NATIONAL REPORT FOR FRANCE

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Abstract

This chapter investigates the treatment of executory contracts under French corporate insolvency law.

While the French Commercial Code does not provide a definition of the concept of executory contracts, it is generally assumed that insolvency proceedings do not result in the automatic termination of the debtor's executory contracts. Hence, executory contracts remain binding on both parties pending their assumption or rejection by the insolvency official. As certain types of executory contracts are deemed to justify special treatment in insolvency proceedings, the chapter investigates their treatment under the law.

The chapter also investigates the treatment of contractual remedies in insolvency law, such as *ipso facto* clauses, close-out netting provisions and flip clauses. Finally, the chapter analyses the most recent reforms in the corporate insolvency field and the drivers behind these regulatory changes.

The report concludes that the most recent reforms have improved the balance between debtor and creditor protection: France is now a more investor-friendly jurisdiction, while debtors benefit from a more sophisticated set of tools.

Keywords

Executory Contracts; Corporate Insolvency Law; Termination and Assignment of Clauses; *Ipso Facto* Clauses; Regulatory Reform; France

A. Introduction: Available Insolvency Procedures in France

12.1 French corporate insolvency law is a very old legal subject, which has its origins in Roman law. Before the introduction of the Commercial Code of 1807, although bankruptcy law evolved over time, it was mostly of a purely coercive nature. Even with the promulgation of the 1807 Code, French bankruptcy law still severely punished

bankrupts, since the bankruptcy procedure consisted of arresting and imprisoning the bankrupt person, and selling his assets in order to pay back his debts.

12.2 It is the Law of 4 March 1889 which introduced the procedure known as judicial liquidation. Such procedure was more flexible and it coexisted with the stricter coercive procedure for a while. The latter was reserved for dishonest traders, whereas the former was available to honest bankrupts, who could save their businesses through a debt forgiveness from their creditors.

12.3 In 1967, the Law of 13 July[1] definitely dissociated the fate of the company from that of its management, considerably reforming the corporate insolvency landscape. Such law was later revised and replaced with a new framework introduced in two parts, through the laws of 1 March 1984 and of 25 January 1985.[2] The Law of 1984 introduced the concept of corporate rescue, while the Law of 1985 focused on insolvency proceedings and insolvency practice. Such laws importantly. They were the first laws to introduce alert procedures, which were designed to force managers showing signs of financial difficulties to explain themselves as to how they were going to resolve their growing difficulties. A court-supervised compromise arrangement procedure was also introduced.

12.4 Finally, the year 2000 marked the promulgation of the new Commercial Code, which reconsolidated insolvency laws, as part of the bicentenary celebrations of the great codification project inaugurated by Napoleon. The provisions relating to French insolvency proceedings are codified under Articles L610-1 to L680-7 of the French Commercial Code ("*Code de Commerce*"). In France, companies encountering financial difficulties are offered two paths to deal with their distress: liquidation or restructuring. The French insolvency test is a pure cash flow test, *i.e.* a company is declared insolvent ("*en état de cessation de paiements*") when it is unable to meet its current debts out of its current assets.

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[1] Law N° 67-563 of 13 July 1967.

[2] Law N° 84-148 of 1 March 1984 and Law N° 85-98 of 25 January 1985.

1) Liquidation and Rehabilitation Proceedings

12.5 **Liquidation proceedings** ("*liquidation judiciaire*")[3] aim at liquidating a company through the sale of its business, or each of its assets individually, when there is no prospect of recovery. Liquidation proceedings are opened either when salvaging the company seems to be impossible or after a court orders a sale plan of the debtor's assets in the context of restructuring proceedings.

12.6 Liquidation proceedings last until the sale of the company's business or assets generates no more proceeds. However, no later than two years after the judgment ordering liquidation was made, any creditor can apply to the court to request the closing of the liquidation procedure.

12.7 Additionally, a simplified form of liquidation proceedings is available for small business, which can last no more than one year.

12.8 **Rehabilitation proceedings** ("*redressement judiciaire"*)[4] are rescue proceedings, available to insolvent, yet still operating, debtors, in order to rescue the going concern of the business. In contrast to safeguard proceedings (described below) which can be opened at the discretion of the management at a preventive stage, filing for rehabilitation proceedings must be done no later than 45 days following the date at which the enterprise becomes insolvent, unless conciliation proceedings are ongoing.[5] A rehabilitation plan ("*plan de redressement*") may provide for a debt restructuring; a recapitalisation of the company; a debt-for-equity swap; and/or the sale of assets or some parts of the business. If the company is later deemed unviable, the court can convert rehabilitation proceedings into liquidation proceedings.

2) Pre-Insolvency Proceedings

12.9 **Safeguard proceedings** ("*procedure de sauvegarde*")[6] are voluntary proceedings,[7] available to a debtor who is solvent and which lead to a "continuation" plan for the company. The purpose of the safeguard procedure is the reorganisation of the business

[3] Commercial Code, arts. L640-1 *et seq.*
[4] Commercial Code, art L631-1.
[5] Commercial Code, art L631-4.
[6] Commercial Code, arts. 620-1 *et seq.*
[7] Commercial Code, art 620-1.

to allow for the continuation of the economic activity, the maintenance of employment and the settlement of liabilities.[8]

12.10 **Accelerated safeguard procedure** ("*procedure de sauvegarde accélérée*") (AS),[9] introduced by the Ordinance of 2014[10] is a particular type of safeguard proceeding, to be implemented on an accelerated basis. It is available to a debtor who is going through a conciliation procedure and has drawn up a restructuring plan which would have sufficient support from the creditors such that it is reasonably likely to be adopted on an expedited basis, *i.e.* a maximum of three months.[11]

12.11 **Accelerated financial safeguard** ("*procedure de sauvegarde financière accelérée*") (AFS)[12] is similar to the AS but applies to restructurings involving only financial debts and therefore, affects financial creditors only. The objective of such procedure is to provide for the elaboration of a fast reorganisation plan with a limited impact on commercial partners. It is a middle ground between an out-of-court procedure ("*procedure de conciliation"*) and a safeguard proceeding since it allows for the restructuring of some of the company's debts, without a stay on all of the creditors' claims.

3) Out-of-Court Proceedings

12.12 **Mandat *ad hoc*** proceedings[13] are flexible proceedings. A debtor can apply to the court to request the appointment of a "*mandataire*" *ad hoc* charged with facilitating and supervising negotiations with the debtor's main creditors. The debtor continues to manage his business without being divested and the tasks of the *"mandataire*" *ad hoc* are decided by the court according to the specific needs of the debtor.

12.13 **Conciliation** proceedings[14] are voluntary proceedings, open when a debtor facing "legal, economic or financial difficulties"[15] and who has not been insolvent for more than 45 days request the appointment of a conciliator to assist it in reaching an

[8] Ibid.: "afin de permettre la poursuite de l'activité économique, le maintien de l'emploi et l'apurement du passif."
[9] Commercial Code, arts L628-1 *et seq.*
[10] Ordinance n°2014-326 of 12 March 2014, "portant réforme de la prévention des difficultés des entreprises et des procédures collectives."
[11] Commercial Code, art L628-8.
[12] Commercial Code, art L628-9 *et seq.*
[13] Commercial Code, art L611-3 *et seq.*
[14] Commercial Code, art L611-4 *et seq.*
[15] Commercial Code, art L611-4: "les débiteurs … qui éprouvent une difficulté juridique, économique ou financière."

agreement with its main creditors and contractual partners. The procedure cannot be opened for longer than four months[16] and the conciliator's duty is to reach an amicable agreement between the company and its main creditors in order to end the business' financial difficulties.[17]

12.14 If an agreement is reached, it may be acknowledged by the President of the Commercial Court giving legal force to the agreement, or approved by the court if:

- The debtor is still solvent or the agreement puts an end to the debtor's insolvency;
- The terms of the agreement ensure the continuity of the business;
- The agreement does not harm the interests of non-signatory creditors.[18]

4) General Comments and Other Remarkable Features of the French Regime

12.1 Historically, French insolvency law has generally been quite debtor-friendly. However, a shift in the debtor-creditor balance began in 2005, before the financial crisis of 2008-2009 with the promotion of the rescue culture, with the introduction of pre-insolvency proceedings, as well as the advancement of creditors' rights who are encouraged to take a more active role in (pre-) insolvency proceedings.

12.2 The use of out-of-court proceedings has been stimulated by recent reforms, such as the Ordinance of 2014 and the Law No. 2016-1547 dated 18 November 2016. In 2015, the French National Institute of Statistics and Economics Studies (INSEE) reported the altogether decline of insolvency and restructuring procedures over the last five years: generally, INSEE reported the opening of 57,844 restructuring proceedings, of which 2,400 were out-of-court proceedings (160 rehabilitation and safeguard proceedings for companies over 50 employees),[19] an increase of 3% compared to 2015. In 2016, 1293 "*sauvegardes*" were opened (against 1,647 in 2014; and 1,516 in 2012); 17,288 "*redressements judiciaires*" (against 18,205 in 2014; and 18,726 in 2012); and 39,263 "*liquidations judiciaires*" (against 43,156 in 2014; and 41,817 in 2012).

[16] Commercial Code, art L611-6.
[17] Commercial Code, art L611-7.
[18] Commercial Code, art L611-8.
[19] See Stéphanie Chatelon and Arnaud Pédron, 'Insolvabilité : Actualités au niveau européen et état des lieux en France' (2017) Deloitte Taj.

B. Treatment of Executory Contracts in France

1) General Remarks about Executory Contracts

12.3 The French Commercial Code does not provide a definition of the concept of executory contracts and therefore, case law and academic discourse have been quite important in shaping its definition over time.[20] For an existing contract to be executory, one must look at the obligation *characteristic* of the contract. Indeed, it is argued that certain obligations certain contracts, *e.g.* a sale contract is defined by the obligation to transfer ownership and a loan contract by the obligation to transfer funds. If the relevant characteristic obligation of a contract has already been performed before the insolvency procedure is opened, the contract is not deemed executory.[21] Generally, the trend in the legislature's treatment of executory contracts over the years has been to strengthen the position of counterparties.

12.4 Executory contracts are mostly dealt with in Articles L622-13 and L641-11-1 of the Commercial Code. Article L622-13 generally applies to reorganisation proceedings, whereas Article L641-11-1 applies to liquidation proceedings. However, these provisions are very similar.

2) Executory Contracts in French Insolvency Proceedings

12.5 Insolvency proceedings do not result in the automatic termination of the debtor's executory contracts.[22] Therefore, the Commercial Code requires the counterparty to perform its obligations, irrespective of the debtor's failure to perform his before insolvency proceedings were open.[23] Hence, executory contracts remain binding on both parties pending their assumption or rejection by the insolvency official.

12.6 Under French law, no distinction is made between contracts concluded for a fixed or indefinite term. Additionally, the relevant court has discretion to decide which

[20] A. Bac, De la notion de contrat en cours et de ses grandes consequences, notamment pour les cautions, (JCP E I. 2000) 22.
[21] See *e.g.* Cass. Com. 2 March 1993, Case no. 90-21353, Rec. Dalloz 1993, p. 572; Cass. Com. 28 February 1995, Case no. 94-12108, JCP E 1995, I, 487, n°11.
[22] Commercial Code, art L622-13 I. See also E. Jouffin, Le sort des contrats en cours dans les entreprises soumises à une procédure collective, (Préf. Ch. Gaval-DA., LGDJ, 1998) ; Cass. Com. 8 March 2017, n°15-21.937.
[23] Ibid.

executory contracts are necessary to safeguard the business and can therefore sell them as part of the going concern.[24]

2a) Provisions Regarding Executory Contracts in Restructuring Procedures

12.7 **Preventive proceedings (*ad hoc* and conciliation proceedings)**: Article L611-16 provides that any contractual clause increasing the obligations of the debtor or limiting his rights by the sole reason of opening an *ad hoc* or conciliation procedure is deemed null and void. Apart from such provision, there are no specific rules regarding executory contracts in *ad hoc* or conciliation proceedings.

12.8 **Reorganisation proceedings (safeguard and rehabilitation)**: Article L622-13 I protects executory contracts in safeguard proceedings, notwithstanding any legal or contractual provisions to the contrary. As a result, an executory contract remains in force and the debtor's counterparty must perform the obligations arising under such contract despite non-performance of the debtor's obligations.[25]

2b) Assumption and Rejection of Executory Contracts

12.9 Article L622-13 II states that the decision to assume or reject the contract is taken by the insolvency officer alone. The insolvency official can request the counterparty to perform its obligations under the executory contract in exchange for the performance of the debtor's post-petition obligations, if the debtor has sufficient funds to perform his obligations.[26] Pursuant to article L622-13 III 1° of the Commercial Code, the counterparty can require the administrator to give his position on the continuation of an executory contract, which will be automatically terminated if left unanswered for longer than one month.

12.10 Regarding termination of executory contracts, pursuant to Article L622-13 II of the Commercial Code, the administrator must apply to the court to terminate an executory contract if the debtor's funds prove insufficient to pay the next term. Early termination of executory contracts results in damages which constitute pre-petition claims.[27]

[24] Commercial Code, art L642-7.
[25] R. Dammann, 'Le sort des contrats en cours dans les procédures de sauvegarde, de redressement judiciaire et de liquidation judiciaire', 41 Journal des sociétés.
[26] Commercial Code, art L622-13 II.
[27] Commercial Code, art L622-13 V.

12.11 Article L622-13 III 2° also provides that an executory contract can be automatically terminated if the counterparty does not agree to continue such contract[28].

12.12 Finally, Article L622-13 IV provides that the decision to reject executory contracts can be made only by the relevant insolvency court ("*juge-commissionnaire*") on application by the insolvency official. Since such termination would result in a loss to the counterparty, the insolvency official's power to reject a contract is limited by two conditions: (1) it must be necessary for the restructuring of the debtor; and (2) it must not adversely impact the interests of the counterparty.[29]

12.13 In the case of liquidation proceedings, Article L641-11-1 III 3° adds that an executory contract is automatically terminated by the insolvency official without application to the court if the debtor's sole obligation was the payment of a sum of money.

2c) Special Types of Contracts

12.14 Certain types of executory contracts are deemed to justify special treatment in insolvency proceedings.

Sale contracts, hire-purchase, and finance lease contracts

12.15 There is no special statutory regime regarding sale contracts: if a sale contract ceases to be executory, the seller's claims for non-payment are converted into unsecured insolvency claim. Additionally, the French *Cour de cassation* has held that life annuity sales contracts ("*vente en viager*") are not executory contracts if the ownership of the good was transferred to the buyer before insolvency proceedings were opened.[30]

12.16 A hire-purchase contract ("*vente à temperament*") is deemed executory if the ownership of the asset or the payment of the last instalment has not been transferred. However, the Commercial Code does not provide for specific rules regarding such type of contract, therefore they are governed by the general regime described above.

12.17 Special rules apply to lease contracts ("*contrat de bail*") regarding the termination of leases pertaining to property assets rented or used by the debtor in the course of his

[28] Pursuant to article L622-13 II, only the officer has the power to make the decision to assume a contract: counterparties do not have a veto power. However, in a case where a fix-term contract stated that it would be automatically renewed unless one of the parties sent a termination notice, the Supreme Court in France ruled that the counterparty was entitled to rely on that termination provision, notwithstanding the officer's powers to assume the contract (Cass. Com. 30 October 2000, case N° 97-21339).
[29] Commercial Code, art L622-13 IV.
[30] Cass. Com. 28 February 1995, Case N° 94-12108.

business.[31] The termination of such contracts occurs either (i) on the date when the lessor is informed by the insolvency official of his decision not to assume the lease contract;[32] (ii) when the lessor requests the termination of such contract on the basis of a default payment after the opening of insolvency proceedings;[33] (iii) the absence of activity during the observation period in the rented property does not lead to the automatic termination of the lease, notwithstanding clauses to the contrary.[34]

Utilities

12.18 No specific rules apply to utilities contracts in the Commercial Code. The general regime governing executory contracts apply.

Employment contracts

12.19 Articles L622-13 VI and L641-11-1 VI specify that they do not apply to employment contacts, to which general rules of employment law apply. In pre-insolvency proceedings, the general regime of French employment law applies, which affords a high level of protection to employees who cannot be dismissed freely by the debtor. Dismissals are allowed either for economic reasons or for misconduct and a formal procedure must be followed by the employer. Special rules apply for certain types of employees[35] and businesses of a certain size may be obliged to redistribute employees made redundant.[36]

12.20 In insolvency proceedings – either restructuring or liquidation – employment contracts are ruled by a unique combination of general law and special insolvency provisions. General provisions of employment law remain applicable with respect to dismissal for misconduct in insolvency proceedings. However, special insolvency rules apply

[31] P. Roussel Galle, *Les nouveau régimes des contrats en cours et du bail* (Rev. Proc. Coll., janvier-février 2009), 55 ; B. Saintourrens, 'Le régime du bail commercial après la réforme des procédures collectives (loi du 26 juillet 2005 de sauvegarde des entreprises)', (2005) 10 Loyers et copr.; C. Saint-Geniest and A. Colin, *Bail et entreprises en difficulté : les apports de la loi du 26 juillet 2005 ou l'incidence de la loi de sauvegarde des entreprises sur la situation des bailleurs*., (Rev. Loyers, 2006) 862 ; R. Castel and A. Romain-Huttin, 'Le bail commercial à l'épreuve des procédures collectives',(2010) 48 RLDA 65 ; F. Auque, *La résiliation du bail commercial en cas de procédure de sauvegarde ou de redressement judiciaire du bailleur*, (RJ com. 2005), 478 ; F. Barat, 'La levée d'option d'achat du crédit-bail par le preneur soumis à une procédure collective après l'ordonnance du 18 décembre 2008', (2010) RLDA 99 ; Cass. Com. 17 Février 2015, n°13-17.076.

[32] Commercial Code, art L622-14 1°.

[33] Commercial Code, art L622-14 2°.

[34] Commercial Code, art L622-14.

[35] *E.g.* employee representatives, Labour Code, art L2411-1; women who are pregnant or on maternity leave: Labour Code, art L1225-4.

[36] Labour Code, art L1233-61.

regarding dismissals for economic necessity. Regarding procedural rules, the insolvency officer must first consult the employee representatives and inform the French labour administrator and second, apply to the insolvency court, in order to dismiss the employees.[37] On a substantive level, dismissals for economic necessity are allowed only if they are "*urgent, unavoidable and indispensable*".[38] The intention of the legislator is clearly that such layoffs remain exceptional during insolvency proceedings.

12.21 Additionally, the Commercial Code directs the court, when deciding on a sale of the business as a going concern[39] or the adoption of a restructuring plan,[40] to take into account the impact of such decision on employment.

12.22 Finally, French law also confers a specific status on unpaid salaries and other employees' claims arising before the commencement of the insolvency proceedings. As a consequence, employees are given a preferential right[41] on movable and immovable properties owned by the insolvent employer, which comprises wages, paid leave and severance payment for the termination of the labour contract and dismissal compensation.

Pension contracts

12.23 Subscriptions to compulsory complementary pension programmes meet the definition of executory contracts. If insolvency proceedings are opened against such company, the pension institution as well as the insolvency official can terminate the pension contracts within three months after the proceedings are opened. The debtor can be reimbursed the part of pre-paid premium which corresponds to the lapse of time during which risks were not covered.[42] The French Social Security Code ("*Code de la Sécurité Sociale*") also states that insolvency proceedings against pension organisations can be either requested by the dedicated supervisory authority ("*autorité de contrôle prudentiel*") or after such authority has been consulted.[43]

[37] See *e.g.* Commercial Code, art L631-17.
[38] Ibid.
[39] Commercial Code, art L642-5.
[40] Commercial Code, art L631-19.
[41]Commercial Code, art L625-7.
[42] Social Security Code, art L932-10.
[43] Social Security Code, arts. L951-2.

Financial contracts

12.24 Directive 2002/47/EC, amended by Directive 2009/44/EC governs the treatment of financial collateral contracts. A European measure was deemed necessary in this area in order to promote the smooth functioning the capital markets. Such requirement led to the conclusion that financial transactions should not be affected by the opening of insolvency proceedings. The French legislator implemented such European provisions in the Financial and Monetary Code ("*Code Monétaire et Financier*"). Article L211-36-1 II of the Financial and Monetary Code provides that the rules governing assessment, set-off and termination of financial contracts are enforceable against third parties, even if insolvency proceedings have been initiated against the parties.

3) Statutory Treatment of Contractual Remedies

Ipso facto clauses

12.25 Under French law, termination and acceleration clauses, also called *ipso facto* clauses, are not automatically considered null and void. However, Article L622-13 I (and Article L641-11 I regarding liquidation) of the Commercial Code states that indivisibility or termination clauses, or clauses allowing rescission of an executory contract cannot be triggered by the opening of insolvency proceedings, whether liquidation or reorganisation proceedings, except for employment and fiduciary contracts.[44]

12.26 The French Commercial Code goes further in the case of reorganisation proceedings, stating that the opening of such proceedings does not lead to the triggering of acceleration clauses, under which sums of money to be paid or other obligations to be performed become payable and due immediately.[45] The Commercial Code provides that such clauses are deemed non-existent ("*non-écrites*").

Close-out netting provisions

12.27 Close-out netting is permitted under French law and close-out netting provisions are governed by Article L211-36-1 II of the Financial and Monetary Code, regarding their assessment, set-off and termination.

[44] Commercial Code, arts. L622-13 VI.
[45] Commercial Code, art L622-29.

Flip clauses

12.28 Such clauses are not addressed by the Commercial Code, which deals with termination clauses only.[46]

Flawed/conditional rights

12.29 Since the commencement of insolvency proceedings has no effect on termination clauses, contractual terms which attempt to achieve the same result are also deemed null and void.[47] As a result, a counterparty cannot request the debtor to pay any amounts due before the beginning of the insolvency proceedings before he agrees to perform his own obligations,[48] regardless of any clause in the contract requiring such payment as a pre-condition of his performance.

Liquidated damages/penalty provisions

12.30 The French Supreme Court has held that a clause determining the amount of damages due in the event of a breach of contract is enforceable. If the counterparty is not compensated as a result of the opening of insolvency proceedings but instead as a result of the insolvency official's decision to reject an executory contract, neither the *pari passu* principle, nor the general rule nullifying termination clauses can support the invalidity of a liquidated damage clause.[49]

C. Reforms

1) Major Reforms of French Insolvency Law to Date

12.31 **2000:** The new Commercial Code came into force, which reconsolidating insolvency and restructuring law, in its Book VI. In 2003, insolvency practice was modernised, and insolvency law was later reformed in 2005.

12.32 The principal innovation of this law was the introduction of safeguard proceedings, modelled on Chapter 11 proceedings but incorporating some specifically French characteristics. It also introduced the *ad hoc* representative.

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[46] There is no case law on the validity of such clauses under French law so far. Issues surrounding flip clauses have mainly been addressed by English and US courts in the late 2000s. See *Perpetual Trustee Company Limited v BNY Corporate Trustee Services Ltd* [2009] EWHC 1912 (Ch) and *Lehman Bros. Special Fin. Inc. v BNY Corporate Tr. Servs. (In re Lehman Bros. Holdings Inc.)*, 422 B.R. 407 (Bankr. S.D.N.Y. 2010). These conflicting decisions expose the differences in approach in both jurisdiction and therefore highlight the lack of harmonisation across jurisdictions in terms of enforcement of such clauses.

[47] Cass. Com. 2 March 1993, Case No. 90-21849; Cass. Com. 19 December 1995, case no. 93-20398.

[48] Cass. Com. 3 April 2011, Case No. 10-19463 JCP E 2004, p. 1713.

[49] Cass. Com. 13 June 2006, Case No. 05-14138.

12.33 However, the changes brought in by the Law of 2005 did not have the expected impact and the French government quickly realised that the new safeguard procedure was not attractive as it was hoped, with just over 500 procedures being opened in each of the first few years after the 2005 law came into force.[50] On the other hand, the number of conciliation and *ad hoc* proceedings increased and 2,500 procedures were reported annually, compared to 1,500 procedures before the Law entered into force.[51]

12.34 **Law n°2008-676 of 4 August 2008** on the Modernisation of the Economy ("*Loi de modernisation de l'économie*") was passed and enhanced most of the insolvency procedures contained within Book VI of the Commercial Code, especially pre-insolvency and out-of-court procedures. **Ordinance n°2008-1345**[52] which followed was a response by the French legislator to the Law of 2005 and to the practical difficulties encountered by companies since the introduction of the safeguard proceeding. The Ordinance is principally aimed at making the safeguard proceedings more accessible and to clarify the rules governing such procedure. Additionally, it liberalised the *ad hoc* and conciliation proceedings by making them more flexible.

12.35 **Law n°2010-1249 of 22 October 2010***:* In the wake of the global financial crisis, the French legislator focused on the financial and banking sector and introduced a pre-pack procedure through the AFS procedure.[53]

12.36 With the multiplication of the reforms and the coming into force of new insolvency and pre-insolvency procedures, French insolvency law modernised its insolvency law to focus on restructuring viable companies. However, the continued impact of the global financial and the Eurozone crises led to continuous underemployment and the incapacity of successive Governments to turn the economy around. Such factors led to a review of the commercial legislation, including insolvency law, by the Government in 2012.[54] In its report accompanying the reformed legislative text, the Government

[50] See T. Montéran, 'Pour améliorer le droit des entreprises, osons la réforme' (2008) 24 Gazette du Palais 3. More precise statistics are quoted by M-H. Monsèrié-Bon and C. Saint-Alary-Houin, 'La loi de sauvegardes des entreprises: nécessité et intérêt d'une réforme annoncée' (2008) 14 Recueil Dalloz 941, noting 500 procedures in 2006 and 506 in 2007.
[51] T. Montéran, 'Pour améliorer le droit des entreprises, osons la réforme' (2008) 24 Gazette du Palais 3..
[52] See Ordinance N°2008-1345 of 18 December 2008. An account of these reforms can be found in P. Omar, 'French Insolvency Law: Remodelling the Reform of 2005' (2009) 6 International Company and Commercial Law Review 225; P. Omar, 'Preservation and Pre-Packs à la Française: The Evaluation of French Insolvency Law after 2005' (2011) 8 International Company and Commercial Law Review 258.
[53] Law N°2010-1249 of 22 October 2010, see Articles 57-58.
[54] See P. Pétel, 'Entreprises en Difficulté: encore une réforme' (2014) 18 Entreprises et Affaires 20.

explained that the new legislation was geared towards improving the existing procedures' efficiency.[55] The report listed the main objectives of the new law as (i) the need to efficiently foresee the worsening of businesses' economic conditions; (ii) the need to improve the protection afforded to creditors; and (iii) the necessity to improve procedural insolvency rules to ensure "greater security, simplicity and effectiveness."[56]

12.37 **Ordinance n°2014-326 of 12 March 2014**[57] extensively reformed French bankruptcy law with a view to: (1) favouring preventative measures; (2) strengthening the efficiency of pre-insolvency proceedings; and (3) increasing the rights of creditors in insolvency proceedings.

12.38 The text of the Ordinance is quite lengthy and extensive, with 117 articles regarding insolvency provisions contained in the Commercial Code and other texts. Importantly, two new restructuring procedures were introduced: the "*sauvegarde financière*" and the "*rétablissement professionnel*."[58] Such procedures are conditional upon the opening of another insolvency proceedings before they can be commenced: conciliation proceedings for the financial safeguard and liquidation proceedings for the "*rétablissement professionnel*."

12.39 The reform of 2014 also introduced a pre-pack sale plan in conciliation proceedings, *i.e.* the option for the court-appointed official to draft a partial or total sale plan of the business as a going concern, which would ultimately be implemented in safeguard, rehabilitation or liquidation proceedings. The main objective of such reform was to accelerate the insolvency proceedings and shorten the period during which the

[55] Rapport au Président de la République relative à l'ordonnance N°2014-326 du 12 Mars 2014 portant réforme à la prévention des difficultés des entreprises et des procédures collectives.
[56] "Améliorer les règles de procédures pour plus de sécurité, de simplicité et d'efficacité."
[57] Ordinance N°2014-326 of 12 March 2014, "portant réforme de la prévention des difficultés des entreprises et des procédures collectives."
[58] *Ibid.*, at Chapter IV, Section 3, "Dispositions relatives au rétablissement professionnel". A physical person debtor who has not been the subject of insolvency proceedings and has not employed anyone within the past six months, and who owns assets not exceeding an amount to be determined by subsequent decree may request to open a "*rétablissement professionnel*" rather than judicial rehabilitation or liquidation. The procedure is opened for a period of four months and does not result in the debtor losing control of his assets. Although claims against the debtor are not suspended, the supervising judge may, at the request of the debtor, order the rescheduling of amounts due for a period of four months.

company is undergoing insolvency proceedings in order to preserve the value of the business which is to be sold.[59]

12.40 The Ordinance of 2014 extensively reformed most of the provisions of the Commercial Code contained in Book VI.

12.41 **Law n°2015-990 of 6 August 2015** ("*Loi Macron*") was designed to promote economic growth, activity, and equal opportunity. Some notable features of this law are the creation of specialised insolvency courts for large cases[60] and the power of courts to dilute or compel divestiture of shareholder interests in reorganisation proceedings ("cram down").[61]

12.42 Additionally, **Ordinance 2015-1024 of 20 August 2015** implementing various European financial provisions[62] was also adopted, which aimed at strengthening the framework regarding resilience in times of financial crises, and at promoting the rescue of financial institutions in financial distress, prior to any grant of public aid.

12.43 **Law n°2016-1547 of 18 November 2016** on the Modernisation of 21st Century Justice [63] completed the regulation of the four ordonnances issued over the two years before that date modifying insolvency law.[64] Key changes applying to insolvency proceedings opened after 19 November 2016 are: (1) the promotion of the rescue culture;[65] (2) the enhancement of confidentiality;[66] (3) the ring-fencing of new monies during restructuring ("*privilège de conciliation*");[67] (4) the improvement of transparency;[68] and (5) the promotion of impartiality.[69]

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[59] The first pre-pack sale plan was implemented in June 2015 when the business and assets of NextiraOne, a spin-off of Alcatel-Lucent, were transferred (alongside all of its 1,400 employees) to a purchaser only one month after the opening of rehabilitation proceedings.
[60] Law N°2015-990, at Chapter V, Section 1. See Commercial Code, Article L721-8.
[61] Commercial Code, art L631-19-2.
[62] Ordonnance 2015-1024 of 20 August 2015 "portant diverses dispositions d'adaptation de la législation d'adaptation de la législation au droit de l'Union européenne en matière financière".
[63] Law N°2016-1547 "de modernisation de la justice du XXIè siècle".
[64] Ordonnance N°2014-326 of 12 March 2014, Ordonnance n°2014-1088 of 26 September 2014, Ordonnance n°2015-1287 of 15 October 2015, and Ordonnance n°2016-727 of 2 June 2016.
[65] Law N°2016-1547, at art 99 IV 1°; Commercial Code, at art L621-1.
[66] Law N°2016-1547, at art 99 III; Commercial Code, arts. L611-3; L611-6.
[67] Commercial Code, Article L611-11 : In a "*conciliation*" procedure, post-commencement finance can be granted the "conciliation privilege" under a court-ratified ("*homologué*") conciliation agreement. In this case, such finance may benefit from a priority rank in any distribution of the debtor's assets organised in any subsequent liquidation proceedings. Such privilege does not apply to equity finance.
[68] Law N°2016-1547, at art 99 VI 2° ; Commercial Code, art L642-2.
[69] Law N°2016-1547, at Aart 99 IV 3° a); art99 VI 1° a) ; Commercial Code, art L621-4 ; Commercial Code, art L641-1. See also Commercial Code, art L662-7.

12.44 Regarding the latest French reforms in the insolvency and restructuring area, it is noticeable that the laws of 2014, 2015 and 2016 extensively reformed the field. There is no pending legislation to further reform the French insolvency provisions and the current focus of future reforms is on civil and employment law. It is yet to be seen how any these current reforms will affect the French restructuring practice.

2) Influences Behind the Reforms

12.45 Political actors have strongly influenced the various reforms of insolvency and restructuring law in France: Law n°2015-990 of 6 August 2015 was named after the then French Minister for the Economy and the Bill preceding Law n°2016-1547 of 18 November 2016 was named after the then Minister for Justice Christiane Taubira.

12.46 Additionally, the influence of the Government can be seen in the format of the instruments passed over the last few years to reform French insolvency law. Indeed, the choice of ordinances (which are statutory instruments issued by the Council of Ministers in areas of law which are usually reserved for parliamentary legislation) is not inconsequential; under the provisions contained in Article 38 of the French Constitution, the Government is authorised to regulate some aspects of the law, notably to promote the use of preventive measures under Book VI of the French Commercial Code.

12.47 Additionally, the influence of other main actors has increased over the years: the impact of business unions, such as SOS Entrepreneurs, advocated for the introduction of a pre-pack procedure modelled on Chapter 11 of the US Bankruptcy Code to help companies in financial distress to negotiate with their creditors before the opening of a formal insolvency procedure. As such, business unions were pleased with the creation of such pre-pack and other procedures such as the Accelerated Safeguard procedure. The impact of such business unions and other entrepreneurial actors can also be seen in the introduction of various devices asserting the role of managers, and implementing a debtor-in-possession regime in certain insolvency proceedings. The impact of the banking and lending sector as well as certain type of creditors, such as secured creditors, has led to a rebalancing of powers for the benefit of creditors, giving them an increased role in insolvency proceedings.

12.48 The role of the negotiation process and lobbying activities before a bill is passed into law has been promoted over the years, since it is argued that laws regulating insolvency proceedings have traditionally been drafted by bureaucrats, unaware of the reality of business life. As a result, the Bill preceding Law n°2005-845 of 26 July 2005 for example was deemed to neglect two of the important underlying elements which make a strong insolvency legislation: the promotion of a relationship of trust between stakeholders and of confidentiality of the proceedings. Following intense lobbying activities, mainly by business unions and the lending sector, the French Parliament amended the text and the procedure introduced, relying on the intervention of an *ad hoc* official, is now used in major insolvency cases. The impact of main players in the area of insolvency is therefore extremely usefulness in shaping efficient laws.

12.49 However, the introduction of new reforms every few years has also been deemed to increase the complexity of the law of insolvency, which sometimes have been criticised as been drafted for the benefit of large companies, rather than for small and medium enterprises, which compose the bulk of companies in France.

3) Impacts of such Reforms on Executory Contracts Provisions

12.50 **Law n°2005-845 of 26 July 2005***:* the most notable features of the Law of 2005 concerning executory contracts are:

(a) Article 24 of Law n°2005-845 amended Article L622-6 of the Commercial Code, adding that when insolvency proceedings are opened, the debtor needs to give a list of the executory contracts to the insolvency official.

(b) Article 29 of Law n°2005-845 amended Article L622-13 of the Commercial Code, providing that the counterparty can be awarded damages if the insolvency official does not continue the contract.

(c) Article 9 of Law n°2005-845 amended Article L611-12 of the Commercial Code, stating that creditors who have invested new money into the debtor company or performed essential executory contracts in order to support the continued activity of the debtor as a going concern after the opening of an insolvency proceedings are offered super-priority ranking in conciliation and safeguard proceedings.

(d) Regarding insurance contracts, prior to the Law of 2005 and in accordance with Article L113-6 of the Insurance Code ("*Code des Assurances*"), the insurer had the right to terminate the insurance contracts in progress on the day of the opening of insolvency proceedings, without having to justify its termination. This article was modified by Law n°2005-845 and insurance contracts are now subject to the general regime applied to executory contracts.

(e) It is also Law n°2005-845 which created specific provisions for certain types of contracts, such as lease agreements for buildings used in relation with the business.

12.51 Generally, Law n°2005-845 was quite favourable to the debtor company regarding executory contracts.

12.52 **Ordinance n°2014-326 of 12 March 2014:** regarding executory contracts, the Ordinance of 2014 generally provided that the payment of debts arising after the judgment opening insolvency proceedings must be made on their due date if they arose from an executory contract accepted by the insolvency professional.[70]

12.53 Article 14 added a new Article L611-16 which provided that clauses modifying the conditions of performance of an executory contract, to the detriment of the insolvent debtor opening a restructuring procedure, are deemed non-existent, as well as those imposing the financial burden of the clause on the debtor only.

12.54 The Ordinance introduced the Accelerated Safeguard and therefore added some provisions regarding executory contracts under such procedure,[71] notably the possibility for the insolvency professional to ask the insolvency judge to terminate the contract if it is not excessively detrimental to the counterparty.[72]

12.55 **Law n°2016-1547 of 18 November 2016:** article 99 of Law n°2016-1547 contained the amendments regarding executory contracts. Generally, Article L641-13 of the Commercial Code, as amended by Law n°2016-1547 of 18 November 2016 reformulates the concept of claims arising under an executory contract. Previously, the law provided that claims arising from an executory contract after the opening of insolvency proceedings had a preferential status, if the executory contract had been accepted by

[70] Ordinance N°2014-326, at Article 68, modifying Commercial Code, art L641-13.
[71] Commercial Code, art L622-13 III.
[72] Commercial Code, art L622-13 IV.

the liquidator. However, this led to confusion in cases where liquidation proceedings were opened following the opening or a restructuring procedure. Such claims could not have a preferential status since the executory contract was not accepted by a liquidator. Article 99 V of Law n°2016-1547 of 18 November 2016 corrected this gap and the word "liquidator" was removed from the text.[73] Article L641-13 I of the Commercial Code now provides that preferential claims are those arising from an executory contract accepted in a restructuring or liquidation procedure.

4) General Trends in French Reforms

12.56 Generally, the rate at which reforms of French insolvency law have been passed has intensified since the economic crisis of 2008-2009. The French regime has shifted towards offering more protection and advantages to creditors. Indeed, the reform of 2014 undoubtedly improved the situation of creditors in particular by (a) relaxing the formality surrounding creditors' claims; (b) offering creditors the right to propose their own restructuring plan (or a counter-proposal to a debtor's plan); and (c) giving creditors a bigger role to play in insolvency and restructuring proceedings.

12.57 On the other hand, however, the successive reforms have also promoted the rescue of viable companies, therefore enhancing the options offered to the debtor, notably by abolishing the obligation of debtors to settle due debts in one payment following the opening of safeguard proceedings, by accelerating the liquidation procedure and importantly by creating the "*rétablissement professionnel*" proceeding which leads to a cancellation of debts altogether.

12.58 French insolvency law is now providing more rules governing out-of-court workouts, in particular provisions aiming at anticipating the debtor's financial difficulties, by implementing various alert procedures, which can be triggered by different actors such as the statutory auditor,[74] the employees' council,[75] the shareholders,[76] the President of the Court.[77]

[73] Law N°2016-1547, art 99 VI, §1, c).
[74] Commercial Code, arts. L234-1 *et seq.*
[75] Labour Code, art L2313-14.
[76] Commercial Code, art L223-36.
[77] Commercial Code, art L611-2 I.

12.59 Interestingly, since the beginning of the financial crisis in 2008, restructuring cases have mostly been negotiated through amicable and out-of-court proceedings,[78] which have now become the customary proceedings for negotiations between the various stakeholders in an insolvency case. The introduction of pre-pack proceedings over the last few years has contributed to this development, by promoting the use of pre-insolvency, amicable and out-of-court procedures, considered more efficient than traditional insolvency proceedings.

12.60 The repeated reforms introduced following the economic and financial global crisis have greatly modernised French insolvency law, improving the flexibility of out-of-court and pre-insolvency proceedings and creditors' rights. Creditors, notably new investors, are now offered to play a greater role in their debtor's insolvency proceedings, allowing for negotiations to be conducted more efficiently.

5) The European Context Underpinning French Reforms

12.61 The latest French insolvency reforms have been prompted by several European measures pushing the member states to modernise their rescue regimes. Such instruments comprise notably the European Commission Recommendation on a New Approach to Business Failure[79], the European Insolvency Regulation Recast 2015[80] and the Proposal for an insolvency Directive of 22 November 2016.[81]

12.62 Such documents generally advocate for the strengthening of pre-insolvency proceedings and the rescue culture and for more convergence of the member states' insolvency and restructuring laws since 25% of European insolvency proceedings have cross-border effects.[82] The Recommendation of 2014 in particular, has had a great influence on the French insolvency and rescue law regime, notably visible with the reform of 2014. Indeed, as explained above, the Ordinance of 2014 extensively reformed the legislation

[78] See M. Guillonneau, J-P. Haehl and B. Munoz-Perez, 'La prévention des difficultés des entreprises par le mandat ad hoc et la conciliation devant les juridications commerciales de 2006 à 2011', Rapport de Recherche, Ministère de la Justice (2013).
[79] Council of the European Union, Comission Recommendation of 12.3.2014 on a new approach to business failure and insolvency (C(2014) 1500 final).
[80] European Parliament and Council Regulation (EU) 2015/848 on insolvency proceedings (recast) of 20 May 2015, OJ L141/19.
[81] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016].
[82] European Commission Staff Working Document, Impact Assessment accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, SWD(2012) 416 17.

with a view to favouring reorganisation at a preventive stage, strengthening the efficiency of out-of-court proceedings and increasing the rights of creditors in insolvency proceedings.

12.63 Generally, the insolvency benchmark has improved over the crisis period in France, following the extensive reforms in this area. France, therefore, does not fare too bad in terms of insolvency and rescue proceedings compared to some of its European neighbours and there has been a tendency to opt for out-of-court proceedings, which have a success rate similar to the safeguard proceedings, allowing for better job preservation. However, improvements could be made: Doing Business Report states that France scores 11 (out of 16) for the strength of its insolvency framework.[83] Additionally, in Europe, between 30% and 90% of debts owed to creditors are paid back by debtors and 78% of debts are repaid by French debtors.[84]

12.64 Finally, regarding the international context, the adoption of the UNCITRAL Model Law on Cross-Border Insolvency has been discussed but, for the time being, no steps have been taken to implement it in France.

D. Concluding Remarks

12.65 Since the start of the global financial and economic crisis in 2008-2009, French insolvency law reforms have intensified. Law n°2005-845 of 26 July 2005 set off a new approach to regulating insolvency and rescue law in France, promoting restructuring provisions. Three years later, Law n°2008-676 of 4 August 2008 on the Modernisation of the Economy fulfilled the promise inscribed in its name, by strengthening most of the insolvency provisions contained in Book VI of the Commercial Code. Two years later, Law n°2010-1249 of 22 October 2010 focused on enhancing procedures afforded to financial and banking institutions.

12.66 Another shift occurred in 2014, first with the choice of format of instruments adopted. Indeed, the passing of ordinances as opposed to laws showed the involvement of the Government in the reform activity, as well as the urgency of such modernisation. Second, Ordinances n°2014-326 of 12 March 2014 and n°2015-1024 of 20 August 2015

[83] The World Bank, "Doing Business: Measuring Business Regulations". Available at http://www.doingbusiness.org/data/exploreeconomies/france/resolving-insolvency.
[84] See Stéphanie Chatelon and Arnaud Pédron, 'Insolvabilité : Actualités au niveau européen et état des lieux en France' (2017) Deloitte Taj.

extensively reformed the substance of insolvency and restructuring law by promoting preventive measures. Finally, Law n°2016-1547 of 18 November 2016 on the Modernisation of 21st Century Justice continued on such path by promoting the rescue culture.

12.67 The main drivers behind the most recent reforms have been the lending sector and business unions. Their lobbying activities resulted in the introduction of more efficient pre-insolvency and out-of-court proceedings, as well as an increase in the creditors' role. Additionally, such reforms have been driven by the developments at European level, in particular the European Commission Recommendation on a New Approach to Business Failure 2014, as well as the general convergence of national insolvency regimes happening across the EU member states. As a result, France has now become more competitive in the EU, offering attractive and efficient insolvency and restructuring proceedings to French and European companies facing financial distress.

12.68 Finally, regarding the evolution of the treatment of executory contracts, the general trend has been to increase the protection afforded to debtors' counterparties.

12.69 All the aforementioned reforms have improved the balance between debtor and creditor protection: France is now a more investor-friendly jurisdiction, while debtors benefit from a more sophisticated set of tools.