curator/curateur) is appointed to assume all responsibilities from the board of directors. The receiver's task is to compile an inventory of all debts of the company, to sell off the (remaining) assets of the company with a view to applying the proceeds of such sales towards payment of the creditors of the company according to their legal or contractual priority rights. As a rule, bankruptcy results in the cessation of all the company's activities. At the request of the receiver or any interested party, the Court may however allow for the temporary continuation of (all or part of) the company's activities under the supervision of the receiver, only if there is a reasonable chance that the business can be sold as a "going concern" at a higher price.

Each party, including the shareholders and/or management of the bankrupt company, may make an offer to the receiver with respect to some or all of the assets of the bankrupt. More often than not the receiver will aim at selling the estate as a whole. The debts are not taken over, and the offeror may select the employees it wishes to transfer. The sale process can sometimes be very quick.

Judicial reorganization - In a judicial reorganisation procedure, the company benefits first from a moratorium protecting it against enforcement action by its creditors, which allows it then to restructure its debts and activity either: (i) through a "voluntary arrangement" with one or more of its creditors, (ii) a "collective reorganization plan" submitted to the vote of the creditors, or (iii) the sale of all or part of the business or activity (gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag/ reorganization judiciaire par transfert sous autorité de justice).

The board of directors of the company, the public prosecutor, as well as any other third party with a legitimate interest (including a competitor) can initiate a request for judicial reorganization by way of transfer under judicial authority, by summoning the company before the Business Court. Upon the filing of the request for judicial reorganization, the Court appoints a delegate judge (gedelegeerd rechter/ juge délégué). Unlike bankruptcy, judicial reorganization does not terminate existing contracts, nor does it change the terms of their execution, regardless of any provisions in such contracts to the contrary. The decision to open the proceedings will be published in the annexes of the Belgian Official Gazette. Moreover, the legal requirements with respect to the consultation and information of the employee(s) (representatives) of the company remain applicable. Even if the judicial reorganization can, to some extent, be prepared in advance (for example by already identifying suitable buyers in case of transfer of business, so-called "prepack") and the debtor remains in charge during the reorganization proceedings, it is inevitable that there will be some loss of control over the process. Such a transfer of business (or line of business) can be ordered at the debtor's request or even, in

certain circumstances, at the request of any party having an interest (including competitor, creditor, minority shareholder or the public prosecutor).

Whereas one of the main added-values of the Belgian reorganization procedure is the "right of option" (which allows the transferee to choose which transferor's employees it wishes to keep on after the transfer, provided that this choice is dictated by economic, technical or organizational reasons, article XX.86 §3 of the Economic Code), the European Court of Justice decided however on 16 May 2019 in the "Plessers" case that the choice granted to the transferee by the Belgian law does not meet the cumulative conditions laid down in Article 5(1) of Directive 2 2001/23 relating to the safeguarding of employees' rights in the event of transfer of (parts of) undertakings. As a result, the application of current article XX.86§3 of the Economic Code could seriously threaten the principal objective of Directive 2001/23, i.e. to protect employees against unjustified dismissals in the event of a transfer of undertaking. Therefore, the ECJ decided that Directive 2001/23 has to be interpreted as prohibiting the transferee to choose the employees it wishes to keep on after the transfer. This being said, since the Belgian positive law has not been modified to date, some Business Courts still apply article XX.86§3 of the Economic Code. Furthermore an ad hoc homologation of the transfer agreement can be requested from the Labour Court. The judge ordering the transfer also appoints a judicial receiver who is responsible for performing the transfer. He organizes the transfer and must strive to keep all or part of the activities together, whilst taking into account the rights of the creditors. He will draft one or more sales agreement to present to the delegate judge and the court. If there are different buyers or terms, the Court must decide between them. Preference will be given to the offer that guarantees the maintenance of employment. As a result of the transfer of business, the company becomes an empty shell and can possibly be declared bankrupt at a later stage.

If the previous management or shareholder offers to purchase the company's estate, that offer can only be taken into account provided the assets being accessible to the other bidders.

Company mediator - Last but not least, the Law also allows for the appointment of a company mediator upon the debtor's request, who can seek potential investors or purchasers for the assets or the shares of the distressed company. Such a possibility may prove helpful and efficient, since such a judgment is not made public and does not affect business continuity.

RegSol - Since 2017, most of the information with respect to distressed companies in Belgium is available via an online digital database, called the Central Solvency Register or RegSol in short (Centraal Register Solvabiliteit/Registre Central de la Solvabilité). It allows, for instance, creditors to file their statements of claim online in the context of Belgian bankruptcy proceedings.

Future developments - Last but not least, in June 2019 the EU Council adopted EU Directive 2019/1023/EU, which aims to ensure that: (i) viable enterprises and entrepreneurs in financial difficulty have access to effective national preventive restructuring frameworks, which will enable them to continue operating; (ii) honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period; and that (iii) the effectiveness of procedures concerning restructuring, insolvency and the discharge of debt are improved. This directive is to be implemented in 2021, and will facilitate judicial reorganizations, as well as business transfers.

France

Specific legal provisions related to French Bankruptcy Law in the context of Covid-19

The emergency law 2020-290 of 23 March 2020 to deal with the Covid-19 health crisis has empowered the French Government to adjust the procedures for preventing and dealing with difficulties encountered by companies in this particular context. Shortly afterwards, the French Government made certain adjustments in orderto maintain access to prevention procedures for companies that had been deprived of cash as a result of the measures taken to stem the spread of the Covid19 and to ensure the continuity of the procedures in progress.

Since 22 May 2020 and up to 31 December 2020 (including ongoing conciliation proceedings), the debtor may also request a period of grace, before any formal notice or action is taken, with respect to a creditor who has not accepted, within the time limit set by the conciliator, the request made by the conciliator to suspend the due date of the claim.

In addition, during the period referred to above, the debtor may request that the proceedings of a participating creditor be suspended in order to preserve, for the time of the negotiation and as a precautionary measure, its ability to maintain its activity. While this suspension is similar to the one that occurs automatically when a debtor is placed under safeguard, recovery or judicial liquidation, it is not collective.

Thus, where a creditor called upon to conciliate does not accept, within the time limit set by the conciliator, the request made by the conciliator to suspend the enforceability of his claim during the proceedings, the debtor may request the president of the court that opened the conciliation:

- to interrupt or prohibit any legal action on the part of that creditor seeking the condemnation of the debtor to pay a sum of money or the termination of a contract for non-payment of a sum of money;
- to stop or prohibit any enforcement proceedings on the part of the creditor in respect of both movable and immovable property, as well as any distribution proceedings which have not had an attributive effect prior to the application;
- to postpone or stagger the payment of the sums due (with interest and penalties not being incurred within the time limit fixed by the judge).

The executive order of March 27 2020 authorized the president of the court to extend the period of execution of the safeguard or recovery plan from five months to one year. The May 20 order also provides that the court may add an extension of up to two years, at the request of the public prosecutor or the commissioner, for the execution of the plan. In the event of an extension, the president of the court or the court adapts the payment deadlines initially set by the plan, derogating, where applicable, from the provisions of Article L 626-18 of the French Commercial Code. They may grant grace periods to the debtor within the limit of the extended term of the plan.

The executive order also allows the president of the court, ruling on the application of the judicial administrator, the judicial agent, the liquidator or the plan commissioner, to extend the procedural deadlines imposed on them by a period equivalent to the duration of the period of the state of public health emergency plus three months.

Furthermore, persons who make a new cash contribution to the debtor during the observation period in order to ensure the continuation of the business and its sustainability and those who undertake, for the

implementation of the safeguard or recovery plan ordered or modified by the court, to make such a contribution now benefit from a privilege that allows them to be paid, within the limit of this contribution, before other creditors (with the exception of employees for some of their claims). These persons may not be imposed on these claims without their agreement, nor may they be remitted or delayed in payment by the court or creditors' committees. However, this privilege is excluded for partners or shareholders who consent to a contribution in the context of a capital increase.

The mechanism applies to proceedings initiated between 22 May 2020 and the date of entry into force of the order which must bring national law on collective proceedings into conformity with European law, and no later than 17 July 2021 inclusive.

The right of the manager to make an offer on its company

As a matter of principle, article L642-3 of the French Commercial Code prohibits, in particular, the managers of a company in recovery or liquidation, directly or through an intermediary, from making an offer to take over all or part of the assets of his company. This prohibition is made for a period of 5 years. This also applies to the debtor, the parents or relatives up to and including the second degree of the managers or the debtor who is a natural person, persons having or having had the capacity of controller during the proceedings.

However and as an exception, article 7 of order N° 2020-596 of 20 May 2020 authorizes the transfer of all or part of the assets of a company in recovery or judicial liquidation to its managers if the planned transfer is capable of ensuring the maintenance of employment. Such an important exception to the general rules of French Bankruptcy law is to allow the manager of a company impacted by Covid-19, who has not committed any management fault but has suffered from the crisis, to make a takeover offer if this offer would make it possible to avoid redundancies. The courts will have to find the right balance between the current manager's right to rebound and safeguarding jobs in particular.

This provision is applicable up to and including 31 December 2020 and is obviously applicable to ongoing proceedings.

A second chance is thus given to managers.

Other important provisions existing under French Bankruptcy Law (other than in the context of Covid-19)

Apart from the measures taken in the context of the health crisis, the sale of the assets of a company under French Bankruptcy Law may take place within the framework of the court's "at the bar" takeover. This procedure only concerns the takeover of certain assets as part of a safeguard plan (the safeguard plan cannot lead to the sale of the entire business). On the other hand, it concerns the takeover of some or all of the assets within the framework of a court-ordered recovery plan without a solution of continuation, as well as within the framework of a liquidation procedure.

In the context of a “at the bar” takeover, no liability guarantee is granted to the purchaser. The drafting and signing of the deeds is done under the direction of the administrator or the agent under the conditions of the judgment stopping the transfer.

Moreover, in the context of a judicial liquidation, the court may order the transfer of the business, in order "*to ensure the maintenance of activities likely to be operated autonomously, of all or part of the jobs associated with them and to settle the liabilities*" (C com. art. L 642-1, para. 1). The sale of the business may be total (except in the case of a safeguard) or partial. The transfer is total if the assets not included in the transfer plan are not relevant to the continuation of the activity (Cass. com. 11-6-1996).

A company may be subject to several partial transfers; it is sufficient that each of them relates to a set of operating elements which form one or more complete and autonomous branches of activity, it being of little importance that this set represents only a fraction of the enterprise's assets (Cass. com. 2-2-1993: RJDA 6/93 No. 566).

Germany

Currently, the German legislator has suspended the obligation to file for insolvency for the period until 30 September 2020 (inclusive), but only on condition that

- inability to pay as a result of illiquidity exists (obligation to file for insolvency still exists in the event of over-indebtedness!);
- the insolvency is a consequence of the COVID-19 pandemic (this is assumed if the company was not yet insolvent on the cut-off date 31 December 2019); and
- it is to be expected that after the end of the COVID-19 pandemic it can be expected that the current insolvency situation can be eliminated.

These regulations are incomplete in parts and lead to a number of uncertainties regarding a possible personal liability of the managing director of a company that is insolvent per se, who, according to the above, permissibly fails to file for insolvency.

It is uncertain whether the legislator will extend the suspension of the obligation to file for insolvency once again. A concrete discussion is not yet being held.

The legislator will have to weigh up against each other whether an extension of the suspension of the duty to file for insolvency facilitates the probability of a restructuring of illiquid companies to such an extent that it justifies the risks associated with an extension of the suspension of the duty to file for insolvency (uncertainty of the other market participants and decreasing willingness to grant credit).

United Kingdom

Immediate legal and financiasupport for companies in difficulty

With the intention of helping companies in financial difficulty due to Covid-19 to continue trading, the Corporate Insolvency and Governance Act 2020 (the "Act") came into force on 26th June 2020.

The Act aims to provide businesses with the flexibility and breathing space they need to continue trading despite the effects of Covid-19 by introducing measures to assist businesses avoid insolvency or to restructure their operations if their difficulties are linked to the impact of Covid-19.. Some of the measures will be of permanent effect and others will be only temporary. The Act is detailed and complex, but some of the key measures include:

a) The introduction of the concept of a "moratorium" which gives the company breathing space from enforcement by creditors of 20 business days (extendable by a further 20 business days), to explore options for rescue whilst supplies are protected allowing the company the maximum chance of survival.

b) A ban on implementing contractual clauses which would have allowed a supplier the right to terminate a contract when the customer company enters into an insolvency or restructuring procedure. The supplier must continue trading on the same terms, provided it is paid on time for new orders (even if the pre-Covid debts remain outstanding).

c) There is a new process for getting the swift approval of classes of creditors to a restructuring plan, which plan is then sanctioned by the court if it appears that the plan is better than the next best alternative and is equitable as between classes of creditors.

d) Statutory demands and winding-up procedures issued between 1st March and 20th September 2020 will be reviewed by the court and, if it is determined that the company cannot pay its debts by reason of the impact of Covid-19, the petition will not be granted.

e) There is also also a temporary easing of certain aspects of insolvency law so that directors who continue trading through the pandemic do not face the threat of personal liability for the offence of "wrongful trading".

The UK government has also put huge amounts of money into supporting businesses financially during the worst of the crisis, the main features being:

a) The Job Retention Scheme, under which the government is paying 80% of the wages of 'furloughed' (temporarily suspended) employees up to £2,500 per month. At present this scheme is due to continue until the end of October 2020.
b) The opportunity for businesses to defer payment of certain Value Added Tax liabilities for a year, interest-free; and
c) Government-guaranteed loan schemes aimed at small, medium and larger companies with the opportunity of obtaining loans which are interest and repayment-free for a year.

The longer term

In the longer term, when the pandemic lockdown starts to ease there will inevitably be very many businesses which are struggling financially and, if they do not go under completely, will require financial restructuring. A number of businesses in the hard-hit travel and hospitality sectors, for example, have already announced redundancy exercises and closures, despite the availability of the Job Retention Scheme.

In the UK there are 2 main pre-insolvency procedures which are used to keep the ship afloat whilst restructuring is carried out, which are Administrations and Company Voluntary Arrangements (CVA's).

Administrations are the most common insolvency rescue procedure in the UK. They are governed by the Insolvency Act 1986 as amended, principally by the Enterprise Act 2002. The idea is that, when a company is insolvent (unable to pay its creditors when due), but is considered to be capable of rescue in whole or in part, or has valuable assets or business parts which would be better dealt with in an orderly fashion rather than in the "fire sale" atmosphere of a liquidation, an Administrator can be appointed with wide powers to manage the company and restructure the business. An Administrator can be appointed by the shareholders, the directors, the court or by the holders of certain types of floating charge.

When an Administrator is appointed no officer of the company can exercise any management power without the consent of the Administrator, though the directors do stay in office (unless the Administrator has them removed). This is different from a liquidation, where the directors are automatically removed on the appointment of the liquidator. This is not a merely symbolic difference; in an Administration the experience and commitment of the key directors may well be vital, and certainly they will be needed if the company can be rescued.

The Administrator is tasked with performing his functions as quickly and efficiently as possible, and in accordance with any proposals agreed by the creditors.

The briefest of all administrations tends to be the "Pre-pack" (pre-packaged administration) where the directors have negotiated the sale of the whole or part of the business with a purchaser prior to an Administrator being appointed. The Administrator is then appointed, reviews and decides whether the sale is indeed in the best interests of all concerned, and allows the disposal to proceed. The proceeds of the transaction can then either go towards the funding of a remaining part of the business or, if the whole business has been sold, will ultimately be distributed appropriately in a liquidation.

It should always be borne in mind that Administrators owe fiduciary duties to the company, and have a role in investigating the reasons for the failure of the company and the conduct of the directors, so they do need to act carefully in the context of Pre-packs. Space does not permit a detailed discussion of this important topic in this article, or indeed the rights of employees in these scenarios.

A Company Voluntary Arrangement (CVA) is a swift, statutory- based procedure whereby a majority of the company's creditors can bind the minority to some rescue plan (for example, to be paid X% of their debts in tranches over a given period). This gives the directors the chance of persuading the majority of the creditors to support their rescue plan and prevent the chaos which might occur if creditors were all rushing to separately enforce their debts.

In conclusion, there must be many companies which are currently technically insolvent, or teetering on the brink of insolvency, who, when the temporary assistance and 'moratorium' of the Covid 19 emergency measures are wound down, will very rapidly have to decide whether they have a viable plan for the immediate

future and whether such a plan involves restructuring which might be assisted by one of the foregoing procedures.

Other hybrid operations could be envisaged, such as a share transfer followed by a call back, or allowing the original entrepreneur - once the company is back in business - to regain control of its activities.

For these operations, various price mechanisms are possible. We are thinking in particular of the issue of convertible bonds, an obligation on the part of the seller to reinvest part of the price in the target company, a classic seller's loan etc. Similarly, private takeovers could be combined with the provision of (semi-)public funds (or the granting of bank guarantees), subject to the maintenance or even strengthening of public support measures for companies.

E. ADAPTING OUR PRACTICES AS BUSINESS LAWYERS

As business lawyers, we are adapting our tools and processes to this new situation.

As far as acquisition legal audits are concerned, we are adapting our angles of examination. For example, procurement conditions with key suppliers, the existence of contractual conditions of force majeure, unforeseen circumstances or other conditions will be subject to a more in-depth examination. Similarly, the conditions for granting government economic support measures granted during the COVID-19 period will have to be examined with a view to avoiding a possible claim for reimbursement. In addition to the issues usually examined (environmental law, private data law, etc.), the due diligence questionnaires will also cover compliance with current health conditions and the existence within the company of a continuity plan in the event of a crisis.

On the logistical level, taking into account the high demands of reactivity, we accelerate processes and arrange the usual logistics of a recovery scenario. In this way, due diligence can be carried out completely remotely within the framework of multi-disciplinary and multi-jurisdictional services. Negotiations and closing sessions can be carried out by video-conference, with electronic signatures providing the same guarantees as handwritten signatures. In addition, we recommend the use of technological platforms dedicated to the transfer of companies, allowing us to accelerate and secure operations on behalf of our clients.

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To conclude

In the Chinese language, the word "crisis" is composed of two characters, one representing danger and the other, opportunity. Players with liquidity or acquired financing lines will have a competitive advantage, provided they can act swiftly and wisely.

Through our combined expertise, agility and strategic positioning, ebl's French, English, German and Belgian business law teams can provide you with useful assistance during this period.

Do not hesitate to contact them for any further information !

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