Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

France

Dr Emilie Ghio[1]

Dr Paul Omar[2]

The French Perspective on Restructuring

Compared with other countries which we have surveyed, the approach of France to restructuring has been developed incrementally since the 1980s with continued reassessment and development over time. The *sauvegarde* procedures described below are covered by the EIR-Recast 2015 which is interesting in terms of future developments when we compare which rescue processes are outside or within the Regulation. None of these procedures specifically allows for cross class cram down, which is the corner stone to a robust restructuring process. However, it would seem that further reforms, anticipated in light of the PRD 1023/2019, will address this issue. The prevention of insolvency proceedings and the consequent rescue of dependent businesses and preservation of jobs are amongst the stated policy goals.

PART 1: The General Context of Preventive Restructuring

Current Legislative Framework

In France, the roots of modern insolvency law can be traced back to the 1950s[3] and 1960s,[4] when the corporate insolvency landscape was transformed considerably and the first rescue procedure was introduced (*redressement judiciaire*). The first pre-insolvency process was introduced as early as 1984[5] and French insolvency law has since been in constant evolution, with regular reforms geared towards the rescue of ailing companies and the preservation of employment. Indeed, for the last two decades, important reforms have reached the statute book every couple of years in France.

In 2005, the safeguard procedure (*procédure de sauvegarde*) was introduced, introducing a debtor in possession process into French insolvency law. It was designed to encourage upstream rescue, since

[1] Lecturer in Law, Erasmus/Study Abroad Programme Coordinator, School of Law, Birmingham City University.
[2] Technical Research Co-ordinator for INSOL Europe.
[3] Decree-Law No 55-583 of 20 July 1955.
[4] Decree-Law No 55-583 of 20 July 1955.
[5] Law No 84-148 of 1 March 1984.

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companies can avail of it before becoming officially insolvent '*en cessation de paiements'*. In 2008, following a rather low take-up of the procedure, the Government attempted to address its main flaws.[6] In the wake of the global economic and financial crisis from 2006 onwards, variations of the safeguard procedure were created: the accelerated financial safeguard[7] (*sauvegarde financière accélérée)* in 2010 and the accelerated safeguard[8] (*sauvegarde accélérée*) in 2014, which drew on the practice of pre-packs in the UK.

French insolvency law was, once again, reformed in 2014 with the aim of (i) favouring preventive measures; (ii) strengthening the efficiency of pre-insolvency proceedings; and (iii) increasing the rights of creditors in insolvency proceedings.[9] Finally, in 2016, a law on the Modernisation of 21st Century Justice focused on the promotion of the rescue culture, the enhancement of confidentiality during proceedings, the ring-fencing of new monies during restructuring, and the improvement of transparency and impartiality.[10]

The regular modernisation of the insolvency and restructuring landscape in France has resulted in comprehensive and sophisticated legislation.[11] Three preventive restructuring procedures are now available to companies facing financial difficulties but not yet insolvent (*en cessation de paiements*):[12] (1) the ad hoc mandate (*mandat ad hoc*); (2) the conciliation (*conciliation*); and (3) the safeguard (*sauvegarde*), with its two variants, the accelerated financial safeguard and the accelerated safeguard.

Mandat ad hoc

The ad hoc mandate[13] was formally introduced in 2005[14] for companies which are not yet insolvent. An ad hoc representative (*mandataire ad hoc*) will either be chosen by the debtor or appointed by the relevant court[15] which will define the extent and scope of the process. The objective of the procedure is that the company enters negotiations with its creditors in order to reach an amicable agreement. It is left to the discretion of the debtor to decide which creditors to involve in the negotiations process and creditors can agree to reschedule debts, cancel them, or inject new financing into the business. The agreement reached at the end of an ad hoc mandate is subject to normal contractual rules and therefore is not binding on third parties. It is also not binding on dissenting creditors.

Overall, the ad hoc mandate is not heavily regulated, making it a very flexible procedure, free from many legal formalities. There is no legislative maximum duration, although in practice, ad hoc mandates tend to last between a few months and just over a year. Finally, the confidential nature of the procedure is attractive as it allows the negotiations to take place without bringing undue attention and stigma upon the company.

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[6] [6] Ordinance No 2008-1345 of 18 December 2008. See P Omar, 'French Insolvency Law: Remodelling the Reforms of 2005' (2009) 6 International Company and Commercial Law Review 225.

[7] Law No 2010-1249 of 22 October 2010.

[8] Ordinance No 2014-326 of 12 March 2014.

[9] Ordinance No 2014-326 of 12 March 2014. Another variant on the sauvegarde procedure was introduced, the sauvegarde financière (SA). For an in-depth account of sauvegarde accélérée, see S Danion 'La procedure de sauvegarde accélérée' (Master Thesis, Université de Reims Champagne-Ardenne 2016) <https://dumas.ccsd.cnrs.fr/dumas-01317161/document> accessed 9 January 2020.

[10] Law No 2016-1547 of 18 November 2016. For example, the law removed the need for notification of the employees' council or representatives during the opening of *mandat ad hoc* or *conciliation*; excluded a judge in a prior *mandat ad hoc* or *conciliation* from acting in any subsequent *sauvegarde* of the same debtor; and facilitated the extension of the observation period in a *sauvegarde* by a further six months on application.

[11] See F Baumgartner and A Dupuis, 'Chapter 6: France' in DS Bernstein, *The Insolvency Review* (Law Business Research 2017) 72, 72.

[12] A debtor is in a payment failure situation when due and payable debts exceed available assets. It must file for insolvency within 45 days of the occurrence of such situation: see Commercial Code, Article L631-1. See also P. Omar, 'Defining Insolvency: the Evolution of the Concept of 'Cessation de Paiements' in French Law' (2005) 16 European Business Law Review 311.

[13] Commercial Code, Articles L611-1 to L611-16.

[14] Law No 2005-845 of 26 July 2005. The procedure already existed in practice before that date: See C Dupoux and D. Marks, 'Chapter 11 à la Française: French Insolvency Reforms' (2004) 1 ICR 74, 75.

[15] Commercial Code, Article L611-3. The relevant court will be either the Commercial Court if the debtor carries out commercial or handcrafted activities, or the High Court in all other cases.

Conciliation

The conciliation procedure[16] was also introduced in 2005 and replaced the procedure previously known as amicable settlement (*règlement amiable*).[17] The conciliation is quite similar to the ad hoc mandate in that it is an informal and voluntary procedure. It aims to provide breathing space for troubled companies and to encourage negotiations with creditors at an early stage and on a confidential and contractual basis. Following a request by the debtor, the procedure is opened by the President of the Commercial Court or High Court, depending on the nature of the debtor. The court appoints a conciliator (*conciliateur*) whose powers are partly set out by statute and partly by the court. The conciliator will make any proposal relevant for the preservation of the business, the pursuit of its economic activity and the preservation of employment.[18] An agreement must be reached within a period not exceeding four months, which can be extended by one month.[19]

The main difference between the ad hoc mandate and the conciliation is that a conciliation agreement will either be approved by the court (*constatation*), which means that confidentiality is retained, or will be sanctioned by the court (*homologation*),[20] which renders the judgement public.[21] The adverse effect of publicity, which is attached to the sanctioning of the agreement, is mitigated by the fact that such sanctioning confers more legal advantages than a mere approval in the event of subsequent insolvency proceedings being opened (*e.g.* protection for new money).[22]

Sauvegarde

The safeguard procedure was the main reform introduced by the Law of 2005. Modelled on Chapter 11 of the United States Bankruptcy Code, the procedure was originally introduced as an insolvency, rather than a pre-insolvency, procedure for debtors facing "difficulties that it was not able to overcome" that would lead to insolvency. The safeguard procedure has since been extensively reformed, in 2008,[23] 2014[24] and 2016.[25] The Ordinance of 2008 amended the entry criterion and the procedure can now be opened "at the request of the debtor … who, *without being in a payment failure situation*, can show that he is encountering difficulties which he is not in a position to overcome."[26] Since 2008 therefore, the safeguard procedure has been transformed into a preventive restructuring procedure.

The safeguard is more heavily regulated than the conciliation and the ad hoc mandate; it is not confidential and must involve all creditors. The proceedings cannot exceed 18 months. Safeguard proceedings trigger a stay on enforcement actions, thereby giving the company some breathing space (*période d'observation*) during which the debtor proposes a reorganisation plan (*plan de sauvegarde*) to the creditors. The judgment opening the procedure also triggers the appointment of: (1) an administrator (*administrateur judiciaire*) who supervises and/or assists the management to prepare the plan; (2) an insolvency judge (*juge commissaire*), who oversees the whole procedure; and (3) creditors' representatives (*mandataires judiciaires*), who promote the creditors' interests and assess proofs of claims. They can be assisted by supervising creditors (*créanciers contrôleurs*) appointed by the insolvency judge.[27]

Following the period of the stay, the debtor proposes a restructuring plan to its creditors, who then vote on the plan. Before sanctioning a safeguard plan, the court will hear several actors involved in the restructuring proceedings[28] and will rely on an economic, social and environmental assessment of the

[16] Commercial Code, Articles L611-1 to L611-16.
[17] Introduced by Law No 84-148 of 1 March 1984.
[18] Commercial Code, Article L611-7.
[19] Commercial Code, Article L611-8.
[20] The court can sanction the agreement through *homologation* only if certain conditions are met, including that the provisions of the agreement aim to ensure the viability of the going concern of the company: Commercial Code, Article L611-8.
[21] Before the court sanctions an agreement, it must hear the debtor, the creditors who are parties to the agreement, the conciliator and some representatives of the company: Commercial Code, Article L611-9.
[22] Commercial Code, Article L611-11 7° and Article L622-17.
[23] Law No 2008-1345 of 18 December 2008.
[24] Ordinance No 2014-326 of 12 March 2014.
[25] Law No 2016-1547 of 18 November 2016.
[26] However, some commentators have noted that the amendment of the entry criterion is more theoretical than actual, since the debtor must still prove financial difficulties which it cannot overcome to the court: see J-L. Vallens, 'Flexibility in France' (2009) Summer Eurofenix 22.
[27] Commercial Code, Articles L621-10 and L621-11.
[28] Commercial Code, Article L626-9.

company drafted by the administrator,[29] which must specify the origins, severity and nature of the company's financial difficulties.[30]

Pre-pack variants of the safeguard: accelerated financial safeguard and accelerated safeguard

In the wake of the crisis of the mid-2000s, developments in legal practice prompted further reforms to the French insolvency regime. In 2010, a first variant of the safeguard was introduced, the accelerated financial safeguard.[31] In 2014, following the prolonged devastating impact of the crisis on the French economy, the second variant of the safeguard was created: the accelerated safeguard.[32] The difference between both procedures is that an accelerated financial safeguard will only affect financial creditors and/or bondholders. Both procedures mirrored existing practices where debtors wishing to benefit from an arrangement similar in structure to a pre-pack often negotiated an agreement before applying for a safeguard procedure. The agreement negotiated would then be adopted in the form of the restructuring plan during safeguard proceedings.[33]

The accelerated financial safeguard and the accelerated safeguard are not stand-alone procedures as they can only be opened as a conversion of pending conciliation proceedings into safeguard proceedings. Indeed, in order to file for accelerated financial safeguard or accelerated safeguard, a company must: (i) have opened conciliation proceedings; (ii) not be insolvent or have been insolvent for less than 45 days before their request to open conciliation proceedings; and (iii) face financial difficulties that it finds itself unable to overcome. During the accelerated (financial) safeguard, the debtor will rely on the restructuring plan drafted during the conciliation proceedings and the debtor must demonstrate to the court that the plan will receive the support of the creditors concerned.[34] The decision to open an accelerated (financial) safeguard is taken by the court on the basis of the report prepared by the conciliator, expressing their opinion on the likelihood of the restructuring plan being adopted by the creditors concerned.[35] Overall, the objective is to draft a pre-pack agreement during the conciliation process, which is then sanctioned by the court during an accelerated (financial) safeguard.

France has historically been a Member State committed to fostering a rescue culture for its distressed debtors, in particular through the introduction over the years of several preventive restructuring mechanisms. The regular reforms passed by the legislature and the Government have allowed the French regime to be regularly updated to fit business needs. In terms of current and future developments in France, the "*Loi Pacte*"[64] (*"Plan d'Action pour la Croissance et la Transformation des Entreprises*")[36] introduced in May 2019 allows the French Government to legislate by means of an Ordinance in order to transpose the PRD. Article 196 of the Law includes some specific elements that the ordinance must include, however, these remain quite broad thereby giving some flexibility to the Government regarding the detailed content of the ordinance.

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

A moratorium is available for all French preventive restructuring procedures, either automatically or at the debtor's request. For *conciliation* and *mandat ad hoc*, a debtor can apply to the court for a moratorium if creditors attempt to enforce their rights while proceedings are pending.[37] The maximum duration of this moratorium is two years.[38] However, if the debtor converts conciliation proceedings into accelerated (financial) safeguard proceedings, a general stay on enforcement actions will be

[29] As per Commercial Code, Article L628-8.
[30] Commercial Code, Article L623-1.
[31] Law No 2010-1249 of 22 October 2010. See also P Omar, 'Preservation and Pre-Packs à la Française: The Evolution of French Insolvency Law after 2005' (2011) 8 ICCLR 258.
[32] Ordinance No.2014-326 of 12 March 2014.
[33] Y. Le Gales, "Comment fonctionne la procédure de sauvegarde financière accélérée" (Le Figaro, 11 January 2011).
[34] Commercial Code, Article L628-1. Financial creditors for the FAS and all creditors but the employees in AS proceedings.
[35] Commercial Code, Article L628-2.
[36] Law No.2019-486 of 22 May 2019.
[37] Code Civil, art 1343-5. Where conciliation is converted into a sauvegarde ac*célérée* or *sauvegarde financière* ac*célérée*, a general stay arises, which can endure for up to 3 months for the former and 1 month for the latter.
[38] Civil Code, Article 1343-5.

imposed on the creditors concerned. The stay is of one month (renewable once) for the accelerated financial safeguard and three months for the accelerated safeguard. There is also potential for the introduction of a new automatic stay for the *conciliation* in the future.

For the *sauvegarde*, the opening judgment triggers an automatic moratorium (observation period)[39] during which the debtor proposes a restructuring plan.[40] If the observation period is renewed, the moratorium under French law can last up to 18 months.

A stay granted in *conciliation* can be lifted by the relevant court if the agreement is not implemented by the parties.[41] French legislation, however, has no provision which empowers the relevant authority to lift the stay in the *sauvegarde*.

It is worth bearing in mind that some of the provisions above will have to change in order for France to comply with the PRD. Overall, the articles of the Commercial Code which are likely to be amended are Article L611-7 for the conciliation and ad hoc mandate and Articles L621-3 and L622-21 for the safeguard. France will need to reduce the length of the moratorium in the *safeguard* to comply with the maximum 12-month period imposed by the PRD. Some commentators have also suggested that the French legislator may introduce an automatic stay during the conciliation procedure in the Commercial Code.[42] In this case, the measure would most likely be included under Article L611-7 of the Commercial Code.

The Adoption of Restructuring Plans

The creditors' voting rights and the formation of classes is one of the two core areas for consideration by the French Government when transposing the Directive. At the moment, French legislation does not provide for actual "classes" of creditors; rather, French creditors are grouped within committees ("*comités de créanciers*"), depending on the *nature of their relationship* with a debtor, as opposed to the *nature of their claim*, as provided in the PRD.

Because conciliation and ad hoc proceedings are private workouts, there is no need for majority voting as they are negotiations with particular creditors, which are willing participants in the process. The question of voting classes and voting rights therefore only arises in relation to safeguard proceedings. Affected parties will vote on a safeguard plan. The voting rule is that two-thirds in value of each class must approve the plan.[43] Additionally, all bondholders vote as a single group, even if there are several types of bond issued. They vote in a general meeting, after the plan has been approved by the other creditors' committees. Bondholders' decisions are also taken by a two-thirds majority of the aggregate amount of bond claims held by bondholders who voted at the meeting.[44] If the restructuring plan provides for any operation requiring the shareholders' approval, such as in the case of debt-for-equity swaps, shareholders must also be consulted and the same voting majority applies.[45] Finally, some creditors are not allowed to vote on the plan: (i) those not affected by the restructuring plan;[46] (ii) those who benefit from a fiducie agreement (*"bénéficiaires d'une fiducie*");[47] and (iii) social and taxes authorities, which are invited to negotiate on the plan and can agree to debt cancellation or rescheduling, but are not members of any committees allowed to vote.[48]

Interestingly, during the *sauvegarde* procedure in France, class formation is done on the nature of the business of the creditor, as opposed to the type of the claim. Three classes of creditors exist:[49]

(i) financial institutions;

[39] The observation period is open for six months, which can be renewed once if the administrator or debtor requests it and the court agrees to extend it: Commercial Code, Article L621-3.
[40] Commercial Code, Articles L622-7 and L622-28.
[41] Commercial Code, art L611-10-3.
[42] R Dammann and M Boché-Robinet, 'Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe. Une chance à saisir pour la France' (2017) Recueil Dalloz n 22, 22 June 2017.
[42] Commercial Code, Article L611-10-3.
[43] Commercial Code, Article L626-30-2.
[44] Commercial Code, Article L626-32.
[45] Commercial Code, Article L626-32.
[46] Commercial Code, Article L626-30-32.
[47] Commercial Code, Article L626-32.
[48] Commercial Code, Article L626-6.
[49] Commercial Code, Article L626-30.

(ii) major trade creditors; and

(iii) bondholders.

Workers' claims are treated separately. During accelerated (financial) safeguard proceedings, even companies normally not required to set up creditors' committees (because they fall under the specified threshold) must nonetheless group creditors into committees.[50] For accelerated safeguard proceedings, the same three committees as for safeguard proceedings are created, while under accelerated financial safeguard, only the financial institutions and/or bondholders committees are created, since they are the only types of creditors affected by the procedure.[51]

The classification of creditors in French law will need to be amended to comply with the concept of classes of creditors under the PRD.[52] French commentators and practitioners welcome the forthcoming transformation of creditors' committees into creditors' classes[53] and some authors have proposed that the creation of these classes should be done during conciliation proceedings, as opposed to safeguard proceedings only.[54] However, because conciliation proceedings do not entail specific voting rights and mechanisms, the introduction of classes of creditors during conciliation would only prove useful if the proceedings were to be subsequently converted into accelerated (financial) safeguard proceedings. The future reform will have an impact on Articles L626-1 *et seq.* and Section 3 of Chapter VI of the French Commercial Code, which relate to creditors' committees.

Strictly speaking, examination and approval of creditor classification in the *sauvegarde* is not a prerequisite to its confirmation. However, the fact that voting rights can be amended presupposes some examination. Indeed, creditors may have contracts with the debtor that contain clauses regulating how their vote on the plan will be exercised. The administrator will take into account the benefits accruing to the creditors when deciding on the value of the vote and will notify the creditors before the vote takes place. Decisions made by the administrator regarding the value of votes can be referred to the court for adjudication, in the event of a dispute.[55] Once the plan has been adopted, the court will ensure that the interests of all creditors are sufficiently protected.[56] It is interesting to note that there is some discordance in France relating to the 2014 reforms, which afforded the administrator the power to calculate creditors' rights in light of subordination agreements; the criticisms related to the lack of objective criteria attached to this power.[57]

The Confirmation of Restructuring Plans

Before sanctioning a *sauvegarde* plan in accordance with article L628-8, the court will first hear from: (i) the debtor; (ii) the administrator; (iii) the creditors' representatives; (iv) the supervising creditors; and (v) the employees' representatives.[58] It will also consider the opinion of the Public Prosecutor and rely on the economic, social and environmental assessment drafted by the administrator.[59] This

[50] Commercial Code, Article L628-4.
[51] Commercial Code, Article L628-9.
[52] *Loi Pacte*, art 196(1).
[53] A Droege Gagnier and A Dorst, 'France: *quo vadis*? France is Keen to Reform its Security and Insolvency Law' (2018) 12 Insolvency and Restructuring International 24, 25; see also R Dammann and M Boché-Robinet, 'Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe. Une chance à saisir pour la France' (2017) Recueil Dalloz n 22, 22 June 2017.
[54] See R Dammann and M Boché-Robinet, 'Transposition du projet de directive sur l'harmonisation des procédures de restructuration préventive en Europe. Une chance à saisir pour la France' (2017) Recueil Dalloz n 22, 22 June 2017.
[55] Commercial Code, art L626-30-2: Creditors may have contracts with the debtor which contain clauses regulating how their vote on the plan will be exercised. Creditors who benefit from a guarantee or a subordination agreement must notify the administrator. The administrator will take into account the benefits accruing to the creditor when deciding on the value of the vote and will notify the creditor before the meeting takes place. For bondholders, the same voting rules apply as the ones for the creditors' committees, however, the value of their vote is determined without reference to the value of any accessory security given by the debtor by which they may benefit.
[56] Commercial Code, art L626-31. "Adopted" means the plan has been adopted by each of the creditors' committees and where applicable, by the general meeting of bondholders (and shareholders' meeting in case of a debt-to-equity swap).
[57] A Droege Gagnier and A Dorst, 'France: quo vadis? France is Keen to Reform its Security and Insolvency Law' (2018) 12 Insolvency and Restructuring International 24, 25.
[58] Commercial Code, Article L626-9.
[59] The assessment specifies the origins, severity and nature of the company's financial difficulties (Article L623-1 of the Commercial Code). For the SA, the sanctioning of the plan takes place in the same manner as for a *sauvegarde* procedure, after approval has been obtained from the relevant creditors and bondholders. The court will have three months to approve the plan, or else it terminates. See art L628-8 of the Commercial Code. For the SFA, creditors have only 8 days to discuss and approve the plan, while the court has to approve the plan within 1 month following approval by the creditors per art L628-10.
Per Commercial code, art L626-9, the court will hear from the debtor, the administrator, the creditors' representative, the supervising creditors and the employees' representatives i.e. the relevant parties.

assessment must state the recovery prospects of the company;[60] where there is a "serious possibility for the company to be rescued", the court will confirm the plan.[61] The court can only accept or reject the plan and cannot amend the compromises accepted by the creditors once the latter have voted on the plan. Once the plan is sanctioned by the court, and following that if the plan needs to be substantially amended while it is being implemented by the parties, the court can then proceed to an amendment, but only if requested by the debtor.[62] The law also states that if no solution is found, the court can refuse a plan and open liquidation proceedings or judicial reorganisation proceedings (*redressement judiciaire*) having heard the relevant parties.[63] Article L622-27 empowers the tribunal to do the same if the debtor becomes insolvent while the plan is being implemented.[64]

Confirmation in a *conciliation* can be achieved in two ways; *constater l'accord* or *homologuer l'accord*. The former applies if the parties to the agreement request it. The latter, if the debtor requests it and if certain conditions are met;

(i) the debtor is not insolvent ('*en cessation des paiements*');

(ii) the provisions of the agreement aim to ensure the viability of the going concern of the company; and

(iii) the agreement does not affect the interests of creditors who are not parties to it.[65]

Cross-Class Cram-Down

France has no cross-class cram down in any of its preventive restructuring procedures. It is expected, however, that the *Loi Pacte* of May 2019 will be utilised to introduce this mechanism.[66] Finally, the *sauvegarde* also provides a mechanism to assess fairness and protect the interests of creditors. In France, the court has to verify that the interests of all creditors are sufficiently protected. It does so by looking at: (i) the proposed restructuring plan; and (ii) the economic, social and environmental assessment drafted by the administrator.[67] As a result, French law has some characteristics that could be adapted to comply with an unfair prejudice model.

Protection of New and Interim Financing

French law protects new and interim financiers in *conciliation*, in that the providers will have priority over claims of creditors ("*privilege de conciliation"*) that arose before the date of the opening of the proceedings, if the company is subsequently placed into *sauvegarde* proceedings.[68] The condition is that the court has sanctioned the agreement through *homologation*.[69] Furthermore, new financers cannot have any debt write-off, debt-for-equity swap or debt rescheduling via creditor vote imposed upon them.[70] The latest reforms have extended the protection to new money made available during the negotiation phase (*conciliation*), which was not the case before 2014. Lenders can now extend credit

[60] Commercial Code, art L626-2.
[61] Translated from "*une possibilité sérieuse pour l'entreprise d'être sauvegardée*" per Commercial Code, art L626-1.
[62] Commercial Code, Article L626-26.
[63] Commercial Code, art L622-10; the relevant parties are the debtor, the administrator, the creditors' representative, the supervising creditors, the workers' representatives and the Public Prosecutor. For the legal provisions regarding the *liquidation judiciaire*, see Commercial Code, arts L640-1 et seq. and for legal provisions regarding the *redressement judiciaire*, see arts L631-1 et seq.
[64] For a SA/SFA, the Commercial Code states that the court can terminate the procedure if it does not approve the plan, however, specific conditions for rejection are not listed (Commercial Code, art L628-8). In contrast to *sauvegarde* procedure, however, the court cannot convert the procedure into another procedure such as liquidation or judicial reorganisation; failure to adopt a plan brings the process to an end.
[65] Commercial Code, art L611-8. Per Commercial Code, art L611-9, in order to sanction the plan through *homologation*, the court will hear from the debtor, the creditors which are part of the plan, workers' representatives, the conciliator, the Public Prosecutor and any other person(s) that the court deems necessary. *Homologation* confers more legal advantages than a *constatation* – for example priority for new financing – but it renders the court's decision public, which is not the case of a *constatation.*
[66] Article 196(2); the following articles of the Commercial Code would need to be amended, namely L626-9, L626-18, L626-30-2, and L626-31.
[67] Commercial Code, Article L626-31: *"il s'assure que les intérêts de tous les créanciers sont suffisamment protégés."*
[68] Financiers are those who make credit available within the terms of the restructuring agreement for the purposes of ensuring the continuation of the company's business during the conciliation period. "Claims of creditors" refers to claims other than super-priority salary claims and court fees and expenses
[69] Commercial Code, art L611-11.
[70] This is one of the differences between the *mandat ad hoc* and *conciliation*; if a *conciliation* agreement is sanctioned by the court, creditors benefit from certain protection in subsequent *sauvegarde* procedure i.e. against certain clawback actions. For example, if the rescue of the debtor fails, the court cannot impose any write-off, debt for equity swap or debt rescheduling through the voting mechanism on the providers of new finance.

while discussions are on-going and the protection will apply once the agreement is confirmed by the court (*homologation).* The reforms have also strengthened the protection of new financiers when subsequent insolvency proceedings are opened.[71] In such situations, new debts cannot be rescheduled by a court-imposed plan.[72] Since the 2016 reforms, a rescheduling and write-off of claims can no longer be imposed upon those creditors within a plan, which has been approved by a two-third majority of a creditors' committee.[73] This is one of the differences between the ad hoc mandate and the conciliation. If a conciliation agreement is sanctioned by the court, creditors benefit from certain protections against clawback actions in subsequent safeguard proceedings.

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

The threshold for insolvency in France is defined as "*cessation de paiements*". It can be defined as the inability of a company to meet its payable liabilities with the assets available ("*l'impossibilité de faire face au passif exigible avec [l']actif disponible*").[74] This is important, as it is from the moment that the business satisfies this criterion that certain restructuring processes are closed to the debtor. For example, neither the *mandat ad hoc* nor the *sauvegarde* are available to debtors that are in *cessation de paiements* and *conciliation* is only available to debtors that have not been in *cessation de paiements* for more than 45 days.[75] What constitutes a *cessation de paiements*, however, is not particularly straightforward and has been debated by courts and commentators over the years. Following the introduction of the Law of 1967, French case law was referring to the concept of *cessation de paiements* as an accounting-based notion, resting on a comparison of available assets to meet the due liabilities.[76] Yet, courts have departed from this view and gone on to interpret parts of the concept, such as;

(i) what constitutes an asset;[77]

(ii) what a liability;[78] and

(iii) whether the debt is, in fact, due.[79]

In effect, some courts have disputed the purely accounting nature of the concept and stated that, rather, it is a concept that takes the treasury of the business into account and that includes "dynamic elements" of the life of the company, which are not reflected in the accounts.[80] Accordingly, relying solely on the balance sheet test would not be a true reflection of the reality of the business.[81]

Debtor in Possession

In the *conciliation* and *mandat ad hoc*, the debtor remains in place and in control of the assets and the day-to-day operations of the business. The *conciliateur* does not necessarily have to be a practitioner in insolvency but may be appointed by the court provided they have experience that is likely to facilitate the proceedings.[82] The role of the *conciliateur* is to assist the debtor in reaching agreement, which ends the financial difficulties of the company with its main creditors.[83] Although the conciliator informs the

[71] Either *sauvegarde* proceedings or judicial reorganisation proceedings (*redressement judiciaire*).
[72] Commercial Code, art L626-20, as strengthened by art 20 of the Ordinance of 2014.
[73] This also applies to finance granted in favour of a debtor after the opening of a sauvegarde ac*célérée* or *sauvegarde financière* ac*célérée* if the proceedings are not successfully completed by a court-sanctioned plan.
[74] Commercial Code, art L631-1.
[75] Commercial Code, art L621-1 and L611-4.
[76] Law No 67-563 of 13 July 1967. See C Saint-Alary-Houin, Droit des Entreprises en Difficulté (Montchrestien 2001) para 344.
[77] See *e.g.* Cassation Commerciale, 22 January 2002, RJDA 2002.5 no 516; Cassation Commerciale, 17 May 1989, Bull Civ IV no 152
[78] See *e.g.* Cassation Commerciale, 22 June 1993, D 1993.somm.366; Cassation Commerciale, 8 March 1994, RJDA 1994.7 no 847; CA Nancy, 20 May 1987, JCP 88 éd E.II.15114; Cassation Commerciale, 22 February 1994, Bull Civ IV no 75; CA Aix, 16 April 1985, D 1987.somm.389; CA Paris, 18 February 2000, Cah Dr Aff (actualité jurisprudence) 170.
[79] See the 'due and demanded' doctrine, cf Cassation Commerciale, 17 June 1997, RJDA 1997.11 no 1393.
[80] Such as temporary credits and the use of occasional overdrafts.
[81] CA Aix, 5 June 1987, D.1988.somm.41.
[82] Furthermore, they must not have not received any remuneration from either the debtor or its creditors in the 24 months prior to opening proceedings.
[83] Commercial Code, article L611-7.

President of the Court of the evolution of the situation on a regular and confidential basis, he does not interfere with the management of the company.[84]

Similarly, a debtor remains in possession during the *sauvegarde* procedures, but the administrator is appointed to supervise and assist the management in preparing the plan.[85] The *Loi Pacte* is expected to introduce an obligation for the court to justify the choice of administrator and creditors' representative, amending the Commercial Code with regard to the *mandat ad hoc*, *conciliation*, and *sauvegarde*.

Rights *in Rem* under the EIR Recast and the PRD

A right *in rem* is a right that is attached to an object or property; generally, a fixed charge or mortgage would be viewed a debt, in relation to which a right *in rem* arises.[86] Because the cross-class cram down mechanism does not currently exist in French law, there is no conflict *per se* between French law and the EIR Recast. The *Loi Pacte* will introduce a cross-class cram down mechanism but the law has been, as of yet, silent on a potential conflict. This will need to be clarified once the Ordinance comes out.

[84] Commercial Code, Article L611-7.
[85] Commercial Code, L622-1.
[86] See for example Livre IV, Titre II of the Civil Code, *i.e.* Article 2323 *et seq.*