New tools for a higher level of efficiency in France

Isabelle Didier writes on the first case applying the French reform resulting of the implementation from the EU Directive

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The multiplication of crises at a global level, be they health, political, economic, social or environmental, has multiple consequences. It leads the law to evolve and especially the law of insolvency.

The Covid-19 crisis has shaken all our certainties and has shown us that restructurings may concern any size of company and any sector of the economy, even those that seemed historically sheltered. For example, the energy sector has been experiencing unprecedented tensions since 2020, aggravated by the Ukrainian conflict. Many players in this highly regulated market have been and will be affected by this unprecedented and lasting crisis.

For two years, European governments have been supporting companies. The French government adopted an onerous 'Whatever it costs...' policy, in which aid, among others, state-guaranteed loans and favourable public measures in relation to social security contributions and taxes, kept many companies alive. That policy came to an end. The time has now come to manage these situations according to the traditional rules of collective procedures.

New tools

However, when faced with new situations, professionals in the field of insolvency proceedings must have new tools at their disposal. In France, the Restructuring and Insolvency Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (the 'Directive'), was transposed by Ordinance no. 2021-1193 of 15 September 2021, amending Book VI of the Commercial Code. It entered into force on 1 October 2021. It provides companies with a perfectly adapted and efficient tool which has notably allowed the treatment of the difficulties of a company in the energy sector, which was one of the first, if not the first, to use the new opportunities of differential treatment between creditors, divided into classes of affected parties.

Moreover, the Directive leads European Union Member States to integrate new concepts into their own legal system for dealing with business difficulties, particularly the need for courts to justify their decision with accounting and financial dimensions that makes this field more than ever an economic law.

New professional structures

At the end of 2020, in the context of this evolution of insolvency law and faced with the imminent transposition of the Directive into French law, French insolvency professionals, all members of GRIP 21, under the impetus of the author, became aware of the importance of pooling complementary skills by bringing them together within the same legal structure, which French law had not allowed until then. This awareness is the result of the keen interest in international best practices and regular participation in the work of UNCITRAL and the World Bank. Indeed, exchanges between professionals, academics and legislators in these forums where the floor is freely shared, necessarily lead to questioning one's own convictions as to the efficiency of one's own system and preparation for the evolution of the law desired by the policy maker.

Thus, at the end of 2020, the first multi-professional company ('SPE') was created for the exercise of the professions of court-appointed administrator, chartered accountant and lawyer, dedicated to the treatment and prevention of business difficulties. Though the Order of Chartered Accountants gave its agreement quickly, it then took nine months to manage to lift the reservations of the Bar Council and the National Commission for the registration on the list of court-appointed administrators, both of which are protective of the specific status of their respective professions.

As a reminder, in France, the profession of IP (insolvency practitioner) is entrusted to a profession divided into two distinct bodies: court-appointed administrators for the restructuring phase, numbering 160, and court-appointed liquidators for the liquidation phase, numbering 300. The latter also represent the rights of the community of creditors within the framework of reorganisation proceedings. These two professions enjoy a form of *de facto* monopoly, if not *de jure*, because of the constraints in terms of insurance, attached to their mandate, but mainly because of the historical and protective links which bind them to the commercial jurisdictions where

they intervene. If the competences are national, the designations are very local. The professions of court-appointed administrator and court-appointed liquidator are mutually exclusive and incompatible with any other profession. Only the profession of lawyer can be jointly exercised with the profession of court-appointed administrator, but this dual status is rare. About ten court-appointed administrators are also lawyers, but few practice these two professions in parallel, even though both require compliance with the same professional rules: professional insurance, ethics, professional secrecy, etc.

Facing a rigid legal framework for regulated liberal professions, the French government wanted to change that situation by introducing greater liberalisation through a law called the Macron Law (who was Minister of Economy and Finance in early 2015). Indeed, many professions were required to evolve, merge, or even disappear. An Ordinance of 31 March 2016 and Decrees of 5 May 2017, have therefore instituted a new form of practice for regulated liberal professions: the multi-professional company (SPE). However, in five years, the SPE status has not seen many developments. Nonetheless, the interest of a SPE for the client is very obvious: its purpose is to allow him/her to have access to advice through a single point of contact and a more fluid and efficient collaboration between partners with different skills and expertise. In the case of SPE O3 Partners, these skills are legal, accounting and judicial. The activity pooled by the partners is the prevention and the treatment of the difficulties of the companies in collaboration with the usual advisers, lawyers and chartered accountants of the company facing difficulties. It is also particularly focused on international cooperation.

Due to the difficulties of the registration process by the Bar Councils which have slowed down other initiatives, O3 Partners is, to date, the only SPE bringing together these three professions. Duly authorised at the end of July 2021 to practice the three professions, the SPE was entrusted, in mid-October, by Yves Brulard, lawyer at the Bar of Mons (Belgium) and Paris, specialist in international procedures and Jérôme Lépée, lawyer specialist in the energy market, with the mission to act as counsel for one of their clients, a significant player in the energy market. The partnership immediately set up an operational team to implement the provisions of the Ordinance transposing the Directive that had just come into force on 1 October 2021, and in particular the aspects of business valuation, carrying out of the IBR and all the legal and accounting documentation likely to convince the court and the procedural bodies that would be appointed of the feasibility of the restructuring project and the sustainability of the business.

In this case, the usefulness of the 15 September Ordinance was obviously to be able to obtain a vote on the plan with the support of the majority of affected parties (under the meaning of the Directive) thanks to the *cross-class cram down* mechanism which allows a court to impose a draft plan on one or several classes of recalcitrant creditors who voted against it.

In France, the debtor company used the new designed French *accelerated safeguard* proceedings which should always be opened after a preliminary amicable phase (*conciliation* proceedings). Once convinced of the applicability of the Ordinance (implementing the Directive) to the case, the President of the Commercial Court of Lyon (who was the competent judge) opened first conciliation proceedings and then *accelerated safeguard* proceedings (on 19 January 2022) for the purpose of confirming a safeguard plan with classes of affected parties, including dissenting affected creditors (banking institutions). Indeed, the safeguard plan was confirmed on 13 April 2022 by the court with a favourable opinion from the Public Prosecutor. It demonstrates in the meantime the effectiveness of the hard work done by the varying type of professionals involved in this case, including O3 Partners.

Conclusion

This first success in the application of the 15 September Ordinance demonstrates that the French courts and professionals in the treatment of companies in difficulty have perfectly integrated the new paradigms from international insolvency law. French insolvency law is therefore accompanying the international trend towards the unification of insolvency rules. This rapid evolution of French courts and insolvency professionals will be even more useful as a new European initiative was launched by the European Commission in November 2020 ('Insolvency III') which should be completed by the end of 2022. Numerous key items, such as the common definition of insolvency, the nullity of the suspect period, the obligations and liabilities of directors in case of insolvency or the conditions governing the practice of the profession of insolvency practitioner are also currently being debated within working groups such as those of UNCITRAL Working Group V on Insolvency Law or those of the World Bank.

These will lead tomorrow to new professional rules that professionals will integrate with even more facility for which they will have been prepared by trainings and their exchanges proposed by INSOL Europe or INSOL International which take part in these working groups. This is how GRIP 21's role as an expert with UNCITRAL Working Group V and the World Bank has played an essential role in the creation of the SPE O3 Partners and in the ease of understanding the concepts resulting from the Directive. ■

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