# THE ART OF THE PRE-PACK

THIRD EDITION

Editors
Jacqueline Ingram and Damilola Odetola

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# Publisher's Note

Global Restructuring Review is delighted to publish this new edition of *The Art of the Pre-Pack*, one of our most popular technical guides.

GRR prides itself on being the home for professionals who work in cross-border restructuring and insolvency. We tell them everything they need to know about all that matters. As such, we tend to notice gaps in the literature first: topics that should be covered in detail but haven't been. A few years ago, we realised that 'pre-packs' – private negotiations followed by (the briefest) formal insolvency to cement the deal – are one such area. While the idea is universal, the details vary greatly according to location.

This volume aims to fill that gap, in a pleasingly simple way. It looks past the superficial differences to the underlying common traits. As with so much in this field of professional practice, pre-packs are often a case of the market finding a solution to a problem that nothing else on offer quite solves. In that sense, pre-packs have a certain evolutionary beauty. They're also ephemeral: remove the flaws that make them necessary and they may cease to occur.

But for as long as they are a feature of life, this book will help you master them.

We are grateful to the wisdom of the eminent practitioners who have distilled the art of the pre-pack for us, and we welcome your comments and feedback.

If you enjoy this book, you may be interested in its sister, *The Art of the Ad Hoc*, which is also available on the GRR site and in print. Please write to us at insight@globalrestructuringreview.com for more information.

Last, my personal thanks to the team at Milbank, as editors of this guide, for their vision, and to my colleagues, particularly on the production side, for the elan with which they have brought it to life.

**David Samuels**
London
April 2023

## CHAPTER 5

# France

Saam Golshani and Alexis Hojabr[1]

Historically, the French restructuring and insolvency framework has been perceived as a debtor-friendly framework due to limited creditor involvement and extensive protection granted to the debtor and its shareholders.

Over the past 15 years, however, changes to French legislation have favoured more involvement of creditors in restructuring processes. Lately, insolvency courts have approved a number of lender-led restructurings, illustrating that these changes have effectively made their way into the French restructuring market.

The use of preventive proceedings has also significantly increased and is now a distinctive feature of the French system.

Most importantly, the French restructuring and insolvency framework has recently been amended to, among other things, transpose the EU Directive on Restructuring and Insolvency (the Directive) into French law.[2]

These amendments have been introduced by Ordinance No. 2021-1193, dated 15 September 2021 (the 2021 Ordinance), effective as of 1 October 2021 (subject to limited exceptions) in respect of preventive and insolvency proceedings initiated since 1 October 2021, and Decree No. 2021-1218, dated 23 September 2021 (the 2021 Decree), which implements the 2021 Ordinance.

As the French system already has a strong culture of encouraging preventive restructurings to address financial difficulties at an early stage, the procedural rules have remained largely unchanged and, as opposed to the German Stabilisation

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2 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

and Restructuring Framework for Businesses regime or the Dutch Scheme of Arrangement, no new proceedings have been created for the purpose of achieving the objectives set by the Directive.

However, the way restructuring plans are adopted within existing proceedings has undergone a significant change.

In particular, the 2021 Ordinance introduced: (1) a new concept of 'classes of affected parties', differing materially from the previous 'creditors/bondholders' committees'; and (2) the ability for an insolvency court to adopt a restructuring plan through a cross-class cramdown (while only a regular cramdown was possible under the former rules).

These changes are expected to redefine the balance of the interests at stake, with the following trends anticipated:

- the 'passive' veto right of shareholders in respect of restructuring plans affecting their equity interests should be significantly lessened;
- 'in the money' creditors should generally benefit from greater involvement in the preparation of a restructuring solution; and
- while debtors anticipating difficulties will retain significant control in safeguard and accelerated safeguard proceedings, creditors' 'step in' ability in reorganisation proceedings should now be more tangible (e.g., affected parties will be able to submit alternative plans to be voted on by other affected parties).

The 2021 Ordinance has significantly limited the ability for French courts to impose the infamous 10-year term-out on dissenting creditors as part of safeguard proceedings, with the aim of ending the practice of 'hostile' safeguard proceedings that have enabled certain debtors to implement major debt restructurings on fairly aggressive terms.

The French framework's strong focus on preventive restructuring tools and ensuring consensus among affected parties has led to prepackaged solutions being the natural outcome of many restructuring processes.

Prepackaged solutions initially emerged from the practice of insolvency professionals. Procedural rules were then introduced to facilitate the implementation of these solutions while ensuring that the legitimate interests of the various stakeholders are sufficiently accounted for.

The idea underpinning French prepackaged plans is that preventive proceedings should be 'continued' before an insolvency court for implementation purposes if a restructuring solution has found sufficient support among stakeholders but cannot be implemented as part of a consensual deal.

Following a brief overview of the restructuring proceedings available under French law, this chapter focuses on prepackaging tools concerning both the implementation of traditional restructuring plans – through debt restructuring, for example – and comprehensive disposal of the debtor business.

## Brief overview of key restructuring tools

Under French law, there are two main categories of proceedings: amicable out-of-court proceedings and formal court-administered proceedings.

The first category includes *mandat ad hoc* and conciliation proceedings.

- *Mandat ad hoc* proceedings are confidential out-of-court proceedings, pursuant to which the court appoints a restructuring practitioner to assist a debtor in confidential negotiation with all or some of its stakeholders, under the supervision of the president of the court.
- Conciliation proceedings are confidential out-of-court proceedings, pursuant to which the court appoints a restructuring practitioner to assist a debtor that is solvent or has been insolvent for no more than 45 days during confidential negotiation with all or some of its stakeholders, under the supervision of the president of the court.

The second category includes safeguard, reorganisation and liquidation proceedings.

- Safeguard proceedings are formal court-administered proceedings. These are only available to debtors that are not cash flow insolvent.
- Reorganisation and liquidation proceedings must be commenced if the debtor is cash flow insolvent according to the French insolvency test, defined as the debtor's inability to pay its debts as they fall due with its immediately available assets (taking into account available credit lines and moratoria). If the debtor is not facing cash flow insolvency, it has the option to request consensual proceedings or safeguard proceedings. However, a distressed debtor is required to file a petition for reorganisation or liquidation proceedings within 45 days of the date of insolvency, unless it has requested the court to appoint a conciliator. Reorganisation and liquidation proceedings can also be initiated at the request of the public prosecutor or any creditor (unless conciliation proceedings are ongoing).

If a debtor facing hardship is not cash flow insolvent, it has the option to request the initiation of either consensual proceedings or regular safeguard proceedings.

Hybrid proceedings, known as accelerated safeguard proceedings, are also available to debtors under certain conditions that are discussed below.

## Out-of-court proceedings

As a matter of principle, market practice promotes out-of-court proceedings over court-administered insolvency proceedings, which are often associated with litigation and business disruption.

*Mandat ad hoc* and conciliation proceedings are preventive, amicable and confidential proceedings with limited court involvement, conducted under the aegis of a court-appointed officer supervised only by the president of the court.

These consensual proceedings are generally opened with a view to reaching a consensual outcome.

The duties of the *mandataire ad hoc* or the conciliator are determined within the order of the president of the court commencing the proceedings.

The *mandataire ad hoc* or conciliator is usually appointed to facilitate negotiations with the debtor's creditors (or other stakeholders), but they cannot force them to accept any proposal: the restructuring agreement will consequently be negotiated on a purely consensual and voluntary basis.

*Mandat ad hoc* proceedings do not trigger an automatic stay of payment and enforcement actions. Creditors are not barred from taking legal action against the debtor to recover their claims, but those that have accepted to take part in proceedings usually agree to abstain from this type of action while proceedings are ongoing.

Under conciliation proceedings, no automatic stay applies, but the president of the court may: (1) stay enforcement actions and reschedule due claims for a maximum of two years with respect to creditors that have attempted to enforce their claims or that have not granted a standstill if so requested by the conciliator; or (2) reschedule claims that are not yet due and payable, for the duration of the proceedings (i.e., a maximum of five months) for creditors that have not granted a standstill if so requested by the conciliator.

Generally, banks and credit funds tend to take a supportive and proactive approach in conciliation proceedings to the extent that debtors agree to provide a proper independent business review and that shareholders are open for discussions in relation to additional support or dilution.

Under amicable proceedings, the agreement of every relevant stakeholder is required to implement the restructuring solution (unless specific voting rules and majorities exist, for example, under the terms of debt documents – but these often provide for unanimous or super majority consent in relation to important decisions such as debt deferral or write-offs).

Conciliation proceedings may be opened for a period of up to four months and can be extended by another month in exceptional circumstances. *Mandat ad hoc* proceedings are not limited in time. In practice, debtors often combine the use of *mandat ad hoc* and conciliation proceedings.

*Mandat ad hoc* proceedings are usually commenced first, as they are not subject to any time constraint. If the debtor feels that some creditors may take enforcement action or that an agreement with its creditors is about to be found, it may apply to convert *mandat ad hoc* proceedings into conciliation proceedings. Agreements reached in conciliation (as opposed to agreements entered into as part of *mandat ad hoc* proceedings) can be either acknowledged by the president of the court or approved by the court.

Where investors would be willing to provide new money, goods or services to ensure the continuation of the debtor's business, it could be necessary to convert *mandat ad hoc* proceedings into conciliation proceedings to enable new money providers to benefit from the 'new money' privilege granting the corresponding claims a preferential ranking in the liquidation waterfall and protection from term-out or cramdown in subsequent proceedings – the new money privilege can only be granted by the court as part of a court-approved agreement.

## Formal court-administered proceedings

### *Safeguard proceedings*

Safeguard proceedings are public court-administered proceedings commenced at the request of a debtor experiencing difficulties that it cannot overcome on its own, if it is not already insolvent. These proceedings aim to facilitate the continuation of the business, the protection of employment and the repayment of creditors.

In that respect, the debtor will prepare, with the assistance of the judicial administrator, a draft restructuring plan to be negotiated with and submitted to its stakeholders, either through an individual consultation with each creditor or through a class-based consultation (see below).

During these proceedings, the debtor benefits from a stay on payments and enforcement, which prevents creditors from suing the debtor for payment and enforcing security interests.

Because these are court-administered proceedings, specific rules will apply in relation to, among other things, the management of the debtor business (in particular, actions falling outside the ordinary course of business will have to be judicially authorised), the payment of certain creditors, the continuation of ongoing contracts and the determination of creditors' claims.

### *Reorganisation proceedings*

Reorganisation proceedings are commenced upon the request of an insolvent debtor, a creditor or the public prosecutor. One administrator (or several administrators) will be appointed by the court to assist the debtor with management decisions or take over the full management of the debtor.

The administrator will prepare the reorganisation of the debtor and will produce a restructuring plan, with the assistance of the debtor (rules governing the adoption of the restructuring plan in safeguard are applicable (subject to certain exceptions, detailed below)). If a restructuring plan is not possible, the administrator may receive instruction from the court to organise the comprehensive disposal of the business through an open bid process. Although the court can sanction either process, it is required to favour a restructuring plan over comprehensive disposal, where possible.

### *Liquidation proceedings*

Liquidation proceedings may be initiated by an insolvent debtor, a creditor or the public prosecutor if the debtor's recovery is manifestly impossible. A liquidator is appointed by the court, and vested with the power to represent the debtor and to perform the liquidation operations that mainly consist of the disposal of the assets and the allocation of disposal proceeds to creditors whose claims have been admitted.

In that respect, the liquidator may organise a comprehensive disposal plan (in which case, certain rules relating to the continuation of the business will apply, notwithstanding the ongoing liquidation) or disposal of the individual assets.

## Adoption rules for restructuring plans under French law

Setting aside liquidation proceedings, as part of court-administered proceedings, creditors (and, if applicable, equity holders) must be consulted on the treatment that their respective debt or equity interests would receive under the proposed restructuring plan (e.g., debt write-offs, deferrals or debt-for-equity-swaps) prior to the plan being approved by the court.

The rules governing consultation will vary depending on the size of the business.

### *Standard consultation*

Under the standard consultation process, stakeholders receive individual proposals (subject to certain rules and exceptions) and must respond within a certain time frame.

Depending on the nature of the contemplated impairment, the absence of response is regarded as either consent or refusal of the proposal.

Dissenting creditors may face a 10-year term-out on their claims, which may be imposed by the court.

### *Class-based consultation*

Mandatory class-based consultation applies to debtors that, on the date of the petition for commencement of the relevant proceedings, exceed either of the following thresholds: (1) 250 employees and €20 million in net turnover; or (2) €40 million in net turnover (at either the debtor level or together with subsidiaries controlled by the debtor).

Alternatively, class-based consultation can be conducted on a voluntary basis at the debtor's request (or the judicial administrator in reorganisation proceedings) and with the authorisation of the supervisory judge if the thresholds are not met.

Only the affected parties are entitled to vote on the draft plan: the creditors whose rights are directly impaired by the proposed plan and equity holders (including shareholders and holders of securities giving future rights to the share capital) if their equity interests, the debtor's articles of association or by-laws, or their rights would be modified by the proposed plan.

The court-appointed administrator is responsible for establishing the different classes and informing each affected party that it is a member of a class.

The court-appointed administrator must, based on objective and verifiable criteria, allocate the affected parties in classes representing a sufficient commonality of economic interest in compliance with the following conditions:

- creditors whose claims are secured by security interests *in rem* – in respect of those claims – and other creditors must be allocated to different classes;
- subordination agreements entered into before the commencement of the proceedings shall be complied with if they have been brought to the attention of the court-appointed administrator;
- equity holders must be separated into one or several classes of their own; and
- claims arising from employment contracts, pension rights and maintenance claims cannot be affected by the plan. In respect of creditors secured by a security trust granted by the debtor, only the amount of their claims not secured by the trust is considered.

The formation of the classes can be challenged by the dissenting affected parties. Challenges and any subsequent appeals are to be filed and ruled on within a short period of time.

Each class votes on the restructuring plan with a two-thirds majority of the voting rights (determined by reference to the amount of the claims (or rights)) being required.

If applicable, the class or classes of equity holders will vote under the rules governing shareholders' or equity holders' general or special meetings.

If the plan is adopted by each of the classes, it will be submitted to the court, which shall verify that the following conditions are met:

- the classes have been duly formed in accordance with the applicable rules;
- affected parties, sharing a sufficient commonality of interest within the same class, are treated equally and in proportion to their claims or rights;
- the plan has been duly notified to all the affected parties;
- if there are dissenting affected parties, the plan meets the 'best interests of creditors' test, which would be met if no dissenting affected party is worse off under the plan than:
    - in distribution of liquidation proceeds: in liquidation proceedings or after a comprehensive disposal of the debtor's business in judicial proceedings; or
    - pursuant to a best-alternative scenario;
- where applicable, any new financing is necessary to implement the plan and does not excessively impair the interests of the affected parties; and
- the interests of all affected parties are sufficiently protected.

The court may refuse to adopt the plan if it does not offer a reasonable prospect of avoiding the debtor's insolvency or of ensuring the viability of the business.

The judgment sanctioning the plan renders the plan enforceable against all (*erga omnes*), including the affected parties that did not vote on, or voted against, the adoption of the plan.

Alternatively, the court may sanction a plan – with the prior approval of the debtor in safeguard proceedings – despite one or several classes voting against it, subject to the following additional conditions:

- the plan is approved by:
    - a (numerical) majority of classes (necessarily including a class of secured claims or a class with a higher ranking than unsecured creditors class); or
    - at least one class other than a class of equity holders or a class that would reasonably be expected to be 'out of the money' based on a determination of the debtor's going-concern value and if the rules governing the allocation of proceeds in judicial liquidation or as part of a comprehensive disposal plan were to be applied;

- the plan complies with the absolute priority rule (i.e., the claims of dissenting classes shall be discharged 'in full' by 'same or equivalent means' where a junior class is entitled to receive any payment or to keep any interest under the plan (with possible exceptions where necessary, at the court's discretion, and provided these exceptions do not unfairly prejudice affected parties)); and
- the plan does not permit a class to receive or retain more than the total amount of its receivables or interests.

Where one or more classes of equity holders have been formed and have not approved the plan, the plan can be imposed on the dissenting equity holders if:

- any of the thresholds triggering mandatory class-based consultation are met (i.e., voluntary application of the class-based consultation will not allow a cramdown of equity holders' class or classes (see above));
- the relevant equity holders would reasonably be expected to be 'out of the money' based on a determination of the debtor's going-concern value and if the rules governing the allocation of proceeds in judicial liquidation or as part of a comprehensive disposal plan were to be applied;
- a preferential subscription right is given to existing shareholders in relation to any share capital increase in cash contemplated by the plan; and
- the plan does not provide for the forced transfer of all or part of the rights of the dissenting class or classes of equity holders.

Adoption of a restructuring plan pursuant to the class-based consultation is broadly similar in safeguard or in reorganisation proceedings, subject to certain specificities for reorganisation proceedings where the affected parties' step-in ability is enhanced. In particular, in reorganisation proceedings:

- if the debtor does not meet the required thresholds, the authorisation to rely on a class-based consultation may also be requested from the supervisory judge by the judicial administrator on its own, without the debtor's approval (in addition to being requested by the debtor);
- any affected party may submit an alternative plan for classes to vote on (this right only lies with the debtor in safeguard);
- if the plan has not been approved by all classes of affected parties, the court can decide to apply the cross-class cramdown mechanism at the request of any affected party (in addition to the debtor or the judicial administrator with the debtor's consent, as in safeguard); and

- if no plan approval can be obtained through the class-based consultation, a new draft plan may be submitted through the standard consultation route (with a potential 10-year term-out being imposed on dissenting parties). This fall-back option no longer exists in safeguard because of the introduction of the 2021 Ordinance.

## Can a restructuring be implemented on a prepackaged basis?

As highlighted above, the French system is generally a consensual system that offers efficient amicable out-of-court proceedings to debtors to enable them to remedy hardships well before they enter the zone of insolvency.

The opening of out-of-court consensual proceedings is never mandatory under French law and remains at the discretion of debtors. Nevertheless, these proceedings present numerous advantages for debtors (e.g., mandated confidentiality, assistance of an experienced insolvency practitioner, reasonable costs, deterrent effect on creditors' enforcement actions, protection against *ipso facto* provisions, mitigation of directors' liability risk) with limited disadvantages, especially as court involvement is unobtrusive with respect to the debtor's business. As a result, debtors' first choice is often to request the opening of amicable proceedings, even if insolvent (in which case, only conciliation proceedings may be opened under strict conditions).

However, limited court involvement also implies that no solution can be implemented if the required consent is not obtained.

As such, out-of-court proceedings are often used as an initial step to initiate and prepare solutions that may need to be implemented as part of subsequent court-administered proceedings if no agreement can be found.

To overcome the opposition of dissenting creditors preventing the adoption of a restructuring agreement negotiated in the context of amicable proceedings, practitioners initially used safeguard and reorganisation proceedings to benefit from the cramdown ability and force the adoption of restructuring plans. However, recourse to full-fledged court-administered insolvency proceedings – which are public and affect debtors' business counterparts – can prove cumbersome and risky for the underlying business, in particular when implemented only to overcome the refusal of a few creditors or aggressive holdout strategies.

Law No. 2010-1249 of 22 October 2010 therefore introduced new proceedings – known as financial accelerated safeguard proceedings – whose purpose was to allow for prepackaged plans to be implemented through a fast-tracked process following conciliation proceedings, with limited impact on the debtor's business as trade creditors remain unaffected by these proceedings.

French legislation has recognised the practice of prepackaged sales. Order dated 12 March 2014 introduced the procedural ability for a debtor to prepare the disposal of all or part of its business in the context of amicable proceedings (through a traditional mergers and acquisitions (M&A) process) that may be implemented in the context of subsequent reorganisation or liquidation proceedings, without launching an additional bidding process, thus enabling the rapid circumvention of any legal impediments related to the insolvency of the seller.

The rules applicable to prepackaged restructuring plans or to prepackaged disposal plans are further described below, but both sets of rules rely on the same ideal that the continuity between confidential amicable proceedings – allowing for a careful preparation phase – and fast-tracked court-administered proceedings, which are initiated to enable scrutiny over the proposed solution, offer an effective framework that considers the various interests involved.

## Prepackaged restructuring plans

### *The premises of the French prepackaged plan: Autodis case*

Even before the introduction of specifically designed prepackaged proceedings, practitioners found a way to use existing proceedings – with the combination of conciliation and safeguard proceedings – to carry out prepackaged plans. The restructuring of the Autodistribution group, which took place in 2009, was the first meaningful illustration of this.

In this case, the leveraged buyout documentation provided that significant restructuring steps were subject to the unanimous consent of Autodis's lenders, which made it difficult for Autodis to implement a restructuring agreement in the context of amicable proceedings. As a unanimous vote was impossible to reach, given the plurality of creditors, the only solution was to try to obtain the agreement of a two-thirds majority of the members of (former) creditors' committees in the context of safeguard proceedings.

In this context, safeguard proceedings were opened while the terms and conditions of the financial restructuring were decided by the debtor and its main creditors before the commencement order, pursuant to a memorandum of understanding concluded under the aegis of a *mandataire ad hoc*. In contrast to defensive safeguard proceedings – which were traditionally opened for the purpose of an automatic stay on payment and enforcement – the main advantage of safeguard proceedings in this case was the possibility of using the cramdown mechanism to impose the adoption of the plan on the dissenting creditors.

Insofar as the restructuring plan had been prepared before the opening of the proceedings, the implementation of the plan took no longer than six weeks, with a vote in committee organised less than a month after the commencement

order and a judgment approving the plan 15 days later. The efficiency of the process mitigated the value-eroding effect traditionally induced by public court-administered proceedings.

Despite the lack of dedicated proceedings available at the time, the wide range of tools offered by French law had permitted the implementation of a prepackaged plan and brought to light its numerous advantages.

### *Introduction of specifically designed prepackaged proceedings: accelerated safeguard proceedings*

Following the above case, French legislation has enshrined the practice by introducing two new proceedings: accelerated financial safeguard proceedings[3] and accelerated safeguard proceedings.[4]

The 2021 Ordinance has merged accelerated financial safeguard proceedings with accelerated safeguard proceedings – for simplification purposes – but they may still be limited to financial creditors.

### *Opening conditions*

Accelerated safeguard proceedings are specific court-administered proceedings that can only be opened at the request of a debtor in conciliation proceedings that can demonstrate that it has prepared a restructuring plan aimed at ensuring the continuity of its business and that is likely to receive sufficiently broad support from the affected parties to allow its adoption within a short period of time.

Therefore, debtors may enter accelerated safeguard proceedings on an insolvent basis if less than 45 days have passed between insolvency and the request for the opening of the preliminary conciliation proceedings.

The simple threat of accelerated safeguard proceedings is sometimes sufficient to implement the contemplated restructuring outcome during conciliation proceedings. The mere possibility of implementing a cramdown of dissenting creditors is generally regarded as facilitating a reasonable consensus to emerge among creditors and incentivising the debtor to submit sensible proposals to its main creditors to obtain their support.

3 Law dated 22 October 2010.

4 Order dated 26 September 2014.

In regular safeguard proceedings (assuming thresholds for class-based consultation are met (see above)), the court can no longer impose a term-out on dissenting creditors if the plan is not approved (i.e., there is no fall-back option). This important change introduced by the 2021 Ordinance is expected to considerably lessen the appeal of regular safeguard proceedings for debtors.

As an additional condition, these proceedings are only available to debtors whose financial statements have been certified by an auditor or drawn up by a chartered accountant.

#### *Procedural rules and main advantages*

The regime applicable to regular safeguard proceedings is broadly applicable to accelerated safeguard proceedings, subject to certain exceptions.

Three main differences – which are also the main advantages – should, however, be noted.

First, these proceedings only take effect in respect of parties affected by the draft plan prepared in conciliation proceedings, thus limiting disruption to trade or business counterparties of the debtor if they are not affected by the draft plan.

Second, the legal duration of accelerated safeguard proceedings is two months, which may be extended to a maximum duration of four months. This mitigates the uncertainty and value-eroding effects of court-administered proceedings.

Third, the draft plan is submitted to affected parties through a class-based consultation, regardless of any applicability threshold, thus enabling cramdown and cross-class cramdown of dissenting creditors as per the rules set out above.

### Illustrative cases

The restructuring of manufacturing company Vallourec, in 2021, may be the most significant illustration of a prepackaged plan. In the context of *mandat ad hoc* proceedings, Vallourec had secured a lock-up agreement with its main creditors on the basis that they would support the contemplated restructuring plan. This restructuring plan was then implemented in the context of subsequent safeguard proceedings after the vote of the former creditors' committees.

The restructurings of IKKS group (2019) and Pierre & Vacances (2022) are also notable examples of the use of prepackaged restructuring plans in France.

## Pre-pack sale

### Overview of disposal plans for distressed debtors

As a general principle, a comprehensive distressed disposal of business is organised in the context of reorganisation proceedings if the adoption of a restructuring plan is unlikely.

It can also be implemented in the context of liquidation proceedings (with a temporary continuation of the business activities) and, to the extent the contemplated disposal relates to certain (but not all) business activities, in the context of safeguard proceedings.

A disposal plan provides for the transfer of assets, contracts and employment contracts of the debtor to a third-party purchaser.

As the disposal plan is a judicially approved asset deal, the debtor's liabilities are not transferred to the purchaser of the distressed business (subject to certain exceptions).

A distressed disposal plan process is construed as an open bidding process where there is no exclusivity for any of the bidders. The contemplated sale is publicly advertised and a formal offer solicitation period is opened.

At the end of the solicitation period, the court will review the offers and approve the offer (or combined offers) that provides the best prospects in terms of employment, continuation of activities and repayment of creditors, and that presents sufficient certainty as to its implementation.

Disposal plans are often conducted in situations where the future of significant numbers of employees is at stake; because the alternative is liquidation proceedings, the interest of creditors tends to be lower priority than saving employment as disposal proceeds are most frequently lower than the amount of outstanding debtor liabilities.

## The pre-pack sale legal framework: preparation of the business disposal in the context of consensual proceedings

Although disposal plans are essentially public and open processes, French law provides for these to be prepared within confidential amicable proceedings.

At the request of the debtor and after the creditors taking part in the proceedings have been consulted on the matter, conciliation proceedings may be used to organise the partial or total disposal of debtor activities, through a disposal plan that may be implemented by way of subsequent safeguard, reorganisation or liquidation proceedings. Although not expressly provided for by law, this mission could also be entrusted to the *mandataire ad hoc*.

The French Commercial Code suggests that the mission to organise the sale of the business should be assigned to the conciliator during conciliation proceedings if an agreement cannot be reached with the creditors and not as a first choice, but this point remains undecided as a matter of French law.

The court-appointed officer will initiate a process for the acquisition of the debtor's business. In contrast to the bidding process provided for in court-administered proceedings, this bidding process does not have to be public.

It is, however, essential that sufficient publicity is given to the sale having regard to the debtor's activities. As a general rule, an M&A adviser or an investment bank would be appointed to run the process, identify and contact potential acquirers, and ensure that they are in position to effectively consider the acquisition and to provide offers.

It is often difficult to achieve the right balance between the confidentiality that governs amicable proceedings and the need for sufficient publicity to ensure that a potential purchaser is found.

Provided they comply with certain requirements, offers received by the *mandataire ad hoc* or the conciliator may, after consultation with the public prosecutor, be considered by the court in the context of safeguard, judicial reorganisation or judicial liquidation proceedings without a public open bidding process, therefore enabling the court to rule on the offers within an accelerated timeline (usually a few weeks).

The opening of subsequent insolvency proceedings is not mandatory if the contemplated disposal can be implemented within the framework of a share deal or an asset deal in which the debtor's liabilities could be fully paid up as a result. However, in practice, reorganisation or liquidation proceedings would be generally opened to benefit from the favourable framework associated with these proceedings.

In particular, favourable provisions limiting the need to obtain third-party consent (e.g., from lenders or secured creditors (subject to certain exceptions), business counterparties or certain stakeholders benefiting from pre-emptive rights) apply. However, not all legal impediments are removed by the judicial nature of the disposal plan, and typical conditions for M&A deals (e.g., merger control processes, foreign investment reviews, specific regulatory approvals) may be relevant in this context.

Prepackaged sales are therefore particularly relevant for complex or multi-jurisdictional transactions or industrial or heavily regulated assets and activities to allow for the necessary preparation and coordination phase (which may take several months), as the court may ultimately only review offers that are no longer subject to meaningful conditions as at the review date.

### Implementation in the context of subsequent insolvency proceedings

After satisfactory and (almost) unconditional offers are received in the context of conciliation or *mandat ad hoc* proceedings, the debtor will usually request the opening of reorganisation or liquidation proceedings.

Although the opening of these proceedings is only justified by the implementation of the pre-negotiated disposal, the debtor must demonstrate that it is insolvent as an opening condition.

The conciliator or *mandataire ad hoc* who supervised the preparation process is, in most cases, appointed as judicial administrator in the subsequent insolvency proceedings but this is not a legal requirement. This ensures a natural continuity between the preparation phase and the effective implementation of the disposal.

The court will ensure that sufficient publicity has been given to the disposal preparation and that offers received comply with legal requirements set out in this respect. The public prosecutor is required to issue an opinion on the same.

Provided the process has been run in a satisfactory manner for the court, the court may decide not to open a public bidding process and immediately set a date for the examination of the offers.

As with any disposal in the context of insolvency proceedings, and to the extent that dismissals on economic grounds may have to be conducted following the disposal, the employees' representative shall be informed and consulted on the bids submitted and on potential dismissals.

## Advantages of the pre-pack framework

The main advantage of using the pre-pack sale framework lies in the confidentiality attached to out-of-court consensual proceedings during the preparation phase and the speed of subsequent insolvency proceedings.

In particular, public insolvency proceedings generally have a negative impact on the value of a business. The adverse effects of the proceedings may not allow for the best valuation of the debtor's assets to arise from a bidding process and may result in significantly discounted bids being made, especially as distressed disposals are made on a non-recourse basis.

The preparation of the disposal within a confidential framework gives time to potential buyers to run a thorough assessment of the debtor's business.

## Illustrative cases

Since the introduction of the pre-pack sale framework in French law, some significant disposals have been successfully implemented within this framework, such as in respect of the businesses of FRAM, NextiraOne, Tati, William Saurin and Recylex. In each of these cases, an investment bank had been mandated to coordinate the process and seek potential buyers.

There have also been cases – such as *Doux* and *Toys 'R' Us France* – where potential buyers were identified and offers were submitted during conciliation proceedings, but a public bidding process was nevertheless initiated during the subsequent insolvency proceedings as the court was not satisfied with the offers made in the preparation phase.

## Conclusion

Over the past 10 years, France has introduced a new range of restructuring tools at the crossroads of amicable out-of-court proceedings and court-administered proceedings, contributing to the development of prepackaged solutions.

The practice of prepackaged plans is now well established for major situations and may even intensify under the new French restructuring framework.

Nevertheless, the French 'distressed M&A' market and ecosystem remain moderately developed compared to some neighbouring jurisdictions, rendering prepackaged sales an underused tool to date, despite the existence of an appropriate legal framework.

'Pre-packs' remain important in the restructuring world, but how one gets one done varies greatly from place to place. This guide aims to simplify the subject by cutting through the surface elements to the underlying common traits.

*The Art of the Pre-Pack* draws on the wisdom of 16 pre-eminent practitioners from around the world to distil the essence of a successful pre-pack. It is a companion to Global Restructuring Review's *The Art of the Ad Hoc*, on how to work successfully with ad hoc committees. Find both volumes on www.globalrestructuringreview.com.

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