The French insolvency regime moves forward

Jean-Luc Vallens gives us his run-down on the latest news about the French insolvency regime

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In the last few months, a set of new measures has been implemented in order to improve the efficiency of the commercial justice in France. These measures cover the substantive insolvency law as well as the institutional framework.

New measures relating to the substantive insolvency law

Facilitating out-of-court agreements

The information of staff representatives

In order to facilitate out-of-court agreements, the Law n°2016-1547 of 18 November 2016 allows the directors engaged in negotiations with creditors not to inform the staff representatives about the opening of a *mandat ad hoc* (C. com., art. L.611-3 al. 3) or a conciliation procedure (C. com., art. L.611-6 al. 3). This measure prevents the director from being prosecuted on the basis of the Labour Law. According to the Labour Code, the director has to notify the financial difficulties the company is facing to the representatives of employees.

However, the obligation introduced by the Ordinance n°2014-326 of 12 March 2014 still remains, namely the obligation of information of the employee representative committee or the staff representatives when the debtor seeks the court's approval ('homologation') (C. com., art. L.611-8-1).

Conciliation proceedings as an alternative to safeguard proceedings

The Law n°2016-1547 of 18 November 2016 also allows the court to suggest the debtor to apply for the opening of a conciliation procedure when the latter does not comply with the requirements for the opening of safeguard proceedings (C. com., art. L.621-1 al. 3). In particular, it relates to cases where it seems that the debtor does not suffer from difficulties that he cannot overcome.

The President of the Court has to deal carefully with this new legal incentive as he or she should not give the feeling that his (her) opinion is already clear about the financial difficulties of the debtor and a possible insolvency.

Rescue plan: new shareholders and managers

New rules have also been introduced by the Law of 18th November 2016 with regard to the modifications deemed to be necessary for the adoption of a rescue plan. Before, the Law provided for the minimum conditions to be met by the meetings of shareholders after the approval of a rescue plan. The voting process within the meetings of shareholders should now take place before the adoption of the rescue plan by the court. In addition, courts will have the possibility to decide that the changes required by the plan will be agreed by only a simple majority of shareholders (C. com., art L.626-3).

Disqualification of directors regarding the failure to file for insolvency

In France, it is possible for courts to order the disqualification of directors from any kind of business when they do not file for insolvency within a specific time limit of 45 days since the cessation of payments.

However, the Law n°2015-990 of 6th August 2015 has introduced an additional condition: the failure of the director has to be voluntary (C. com., art. L.653-8). It creates more difficulties for practitioners and courts, for which the intent of the director is not easy to put forward… In practice, such a condition of disqualification is indeed rarely used alone and is often joined to other cases of mismanagement linked with personal use of assets belonging to the company or rules of accounting.

Personal liability of directors regarding managerial misconduct leading to the inadequacy of assets

Directors may have to pay the debts of the company in case of break of duties. The personal liability of directors that courts may order in case of misconduct is now *more than before* limited:

> **THE PERSONAL LIABILITY OF DIRECTORS THAT COURTS MAY ORDER IN CASE OF MISCONDUCT IS NOW MORE THAN BEFORE LIMITED**

directors are no longer personally liable in case of a simple negligence in business. The purpose of this change highlights the wish of the French legislator to support directors acting in good faith (C. com., art. L.651-2 al.1, introduced by the Law n°2016-1097 of 9 Dec. 2016).

It is however more a signal than a real change: practitioners and courts usually admit such personal and financial liability only in case of severe misconduct or fraudulent behaviour of the directors.

Protection of the main residence of an individual entrepreneur

By way of principle, the personal flat or the home of individual entrepreneurs, considered as their main residence, cannot be any more seized by the liquidator in case of insolvency proceedings (C. com., art. L.526-1, introduced by the Law n°2015-990 of 6th August 2015). It is important to note that such a protection is valid without any legal publication (it was not the case before).

However, one important exception is provided by the legislator: the debtor may deviate from this legal rule in favour of a targeted creditor. That grants creditors a real shield in case of a subsequent cessation of payments, but other creditors won't be any more entitled to get funds from the sale of these assets.

Professional recovery proceedings for individual entrepreneurs (C. com., art. L.645-1)

Since the former reform enacted in 2014, it is possible for individual entrepreneurs with few assets (less than €5000) and no employee to obtain a discharge for their unpaid debts. It implies a short enquiry of 4 months but without the current effects of real collective proceedings.

The conditions for the individual entrepreneur to access to the so-called "*Professional recovery proceedings*" are similar to those of liquidation proceedings, namely to be in a state of cession of payments

where a reorganisation is manifestly impossible. These proceedings do not however apply to debtors acting in bad faith.

Since the new Law of 18th November 2016, such a procedure is also available for debtors who are active and those who have stopped their activity for less than one year before.

New measures relating to the institutional framework

New fees structure for French administrators and liquidators

Decree n°2016-230 of 23 February 2016 provides for a new fees structure applicable to administrators and liquidators (C. com., art. R. 663-3 & seq; art. A. 663-3 & seq.).

The new provisions are the result of the wish to control the costs of French insolvency proceedings. But the intention is also to proceed by means of successive small-scale tinkering in the regulation process of the profession of administrator and liquidator.

Commercial judges

New rules have been enacted by Act 2016-1547 of 18 November 2016 with regard to the status of judges acting within commercial courts.

Among the most important ones, the law has introduced a *mandatory initial and continuous training* in legal, economic and accounting matters. In case of non-compliance with these new rules (entry into force on 1st November 2018), the judges will have no choice but to resign from their position.

In addition to the introduction of *new ethical rules*, the French commercial judges are also required to complete a declaration of interests to indicate any personal interests, subject to criminal sanctions. The aim is to avoid any conflict of interests with their official duties.

The law also makes clear that the judges dealing with commercial cases are subject to specific prohibitions. In particular, they cannot be lawyers, clerks, insolvency practitioners nor members of Parliament, and so on… Besides, there is a general limit which is provided by the law as commercial judges should resign after 14 years of service. ■

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