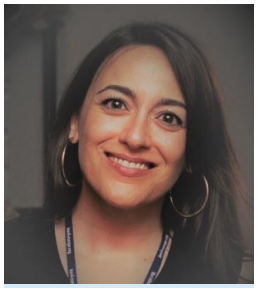
A closer look at...

Recognition of French preventive confidential procedures in the UK



EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> ***In order to address the COVID-19 related economic and financial crisis, the French government has decided to extend the time limits of the conciliation procedure***

French preventive confidential procedures

French insolvency law has seen several reforms since 2005[1] in order to offer tools to prevent insolvency as early as possible and to increase the efficiency of its preventive restructuring framework. Thus, the future transposition of the Directive on Restructuring and Insolvency will not require significant changes.

French insolvency law provides for an insolvency test (cessation of payment) which is a cash flow test. If a company is not insolvent, it can request the opening of one of the two preventive, consensual and confidential procedures - *mandat ad hoc or conciliation* - or the preventive, collective and public procedure - *procédure de sauvegarde*.

The *mandat ad hoc* and *conciliation* preventive procedures are very successful in practice as they are confidential, voluntary and consensual. Firstly, the stakeholders are bound to a duty of confidentiality. Secondly, only the debtor is allowed to request the opening of a *mandat ad hoc* or a *conciliation* procedure before the president of the competent court who will appoint a *mandataire ad hoc* or a *conciliateur*[2], usually proposed by the debtor. Moreover, the debtor will remain in possession and the *mandataire ad hoc* or *conciliateur* will facilitate the negotiation of a confidential agreement between the debtor company and its main creditors. Finally, the negotiation cannot lead to a cram-down of a minority of dissenting creditors[3]. In return, the creditors not taking part to the negotiation cannot be bound by the agreement.

The preventive *mandat ad hoc* procedure is very flexible as it is not subject to any fixed time frame[4]. Moreover, it does not trigger a stay on compulsory enforcement as this procedure is governed by the contract law. On the contrary, the *conciliation* is opened at the request of a solvent debtor company which is facing an actual or a foreseeable legal, economic or financial difficulty, or in the case of an insolvent debtor company, provided it has not been insolvent for more than 45 days[5]. The president of the competent court appoints a *conciliator* for a period of maximum five months[6].

After the opening of the *conciliation* procedure, where any creditors (even public creditors) sent a formal notice or enforced their rights, the court may, at the debtor company's request, grant it a stay of individual enforcement actions for a time limit of maximum two years[7].

The agreement reached by the *conciliator* and concluded between the debtor and the concerned creditors may be acknowledged by the President of the court or made enforceable by the court.

The decision acknowledging the agreement is confidential, not subject to any publication. However, the judgement making the agreement enforceable is published. The terms and conditions of the conciliation agreement remain confidential[8].

The interest of having a confirmed agreement is to create a "new money" privilege for the creditors who provide the debtor with new financing/goods/services in order to ensure the continuation of the business's activity. Therefore, if collective procedures are opened subsequently against the debtor company which has benefitted from the conciliation, the "new money" creditors have the right to preferential payment of their claims[9].

These both successful proceedings, however, are not listed in Annex A of the European Insolvency Regulation n°2015/848 as they are confidential and thus do not fall in its scope. Therefore, they are not automatically recognised in another EU Member State.

French preventive confidential procedures and the COVID-19 crisis

In order to address the COVID-19 related economic and financial crisis, the French government has decided to extend the time limits of the conciliation procedure. Indeed, encouraging prevention has been identified as a tool to address the COVID-19 related crises.

The ordinance n°2020-341 of 27 March 2020[10] provided that the conciliation procedure was automatically extended until 24 August 2020. A second ordinance n°2020-596 of 20 May 2020[11] adds the possibility, until 31 December 2020, for a debtor company in *conciliation*, to request before the president of the court which opened the *conciliation*, a moratorium and a potential rescheduling of its debt up to the end of the conciliation

proceedings, in case a creditor did not accept a standstill on its debt claim within the time period fixed by the conciliator. The last ordinance n°2020-1443 of 25 November 2020[12] provides that the conciliations procedures opened between the 24 August 2020 and 31 December 2021 are extended up to ten months.

It is in this context that a French group of companies hit by the COVID-19 related crisis requested the opening of conciliation procedures in August 2020 before the president of the Commercial Court of Paris[13].

During the negotiations with the creditors, one of them, whose registered office was in the England, decided to enforce its rights equally before the French and the English courts.

The French conciliator tried to negotiate a standstill. However, the English creditor did not accept a standstill on its debt claim within the time period fixed by the conciliator.

Thus, the debtors requested a stay on the basis of the ordinance n°2020-596 of 20 May 2020 before the president of the Commercial Court of Paris.

Legal basis for the recognition of French preventive confidential procedures in the UK

Moreover, the debtors requested before the English courts the recognition of the French conciliation proceedings on the basis of the "Cross-Border Insolvency Regulations 2006" (CBIR)[14], which is the legal basis for the recognition of French preventive confidential procedures in the UK.

Indeed, as the European Insolvency Regulation does not apply in this particular case, the opening of French conciliation proceedings is not automatically recognised in the UK…

However, the CBIR provides the legal basis for the recognition in the UK of foreign insolvency proceedings, as the CBIR gives force to the UNCITRAL Model Law on Cross-Border Insolvency (1997), which is designed to assist the States to equip their insolvency laws with a modern legal framework in order to more effectively address cross-border insolvency proceedings. Contrary to the UK, France has not adopted the UNCITRAL Model law. To date, the Model Law has been adopted in five EU jurisdictions only: Greece, Poland, Romania, Slovenia and United Kingdom. However, the CBIR allows the UK Courts to recognise foreign insolvency proceedings without any need for reciprocity.

In order for foreign proceedings to be recognised under the CBIR, the debtor shall have a place of business, residence or assets situated in the UK. Otherwise, the Court shall consider recognition appropriate. Once foreign main proceedings have been recognised in the UK, there is an automatic stay of certain types of creditor actions. Where a foreign non-main proceeding is recognised, the Court has a discretion to grant any appropriate relief. Upon recognition, the CBIR give certain rights to the foreign representative, for example to be heard in the English courts and in some cases to commence proceedings relying on the provisions of the English Insolvency Act 1986.

In this particular case, the English court recognised the French conciliation procedures and imposed to the creditor a moratorium to the benefit of the group of companies. A stay of individual enforcement actions was also imposed to the creditor, except express approval by the English Court or approval by the Foreign Representative.

Following Brexit, if automatic recognition of insolvency judgements between the UK and the EU became a thing of the past, the CBIR could in fact offer an interesting solution for the recognition of all EU insolvency proceedings. In return, the EU Member States should all implement the UNCITRAL Model Law. ■

Footnotes:

1 Law no. 2005-845 of 26 July 2005 came into force on 1 January 2006.

2 The representative appointed by the President of the court is generally an insolvency practitioner even if this is not required by the French law. In France, two specialised and regulated professions subjected to specific rules benefit from a *quasi* monopoly situation in all insolvency proceedings, representing a sort of public service of justice. These two independent, exclusive and incompatible professions are the *administrateurs judiciaires* and *mandataires judiciaires*, with the sole exception being that the *administrateur judiciaire* can also practise as a lawyer (*avocat*). The *administrateur judiciaire* represents the debtor, whereas the *mandataire judiciaire* represents the creditors.

3 In order to cram down on dissenting minorities of financial creditors during the *conciliation*, the debtor may request the opening of an *accelerated financial safeguard* or an *accelerated safeguard procedure*. However, both procedures are opened at the request of a solvent debtor company or an insolvent one (provided it has not been insolvent for more than forty-five days) (1) whose accounts have been certified by an auditor or a chartered accountant and which employs at least 20 employees, has a minimum annual turnover ex VAT of €3m or a minimum balance sheet total of €1.5m or (2) which has drawn up certified accounts. Moreover, both procedures are opened at the request of a debtor involved in an ongoing *conciliation* procedure, justifying that the restructuring plan negotiated during the *conciliation* proceedings is already supported by a sufficient majority of its creditors. The *accelerated financial safeguard* procedure only applies to financial creditors. The plan is then submitted to the court for approval within a short time period (three months in the accelerated safeguard procedure and one month in the accelerated financial one.)

4 Commercial Code, Article L611-3.

5 Commercial Code, Article L611-4.

6 Commercial Code, Article L611-6, Paragraph 2.

7 Commercial Code, Article L611-7, Paragraph 5.

8 Commercial Code, Article L611-8.

9 Commercial Code, Article L611-11, Paragraph 1.

10 Ordonnance n°2020-341 of 27 March 2020: www.legifrance.gouv.fr/jorf/id/JORFTEXT000041762344/.

11 Ordonnance n°2020-596 of 20 May 2020: www.legifrance.gouv.fr/jorf/id/JORFTEXT000041897273/

12 Ordonnance n°2020-1443 of 25 November 2020: www.legifrance.gouv.fr/jorf/id/JORFTEXT000042565006

13 Dominique-Paul VALLEE, Délégué général à la prévention-traitement au Tribunal de commerce de Paris, 1 Quai de Corse, n° 54.

14 The Cross-Border Insolvency Regulations 2006: www.legislation.gov.uk/uksi/2006/1030/contents/made

Following Brexit, if automatic recognition of insolvency judgements between the UK and EU became a thing of the past, the CBIR could in fact offer an interesting solution