

INSOL EUROPE SURVEY

REGULATION OF INSOLVENCY HOLDERS : FRANCE

JANUARY 2016

JUDICIAL ADMINISTRATORS
(ADMINISTRATEURS JUDICIAIRES)
JUDICIAL LIQUIDATORS
(MANDATAIRES JUDICIAIRES)

The provisions for preventing and resolving the issues related to companies in difficulty have become more attractive to heads of companies since the Act of July 26, 2005, called the "Safeguard Act" ("loi de sauvegarde"), reformed by the Order of December 18, 2008.

These laws are codified in Book VI of the French Commercial Code.

Five procedures are suited to the various difficulties encountered by companies and take into consideration their ability to once again create value:

Non collective procedure :

- ad hoc mandate : (mandat ad hoc) and conciliation: voluntary and confidential procedures begun at the sole initiative of the head of the company; conciliation can be initiated less 45 days after it has been determined that the company is in cessation of payments (l'état de cessation des paiements),

Collective procedure :

- safeguard (sauvegarde) : three collective procedures : sauvegarde, sauvegarde accélérée et sauvegarde financière accélérée : which are public and preventative, prior to cessation of payments, begun solely at the sole initiative of the head of the company,

- judicial reorganization (redressement judiciaire) and judicial liquidation (liquidation judiciaire): joint procedures, which are public, and after cessation of payments ; the first (redressement judiciaire) is an attempt to reorganize the company by removing liabilities or by sale, and the second, judicial liquidation, applies when the business can no longer be continued; the goal of each is to ensure going on of activity , and if it is not possible, that the business is terminated while protecting employee rights and selling the company's assets under the best circumstances considering the interests of creditors and debtor.

Accordingly, commercial and civil courts may grant judicial administrators (administrateurs judiciaires) and judicial liquidators (mandataires judiciaires) judicial duties with varying scope.

These two professions, which are separate, arose from the division of the prior profession of trustee-judicial administrator (syndic-administrateur judiciaire), which was split to ensure the independent representation and defense of the sometimes divergent interests of companies and their creditors.

They have specific, complementary characteristics and scopes of actions:

- judicial administrators assist (and occasionally replace) managers to turnaround their companies
- judicial liquidators represent the collective interests of creditors and, if the company cannot again create value, sell its assets, distribute the sales proceeds and dismiss employees.

I – TWO COMPLEMENTARY PROFESSIONS DEDICATED TO THE SERVICE OF COMPANIES IN DIFFICULTY AND THEIR CREDITORS.

To date around 420 offices, including 111 judicial administrators offices and 309 judicial liquidators offices throughout France, employ more than 3,600 employees.

Assisting the judicial process, they perform a public service mission that is strictly regulated as part of a liberal profession and are not subject to a quantitative restriction (numerus clausus).

In recent years, they have tended to group together.

JUDICIAL ADMONISTRATORS :

Negotiating professionals, receivers hold a special position in preventing corporate difficulties (conciliation, ad hoc administration, etc.).

Pursuant to a judicial order, they are also responsible for managing third-party assets or performing assistance and supervising functions in managing those assets (provisional administration of companies, co-ownership entities (copropriétés), joint-ownership entities (indivisions), estates, etc.).

When a company has a turnover, excluding VAT, that exceeds € 3 M or employs more than 20 employees and is relying on a safeguard or judicial reorganization procedure, a judicial administrator must work with the head of the company and his advisors to try to ensure that the company survives, to identify the source of the difficulties by conducting an assessment of the company, to recommend or implement restructuring steps to ensure the company's survival and to preserve all or some of its employee positions.

Above these thresholds, the appointment of a receiver (judicial Administrator) by the court is optional

With the head of the company, the receiver develops and submits to the court any solution that would allow the business to continue as part of a recovery or reorganization plan.

If necessary, a receiver organizes the sale of the business following transparent tender offer procedures which he submits to the court, after analysis and consultations, to sell the business and/or the company's assets.

JUDICIAL LIQUIDATORS

Judicial liquidators are appointed by civil and commercial courts in all bankruptcy proceedings (safeguard sur and judicial reorganization and judicial liquidation) to represent the interests of creditors.

They request creditors to lodge their claims and certify the company's liabilities, which are approved on a single occasion by the supervisory Judge (juge-commissaire); they consult with creditors regarding settlement proposals made by the company, and submit assessment of such proposals.

They pay the amounts owed to employees, dismiss employees on economic grounds pursuant to a judicial liquidation.

In 2012, 277 300 employees received €2,08M wages from Judicial Liquidators.

A judicial liquidator when appointed as a liquidator breaks the company up (unless it is possible to sell it as a whole) by separately selling the movable and immovable property and collects in case the amounts owed to the company.

II. TWO CONTROLLED AND STRONG REGULATED PROFESSIONS.

DEMANDING SELECTION :

Joining these two professions requires a diploma, completion of test and a trial period:

- receipt of a high school diploma plus a 4-year university degree (in law, finance, economics or management) or the equivalent, a diploma granted by an institution of higher economic and management learning, an advanced finance and accounting degree, etc.
- successful completion of an exam to allow a professional trial period to be started, which includes written sections on law and accounting and an oral exam before a sovereign, independent panel of the National Council (Conseil national). This exam may be taken three times.
- completion of trial period of no less than three years and no more than six years, which must be a paid position, under the supervision of a professional (maître de stage) who practices the profession (Articles R 811-15 and R 812-8 of the French Commercial Code).
- after the trial period, successful completion of a professional aptitude test for the duties of judicial liquidator or judicial administrator including an assessment report from the trial period and written and oral exams; this exam may be taken twice.
- Finally, for both judicial liquidators and judicial administrators, practicing the profession is subject to registration on a list prepared by each of the two national registration and disciplinary commissions (one for judicial liquidators and one for judicial administrators). The two national lists are divided into "sections" that correspond to the geographical jurisdiction of each court of appeal; professionals registered on these lists may practice anywhere in France.

A STATUS THAT PROVIDES SECURITY FOR THIRD PARTIES :

The status of judicial liquidators and judicial administrators, which was originally established by the Act No. 85-1390 of January 25, 1985 and Implementation Decree 85-1389 on December 27, 1985, has since been amended by various laws.

Various orders of the Garde des Sceaux (French Ministry of Justice), in particular, April 11, 2001 Order establishing professional rules, is being rewritten in coordination with the Chancellery.

A STRICTLY CONTROLLED MECHANISM :

Judicial liquidators and administrators are subject to permanent auditing of their accounts by a statutory auditor who certifies twice a year that, inter alia, third-party accounts are properly kept .

In addition, they have an obligation to file quarterly statements with the clerk's office of the courts that appoint them and public prosecutor (parquet).

Each practitioner has all of its activities reviewed every three years. In addition, at any time may be subjected to unannounced audit on an occasional basis..

The audit is conducted by three :

- two judicial liquidators or judicial administrators, as appropriate, who are included on the list submitted by the CNAJMJ (National Council of Judicial Administrators and Judicial Liquidators : Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires) that is approved by the Garde des Sceaux, and

a statutory auditor is included on the list approved by the Garde des Sceaux based on a proposal from the CNAJMJ.

A firm may also be subject to inspections ordered by a judicial authority.

NECESSARY INDEPENDENCE GIVEN THE THE DIVERGENT ECONOMIC INTERESTS INVOLVED :

The stakes and conflicts of interest that arise in handling corporate difficulties require total independence by judicial liquidators and judicial administrators, whether in conjunction with extrajudicial pre-insolvency procedures (ad hoc administration and conciliation) or in bankruptcy (safeguard, judicial pre-insolvency and insolvency procedures ..

This independence is guaranteed by the prohibition to which registered professionals are subject against conducting any type of economic activity specified in Articles L.811-10 and L.812-8 of the French Commercial Code.

As a result, a judicial liquidator or a judicial administrator registered on the list prepared by the National Registration and Disciplinary Commission itself will not find himself with an opposing interest and, therefore, retains total independence with respect to the interests for which he is responsible.

This legal restriction is also reinforced by professional rules that devote an entire chapter to ensuring independence.

This independence is a critical pre-condition for the credibility of the actions of professionals who must not be suspected of defending particular interests (of heads of companies, shareholders, investment funds, etc.).

For ad hoc administration and conciliation, understanding that this independence requirement is necessary to return [the company] to a climate of confidence and transparency, the law established very broad incompatibility rules applying the provisions of Article L.611-13 of the French Commercial Code.

A FINANCIAL GUARANTEE :

The insurance of the civil liability and the representation of funds provides a level of guarantee without equal in Europe.

The status of judicial liquidators and administrators requires them to take out insurance with a professional fund governed by a board of directors consisting of 12 equal members elected for five years, under the oversight of a government commissioner.

This fund having legal personality is specifically dedicated to this purpose and is a separate legal entity designed to insure:

- civil liability (€ 42.5 M in coverage) with a minimum deductible of € 3.8 K and maximum deductible of € 11.7 K, forcing professional to assume liability.
- the risk of failing to represent the funds that they are required to manage, for which they have a broad, collective coverage of € 38 M,
- continuing coverage in the group policy, with no deductible, in the event of death or departure from the profession for any reason whatsoever (subsequent coverage),
- joint professional liability with their own assets in terms of representing funds over € 35 M.

To take advantage of this coverage, professionals paid premiums equal to more than 3.50% of their revenue.

PROFESSIONAL RULES AND ACCOUNTING OBLIGATIONS :

These rules include all ethical requirements that, in accordance with the laws and regulations applicable on the date of their approval by the Garde des Sceaux are binding on all judicial liquidators and judicial administrators in the conduct their activity.

These rules also include accounting obligations; all judicial agents must maintain separate:

- general accounting records of the operation of their firms,
- "special" accounting that records, for each matter accepted, of all transfers affecting the accounts opened in the name of the professional, which must be opened with the Financing Fund Caisse des depots et consignations and, if applicable, as an exception for voluntary matters only, with other financial institutions, as well as the transactions underlying these transfers.

Each firm must have an accounting procedures manual that allows the accounting method used to be understood and which facilitates professional audits, with which it must comply.

The obligation to deposit funds with the Financing Fund Caisse des dépôts et consignations also provides for interest to be earned on the funds deposited, which must be applied to the matter in question.

TWO INDEPENDANT REGISTRATION AND DISCIPLINARY COMMISSIONS :

For each of the two professions, the law has created a national registration and disciplinary commission. These commissions consist of 12 members who are judges, financial and labor representatives and from universities, and three representatives from the profession.

The National Council of Judicial Administrators and Judicial Liquidators issues an opinion on any request included on its agenda.

III. THE NATIONAL COUNCIL OF JUDICIAL ADMINISTRATORS AND JUDICIAL LIQUIDATORS (Article L.814-2 of the French Commercial Code)

The National Council is a legal entity for public utility , consists of two colleges representing each profession, which are elected by their peers (eight judicial liquidators and eight judicial administrators).

And is responsible for:

- defending the joint interests of the two professions,
- ensuring compliance by professionals with their obligations,
- organizing professional training, and permanent training
- Ensuring compliance with their obligation to maintain and improve their knowledge and expertise,
- auditing their offices and drawing up an annual report thereon for the Minister of Justice Garde des Sceaux .

The creation in 1992 of the National Council of Judicial Administrators and Judicial Liquidators (Conseil national des administrateurs judiciaires et des mandataires judiciaires) allowed a joint approach to continually improving the quality, performance and security of the services provided by these professionals.

In 2003, the law granted the Chairman of the National Commission the authority to task each of the two national registration and disciplinary commissions.

In 2011 the French Act on Social Modernisation of Regulated Judicial and Legal Professions entrusted the CNAJMJ Council with the task of setting up an electronic portal providing for secured communication services as related to the activities of Judicial Administrators and Judicial Liquidators.

REMUNERATION :

The remuneration of the an I O H is determined by law when appointed in an insolvency procedure.

The Commercial Code regulates IOH'S fees.

The remuneration and indeed costs are paid out of the proceeds of the assets.

Authorisation and approval of the remuneration are placed in the hands of the court.

Fees are mostly charged of a relevant percentage : of realisations, of amount of the the turnover.

ETUDE MARC ANDRE - 30900 NIMES