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Bankruptcy, Insolvency & Rehabilitation Proceedings in France

ILN RESTRUCTURING & INSOLVENCY GROUP

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER FRENCH LAW

Under French law, companies are protected by several procedures to overcome financial difficulties. This legal protection aims to help companies facing financial difficulties and protect the overall business economy from the risks of cascading bankruptcies.

French bankruptcy law is based on the concept of insolvency (Cessation des paiements), which determines the appropriate procedure.

Insolvency, or inability to pay, means that the company does not have enough liquidity to pay its debts. In practice, this is the case when the cashflow of the company is insufficient to cover immediate debts, and its creditors do not want to extend the payment terms.

Also, French bankruptcy law provides a mechanism which protects the creditor of a debtor experiencing financial difficulties without being unable to pay its debts.

We will analyse the procedures of a company facing financial difficulties from the perspective of both the company (**1**) and its creditors (**2**).

1. From the perspective of a company facing difficulties

There are two types of procedures to remedy financial difficulties of companies:

- Prior and confidential procedures (1.1)
- And public and judicial (official) procedures (1.2)

1.1. The prior and confidential procedures

French bankruptcy law provides two preliminaries and optional procedures for renegotiatingthe existing agreements with creditors:

- Ad hoc Mandate (Mandat ad hoc)
- Conciliation.

These procedures are under the control of the president of the court.

The main purpose of these procedures is to quickly renegotiate the debts of the company and keep discussions confidential between the company and its creditors. In this context, the parties are bound by an obligation of confidentiality towards third parties.

The conditions depend on the procedure:

- The Ad Hoc Mandate may be initiated as soon as the company encounter difficulties, but it must not be "Insolvent."
- The Conciliation procedure can be initiated when the company faces financial difficulties likely to compromise its ability to continue its business. Nonetheless, the company must not have been "Insolvent" for more than 45 days.

A Ad Hoc Representative or a Conciliator (which could be proposed by the company) shall be appointed by the Commercial Court to facilitate negotiations, restructure debts, and amend existing agreements.

The Ad Hoc Representative or the Conciliator has a significant authority and influence in the negotiation of new favourable terms with the company's creditors. Indeed, these professionals work under the control of the Court, and the risk of bankruptcy is high if no agreement is reached.

The appointment of an Ad Hoc Representative or a Conciliator does not suspend the payment obligations to creditors.

1.2. The public and judicial procedures

1.2.1. Court Protection of Companies in difficulty

1.2.1.1. Selection of the Procedure

A company in difficulty may initiate one of the following procedures:

- Judicial Safeguard if the company is not insolvent and demonstrates insurmountable financial difficulties,
- Judicial Recovery if the company is insolvent and its situation can be remedied,
- Judicial Liquidation if the company is insolvent and its situation is irreparably compromised.

If the company is insolvent, its legal representative shall submit a request for Judicial Recovery or Judicial Liquidation within 45 days of the Insolvency, otherwise he is liable to personal sanctions.

These three procedures are public and initiated by a published judgment, in contrast to the prior confidential procedures (see §1.1).

1.2.1.2. Initiation of the Judicial Safeguard or the Judicial Recovery procedure

Unless initiating a confidential procedure (see §1.1), the company shall submit a request to initiate a public debt restructuring procedure with its creditors.

Once the Judicial Safeguard or Judicial Recovery has been initiated by the court, the company is protected from its creditors because the payments are suspended.

Thus, legal proceedings for payment are suspended and now focus solely on determining the amount of creditor's claims.

1.2.1.3. Observation Period

A six-month observation period will be initiated to evaluate the company's financial situation. The observation period may be extended twice, up to a maximum of 18 months.

During this period, the court appoints:

- a Judicial Representative, appointed by the court, shall list the company's debts, and represents the collective interests of creditors;
- a Supervising Judge responsible for overseeing the proceedings and settling certain claims by the company; and
- a Judicial Administrator who supports and assists the company to find solutions.

The Judicial Administrator:

- supervises the company's daily operations, including financial transactions and major decisions (such as employee layoffs, asset sales, etc.). The Judicial Administrator can refuse management from taking actions that would diminish the company's asset value. If the Court requires it, the administrator shall approve any payments initiated by the company; and
- negotiates with creditors to establish a debt restructuring plan.

At any time during the observation period, the court may be requested to approve a debt restructuring plan negotiated with creditors. A typical plan can include both debt rescheduling and debt forgiveness.

The company may also request the Court to approve the sale of the business of the company if a buyer is found. The judicial administrator may also initiate a public sale process for the business of the company with the approval of the company.

If the situation worsens during the observation period and/or if there is no prospect of reaching

an agreement with the creditors, the court may decide to convert the Judicial Safeguard or Judicial Recovery procedure into a Judicial Liquidation of the company (see 1.2.2).

1.2.2. Judicial Liquidation

The Judicial Liquidation aims to sell all the company's assets to pay its debts.

The Court will appoint a Liquidator who:

- shall list the company's debts; and
- sell the business or the assets (separately) of the company.

Even during Judicial Liquidation, the Court may order the continuation of business activities for 3 months in special circumstances (such as the time to shut down machines in the industrial sector).

1.2.2.1. The Global Sale of the business of the Company

The Court can decide to sell the business: thus, the court initiates a tender procedure for all assets and employees of the company and try at least to maintain part of the business activity by the buyer.

The Court receives offers from potential buyers and selects among them, based on three criteria:

- the continuation of activities,
- the preservation all or part of the employees,
- and the repayment of the payable debts.

If no buyer wants to acquire the business of the company, or if the Court rejects all offers, the assets of the company are sold separately.

1.2.2.2. The separate Sale of the Company's Assets

In this case, the profit from the sale of assets is distributed to the creditors of the company, according to priority rules (employees have the highest priority, followed by procedural costs and tax debts, and lastly, unsecured creditors).

2. From the Perspective of Creditors of a Company in difficulty

2.1 The steps to submit a declaration of claim

In case of opening of a public and judicial procedure against a company, any creditor may declare his claim with the Judicial Administrator or the Liquidator.

Moreover, the company shall provide a prior list of creditors to the Judicial Administrator or the Liquidator, so that the latter can contact creditors to declare their claims.

The declaration of claim shall indicate the amount due at the date of the opening judgment and, in the case of future claims, the date of payment.

Creditors shall declare their claims within two months from the publication of the judgment opening the judicial procedure. The declaration delay is extended by two months for foreign companies.

If a creditor does not declare at time, his claim becomes unenforceable, and he is not admitted into the safeguard/recovery plan. In this case, the creditor will not benefit from the sale of assets in the event of liquidation.

Within six months of the publication of the opening judgment, creditors may request from the Supervising Judge to neutralize the foreclosure, in exceptional circumstances, such as lack of information from the judicial administrator.

2.2. Asset recovery

The owner of an asset held by a company (for example under a loan agreement) involved in public and judicial proceedings can request its recovery.

The asset recovery procedure applies in the same manners in all three types of judicial proceedings.

The owner has a period of three months from the publication of the opening judgment to file a request to the judicial administrator or the liquidator proving ownership of the claimed asset.

The judicial administrator or the liquidator has one month from the receipt of the request to give an answer.

If the judicial administrator or the liquidator does not agree on asset recovery or fails to answer within one month, the owner shall refer to the supervising Judge within one month from the expiration of the answer period, or he will be time-barred.

2.3. Continuation of the ongoing agreements

The Judicial Administrator may force the continuation of the ongoing agreements, at the date of the opening judgment. He does not need the co-contractor's approval.

Furthermore, French law prohibits:

- Any clause providing that the opening of collective proceedings terminates the agreement,
- The forfeiture of the agreement term due to the opening of collective proceedings,
- Any clause providing that the co-contractor may not meet its contractual obligations because of the opening judgment.

First, early termination can be initiated by the Liquidator or the Judicial Administrator in two cases:

- The Liquidator or the Judicial Administrator can terminate the contract when the debtor's obligation is to pay a sum of money. In this case, the termination takes effect as soon as the other party is informed.
- The Liquidator or the Judicial Administrator can request the Supervising Judge to terminate the contract when the debtor's obligation is not to pay a sum of money. In this case, the termination shall be necessary for the liquidation process and must not excessively harm the interests of the other party.

However, the co-contractor can ask the Judicial Administrator whether he intends to force carrying on of the agreement.

Furthermore, the co-contractor can also initiate early termination, if he requests the Judicial Administrator or the Liquidator to decide on the continuation of the contract, and:

- If the Judicial Administrator or the Liquidator does not respond within thirty days from receipt of the request,
- If the Judicial Administrator or the Liquidator replies that the agreement shall not be continued.

If the ongoing contract is continued, the creditor will benefit from priority of payment rank concerning the receivable resulting from the performance of the concerned agreement.