New trends and opportunities in France

Nicolas Theys and Diane Ricaud discuss how new legislation in France affects the pre-insolvency and insolvency proceedings available to companies facing difficulties

The year 2014 was when the new reform of French insolvency law entered into force, giving creditors more power and protection.

As a reminder, up until 30 June 2014, French insolvency law offered companies facing difficulties the choice between two types of proceedings i.e.,:

- out-of-court restructuring proceedings, which are confidential preventive voluntary corporate arrangements (generally in chronological order: *ad hoc* mandate and conciliation proceedings); and
- judicial proceedings, which are public and organised to a much greater extent by law, under the strict supervision of the Court, (namely safeguard proceedings, accelerated financial safeguard proceedings, judicial reorganisation (*redressement judiciaire* – proceedings similar to administration process, and liquidation proceedings).

The grounds for the implementation of any of these proceedings is the company's cessation of payments ("*cessation des paiements*") i.e., when the company cannot pay its outstanding liabilities with its available assets (cash plus assets that can be immediately cashed).

The 2014 reform in French insolvency law introduces measures that are favourable to companies, notably under *ad hoc* mandate and conciliation proceedings e.g.:

- the conciliator's assignment is extended to the sale of the business (this is an acknowledgement of what already took place in practice, also known as the "*pre pack cession*"); and
- any clause, which (i) amends the terms and conditions of an ongoing contract by reducing the company's rights or by increasing its undertakings as a result of the opening of *ad hoc* mandate or conciliation proceedings or, (ii) obliges the company to bear a percentage of the fees of the creditor's counsel during proceedings, are prohibited.

However, the major modifications introduced by the 2014 reform cause a shift towards more power and protection for creditors. Indeed, since the reforms of 1955 and 1964, French insolvency law really focused on protecting the debtor, as highlighted by its 3 purposes set out below, ranked by order of importance: (i) favour the continuation of the business, (ii) maintain employment and lastly (iii) repay the creditors. It is only very recently that, under Anglo-Saxon influence and the growing financing needs of companies, that insolvency law has increased protection offered to creditors.

As such, certain creditors are allowed, in safeguard and court-ordered reorganisation proceedings, to submit draft plans as an alternative to the company's plans. However, this ability will be limited, in practice, as changes in capital provided in the plan will be subject to the approval of the company's shareholders.

Three other main changes to French insolvency law will have more of an impact, i.e., (1) the extension of the new money privilege from which companies can benefit ("*privilege d'argent frais*"), (2) the creation of accelerated safeguard proceedings, and (3) the ability for the court-appointed receiver ("*administrateur judiciaire*") to

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request that the Court appoint an ad hoc representative to force the reconstitution of the company's equity to a certain extent.

Extension of the new money privilege

Conciliation proceedings are a preventive arrangement which give the debtor the opportunity to voluntarily resolve its difficulties by negotiating with its main creditors.

One of the specificities of conciliation proceedings is the new money privilege granted to creditors who, as agreed in the conciliation agreement, provided new money, goods or services to the company to ensure the continuation of its business activity, thus securing the payment of this new debt in the event of subsequent insolvency proceedings involving the company (before unpaid post-filing claims and pre filing claims but after certain employee related liabilities and post-filing procedural fees).

The 2014 reform extends this new money privilege to creditors who provided new money, goods or services to the company to ensure the continuation of the business activity during conciliation proceedings (and not only after proceedings have ended when a conciliation agreement is reached). It also provides that in the event of subsequent insolvency proceedings, creditors who benefit from this privilege cannot be subject to a moratorium or cram downs in relation to this new debt. Therefore, their claims will be paid when due, unless otherwise agreed between the parties.

Creation of accelerated safeguard proceedings

These proceedings are an extension of accelerated financial safeguard proceedings created in 2012 and solely reserved for financial creditors.

The main purpose of accelerated safeguard proceedings is to impose on reluctant creditors, within a short time frame, a pre pack restructuring plan accepted in the course of conciliation proceedings by a majority of the creditors.

The 2014 reform (i) extends accelerated financial safeguard proceedings to all creditors (not only financial creditors), (ii) reduces the eligibility thresholds for such proceedings and (iii) maintains the possibility for the company to limit these accelerated proceedings to its financial creditors (and bondholders).

Accelerated safeguard proceedings are opened provided that the following two conditions are met.

Condition No.1

The company must be engaged in on-going conciliation proceedings and be able to provide evidence that it has entered into a pre pack restructuring plan that will ensure the continuation of its business and that is likely to gain widespread support from its creditors (most likely at least 66% of the amount of debt) in order to make the adoption of the agreement likely within a short time frame; and

Condition No. 2

- either the company establishes consolidated annual accounts; or
- the company has its accounts certified by a statutory auditor (or established by a chartered accountant) and has (i) over 20 employees, or (ii) a turnover exceeding 3 million euros, or (iii) a balance sheet total exceeding 1.5 million euros.

These proceedings are said to be accelerated because the Court adopts a pre-pack restructuring plan within a maximum of three (3) months under accelerated safeguard proceedings and one (1) month, renewable once, under accelerated financial safeguard proceedings.

Prior to being formally submitted to the Court, the pre-pack restructuring plan (which can include namely cram downs, debt-to-equity swaps and/or installments) is submitted to two creditor committees (one being made for financial creditors and the other for the company's main suppliers), and a third committee, if applicable, grouping together bondholder creditors. The main suppliers' committee, however, will not be formed in case of accelerated financial safeguard proceedings.

A decision is taken by each committee by the majority of its members representing at least two thirds of the amount of debt held by voting members. As such, the propositions included in the plan will be imposed on all members of the committees, even those who voted against them.

Therefore, as of 1 July 2014, there are 3 types of safeguard proceedings i.e., (i) accelerated financial safeguard proceedings, (ii) accelerated safeguard proceedings and (iii) safeguard proceedings.

Forced reconstitution of equity

This provision can only be enforced when the company is undergoing an administration process.

During the court-ordered reorganisation proceedings, the court appointed receiver ("*administrateur judiciaire*") can request the appointment of an ad hoc representative in order to "convene a shareholders meeting" and vote the reconstitution of equity up to one-half of the capital in lieu of opposing shareholders when the reorganisation plan provides for the modification of the company's capital in favour of one or more persons that undertake to respect the plan".

Therefore, this provision might lead to the exclusion of shareholders in certain cases. However, this provision raises practical issues with respect to its implementation and interpretation notably regarding the notion of "opposing shareholder".

A new debate was introduced in 2014 whereby the Court could force the exit of shareholders (by a shareholders' meeting or by a forced sale of their shares) to the benefit of creditors who agree to inject money into the company's restructuring plan. However, this possibility was not included in the final reform for fear of it being deemed unconstitutional, as an infringement of the right of ownership. This measure has been reintroduced in the "Macron" bill, named after Emmanuel Macron, the Minister of Economy. This bill is designed to liberalise the economy and boost growth in early 2015. This measure would apply in certain circumstances and provided certain thresholds are met. The bill has been adopted by the National Assembly and the Senate but is yet to be discussed in joint meetings between the National Assembly and the Senate. Who knows what will happen next. ■

A NEW DEBATE WAS INTRODUCED IN 2014 WHEREBY THE COURT COULD FORCE THE EXIT OF SHAREHOLDERS TO THE BENEFIT OF (CERTAIN) CREDITORS