The International Insolvency Review

Second Edition

Editor
Donald S Bernstein

Law Business Research

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Chapter 12

FRANCE

Hélène Bourbouloux, Arnaud Pérès, Juliette Loget and Pierre Chatelain[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

French insolvency law currently provides for seven restructuring and (pre-)insolvency proceedings, which can be classified into two subgroups: two court-assisted proceedings (*ad hoc* mandate and conciliation proceedings) and five court-controlled proceedings (judicial reorganisation, judicial liquidation and three types of safeguard proceedings). The main features of each of these proceedings are discussed below, as well as the key changes resulting from a fairly significant reform introduced in the course of 2014.[2]

The two court-assisted proceedings (*ad hoc* mandate and conciliation proceedings) are both informal, amicable proceedings where no creditor can be forced into a restructuring agreement and where the management still runs the business. Negotiations thus remain governed by the terms of the contract for the duration of the proceeding, which (unless the contract provides that certain terms can be changed with the consent of a specified majority of creditors) implies obtaining the consent of each and every creditor involved in the restructuring process. Furthermore, only the debtor can decide to enter into these kinds of non-compulsory proceedings.

These proceedings are conducted under the supervision of a court-appointed practitioner[3] (*ad hoc* agent or conciliator) to help the debtor reach an agreement with its creditors, typically to reduce or reschedule its indebtedness.

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2 Ordinance No. 2014-326 of 12 March 2014 and Decree No. 2014-736 of 30 June 2014.

3 Most of the time, court-appointed practitioners are chosen from the profession of judicial administrators, who are independent restructuring and insolvency practitioners. Judicial administrators are members of a regulated profession requiring a specific degree and

Both are confidential proceedings. The conciliation proceeding can, however, become public if the debtor seeks the approval of the commercial court, so that new money provided to the distressed debtor benefits from a legal privilege in case of future insolvency proceedings.[4] Although the conciliation and the related court decision become public, the terms and conditions of the conciliation agreement must, by law, remain confidential.

Such pre-insolvency proceedings are increasingly implemented to restructure distressed leveraged buyouts (LBOs) or to secure share capital reorganisations and spin-offs of distressed companies (see Section IV, *infra*).

All five court-controlled proceedings are public and share the following common features:

a All pre-filing claims (with very few exceptions) are automatically stayed.[5]

b All creditors (except employees) must file proof of their claim within two months after the opening judgment has been published. The period is extended to four months for creditors located outside France. Fortunately, the 2014 reform has simplified this proof of creditors' claim process, bringing it closer to the one applying to US Chapter 11 proceedings. In particular, the list of creditors' claims prepared by the debtor at the outset of the proceeding is now deemed a valid proof of claim made on behalf of the relevant creditors, except for those creditors who decide to file their own proof of claim.

c Debts arising after the commencement of the proceedings[6] will be given priority over debts incurred prior to their commencement (other than certain employment claims and, as noted above, claims of creditors who provided new money as part of a previous conciliation proceeding).

d In judicial reorganisation and judicial liquidation proceedings, certain types of transactions may be set aside by the court (fraudulent conveyances) if they were entered into by the debtor during a hardening period before a judgment opening a judicial reorganisation or a judicial liquidation. This period runs from the date on which the company is deemed insolvent; such date is fixed by the court and may predate the judgment commencing the relevant insolvency proceedings by up to 18 months.

However, court-controlled proceedings vary in terms of the involvement of the court-appointed practitioner in running the business. The safeguard, accelerated safeguard (AS) and accelerated financial safeguard (AFS) (see Section I.iii, *infra*) are debtor-in-possession proceedings. In a judicial reorganisation proceeding, the court has discretion to decide

appropriate qualifications, dedicated exclusively to the assistance or representation of debtors subject to pre-insolvency or insolvency proceedings.

4 This privilege is useful mainly in liquidation proceedings.

5 In an AFS proceeding, the automatic stay only applies to financial creditors (see Section I.iii, *infra*, for further details).

6 Provided such debts are incurred for the purposes of the proceedings or in consideration of services provided to the debtor.

whether to set aside the managers. The role of management is particularly reduced in a judicial liquidation proceeding because the debtor generally ceases to conduct any business. Nevertheless, the court can decide that the business will continue under the supervision of a court-appointed liquidator who is in charge of liquidating the debtor's assets to pay its creditors.

Further, the safeguard, AS and AFS, introduced in 2005, 2014 and 2010 respectively, can only be opened as long as the debtor remains solvent (i.e., when the debtor is still able to pay its debts as they fall due out of its available assets (taking into account any waiver or moratorium to which its creditors may have consented)) or, with respect to AS and AFS proceedings, provided it has not been insolvent for more than 45 days, whereas only the other two court-controlled proceedings (the judicial reorganisation and judicial liquidation) are available to insolvent debtors.

In practice, some meaningful restructuring cases are first handled via some of those court-assisted proceedings, then implemented through a court-controlled proceeding, typically through an AFS, AS or safeguard.

ii Policy

French insolvency legislation has long been seen, generally, as favouring the debtor and the continuation of a business over the payment of creditors: French law explicitly sets the preservation of the business and the safeguarding of employment as the primary goal of a restructuring over the payment of the creditors (while the payment of the creditors becomes the primary goal only in a judicial liquidation, where all prospects of continuing the business have vanished). However, a fairly significant reform was introduced in 2014, whose stated objective was to shift the balance in favour of creditors. The key changes introduced by the reform were, first, to facilitate the process for creditors to file proof of their claims: in principle, creditors no longer have to go through that process if their claim is mentioned in the filing made by the debtor itself at the outset of the proceeding. Creditors can elect to make that filing themselves if there was an omission in the debtor's filing, or if they dispute the amount mentioned by the debtor. Second, in a safeguard proceeding, creditors (but, surprisingly, not bondholders) are now entitled to submit their own restructuring plan, effectively as a counterproposal to the plan prepared by the debtor. Third, the 'nuisance capacity' of minority shareholders is reduced in safeguard proceedings since the court may decide to reduce the majority required for the shareholders' approval of debt-for-equity swaps from 66.33 per cent down to 50 per cent. Finally, in a judicial reorganisation proceeding, the shareholders' approval of a debt-for-equity swap may be forced on dissenting shareholders, in certain circumstances (see Section I.iii, *infra*).

Furthermore, French law heavily favours voluntary arrangements reached in *ad hoc* mandates and conciliation proceedings. It is often held that the potentially drastic measures that can be imposed on creditors in court-controlled proceedings is a strong incentive for them to reach a voluntary out-of-court arrangement. As a matter of fact, these informal court-assisted proceedings play a key role in most restructuring situations.

Another characteristic feature of French insolvency law is the very favourable treatment of the debtor's employees in insolvency, who are granted first-rank privilege over all the assets for the payment of their wage claims. In practice, employees' claims are also paid upfront by a quasi-public collective body, the Wage Guarantee Scheme (AGS), which will then benefit from the employees' first-rank privilege.

iii Restructuring and (pre-)insolvency procedures

Ad hoc mandate proceedings

Ad hoc mandate proceedings are straightforward and very flexible. It does not take more than a few days to obtain a court order appointing an *ad hoc* agent, who plays the role of an ombudsman and is in charge of facilitating and supervising discussions between the debtor and its main creditors. There is no statutory time limit within which the *ad hoc* agent must complete his or her tasks. The task of the *ad hoc* agent is set by the president of the commercial court according to the debtor's needs.

Conciliation proceedings

A debtor facing 'legal, economic or financial difficulties' may request the appointment of a conciliator to assist it in reaching an agreement with its main creditors and contractual partners provided it has not been insolvent for more than 45 days. At the end of the process, if an agreement has been found, it may be either acknowledged by the president of the competent commercial court or approved by the commercial court. Acknowledgment gives the agreement the legal force of an enforceable court decision. Approval of the agreement allows new financing provided to the distressed debtor (new money) to be granted a legal privilege in case of future liquidation. The court cannot appoint the conciliator for longer than four months, extendable at the conciliator's request provided that the total duration of the conciliation proceedings cannot exceed five months. The task of the conciliator may include the total or partial sale of the business (pre-pack disposal), to be implemented as necessary through court-controlled proceedings.

Safeguard proceedings

The safeguard proceeding was introduced in 2005 and was (in part) modelled on the US Chapter 11 proceedings. The debtor may not apply for safeguard if it is insolvent. Safeguard proceedings are public.

One of the main features of safeguard proceedings is the creation of two creditors' committees (one consisting of credit institutions and other creditors holding bank debt and the other of the main trade creditors) and, where applicable, a bondholders' committee (comprising all holders of bonds issued by the company). Each committee votes on the proposed restructuring plans, and the required majority in each committee is two-thirds of the voting creditors. Creditors whose repayment terms are not affected by the plan are not permitted to take part in the vote. The plans submitted to the committees may include a debt rescheduling, a debt write-off, a debt-for-equity swap, or a combination of the three. The plan can also provide for a partial sale of the business or certain assets (akin to Section 363 sales in the US). In addition to the approval of the creditor and bondholders' committees, debt-for-equity swaps require the approval of shareholders.

Provided that the plan is approved by the committees (and the shareholders if there is a debt-for-equity swap), and that creditors' interests are adequately preserved, the court approves the plan, which becomes binding on all parties, including dissenting committee members and shareholders.

If the plan is not approved by one of the committees, the court may, as a fall-back plan, impose a rescheduling of debt repayments over a maximum period of 10 years, but cannot impose a write-off of claim.

Accelerated safeguard and accelerated financial safeguard proceedings

The AS was introduced by the 2014 reform, as a specific type of safeguard proceeding intended to be implemented on an accelerated basis. This proceeding is only available to companies that have first been through a conciliation proceeding and failed to reach a unanimous restructuring agreement with their creditors.[7] The court will open an AS proceeding if the outcome of the conciliation suggests that the restructuring plan negotiated during the conciliation has sufficient support from the creditors such that it is reasonably likely to be adopted on an expedited basis (three months maximum). In other words, if there is a consensus among creditors on the plan proposed by the debtor in out-of-court negotiations, the AS proceeding is just a tool to cram down dissenting creditors.

The AFS proceeding is very similar to the AS and is intended for situations where the restructuring only involves financial debt. As a result, the AFS only affects financial creditors (and shareholders, to the extent there is a debt-for-equity swap) and does not entail any automatic stay of trade payables and other non-financial liabilities of the debtor, to limit the disruption to the business.

Judicial reorganisation proceedings

Judicial reorganisation proceedings apply to insolvent debtors (i.e., those that cannot pay their due debts out of their available assets). Most of the rules applicable to safeguard proceedings also apply to judicial reorganisation proceedings: pre-filing claims are automatically stayed, the reorganisation plan must be adopted by the creditors' committees and can provide for reschedulings, debt write-offs and debt-for-equity swaps, and the partial sale of the business.

The court may also order a total or partial sale of the business at the request of the court-appointed administrator.

Since the 2014 reform, a debt-for-equity swap may be forced on dissenting shareholders under certain circumstances. This is a significant change in the law that was welcomed by most commentators and practitioners, although it only applies to judicial reorganisation proceedings and is not available in safeguard. Overall, this change is viewed as a step in the right direction, reducing the damaging 'nuisance capacity' of shareholders.

7 AS proceedings are only available to debtors that draw up consolidated accounts or that exceed at least one of the following thresholds: (1) 20 employees, (2) €3 million of turnover or (3) a balance sheet of €1.5 million.

Judicial liquidation

The aim of these proceedings is to liquidate a company by selling its business when there is no prospect of recovery, be it as a whole or by branch of activity, or by each of its assets individually.

Liquidation proceedings last until no more proceeds can be expected from the sale of the company's business or assets. After two years (from the judgment ordering liquidation), any creditor can request that the court order the liquidator to close the liquidation. There is a simplified form of liquidation proceedings available for small businesses, which lasts for a maximum of one year.

iv Starting proceedings

Pre-insolvency proceedings (*ad hoc* mandates and conciliation proceedings) and safeguard proceedings may only be started by the debtor. Judicial reorganisations and judicial liquidations may be initiated by the debtors themselves, creditors or the state prosecutor. The debtor is required to petition for insolvency proceedings within 45 days of becoming insolvent unless it has initiated a conciliation proceeding within the same period. If it does not, directors and, as the case may be, *de facto* managers, may be subject to personal liability.

Only a few persons may appeal the opening of an insolvency proceeding: the debtor, a creditor that is party to the proceeding, the state prosecutor and, in respect of judicial liquidations, the workers' council. The appeal must be filed within 10 days of the judgment being notified to the parties. Third parties (including creditors that were not party to the proceeding) may also contest a judgment opening an insolvency proceeding or approving a conciliation agreement through third-party proceedings within 10 days of the opening judgment being published.

v Special regimes

Banks

The general insolvency regime described above applies generally to the vast majority of companies, with slight adjustments made to account for regulated entities such as insurance companies. However, France recently adopted new banking legislation[8] introducing an enhanced supervisory framework, including, critically, bail-in and other resolution powers in advance of the implementation of the European Recovery and Resolution Directive.[9] The French banking regulator, ACPR, is given very broad resolution tools with respect to failing banks,[10] including:

8 Law No. 2013-672 on the separation and regulation of banking activities dated 26 July 2013.

9 Directive 2014/59/EU of the European Parliament and of the Council dated 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms shall be implemented by Member States from 1 January 2015, except with respect to the bail-in tool for senior debt, which will apply from 1 January 2016 at the latest.

10 Failing banks are defined as those that, currently or in the near future: (1) no longer comply with regulatory capital requirements; (2) are not able to make payments that are, or will be imminently, due; or (3) require extraordinary public financial support.

a bail-in (i.e., the power to cancel or write-off shareholders' equity and then cancel, write-off or convert subordinated debt into equity, in accordance with their seniority);[11]
b the power to transfer all or part of the bank's assets and activities;
c the power to force a bank to issue new equity; and
d the power to terminate the contracts of executives or appoint a temporary administrator.

In cases determined by the French regulator, at its sole discretion, to be presenting urgent risks, it may adopt resolution measures unilaterally, without affording a hearing to interested parties.

Corporate groups

The French insolvency regime does not yet include specific rules tailored for corporate groups. Therefore, a separate insolvency proceeding must be opened with respect to each distressed company of the group and conflicts of jurisdiction (even within France among different local courts) may arise as a result.[12] Practitioners have attempted to avoid such conflicts and centralise all proceedings of the group companies using concepts such as the 'centre of main interests' (COMI)[13] (stemming from EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EU Insolvency Regulation) – see Section I.vi, *infra*) or 'merger of the assets and liabilities'.[14] None of these concepts are, however, ideal for the (albeit common) situation where a corporate group is affected by financial difficulties.

vi Cross-border issues

Recognition of foreign insolvency proceedings differs largely depending on whether the debtor has its COMI located within the European Union (except Denmark).

In a case where the debtor's COMI is located in the EU, the EU Insolvency Regulation allows insolvency proceedings carried out in EU Member States to be automatically recognised in France. Alternatively, if a debtor's COMI is in France, the main proceeding can be commenced before the French courts and will be automatically recognised throughout the EU. The EU Insolvency Regulation also provides that secondary proceedings can subsequently be commenced to liquidate an establishment's assets located in another EU Member State.

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11 As yet, senior debt is not subject to this bail-in power, contrary to the provisions of the EU Recovery and Resolution Directive.

12 As a step in the right direction, the 2014 reform has at least authorised the use of one single court-appointed practitioner for the proceedings of all companies within a group.

13 A company's COMI is presumed to be the place of its registered office.

14 A merger of the assets and liabilities entails the extension of an insolvency proceeding to an affiliate and is characterised when the following applies to companies in the group: commingling of the accounts, abnormal financial flows or interference in the affiliate's activities and management.

The recognition and enforcement in France of insolvency proceedings commenced in another country (outside the EU) requires an enforcement procedure during which, although the merits will not be reviewed, the French court will verify certain conditions pertaining to the jurisdiction of the foreign court in accordance with French rules of international conflicts of jurisdiction, compliance with French international public policy, absence of fraud, and absence of conflict with a French judgment (or a foreign judgment that has become effective in France). Although this would greatly simplify this burdensome process, France has not adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, as the United States did through Chapter 15 of the federal Bankruptcy Code.

II INSOLVENCY METRICS

With an unemployment rate of 10.7 per cent in 2013 and no growth (GDP in 2013/2014 is about flat),[15] France has been severely affected by the economic downturn of 2008.

In 2013, 63,101 insolvency proceedings were opened in France, compared with 61,278 in 2012 (i.e., an increase of 3 per cent following a similar increase in 2012 and small decreases of insolvency proceedings in 2010 and 2011).[16]

These official figures are unfortunately not representative of the restructuring market in France, first, because they do not include confidential amicable court-assisted proceedings (*ad hoc* mandates and conciliations), although these are more commonly used than public court-controlled proceedings in France in the case of large restructurings.[17] Second, the bulk of the more than 60,000 insolvency proceedings opened in France each year concerns extremely small businesses, mostly with no or very few employees: in 2013, 92 per cent of insolvency proceedings concerned companies with fewer than

15 Employment and labour markets: *OECD Economic Outlook No. 95 – May 2014*, http://stats.oecd.org/index.aspx?DataSetCode=EO93_FLASHFILE_EO93.

16 Source: 2013 report *Défaillances et sauvegardes d'entreprises en France* published by Altares, 16 January 2014, www.altares.fr/wp-content/uploads/2014/01/AltaresDefaSauvBilan2013.pdf. The number of insolvency proceedings opened in 2013 is close to that of 2009, in the midst of the financial crisis.

17 The few statistics available suggest that nearly 10,000 court-assisted proceedings were opened between 2006 and 2011 (Guillonneau, Haehl and Munoz-Perez, 'La prévention des difficultés des entreprises par le mandat *ad hoc* et la conciliation devant les juridictions commerciales de 2006 à 2011'). However, this number is not a fair reflection of the economic, financial and social significance of the businesses that used such court-assisted proceedings. In the absence of nationwide statistics on this subject, the figures of co-author Hélène Bourbouloux – a single professional judicial administrator – speak for themselves: since the end of 2008, nearly 56 court-assisted proceedings have been handled, concerning about 140,000 employees, and debts amounting to €25 billion, with the consolidated turnover reaching €25 billion.

10 employees.[18] At the other end of the spectrum, only 185 companies in insolvency in 2013 (representing 0.3 per cent) had more than 100 employees. Similarly, companies with a turnover exceeding €15 million accounted for 0.4 per cent of insolvency proceedings in 2013, while companies with a turnover under €1.5 million represented 39.9 per cent.[19] Also, the number of insolvency proceedings must be compared with the number of new companies created in France – 538,185 in 2013,[20] about nine times the number of bankruptcies.

When looking at statistics, commentators note that 85 per cent of insolvency proceedings opened in France lead to a liquidation,[21] to conclude that the legal framework is inefficient. A closer examination, however, reveals that nearly half of the jobs of businesses in insolvency are saved.[22]

III PLENARY INSOLVENCY PROCEEDINGS

Ailing LBOs have continued to fuel the restructuring market in recent years, in the aftermath of the private equity bubble in 2006. In most cases, LBO restructuring cases are lender-led and are handled through informal (court-assisted but not court-controlled) proceedings.

i Saur

Saur is the third-largest water services company in France (after Veolia and Suez Environnement). Its 13,000 employees generated revenues of €1.7 billion in 2012 with 10,000 municipalities and 18 million end-consumers in France and worldwide.

Saur breached a financial covenant when it faced a 10 per cent drop in its operating profit in the first half of 2012. The group petitioned the President of the Versailles Commercial Court to appoint a conciliator to help negotiate with its lenders and shareholders under a (confidential) pre-insolvency conciliation proceeding. The key features of the restructuring plan that was negotiated under the aegis of the conciliator involve:

18 Altares report op. cit. (footnote 16). This figure includes the insolvency proceedings of companies with fewer than 10 employees or where the number of employees is unknown.

19 Altares report op. cit. (footnote 16).

20 *Key Figures of Business Creation in 2013*, published by the governmental agency for business creation (APCE) and available online at www.observatoire-creation.com/sites/default/files/actualites/pdf/APCE_chiffrescles_2013.pdf.

21 2013 statistics of French commercial courts prepared by the General Conference of Lay Judges of France in April 2014.

22 Over the 12 months before 31 March 2012, approximately 58 per cent of jobs were saved. For further detail see Bourbouloux, 'Les chiffres trompeurs: halte aux idées reçues! La boîte à outils du livre VI est performante', *Bulletin Joly: Entreprises en difficulté*, No. 4, July–August 2012.

a lenders taking over Saur, with former shareholders[23] being written off entirely;
b a write-off of more than 50 per cent of senior debt and a full write-off of junior debt (total debt halved down to €900 million with an additional €150 million tranche that can be fully written off in the event of subsequent difficulties);
c new money financing of €200 million.

Interestingly, although the restructuring was fairly drastic, it was not necessary to resort to a safeguard to proceed to a court-enforced cramdown of dissenting creditors, since the lender-led restructuring agreement negotiated under conciliation was eventually approved by the court, so that the new money financing could be afforded a legal privilege in the event of a future liquidation. As noted above, whenever possible, the parties in France tend to avoid court-controlled proceedings such as a safeguard or judicial reorganisation, to avoid the public stigma linked to bankruptcy and reduce the disruption to the debtor's business.

ii Solocal

Solocal was previously known as PagesJaunes (akin to the Yellow Pages in the UK), the group that marketed the telephone directories. Although the group transitioned to online services, its business model was challenged, in particular by web search engines such as Google or Yahoo and it was faced with a significant decline in revenue.

In 2014, Solocal negotiated with its creditors to extend the maturity of its €1.3 billion 2006 LBO debt by three to five years, in exchange for an immediate partial repayment of €400 million, financed through a share capital increase. The company was not able to achieve the contractually required majority consent of 90 per cent of its creditors, so it requested the opening of an AFS to enforce the proposed financial restructuring.

Eventually, in the AFS the creditors approved the restructuring plan and the vote did reach a 90 per cent majority (well above the two-thirds threshold mandated by safeguard proceedings rules).

The restructuring of Solocal in 2014 was the first time this new AFS proceeding was implemented with respect to a listed company. As previously mentioned, the AFS aims at limiting the disruption to the debtor's business, as it does not entail any automatic stay of trade payables and is implemented on an accelerated basis. Also, the *Solocal* case shows that the AFS forces creditors to actually take a position on the proposed restructuring: either to approve or to reject it,[24] while it is tempting for creditors to simply wait and see during informal negotiations, thus delaying implementation. Hedged creditors under a credit–default swap are a good illustration of this issue.[25]

23 Séché Environnement (a French player in environmental projects and waste management), the French sovereign investment fund FSI and private equity funds Axa PE and Cube Infrastructure.

24 If, however, creditors choose not to show up at the creditors' meeting convened to rule on the plan, their claims will be disregarded.

25 Because a hedged creditor is compensated only upon the occurrence of a 'credit event', it usually prefers to remain passive and not to approve any restructuring of the debtor so as not

iii Sequana

Sequana, also a publicly listed company, is a leader in the distribution of paper and packaging products, with €3.3 billion sales in 2013 and 10,000 employees worldwide. It underwent in 2014 its third financial restructuring in three years. Almost €1 billion of debt were restructured through a court-assisted conciliation proceeding, with a debt write-off in the amount of €164 million, a rescheduling for €320 million, a deferred debt-for-equity swap of €132 million and a new equity contribution by existing shareholders for €64 million.

An interesting feature of the Sequana restructuring was the swap of €20 million of existing debt against 'disposal proceeds notes' (DPN). The DPN, which were created for the purpose of the Technicolor restructuring in 2010, are notes that entitle their holders to a reimbursement based on the proceeds to come of disposals of certain identified non-strategic assets. Therefore, DPN are a way to buy time (about a year in the Sequana case) to organise a smooth disposal process of certain assets, in order hopefully to maximise the value and cash proceeds to be received by the company.[26]

iv Cœur Défense

Cœur Défense, named after the largest office towers in Europe, located in La Défense near Paris, was one of the incidental victims of Lehman Brothers' demise in September 2008. It is also one of the most famous (or infamous, depending on one's point of view) restructuring cases in France in recent years, attracting considerable attention from practitioners and scholars.

In June 2007, a Lehman Brothers investment funds bought the Cœur Défense towers for €2.1 billion through a special purpose vehicle called Heart Of La Défense (HOLD) incorporated in France, itself held by a Luxembourg entity named Dame Luxembourg. A €1.6 billion loan to finance the acquisition was refinanced through a securitisation structure and secured through: (1) a mortgage on the assets (the towers), (2) an assignment (by way of a *bordereau* Dailly[27]) of the rental income and (3) a pledge of HOLD shares. Under the terms of the loan, HOLD was required to hedge its interest rate exposure and Lehman was then chosen as the swap counterparty. When the bank collapsed, the borrower was compelled to find a better-rated swap counterparty, which proved impossible given the market conditions (as one recalls, there was hardly a market at all for several weeks).

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to be seen as participating in any way in the characterisation of the 'credit event' triggering the unwinding of the credit–default swap. For further information on this topic, see Pérès, Perchet, Loget and Schlumberger, 'Quelle réforme du droit des faillites?' *Banque & Droit* No. HS-2013-2, October 2013, pp. 22 et seq. and Foillard, 'Les procedures collectives à l'épreuve des contrats de swap', p. 51.

26 For further details on DPNs, see Pérès and Loget, 'Les DPN émis par Technicolor : un outil sur mesure au service du recentrage de ses activités', *Bulletin Joly: Bourse & Droit*, January 2011, pp. 64 et seq.

27 Under French law, a professional or a company can transfer its receivables to a bank via a simplified mechanism known as a *bordereau* Dailly or *cession* Dailly.

To prevent an imminent default under the loan (for failure to maintain a suitable hedging protection), HOLD and its shareholder filed for safeguard in France. Various important legal issues were at stake here, including whether and under what conditions a Luxembourg entity could be eligible for safeguard in France and also if a mere holding company (holding buildings and therefore hardly a 'business' in the usual sense) was eligible for safeguard.

Both questions were much debated, gave rise to a long (several years) and complex judicial battle between the debtor or sponsor and the senior creditors. Ultimately, the French Supreme Court ruled that the answer to each question was positive: first, the determination that the Luxembourg shareholder was eligible for safeguard in France was made on the basis that, according to the court, its COMI within the meaning of the EU Insolvency Regulation was in France. On the second question, the court merely stated that the law did not provide as a condition that the debtor should also qualify as a 'business' or an 'enterprise'.

In the United States, assuming Cœur Défense would have been eligible to the protection of Chapter 11, the secured creditors would have been entitled to foreclose on their mortgage or pledge and become the new owners of the assets. This outcome contrasts with French insolvency law, pursuant to which a creditor takeover requires the shareholders' approval in safeguard proceedings (see Section IV, *infra*, for further details). Cœur Défense's sponsor was not written off.

v Vivarte

Vivarte is a footwear and clothing retailer with well-known brands such as Caroll, Kookaï, La Halle, André and San Marina – and another example of an ailing LBO. Private equity funds acquired Vivarte for €3.5 billion in 2007, but the level of debt (€2.8 billion, one of the highest level of debts among European groups under LBO) had become unsustainable given the competition from low-cost players such as Zara, H&M or Uniqlo.

The main features of the restructuring plan that was agreed to in July 2014, after a lengthy and intensive negotiation process, are the following:

a lenders will take over Vivarte, with former shareholders[28] being entirely written off (subject to a contingent claw-back provision enabling them to receive equity in the future);

b a 70 per cent debt write-off. In total, the debt is reduced by €2 billion;

c creditors agree to provide new money financing of €500 million.

Although these terms are drastic for shareholders and creditors alike, this lender-led restructuring was achieved with unanimous creditors' approval, without the need to resort to a safeguard. However, the agreement negotiated under conciliation was eventually approved by the court, to allow for new money privilege. But the most specific feature of this deal is that the key creditors (specifically, four private equity funds) were granted a seat on Vivarte's board of directors, along with Vivarte's

28 Private equity funds as well as the former management of the group.

management. In their capacity of board members, those creditors will therefore have to comply with related fiduciary duties, having regard to Vivarte's corporate interest.[29]

vi Belvédère

The Belvédère restructuring is another interminable judicial saga that started in 2008 and went on for more than five years, under the close watch of commentators. Belvédère is an alcohol and spirits business that owns Sobieski, a popular Polish vodka brand, and Marie Brizard Liqueurs. There is a lot to say on this case as it illustrates some of the most blatant shortcomings in the way certain restructuring cases are conducted in the current legal framework in France: proceedings are generally too long and unpredictable.

In five years, with virtually no respite, Belvédère first moved into safeguard, then out of safeguard, then fell into a judicial reorganisation. There were about 15 court decisions in France, the United Kingdom and Poland – although all three countries are under the same umbrella of the EU Insolvency Regulation – and, in France itself, there were conflicting decisions from various local courts, several other decisions at the appeal and Supreme Court levels.

Eventually, in March 2013 the court-approved restructuring plan provided that creditors would take over 87 per cent of the equity (through a debt-for-equity swap for approximately €500 million). Former shareholders, who include actor Bruce Willis, would be diluted to hold together the remaining 13 per cent. In a US Chapter 11 proceeding, Belvédère's shareholders would probably have been written off entirely from the outset.

Belvédère illustrates the vulnerability of insolvent companies towards competitors: the debt-for-equity swap is expected to allow rival Stock Spirits, which makes Polish Orzel vodka, to take over 38 per cent of Belvédère's equity (with voting rights limited to 19.9 per cent) through investment fund Oaktree Capital Management, Belvédère's main creditor.

IV TRENDS

The move towards the takeover of debtor companies by their creditors, which we described in the first edition of the *International Insolvency Review* (see the French chapter, at Section V) will likely continue to grow, at least to the extent permitted by French law.[30]

In this respect, certain of the groundbreaking provisions introduced by the 2014 reform will certainly foster creditors' takeover. Such is the case of the provisions intended to reduce the 'nuisance capacity' of minority shareholders in safeguard proceedings or,

29 The corporate structure of a French limited liability company with a board of directors was used for this Vivarte restructuring.

30 After a first occurrence in the restructuring of CPI Group in 2009, Europe's leading monochrome book printer, 'lender-led restructuring' has grown following the 2008, 2010 and 2014 reforms. See, for example, the Vivarte and Saur restructurings described in Section III, *supra*, or the Terreal restructuring.

under certain circumstances, force shareholders' approval of debt-for-equity swaps on dissenting shareholders, in a judicial reorganisation proceeding (see Section I.ii, *supra*).

Nevertheless, shareholders can still veto a creditor takeover approval in safeguard proceedings. This leverage can be used by the shareholders throughout the negotiation process, to have the creditors bear more losses than would otherwise be the case. And yet, the shareholders are the ones benefiting primarily from the creation of value (through dividends, capital gains following transfers, etc.) and should therefore be the ones who bear the losses in priority, before the creditors. We believe that the reform should go one step further in the recognition of this fairly fundamental principle, known in the US as the 'absolute priority rule', which should provide greater predictability as to the outcome of the restructuring and overall a shorter process.[31]

The most recent restructuring practice also shows a new trend towards the use of conciliation proceedings to prepare and secure spin-offs of distressed companies (see for example the recent spin-off to their managers of La Redoute and Relais Colis, held by the Kering group).[32] Through the court approval of the agreement negotiated under conciliation, the parties aim at avoiding the risk that the spin-off is set aside as a fraudulent conveyance.

Finally, at the European level, a proposal for a regulation of the European Parliament and of the Council amending the EU Insolvency Regulation is currently being finalised and could be adopted within the next few months.[33] The following three modifications are particularly relevant.

In addition to the codification of the previous case law on the definition of the COMI, the proposal requires that the court verifies its jurisdiction *ex officio* and states the basis of its jurisdiction in its decision. Besides, the proposal grants foreign creditors the right to challenge the decision opening the proceeding. Those changes aim at limiting the 'forum shopping' allowed by an extensive definition of the COMI.

Also, secondary proceedings are no longer necessarily winding-up proceedings. When a secondary proceeding is opened because the debtor subject to a main proceeding has an establishment in another EU Member State, the jurisdiction can choose between all the proceedings offered by local law, including restructuration or reorganisation, to avoid untoward interference with the main proceeding.

31 If the agreed order of priority among creditors (senior and junior) and shareholders is not respected, the outcome of the restructuring becomes impossible to predict. This uncertainty increases the cost of distressed debtors' credit, or even worse can prevent distressed companies from accessing new financing. See Pérès, Perchet, Loget and Schlumberger, 'Quelle réforme du droit des faillites?', *Banque & Droit* No. HS-2013-2, October 2013, pp. 22 et seq.

32 For further information, see Bourbouloux and Chatelain, 'L'accord de conciliation homologué au secours des spin off d'entreprises en difficultés', *Bulletin Joly: Entreprises en difficulté*, July 2014, No. 4, p. 225 et seq.

33 Proposal for a Regulation of the European Parliament and of the Council amending the EU Insolvency Regulation. See Section I.vi, *supra*, for further information on the EU Insolvency Regulation.

Finally, the proposal attempts to better take into account corporate groups by requiring cooperation between insolvency practitioners and courts; further, insolvency practitioners are granted the right to request a stay of the EU proceedings opened with respect to any other member of the group.

Appendix 1

ABOUT THE AUTHORS

DONALD S BERNSTEIN

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Donald S Bernstein, co-head of Davis Polk's insolvency and restructuring group, is recognised as one of the leading insolvency lawyers in the world. He was elected by his peers as the chair of the National Bankruptcy Conference and is a commissioner on the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11, a director of the International Insolvency Institute and a member of the legal advisory panel of the Financial Stability Board. Mr Bernstein's practice includes representing debtors, creditors, receivers and acquirers in corporate restructurings and insolvencies. In addition, he heads the group's multi-team representation of global financial institutions in connection with the 'living wills' required to be submitted to financial regulators pursuant to the Dodd-Frank Act.

Outside the firm, Mr Bernstein is a member of the editorial board of *Collier on Bankruptcy*, the treatise on US bankruptcy law.

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Hélène Bourbouloux is a French judicial administrator (an independent restructuring and insolvency practitioner appointed by the commercial courts). She is a partner at FHB with extensive experience in the restructuring field and has handled more than 2,000 matters (*ad hoc* mandates, conciliations, safeguards, reorganisations, insolvency proceedings, amicable liquidations and provisional receiverships).

Ms Bourbouloux is a prominent practitioner in restructuring and is listed as a leading judicial administrator, as well as a frequent author and speaker on restructuring and reorganisation matters, notably speaking at the 2012 and 2013 International Insolvency Institute conferences. She is a member of the ARE (Association pour le retournement des entreprises), the International Insolvency Institute and INSOL International.

Since 2012 she has also been a member of the board of the Guarantee Fund for Judicial Administrators and Receivers, and from 2008 to 2011 she was a member of the board of the National Council of Judicial Administrators and Receivers.

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Pierre Chatelain is a senior associate at FHB preparing for the exam to qualify as a judicial administrator. Since joining FHB, Pierre has been involved in several restructuring transactions, in particular court-assisted proceedings (i.e., *ad hoc* mandates and conciliations), and has acquired experience in this field. Before joining FHB, Pierre was a French lawyer in the Paris office of several law firms from 2005 to 2012.

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Timothy Graulich is a partner in Davis Polk's insolvency and restructuring group, and focuses on international restructurings. He has substantial experience in a broad range of domestic and international restructurings, including the representation of public and private companies, agent banks and lenders, acquirers and hedge funds in connection with pre-packaged and traditional bankruptcies, out-of-court workouts, DIP and exit financings, bankruptcy litigation and Section 363 sales. In addition to his regular insolvency matters, Mr Graulich plays a key role in the firm's representation of certain global financial institutions in connection with their Dodd-Frank resolution planning. He is a frequent author, lecturer and panellist on a broad range of bankruptcy topics and is a contributing author to *Collier on Bankruptcy*.

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