The International Insolvency Review

Editor
Donald S Bernstein

Law Business Research

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I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

French insolvency law provides for six restructuring and (pre-)insolvency proceedings, which can be classified into two sub-groups: two court-assisted proceedings (the *mandat ad hoc* and conciliation proceedings) and four court-controlled proceedings (the judicial reorganisation, judicial liquidation, *sauvegarde* and accelerated financial *sauvegarde* proceedings (AFS)).

The two court-assisted proceedings (the *mandat ad hoc* 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 contractual law for the duration of the proceeding, which implies obtaining the consent of each and every stakeholder involved in the restructuring process (e.g., the debtor, financial creditors and shareholders). 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[2] (*mandataire ad hoc* or conciliator) to help the debtor reach an agreement with its creditors in particular by reducing or rescheduling its indebtedness.

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1 Hélène Bourbouloux is a partner at FHB and Arnaud Pérès is a partner at Davis Polk & Wardwell LLP. The authors wish to thank Juliette Loget of Davis Polk and Pierre Chatelain of FHB for their contribution to this chapter.

2 Most of the time, court-appointed practitioners are French judicial administrators, who are independent restructuring and insolvency practitioners. To ensure their independence, these professionals are dedicated exclusively to the assistance or representation of debtors subject to pre-insolvency or insolvency proceedings. In this respect, judicial administrators are members of a regulated profession requiring a specific degree and appropriate qualifications. Presidents

Both are confidential proceedings. The conciliation proceeding can, however, become public if the debtor seeks the approval of the commercial court,[3] so that new money provided to the distressed debtor benefits from a legal privilege in case of future insolvency proceedings.[4] Although the conciliation becomes public, the terms and conditions of the conciliation agreement remain confidential and can only be disclosed to its signatory parties.

Such pre-insolvency proceedings are increasingly implemented to restructure distressed leveraged buyouts (LBOs) or distressed loans or to secure share capital reorganisations and spin-off transactions.

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

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

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.

c Debts arising after the commencement of the proceedings 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).[5]

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, the court-controlled proceedings vary in terms of involvement of the court-appointed conciliator in running the business. The *sauvegarde* and AFS are debtor-in-possession proceedings. In a judicial reorganisation proceeding, the court has discretion to decide whether to set aside the managers. The role of management is particularly reduced in a judicial liquidation proceeding because the debtor generally ceases to

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of commercial courts can nonetheless appoint lawyers or other restructuring practitioners as *mandataires judiciaires* provided they comply with rules of independence under French law. The legitimacy of the *mandataire ad hoc* or conciliator derives from his or her independence. Creditors, sponsors and investors accept these practitioners' requests and recommendations as a consequence of their independent point of view, which enables them to find the most balanced position among opposite interests.

3 After approval, the court decision is public and filed with the commercial registry where any third party can access it.

4 This privilege is useful mainly in liquidation proceedings.

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

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 *sauvegarde* and AFS, introduced in 2005 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 its creditors may have consented to)), whereas only the other two court-controlled proceedings (the judicial reorganisation and judicial liquidation) are available to insolvent debtors.

In practice, most restructuring cases are first handled via some of those court-assisted proceedings, then implemented through a court-controlled proceeding, typically through a *sauvegarde*.

ii Policy

Although the current reform may change this perspective (see Section V, *infra*), French insolvency legislation is generally seen 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 safeguard of employment as the primary goal of a restructuring over the payment of the creditors. The payment of the creditors becomes the primary goal of the court only in a judicial liquidation, where all prospects to pursue the business have vanished.

French law also heavily favours voluntary arrangements reached in *mandat ad hoc* and conciliation proceedings. It is often held that the harsh treatment of creditors in court-controlled proceedings acts as a strong incentive for them to reach a voluntary arrangement. These informal court-assisted proceedings play a key role in most restructuring situations.

Another 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 up front by a quasi-public collective body, the Wage Guarantee Scheme (AGS), which will then benefit from the employees' first-rank privilege.

iii Insolvency procedures

Mandat ad hoc proceedings

Mandat ad hoc proceedings are straightforward and very flexible. It does not take more than a few days to obtain a court order appointing a *mandataire ad hoc*, playing the role of an ombudsman, in charge of facilitating and supervising discussions between the debtor and its main creditors. There is no statutory time limit within which the *mandataire ad hoc* must complete his or her tasks. The task of the *mandataire ad hoc* 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 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 by up to one month at the conciliator's request.

Sauvegarde proceedings

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

One of the main features of the *sauvegarde* 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 all bonds issued by the company), to which the debtor submits proposals to reach agreement on a recovery plan. Those creditors whose repayment terms are not affected by the plan or for which the draft plan provides for full repayment in cash upon approval of the plan are not permitted to take part in the vote. The plan submitted to the committees may include debt reschedulings, debt write-offs and debt-for-equity swaps and may also provide for a partial sale of the business. In addition to the approval of the committees at a two-thirds majority, debt-to-equity swaps require the approval of shareholders.

Provided that the plan is approved by the committees and – for debt-to-equity swaps – the shareholders, and that creditors' interests are adequately preserved, the court approves the plan, which becomes binding also on dissenting committee members.

If the plan is not approved by the creditors' committees, the court can only impose a rescheduling of debt repayments over a maximum period of 10 years, but cannot impose a write-off of claim.

AFS

The AFS proceeding is a special kind of *sauvegarde* proceeding for financial restructuring available only to relatively large companies, exceeding certain thresholds regarding their workforce, turnover or balance sheet,[6] which have first been through a conciliation proceeding and failed to reach a unanimous restructuring agreement with their financial creditors. The court will open an AFS proceeding if the outcome of the conciliation suggests that the restructuring plan negotiated during the conciliation has sufficient support from the debtor's financial creditors such that it is reasonably likely to be adopted within two months. Trade creditors are not affected by the AFS proceeding

6 AFS proceedings are only available to solvent debtors with at least (1) 150 employees, (2) €20 million of turnover or (3) a balance sheet of €25 million (or a balance sheet of €10 million if it controls a company with at least 150 employees or €20 million of turnover or a balance sheet of €25 million). The thresholds were modified to allow holding companies to qualify.

(no automatic stay of trade payables). Only financial creditors (credit institutions and bondholders) are asked to vote on the plan.

This proceeding therefore enables a company that has failed to reach a unanimous restructuring agreement with its creditors under a conciliation proceeding to successfully restructure its financial debt, thereby overriding the refusal of a minority of financial creditors.

Judicial reorganisation proceedings

Judicial reorganisation proceedings apply to insolvent debtors (i.e., that cannot pay their due debts out of their available assets). Most of the rules applicable to *sauvegarde* 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.

Judicial liquidation

The aim of these proceedings is to liquidate a company by selling its business when there is no prospect of recovery, as a whole or per branch of activity, or 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, whichs last for a maximum of one year.

iv Starting proceedings

Pre-insolvency proceedings (*mandats ad hoc* and conciliation proceedings), *sauvegarde* and AFS 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 few persons may appeal the opening of an insolvency proceeding: the debtor, a creditor that is party to the proceeding, the state prosecutor and the workers' council with respect to judicial liquidations. 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 Control of insolvency proceedings

For the role of the courts in connection with French insolvency proceedings, please refer to Section I.iii, *supra*.

vi Special regimes

Banks

The general insolvency regime described above applies generally to the vast majority of the companies, with slight adjustments made to account for regulated entities such as insurance companies. However, France very recently adopted new banking legislation[7] introducing an enhanced supervisory framework, including, critically, bail-in and other resolution powers in advance of the implementation of the European recovery and resolution draft directive (RRD).[8] The French banking regulator[9] is given very broad resolution tools with respect to failing banks,[10] including:

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. Practitioners have attempted to avoid such conflicts and centralise all proceedings of the group companies using concepts such as 'centre of main interests' (COMI)[12] (stemming from the EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EU Insolvency Regulation) – see Section

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

8 Draft of the legislative proposal for a directive providing for the establishment of an EU-wide framework for the recovery and resolution of credit institutions and investments firms published by the Council of the European Union on 28 June 2013.

9 The ACPR (Autorité de Contrôle Prudentiel et de Résolution).

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.

11 As yet, senior debt is not subject to this bail-in power, contrary to the provisions of the RRD.

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

I.vii, *infra*) or 'merger of the assets and liabilities'.[13] None of these concepts are, however, ideal for the (albeit common) situation where a corporate group is affected by financial difficulties.

vii 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.

The recognition and enforcement in France of insolvency proceedings commenced in another country (outside the EU) requires an enforcement procedure (*exequatur*) 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). France has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, as the United States has done through Chapter 15 of the federal Bankruptcy Code. Although such adoption would greatly simplify this burdensome process, it is apparently not included in the currently comtemplated reform of the French bankruptcy regime (see Section V, *infra*).

II INSOLVENCY METRICS

With an unemployment rate of 9.9 per cent in 2012 and no growth (GDP in 2012/2013 is about flat),[14] France has been severely affected by the economic downturn of 2008.

In 2012, 61,278 insolvency proceedings were opened in France, compared with 59,614 in 2011 (i.e., an increase of 9.7 per cent following a small decrease of insolvency

13 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 and/or interference in the affiliate's activities and management.

14 Sources: Employment and labour markets: Key tables from OECD, dated 16 July 2013; OECD Economic Outlook No. 93 – June 2013, http://stats.oecd.org/index.aspx?DataSetCode=EO93_FLASHFILE_EO93.

proceedings in 2010 and 2011).[15] For several years, mainly the construction, real estate, retail and B2B industries were affected by insolvency proceedings.[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 (*mandats ad hoc* 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 60,000 insolvency proceedings opened in France each year concerns extremely small businesses, mostly with no or very few employees: in 2012, 92 per cent of insolvency proceedings concerned companies with less than 10 employees.[18] At the other end of the spectrum, only 195 companies in insolvency in 2012 (representing 0.4 per cent) had more than 100 employees.[19] Similarly, companies with a turnover exceeding €15 million accounted for 0.3 per cent of insolvency proceedings in 2012, while companies with a turnover under €1.5 million represented 37.8 per cent.[20] Also, the number of insolvency proceedings must be compared with the number of new companies created in France – about 550,000 in 2012,[21] about 10 times the number of bankruptcies.

When looking at statistics, commentators note that 95 per cent of the insolvency proceedings opened in France lead to a liquidation,[22] 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.[23]

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15 Source: 2012 report '*Défaillances et sauvegardes d'entreprises en France*' published by Altares dated 17 January 2013, available at www.altares.fr/index.php/publications/etudes-altares/defaillances-dentreprises.

16 Source: Altares report op. cit.

17 The rare statistics available suggest that nearly 10,000 court-assisted proceedings were opened between 2006 and 2011 (Source: '*La prevention des difficultés des entreprises par le mandat ad hoc et la conciliation devant les juridications commerciales de 2006 à 2011*', M Guillonneau, J-P Haehl and B Munoz-Perez). But 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 Hélène Bourbouloux – a single professional judicial administrator – speak for themselves: since the end of 2008, nearly 40 court-assisted proceedings have been handled, concerning about 110,000 employees, and debts amounting to €20 billion, with the consolidated turnover reaching €21 billion.

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

19 Source: Altares report op. cit.

20 Source: Altares report op. cit.

21 The exact figure is 549,976. Source: Key figures of business creation in 2012, published by the governmental agency for business creation (APCE) and available online at http://media.apce.com/file/07/5/chiffres-cles_2012.60075.pdf.

22 This figure has dropped to 85.6 per cent in 2012. Source: 2012 statistics of French commercial courts prepared by the Conférence Générale des Juges Consulaires de France in May 2013.

23 Over the 12-month period leading to 31 March 2012, approximately 58 per cent of jobs were saved. For further detail please refer to '*Les chiffres trompeurs: halte aux idées reçues! La boîte à outils*

III PLENARY INSOLVENCY PROCEEDINGS

A number of ailing LBOs have fuelled 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 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:

a lenders taking over Saur, with former shareholders[24] 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 *sauvegarde* 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 *sauvegarde* or judicial reorganisation, to avoid the public 'stigma' linked to bankruptcy and reduce the disruption to the debtor's business.

ii Hejenion

In March 2013 the restructuring of Hejenion (the holding company of Soflog-Telis, a packaging and logistics business) was the first time the new AFS proceeding was implemented in France.[25]

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du livre VI est performante', Hélène Bourbouloux, *Bulletin Joly Entreprises en difficulté,* No. 4, July–August 2012.

24 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.

25 The purpose of the AFS is to limit the disruption to the debtor's business (no automatic stay of trade payables and quicker implementation). Commentators greeted the AFS warmly when it was introduced in 2010, but it was not used in practice until 2013 because the initial version of

This AFS proceeding is intended to enforce a financial restructuring through a cramdown of dissenting creditors, after an informal conciliation proceeding, if the plan is eventually likely to be supported by a qualified majority of creditors. In the *Hejenion* case, the holdout creditor does not appear to have actually objected to the proposed restructuring plan (based, for example, on its own assessment of the viability of the business or the extent to which its own position is affected by the plan), but rather abstained from supporting the plan for unrelated reasons (e.g., to comply with its global management policy or not to weaken its position in future negotiations). Similarly, hedged creditors having bought a protection under a credit default swap (CDS) usually refrain from approving any negotiated restructuring, to avoid jeopardising their positions under the CDS.[26]

The *Hejenion* case was also reasonably quick, considering that the restructuring plan was approved by the court within a month of the opening of the proceeding.

While the AFS is a useful tool, it remains scarcely used because the conditions posed by the law remain too stringent.[27] Further reform allowing a more widespread use of this new proceeding would be welcome.

iii Consolis

An interesting feature of the Consolis restructuring is its cross-border nature; French court-assisted conciliation proceedings allowed a restructuring of an entire international group, including with respect to non-French subsidiaries of the group. Consolis is the European leader in pre-cast concrete elements, operating mainly in the construction and public services sectors such as civil engineering. The group operates in 25 different jurisdictions in the EU and elsewhere, including Russia, Egypt, Tunisia and Indonesia. Following an LBO and an initial restructuring in 2011, Consolis was owned by the financial sponsor LBO France (85 per cent of the equity) and its management (15 per cent). Faced with the economic downturn, as well as the consequences of the political turmoil in North Africa, Consolis could no longer comply with its financial covenants as from the second quarter of 2012.

Consolis and 23 of its subsidiaries, including 18 non-French companies, filed for a French court-assisted proceeding (*mandat ad hoc* followed by a conciliation). This was an unexpected way to go about a cross-border restructuring, as these informal proceedings do not fall within the scope of the EU Insolvency Regulation, and thus cannot benefit

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the law imposed very strict (and poorly drafted) conditions, such that holding companies were in fact not eligible to AFS; see Section I.ii, *supra* for further details.

26 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 to not to be seen, in any way, as participating to the characterisation of the 'credit event' triggering the unwinding of the CDS. For further information on this topic, please refer to '*Quelle réforme du droit des faillites?*' by A Pérès, C Perchet, J Loget and H Schlumberger published in *Banque & Droit* No. HS-2013-2, October 2013, pp. 22 et seq. and '*Les procedures collectives à l'épreuve des contrats de swap*' by G Foillard p. 51.

27 See footnote 6.

from the automatic recognition of proceedings within the EU that is otherwise afforded under the EU Regulation.[28]

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 *bordereau Dailly*[29]) 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).

To prevent an imminent event of default under the loan (for failure to maintain a suitable hedging protection), HOLD and its shareholder filed for *sauvegarde* in France. Various important legal issues were at stake here, including whether and under what

28 On a European level, the *mandat ad hoc* and conciliation proceedings are not regarded as insolvency proceedings in the sense of the EU Insolvency Regulation since they do not entail any partial or total divestment of the debtor or the appointment of a liquidator. The *mandat ad hoc* and conciliation are thus governed jointly by Regulation 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters and, on an international scale, by the relevant rules of international private law. In France, these rules are set out in Article R600-2 of the French Commercial Code, pursuant to which the competent court to hear the amicable preventive proceedings is the court having jurisdiction over the physical location of the debtor's registered office (and absent a registered office in France, the court of the debtor's COMI). French law also recognises the principle of proper administration of justice based on which several pre-insolvency proceedings may be combined under the aegis of a single court whenever several companies that are parties to a single set of contracts encounter the same difficulties in their negotiations with their joint creditors.

These various rules, when combined, allow for cross-border *mandat ad hoc* or conciliation proceedings, but the process is cumbersome. Therefore, many insolvency practitioners, along with legal scholars, are calling for the straightforward recognition of such French amicable pre-insolvency proceedings under the EU Insolvency Regulation; see Section I.vii, *supra*, for further information on the EU Insolvency Regulation.

29 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*.

conditions a Luxembourg entity could be eligible for *sauvegarde* in France and also if a mere holding company (holding buildings – hardly a 'business' in the usual sense) was eligible for *sauvegarde*.

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 *sauvegarde* 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 *sauvegarde* proceedings (see Section V, *infra*, for further details). Cœur Défense's sponsor was not written off.

v Petroplus

Petroplus, a Swiss oil group, previously listed in Zurich, was an important independent player in Europe. It operated a refinery in Petit-Couronne near Rouen in France. The group was badly hit by the economic downturn in 2009 and margins collapsed in the refining industry. The banks accelerated certain loans early in 2012 and the group decided to close some of its plants, including the one located at Petit-Couronne. Over 500 employees were affected and pickets occupied the plant. The case was widely publicised, hitting the headlines in the press, to a point where it became the centre of political debate in France (the government saw in it a topical example of the country's industrial decline that it was determined to stop). One particular piece of information was the focus of great media attention, namely that the Petroplus group had proceeded with cash transfers (withdrawals from the French entity's bank account) shortly before bankruptcy. Whether these cash transfers were actually legal was irrelevant in the row that ensued, and the government felt compelled to change the law to 'further protect the assets' of a debtor in bankruptcy.

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 *sauvegarde*, then out of *sauvegarde*, then fell into a juducial 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.

In March 2013 eventually, the court-approved restructuring plan provided that creditors would take over 87 per cent of the equity (through a debt-to-equity swap for approximately €500 million). Former shareholders, which 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-to-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 ANCILLARY INSOLVENCY PROCEEDINGS

No recent ancillary insolvency proceedings have been of relevance in France.

V TRENDS

In the context of an increasing number of insolvency proceedings consequent to the economic downturn in France, current practice shows a new trend towards the takeover of debtor companies by their creditors. 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[30] and 2010[31] reforms. Lender-led restructuring is particularly relevant for overindebted LBO holdings (see the description of the Saur restructuring in Section III, *supra*, or the recent successful restructuring of Terreal through a conciliation proceeding). Even if LBO valuation and debt have been more reasonable in recent LBO deals, many LBO credit facilities will soon become due. The move toward creditor takeover of debtor companies will likely continue to grow, at least to the extent permitted by French law.

In this respect, a forthcoming reform of French bankruptcies is expected. We have called for a greater predictability of bankruptcy outcomes in line with the initially agreed order of priority.[32] The shareholders, who benefit from the creation of value (through dividends, capital gains following transfers, etc.), should bear the losses in

30 Order No. 2008-1345 dated 18 December 2008.

31 Law No. 2010-1249 on the banking and finance regulation dated 22 October 2010.

32 If the agreed order of priority is not complied with in bankruptcies, the outcome of a 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. For further information, please refer to '*Quelle réforme du droit des faillites?*' by A Pérès, C Perchet, J Loget and H Schlumberger published in *Banque & Droit* No. HS-2013-2, October 2013, pp. 22 et seq.

priority, before the creditors. Currently, this principle, albeit simple, only applies in judicial liquidations. On the contrary, creditor takeover requires shareholder approval in *sauvegarde* proceedings.

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 discussed.[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 'forum shopping' induced by an artificial 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, in order to avoid unfortunate interferences with the principal proceeding.

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 either to request a stay of the EU proceedings opened with respect to any other member of the group or to propose a rescue plan for members of the group under insolvency proceedings.

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