The FRAM case and the French "Pre-Pack" solution

Didier Bruère-Dawson and Charles Moulette report on a very interesting "pre-pack" case, involving a 60-year-old group of companies, historically prominent and profitable and employing more than 3,000 people in France and overseas

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On 25 November 2015, the Commercial Court of Toulouse ordered the "pre-pack" sale of the assets of a major French tour operator, FRAM, to the leading online travel specialist, Karavel-Promovacances.

The sale will lead to the creation of the biggest French tour operator and is one of the most important "pre-pack" sales to be completed following the 2014 reform of the French Insolvency Law.

Introduction to the French "pre-pack" proceedings

Whilst the "pre-pack" was a tool already informally used by French insolvency practitioners, the Order of 12 March 2014 reforming the French Insolvency Law officially introduced the concept of "pre-pack" sales into the French law.

The insolvency proceedings now available in France include preventive proceedings such as the *mandat ad hoc* and the *conciliation*, where debtors and creditors can negotiate the debt, but also now the "pre-pack" proceedings. There are also the more formal insolvency proceedings, the *sauvegarde* and the *redressement judiciaire*, which provide a structure in which a formal reorganisation can take place, while offering various protections for debtors against enforcement measures by their creditors.

Prior to the 2014 reforms, the aim of the French preventive proceedings was exclusively to renegotiate debts between a debtor and the principal creditors in order to reach an agreement between them.

However, the economic crisis and the increased use of preventive proceedings showed that solely renegotiating the debts of a distressed company was sometimes insufficient and that often the only effective method to save a distressed company was to contemplate a partial or a total sale of its assets.

The concept of a "pre-pack" will be familiar to many practitioners but let us remind that in "pre-pack" proceedings the sale of the debtor's assets is negotiated between the relevant parties during the preventive proceedings and completed either:

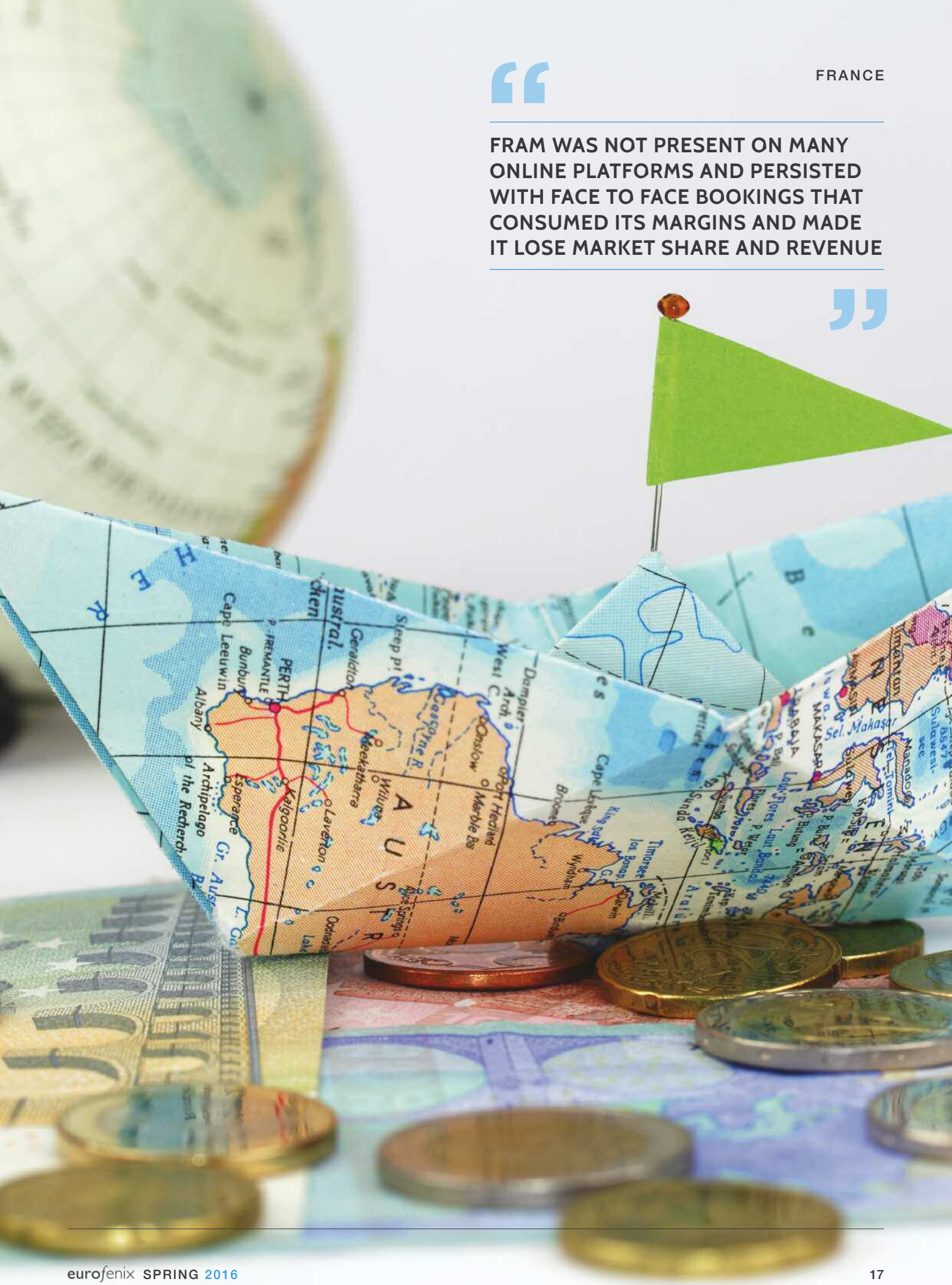
(i) before the end of the preventive proceedings (thus keeping the financial difficulties of the debtor confidential) or
(ii) during insolvency proceedings.

The "pre-pack" tool has long been an important restructuring tool in England and Australia but is now also being applied to some major French group-of-companies restructurings.

The French proceedings preserve goodwill and tend to retain corporate value as they take place outside the formal insolvency proceedings context and only requires the consent of the main creditors. Time is of the essence in the procedure: it encourages "business as usual" while confidential negotiations are ongoing, thus avoiding the "insolvency stigma", preserving brand integrity and preventing attrition of key customers, employees and strategic assets in a takeover. Of course it is essential to address the balance sheet and to ensure that all parties adhere to a swift and seamless handover of the business according to the plan, under the conciliator's supervision.

In the French "pre-pack", shareholders cannot be compelled to embark in pre-pack proceedings and/or to give up their equity and/or to sell a debtor's asset as a going concern, but the conciliator's capacity to inform the court of a viable plan for business in the absence of another sustainable solution may turn the shareholders favourable

FRAM WAS NOT PRESENT ON MANY ONLINE PLATFORMS AND PERSISTED WITH FACE TO FACE BOOKINGS THAT CONSUMED ITS MARGINS AND MADE IT LOSE MARKET SHARE AND REVENUE



to a plan. For if conciliation fails and the debtor goes into formal insolvency proceedings, the court would bear in mind that a viable offer had been proposed and was refused by the company's shareholders. The restoration of the debt-equity ratio[1] and/or the sale of the going concern could also be imposed by the court if the shareholders' plan is not considered viable or is criticised by creditors who can propose an alternative recovery plan.

The FRAM "pre-pack" sale

FRAM is a very interesting "pre-pack" case, involving a 60-year-old group of companies, historically prominent and profitable and employing more than 3,000 people in France and overseas.

The first difficulties and the 2013 restructuring

In 2011 FRAM faced financial difficulties, partly due to the political turmoil and violence caused by the Arab Spring in FRAM's main tourist destinations of Egypt, Morocco and Tunisia. However, in reality, many of FRAM's problems were caused by difficulties in adapting to the digital revolution which swept the tourism industry.

Unfortunately, FRAM had failed to keep up with the growth in online trends and lacked a sophisticated digital interface. FRAM was not present on many online platforms and persisted with face to face bookings that consumed its margins and made it lose market share and revenue. Moreover, FRAM suffered from a dispersion of its business, being involved both in tour operating activities and the hotel business.

These difficulties led the Group to apply for the opening of several preventive proceedings. Following the end of the first preventive proceedings opened in 2012, a conciliation agreement was executed and homologated by the Commercial Court of Toulouse in 2013. According to this agreement, banks and shareholders agreed to contribute new money to the Group and were granted a "new money privilege"[2] in this respect. Moreover, because of persistent cash difficulties in the FRAM group, the agreement provided that a sale mandate could be signed with an investment bank.

Between 2013 and 2015, FRAM sold several of its main assets (hotels in Spain, Tunisia and Morocco, and its head offices near Toulouse) to cover its liquidity requirements and to refocus its activities under the control of the conciliator. These sales, amounting to several million euros, did not allow FRAM to finance the necessary digital investments as all the income deriving from such sales was used to cover the liquidity needs. Unfortunately, this lack of investment in an online platform and also the political turmoil and attacks in North Africa had a devastating impact on FRAM's business.

The 2015 restructuring and the "pre-pack" sale

During the preventive proceedings, several purchasers were approached and Karavel quickly emerged as the most serious one.

In the summer of 2015, following a due diligence process, Karavel submitted an offer to acquire FRAM's French assets within the framework of a "pre-pack" sale, to be executed during the judicial recovery proceedings ("*procédure de redressement judiciaire*"), which would be opened subsequently. This solution offered more certainty to the purchaser than a sale realised during the preventive proceedings, especially both as regards the financial security package, and the collective employee-layoff and tax regime. The investments meant to restructure the business of FRAM (more than €20m) did not allow Karavel to incur additional expenses. Moreover, and contrary to a sale process in the course of conciliation proceedings, this solution allowed the purchaser:

(i) to select the assets and agreements to be transferred;
(ii) to renegotiate the agreements entered into by the FRAM Group; and
(iii) to be subject to accelerated proceedings concerning the authorisation of the sale by the European or French Competition Authorities and the financing of social restructurings.

> **FRAM HAD FAILED TO KEEP UP WITH THE GROWTH IN ONLINE TRENDS AND LACKED A SOPHISTICATED DIGITAL INTERFACE**

The Chinese HNA Group, associated with AFAT/Selectour, was reportedly interested in a share-deal transaction, to be finalised during the preventive proceedings negotiations, thus avoiding the detrimental economic consequences of a large publicity caused by the opening of formal insolvency proceedings. The Chinese Group's proposal aimed at being preferred to Karavel's offer, since it presented an out-of-court solution (which is always encouraged by the French Insolvency Law). However, HNA never submitted a binding offer and eventually renounced.

By the end of October 2015, FRAM had to declare its state of "cessation of payments" (its available assets had become insufficient to cover its due liabilities), and the Commercial Court of Toulouse ordered the opening of insolvency proceedings for FRAM's four main French companies.

However, as Karavel had made an offer for a purchase of the assets during the conciliation proceedings as a "pre-pack" solution and since such an offer was compliant with the conditions prescribed by the law (preservation of the business, of the jobs and payment of the creditors), the Commercial Court of Toulouse applied the new provisions of the French Insolvency Law and ordered a simplified bidding process (although allowing any other potential purchaser to send its offer to the judicial receiver) and an accelerated time schedule (in fact, only three weeks elapsed between the opening of the proceedings and the final decision of the Court on the bid selection).

Five other potential purchasers submitted offers for the company's assets during this short time-frame. These offers were made available to the public and to the other competitors, and led Karavel to make an improved offer, at a higher price and with more jobs being saved.

Karavel's improved offer was definitely the best offer, complying with all the three aforementioned main objectives of the French Insolvency Law.

Doctegestio, another bidder which had presented a sale plan, came forward with a continuation plan, supported by a number of shareholders who had agreed to sell their shares to Doctegestio. The aim of this continuation plan was to beat the sale plan proposed by Karavel. Indeed, the French law prefers a continuation plan over a sale plan, unless the former is not viable.

Pursuant to Doctegestio's plan, all the jobs were to be preserved (Karavel only offered to retain 85% of the personnel) in exchange for a very low price. In comparison, Karavel offered the highest price, taking into account the need to pay part of the company's debts.

Operating in the same sector as FRAM, Karavel presented ideal synergies to reassess FRAM's business and had already purchased and restructured other distressed companies. Doctegestio, in comparison, only ran clinics, retirement homes and hotels and had no experience in running travel agencies.

Consequently, the judicial receiver ("*administrateur judiciaire*"), the judicial liquidator ("*mandataire judiciaire*"), the prosecutor, as well as the employees' representatives supported Karavel's offer. The transfer of the assets of the four main French companies to Karavel was therefore ordered by the Commercial Court of Toulouse.

Conclusion

Since the 2014 French Insolvency Law Reform, FRAM and NEXTIRAONE have been the most significant examples of cases solved by a "pre-pack" solution.

The FRAM case clearly evidenced the advantages of "pre-pack" sales by insolvency professionals in France and can be seen as an early success for the French Reforms, whose main purposes were:

- to enhance transparency towards creditors which are not party to the conciliation proceedings;
- to maximise the sale price; and
- to limit the duration of insolvency proceedings which can last from 6- 18 months and usually lead to the company being wound up.

The FRAM case also demonstrates the ability of the French courts to preserve an international group with multiple assets and numerous employees working outside of France by finding the best solutions.

The CIRI (the French Treasury division in charge of restructuring cases) played a pre-eminent role in the FRAM case, helping to find a viable and long-term solution. They were in charge of the negotiations with the French tax and social authorities, and closely followed the bid process with the conciliator during the preventive proceedings. Indeed, FRAM's difficulties threatened not only the business of some of its co-contractors and/or main players in the travel business, but also the guarantee system of the travel agency operators.

Therefore, the pre-pack sale of FRAM succeeded in safeguarding one of France's main tour operators, and beyond that, in preserving the travel agency business in France. ■

Footnotes:

1 Pursuant to French law, when a company's equity is less than half of its share capital, the company must either be dissolved, or reduce/restore its share capital.

2 A priority in the creditor payment waterfall should the debtor become subject of insolvency proceedings, which was eventually the case.

> **KARAVEL SUBMITTED AN OFFER TO ACQUIRE FRAM'S FRENCH ASSETS WITHIN THE FRAMEWORK OF A "PRE-PACK" SALE, TO BE EXECUTED DURING THE JUDICIAL RECOVERY PROCEEDINGS**

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