France:
An update of French Law on Insolvency

Amendments of the Commercial Code by the "Loi Pacte" of 22 May 2019.

With the adoption of the Law No. 2019-486 of May 22, 2019 (Action Plan for the growth and transformation of enterprises – "Loi Pacte"), some technical improvements should be mentioned.

Indeed, among several amendments introduced to the French commercial code, some provisions modify the current rules on insolvency. These changes are made before a major reform expected in the coming two years, as a consequence of the implementation of the Directive 2019/1023 of 20 June 2019.

- Middle-sized companies will be defined in consideration with the following criteria: an annual turnover of €40 million, a balance sheet of €20 million and 250 employees. Companies fulfilling two of these three criteria are considered as middle-sized companies.
- Tax claims will have to be definitively lodged within 12 months after the publication of the opening judgement (and no more defined by the court), except for challenged tax claims.
- The manager of an insolvent company filing for rescue proceedings will be free to propose the name of a practitioner (as it can currently be done, but only in safeguard proceedings, that is, before insolvency). During such rescue preventive proceedings, the manager keeps his executive compensation or wages, except if the delegate judge modifies it (by contrast with the former legal provisions which gave the judge the exclusive right to decide upon it).
- In case of a sale of a company as a going concern, any solidarity clause contained in a current commercial lease of the transferee with the transferor will be null and void: this creates a favourable framework for the transfer of financially-troubled businesses.
- In case of liquidation proceedings, the opening judgement will no more be registered; only disqualifications remain registered for the information of third parties.
- Legal provisions applicable to farmers have been extended to all kinds of individual or legal persons practising agricultural activities. That namely concerns rescue plans whose duration can be longer than for commercial debtors (15 years instead of 10 years).
- Lastly, the legislator has empowered the government to reform rules on securities and on enterprises in difficulty by means of ordinances, in order to balance the rights of creditors in both preventive and insolvency proceedings. In parallel, it has also empowered the government to introduce modifications to the Commercial Code for implementing the above-mentioned Directive. On these two points, a time-limit has been given: May 2021.

Relevant French case-law

Several relevant decisions issued the past few months should be brought to the attention of both practitioners and creditors.

- Restructuring plans: the courts can take into consideration interests of the whole group before deciding upon the plan of each insolvent company: such a global approach is clearly approved by the 'Cour de cassation' (Cass. Com., 19 December 2018, n° 17-27.947).
- In case of a transfer plan, the secured creditor may claim payment of subsequent debts toward the transferee (Cass. Com., 20 March 2019, n° 17-29.009).
- The liquidator may exercise the rights of an insolvent debtor upon a real property located abroad, especially for agreeing with its sale (Cass. Com., 29 May 2019, n° 18-14.844).
- As soon as a secured claim is admitted by the delegate judge of the Court, the security cannot be anymore challenged by way of an avoidance action (Cass. Com., 19 December 2018, n° 17-19.309).
- A restructuring plan should take into account all financial lodged claims, even those the debtor or the liquidator may challenge, as registration of all claims into a plan is deemed necessary for building a realistic plan (Cass. Com., 20 March 2019, n°17-27.527).
- A French creditor who does not lodge its claim in proceedings opened in Italy cannot be authorised to participate in the distribution of the proceeds of an immovable property located in France, sold by the Italian liquidator (Cass. civ.1, 11 July 2019, n° 18-14.186).
- A retention right registered on a real estate property is not affected by the insolvency proceedings opened towards the holder. If the asset is sold by the liquidator, the retention right is just carried over the sale price in order to protect the interests of the secured creditor (Cass 30 January 2019, n° 2019, n° 17-22.223). ■

JEAN-LUC VALLENS
Honorary judge,
Professor emeritus, France

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