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**New Tools for Greater Efficiency in French Insolvency Proceedings:**

**A Case Study**

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*Introduction*

The current multiplication of crises is weakening the entire economic environment, regardless of the size or history of the company. With the end of the aid policies practised until now by many governments, the difficulties are becoming more acute. At the same time, legal tools are evolving to enable the consequences of these crises to be dealt with more effectively.

In October 2021, the multi-professional firm O3 Partners accompanied one of the alternative players in the energy sector, which until then had been growing rapidly, in what will be the first application in France of the accelerated safeguard procedure with classes of affected parties. This procedure has been completely renewed by Ordinance No. 2021-1193 of 15 September 2021, which came into force on 1 October 2021 and which transposed the Directive on Restructuring and Insolvency.

The context of unification of the different laws of the EU Member States gives the ordinance an innovative character, but has also added legal uncertainty to the economic insecurity. It creates a new field in which counsel and experts as well as the court must integrate and implement new concepts and reasoning stimulating imagination and creativity.

*The Case*

ABC Group (name changed), created in 2015, was a fast-growing player in the renewable energy sector, present throughout the value chain. By 2020, it had achieved a turnover of €80 million and employed 170 people. The group’s difficulties appeared at the beginning of 2020, but these were only the beginnings of a major energy crisis. At the end of 2021, with the economic recovery, the market went into overdrive with peaks where the price/KW increased tenfold.

All suppliers have been affected, with news in the press regularly. Some are going bankrupt; others want to get rid of their customers. Yet ABC’s CEO wanted to understand the legal environment to make the right choices. At the instigation of his lawyer, a specialist in the energy market, Jérôme Lépée, he brought together a specialised team capable of mastering the new provisions, made up of lawyers: Yves Brulard, a Franco-Belgian lawyer specialising in international procedures, with experience with Chapter 11, Isabelle Didier, a court-appointed administrator, and the chartered accountants partners of the SPE O3 Partners: Jean-Michel Matt, Marc Chernet and Daniel Chriqui.

The ambition was to obtain the adoption of the plan and impose significant efforts (-50%) on recalcitrant creditors. A majority of classes must be convinced of the interest and feasibility of the plan as well as the validity of the efforts requested.

*The Course of the Procedure*

The earlier a company realises it needs to consider restructuring, the more it increases the time at its disposal and its chances of success. Anticipation and reactivity are key during the three phases of the procedure. The accelerated safeguard procedure, a collective procedure, has the originality of being preceded by a conciliation procedure, a confidential procedure.

**1. Preparatory Phase**

In order to meet the time constraints imposed by the new provisions and before considering a procedure (amicable or judicial), the company must very quickly have:

* reliable and up-to-date accounting;
* operating and cash flow forecasts showing both the cash shortfall and the return to equilibrium; and
* legal documentation .

The company’s presentation of legal, accounting and financial documentation and its strategy will serve to convince the conciliator, the court and each creditor concerned that the creditors’ interests are taken into account and that it is fair to ask them to make efforts to ensure the continuity of the business. To do this, the company must provide:

* a complete, precise, convincing and sufficiently instructive note setting out for third parties the causes of the difficulties;
* a statement of the measures implemented or to be envisaged to remedy them;
* an IBR identifying the financing needs; and
* valuations of the company and its assets: in liquidation, as a going concern or under a disposal plan.

This information makes it possible to establish:

* the best interests of the creditors (C. com., art. L.626-31, 4°);
* the date of cessation of payments;
* the need for creditors’ efforts;
* proposals for discharge; and
* to consider which creditors or affected parties should be called to the conciliation and to identify the economic criteria to form a basis for the future constitution of classes.

It took two months of intense collective work involving accountants and lawyers. The accounting and financial work proved to be particularly complex, due to the evolution of the market where all the reference systems have become obsolete.

**2. Conciliation Phase**

The conciliation phase opened by the President of the Court, seized by a request from the CEO, lasts between 2 and 5 months. The request demonstrates the feasibility of the restructuring project and the absence of a suspension of payments 45 days prior to the referral. The list of creditors and shareholders with whom negotiations must be undertaken is attached.

In this case, the request included projections of the economic model revised by the experts of O3 Partners. Jean-Michel Matt, judicial expert and partner of O3 Partners, with a solid knowledge of the energy market, was able to carry out the different valuations allowing the development of a fair strategy towards the creditors, neither too aggressive nor insufficient to ensure the turnaround. The valuations demonstrated to the creditors that their best interest lay in the durability of the structure. Abandonments, combined with return to better fortunes, were a fair solution to share the consequences of the brutality of the crisis, without losing value.

The objective criteria for the distribution of creditors have been studied in detail and will have to stand up to challenge by the parties concerned. In this case, 8 categories have been identified, some usual (banks, ordinary suppliers, preferred creditors, etc.) and others more specific (suppliers with guarantees). Four were retained. Small creditors and suppliers essential to the business were excluded from the plan and the collective procedure and were settled as soon as the plan was approved without any change in their rights to promote the continuation of the business.

The same proposal was made to all creditors of the same class. At the end of the creditor consultation period, three classes out of four supported the draft plan. The public preferential creditors renounced their absolute priority to be paid in advance of suppliers. The refusal of the credit institutions to support the plan was due to their concern about losing the state guarantees they had. This guarantee would not be called into question if the plan were imposed on them.

Enforcement against a class of capital holders is an effective negotiating lever that should not be abused. In this case, despite the desire to redistribute the capital into new hands and to impose a solution on the shareholders, the manager renounced inter-class enforcement preferring to favour a concerted solution.

The exchanges between the creditors and the company and its advisors took place outside or in the presence of the conciliator. They made it possible to validate or change the projections made in the preparatory phase, to refine the criteria defining the categories of creditors and the communities of economic interest likely to bring them together, to produce valuations of the company, to draw up proposals for treatment and, finally, to ensure the reasonable and necessary nature of the efforts required of the creditors.

At the end of this negotiation phase, the creditors are invited to give their opinion on the draft plan which will then be formally submitted to their vote in the context of the safeguard. They express their opinion on the draft plan formally to the conciliator. If the conciliator receives responses that show sufficiently broad support for the plan, expressed by a majority of the stakeholder classes according to the two-thirds majority rules within the class, then the conciliator reports to the president of the court to support the plan.

**3. Opening an Accelerated Safeguard with a Class of Affected Parties**

The company, on the strength of the positive results obtained in the conciliation negotiations, applies to the court for the opening of an accelerated safeguard procedure. The court decides on this request based on the conciliator’s report and after hearing the parties at the hearing. The essential condition to be shown to the Court is the presence of sufficiently broad support of the parties affected for the draft plan presented. The conciliation phase makes it possible to secure the support of creditors.

**4. The Inter-class Enforcement Mechanism**

In order to force the banks to give up part of their state-guaranteed claims, it was necessary to use the mechanism of inter-class enforcement. The court ensured compliance with:

* general conditions:
  + consistent division of creditors who share “a sufficient community of interest” into classes of affected parties;
  + principle of equal treatment of affected parties within the same class;
  + treatment in proportion to their claim or right;
  + regularity of the notification of the plan to all affected parties;
  + compliance with the “creditor best interest test” (C. com., Art. L.626-31, 4°);
  + interests of the affected parties that are not excessively affected by any new financing required to implement the plan; and
  + presence of a reasonable prospect of avoiding the debtor’s cessation of payments or guaranteeing the viability of the business.
* specific conditions :
  + plan has been approved by (in principle) at least one class of creditors with security interests or ranking above the class of unsecured creditors;
  + claims of affected creditors of a class that voted against the plan are fully satisfied by the same or equivalent means where a lower ranking class is entitled to a payment or retains an interest under the plan (the so-called “absolute priority” rule); and
  + under the plan, no class of affected parties may receive or retain more than the full amount of its claims or interest.

The absolute priority rule is subject to derogations when they are “necessary to achieve the objectives of the plan and if the plan does not unduly prejudice the rights or interests of affected parties”. In the ABC case, the Court was able to validate the first application of the absolute priority rule because the preferential creditors waived the full payment of their claims, favouring the strategic creditors. It imposed the draft plan with a debt waiver on the recalcitrant class of credit institutions, an innovation in French law.

**Conclusion: An Effective Tool**

Corporate restructuring requires the implementation of measures that affect the business model, capital, debt and the social dimension. It assumes that the company and its manager have retained the confidence of all their partners and are able to demonstrate the feasibility of a turnaround.

French law now has an effective tool that will help bring companies and their creditors closer together to ensure the reorganisation of those that can demonstrate the seriousness and validity of their plan. Combined with the European Insolvency Regulation and the future directive on the common insolvency framework, this procedure should favour the recovery of international groups, national flagships and SMEs that choose to use it. However, despite the success of the procedure, which has allowed a return to normality and growth, ABC still bears the stigma of this period. The historical banks refused to lend to the company for two years, depriving it of the ability to move forward.