France

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Brief overview of insolvency proceedings

Enhanced by no less than five reforms over the past 10 years, French insolvency law now provides a comprehensive set of tools designed to efficiently handle the legal, economic and financial difficulties that companies are facing. The whole insolvency architecture hinges on the key concept of cessation of payments (ie, inability of the debtor to pay its debts as they fall due with its available assets).

Court-assisted restructuring proceedings

Common features

Mandat ad hoc and conciliation proceedings are often referred to as amicable proceedings since their purpose is to facilitate the negotiation of an agreement between the debtor and its creditors, which usually consists of basic measures such as rescheduling or reducing the debtor's indebtedness, but may also implement sophisticated schemes such as debt-for-equity swap.

Negotiations are undertaken by a court-appointed mediator usually proposed by the debtor within the list of judicial administrators.

The attractiveness of amicable proceedings depends on:

- discretion, since stakeholders are bound by a duty of confidentiality (even though the statutory auditor has to be notified of the commencement order);
- consensus, as creditors cannot be coerced to accept any proposal and those not willing to take part cannot be bound by the agreement; and
- voluntariness, insofar as only the debtor can request the appointment of a mediator who will not be able to interfere with its management.

Mandat ad hoc

Mandat ad hoc's effectiveness relies on flexibility. The President of the Court may appoint a *mandataire ad hoc* upon the request of a debtor that, though not insolvent, encounters difficulties. Both the *mandataire ad hoc*'s mission and duration are freely determined by the President of the Court having regard to the debtor's application.

Conciliation proceedings

Conciliation proceedings are more closely regulated. Such proceedings apply to debtors that, though not insolvent for more than 45 days, are facing with actual or foreseeable legal, economic or financial difficulty. The conciliator is appointed for a period not exceeding four months, which can be extended by the President of the Court so the proceedings can last up to five months.

The agreement reached, which is intended to put an end to the difficulties faced by the business, may be either acknowledged and made enforceable by the President of the Court or approved by the Court. Only the judgment approving the agreement is public.

However, the agreement's approval enables: (i) to grant a legal privilege in case of subsequent insolvency proceedings to creditors that provided new money at the time of the conciliation proceedings ('new money privilege'); and (ii) to prevent the clawback period from starting prior to this judgment.

Combination of amicable proceedings

Since *mandat ad hoc* is not subject to any time constraint, it is usually advisable to conduct negotiations within this framework. Then, when an agreement is about to be reached, the debtor shall request for the opening of conciliation proceedings in order for the arrangement to be either acknowledged or approved by the court.

Court-controlled rescue proceedings

French insolvency law offers a range of court-controlled proceedings, each of them being designed to handle a specific degree or nature of difficulty. The emergence of 'pre-pack' proceedings strengthens the whole legal arsenal, creating a bridge between court-assisted and court-controlled proceedings.

Safeguard proceedings

Safeguard proceedings are commenced at the request of a debtor that can prove that, although it is not insolvent, it has difficulties that it is unable to overcome on its own.

The debtor still runs the business (even though an administrator can be appointed to either supervise or assist the management), while preparing a safeguard plan to be negotiated with its creditors.

The negotiations take place through two creditors' committees, gathering, respectively: (i) all credit institutions and holders of bank debt, and (ii) main trade creditors.

The different bondholders are all gathered in a single general assembly.

For the first time in June 2017, safeguard proceedings have been considered as a 'foreign main proceeding' under the US Bankruptcy Code, allowing a company to file for its recognition in the US under Chapter 15.

Accelerated safeguard and accelerated financial safeguard proceedings

Both proceedings are opened at the request of a debtor[1] involved in ongoing conciliation proceedings justifying that the restructuring plan negotiated during conciliation proceedings is already supported by a sufficient majority of its creditors to ensure its adoption by the creditors' committees[2] and the general assembly of bondholders, if any. The plan is then submitted to the court for its approval within a short time period (three months in accelerated safeguard and one month in accelerated financial safeguard).

Reorganisation proceedings

Reorganisation proceedings are commenced upon the request of a debtor that is insolvent, a creditor or the public prosecutor.

As in safeguard proceedings, the debtor generally stays in possession while preparing a reorganisation plan with its creditors. If it appears that a reorganisation plan is not possible, the court may decide to have the debtor's business sold through an open bid process organised by the judicial administrator.

Reorganisation proceedings provide greater involvement of the judicial administrator, who can be appointed in rare cases to administer the company.

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Judicial liquidation proceedings

Judicial liquidation proceedings apply to a debtor that is insolvent and whose restructuring is obviously impossible.

The debtor is no longer in possession, and the liquidator is therefore charged to sell the assets as a whole or piecemeal.

Combined use of court-assisted and court-controlled proceedings

The introduction of pre-pack proceedings to the legal arsenal came alongside the increasing use, during the financial crisis, of court-assisted proceedings by distressed companies, especially leveraged buyouts where a debtor could not obtain unanimous consent considering the multiplicity of its creditors (banks, collateralised loan obligations, hedge funds, alternative funds).

They consist of the combination of a negotiation phase in conciliation proceedings (which are confidential) and through the vote of the plan by the creditors' committees and the general assembly of bondholders in safeguard proceedings to cram down dissenting minority creditors.

Procedural timelines are kept to a minimum to limit the negative impact on the business of the opening of court-controlled proceedings.

Accelerated financial safeguard is suited to restructure only financial debts without freezing the suppliers' debts.

Shaped by the insolvency practitioners, pre-pack proceedings also include a pre-pack sale particularly suited when the debtor's indebtedness does not make a reorganisation plan possible. This specific type of pre-pack seeks potential purchasers under *mandat ad hoc* or conciliation proceedings, taking advantage of the confidentiality, and then, once a satisfying offer is made, in implementing the sale of the company's business within a few weeks in subsequent reorganisation or judicial liquidation proceedings.

Creditors within insolvency proceedings

Court-assisted restructuring proceedings

Given their specific nature, the opening of amicable proceedings does not trigger the same effects as the opening of safeguard or reorganisation proceedings: there is no automatic stay and no need for creditors to file a proof of claim.

However, even if the conciliator cannot coerce the creditors to negotiate, the court may grant the debtor a grace period for a maximum period of 24 months if a dissenting creditor takes legal action or sends a formal notice to pay.

Contractual provisions that would trigger detrimental consequences (such as acceleration clauses) for the debtor upon the sole opening of amicable proceedings are considered null and void.

Court-controlled rescue proceedings

Freezing of debts and claims

As of the opening of such proceedings, the debtor is prevented from making payments (and creditors from demanding payments) in respect of any debts incurred before the commencement of the insolvency proceedings, except in limited circumstances such as the set-off of closely related claims.

Meanwhile, all actions and proceedings against the debtor will be stayed insofar as they relate to the payment by the debtor of any debt incurred prior to the insolvency proceedings or the termination of a contract for default (as for amicable proceedings, events of default related to insolvency or similar events will be null and void).

These prohibitions are subject to limited exceptions (see 'Securities immune to insolvency proceedings', below).

Assessment of liabilities

Creditors are required to file their claims within two months (four months for creditors domiciled outside France) from the publication of the judgment opening the proceedings in the Bulletin Officiel des Annonces Civiles et Commerciales.

Failure to file the claim within this time limit results in the relevant creditors being barred from receiving distributions in the insolvency proceedings.

Specific provisions for special claims

Claims arising for the needs of the proceedings or the observation period, or as consideration for a service provided to the debtor during this period shall be paid as they fall due.

Claims benefiting from the new money privilege are highly ranked just after the employees' super-priority claims and court fees incurred after the judgment commencing the insolvency proceedings, and they cannot be rescheduled or reduced by the reorganisation plan.

Participation of the creditors in the outcome of safeguard and reorganisation proceedings

The creditors' committees and the general assembly of bondholders provide the discussion and negotiation interface between the debtor and its creditors.

The plan is approved when members of each committee voting in favour of the plan account for at least two-thirds of the outstanding claims of the creditors expressing a vote. Any member of one of the two creditors' committees (the bondholders have not been granted such possibility), can propose an alternative safeguard or reorganisation plan to the debtor's plan.

The plan must take into account subordination agreements entered into prior to the opening of the proceedings. Each creditor must inform the judicial administrator of the existence of any agreement that makes the exercise of its vote subject to any conditions, or whose purpose is the full or partial payment by a third party of its claim.

Debt-to-equity swap

If a change in the equity structure seems to be the sole solution to avoid cessation of business, an opposing shareholder may be diluted by a capital increase approved at a shareholder assembly convoked by a court-appointed trustee, who will exercise the voting rights of the opposing shareholder.

The court may also coerce such dissenting shareholder to sell its shares of the debtor to a new shareholder who commits to comply with the restructuring plan. An expert will be designated by the court to estimate the value of the shares.

The dilution or sale process applies in cases where: the debtor and the companies it controls have more than 150 employees; liquidation would cause serious disruption to national or regional economy and to regional employment; and a dilution or sale process is the only solution to avoid cessation of business. These conditions may seem restrictive, but were necessary in order to abide by the French Constitution, which protects, among other fundamental rights, the right of ownership.

Ranking of creditors in judicial liquidation proceedings

The proceeds of the realisation of the assets are distributed among creditors in accordance with the statutory order of priority:

- employees' super-priority claims, being wages (including certain allowances and holiday pay) for the 60 days prior to the judgment commencing insolvency proceedings;
- court fees incurred after the judgment commencing the insolvency proceedings;

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- claims of creditors benefiting from new money privilege;
- claims of secured creditors with the benefit of mortgages and pledges that give a right of retention over the charged assets limited to the proceeds of the realisation of the charged assets;
- certain debts incurred by the debtor after the opening of the insolvency proceedings that meet the criteria provided for by law, including the expenses of the insolvency proceedings; and
- other claims.[3]

Where assets are sold piecemeal, several separate rankings shall apply depending on the nature of the asset.

Creditors secured by pledges may escape from the ranking of creditors by requesting the court the assignment of the encumbered asset prior to the authorisation to sell this asset granted by the supervising judge.

Securities immune to insolvency proceedings

Despite the insolvency proceedings, some securities remain particularly effective.

First, the encumbered assets were, prior to the opening of insolvency proceedings, transferred as guarantee outside of the debtor's estate. These assets are therefore outside the scope of insolvency proceedings allowing the creditor to freely enforce its security. This is the case with *fiducie*, Dailly assignment of receivables and leasing.[4]

Secondly, the encumbered assets appear necessary for the purpose of the efficient conduct of the proceedings or the pursuit of the debtor's business activity. During safeguard and reorganisation proceedings, the supervising judge may therefore authorise the payment of debts incurred prior to the proceedings to obtain the return of such assets. This is the case of *fiducie*, retention right and leasing.[5]

Thirdly, in case of sale of the business as a whole in reorganisation or liquidation proceedings, liability for special securities over immovable and movable assets guaranteeing the repayment of a loan granted to the business for the financing of the encumbered asset shall be conveyed to the new purchaser of the business.

Corporate groups within insolvency proceedings

Internal aspects

Major enhancements to handle corporate groups in insolvency have been introduced by the Macron Law.[6]

Specialised courts for insolvency proceedings[7] have been created for:

- debtors (directly or the companies under its control) that exceed one of these two thresholds:
  - €20 million turnover and 250 employees; or
  - €40 million turnover; and
- for the opening of proceedings pursuant to European regulation on insolvency proceedings.

A debtor can request the transfer to another court and, in particular, to a specialised court.

The court that opened insolvency proceedings for a member of a corporate group has jurisdiction over all the other members of this group. Consequently, a court can supervise the insolvency proceedings of the whole group and may, for this purpose, appoint a single judicial administrator for all proceedings.[8]

Cross-border aspects

The new Regulation (EC) No. 2015/848 of 20 May 2015 on insolvency proceedings became effective (most of its provisions) on 26 June 2017. It applies in all member states (except Denmark) and establishes the principle that main insolvency proceedings may be opened in the member state where the debtor has its centre of main interests (COMI).

This regulation allows insolvency procedures opened in any EU member state to be automatically recognised in the other EU member states and secondary proceedings in another EU member state are no longer limited to winding-up proceedings.

This regulation aims, among other things, to prevent fraudulent or abusive forum shopping and creates different mechanisms for cooperation (i) between jurisdictions, and (ii) between jurisdictions and insolvency practitioners.

This regulation also provides a legal framework on the cooperation and communication, and coordination of insolvency proceedings in order to facilitate the restructuring of group of companies.

A draft of a new EU Directive regarding business insolvency in Europe issued on 22 November 2016 in order to establish common principles on the use of early restructuring frameworks is under discussion. A new reform of French insolvency law partially inspired by the draft of this Directive should be implemented in 2018.

Restructuring trends

The development of conciliation proceedings and pre-pack proceedings

Since the financial crisis in 2008, very few large restructurings have been implemented through defensive or hostile safeguard proceedings. Most of them have been negotiated through amicable proceedings, which have progressively become the customary frame for negotiations between companies, the lenders and their shareholders. The introduction of pre-packaged proceedings contributes to the development of these proceedings by strengthening their efficiency through a cramdown of dissenting minority creditors in accelerated (financial) safeguard.

The pre-pack sale, recently introduced, perfectly supplements the toolkit and improves largely the conditions of the sale of distressed businesses in terms of number of employees and proceeds obtained for the creditors.

In recent years, conciliation proceedings have also been used in order to face various new kinds of issues, such as complex sales of business, tax issues or plant closure. In using these proceedings, companies find an efficient tool to provide them with legal certainty. These developments definitely contribute to the global decrease in the number of reorganisation and liquidation proceedings.

Emergence of new players

Under the pressure of Basel III, banks logically reviewed their portfolio of debts. Alternative capital providers and hedge funds took this opportunity to buy distressed loans.

These new players being less reluctant to act as shareholders of distressed companies and their increasing presence around the table of negotiations in amicable proceedings has given rise to lender-led transactions since 2013. Their ability to provide new money to distressed companies enables them to play a significant role in major restructuring matters.

The repeated reforms of these previous years have greatly modernised French insolvency law, improving creditors' rights and the flexibility of amicable and insolvency proceedings in France. Nevertheless, the recent reforms have granted the creditors with substantial new rights, which must be welcomed. Creditors, and especially alternative capital providers, are able to play a greater role in French insolvency proceedings and, more generally, in French restructurings.

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Notes

1 More precisely, AS and AFS apply to large companies that (i) publish consolidated accounts or (ii) publish accounts certified by a statutory auditor or drawn up by a certified public accountant and exceed at least one of these three thresholds: (a) 20 employees, (b) €3 million of turnover (VAT excluded) or (c) balance sheet total amounting to €1.5 million.

2 Only the credit institutions committee regarding accelerated financial safeguard proceedings.

3 The order of priority may differ depending on whether the business or the assets were sold under reorganisation proceedings or judicial liquidation. This is a complex area of law, and this list is only a broad outline of order of priority of payment.

4 In this case, the asset has never been part of the debtor's estate. The creditor is then entitled to demand restitution of the leased properties as long as the contract was duly published.

5 In this case, the payment aims to exercise the purchase option. Besides, in the event of plan of sale, the purchaser may exercise the option to purchase only after payment of the sums remaining due by the debtor to the lessor.

6 Law No. 2015-990 dated 6 August 2015, effective 1 March 2016.

7 Mandat ad hoc is excluded.

8 'Loi Macron: l'introduction du forum shopping à la française', Reinhard Dammann et Marika Pigot, in Bulletin Joly Entreprises en difficulté.

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Céline Domenget Morin is in charge of the restructuring and insolvency practice of White & Case in Paris. She guides corporations in distress, as well as their shareholders or creditors, through judicial or out-of-court restructurings. She also provides knowledgeable, value-driven advice to investors seeking opportunities in distressed businesses.

Drawing on her thorough understanding and experience of French and European restructuring and insolvency law, she handles complex out-of-court (*mandat ad hoc* and conciliation) and insolvency proceedings (safeguard, accelerated safeguard and bankruptcy). Clients that have benefited from her representation include debtors, investors and creditors, especially with respect to troubled LBO's. Céline also has significant experience in distressed M&A and insolvency proceedings litigation.

A partner in White & Case's global financial restructuring and insolvency practice, Céline is a member of the Association pour le Retournement des Entreprises (ARE) and France Invest (Association Française des Investisseurs pour la Croissance).

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Bruno Pousset is a member of White & Case's global financial restructuring and insolvency practice based in Paris. Before joining White & Case in 2014, Bruno was an intern in the restructuring departments of several high-profile law firms in Paris.

Bruno assists creditors and debtors at all stages of preventive restructuring proceedings (*mandat ad hoc* and conciliation) or insolvency proceedings (safeguard, accelerated safeguard, accelerated financial safeguard, reorganisation and liquidation proceedings). He represents investors in safeguard or reorganisation plans as well as purchasers in sale plans. He also handles issues of corporate executives' personal liability and commercial disputes.

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