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INTERNATIONAL FINANCIAL LAW REVIEW

INSOLVENCY AND CORPORATE REORGANISATION SURVEY 2014

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INTERNATIONAL FINANCIAL LAW REVIEW

France

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Rod Cork, Allen & Overy and Marc Santoni, Santoni & Associés

Section 1: CREDITORS' RIGHTS

1.1 When may a company seek relief from creditors? Must a company be insolvent?

A company may seek relief from its creditors whether it is solvent or insolvent. The solvency test in France is a cash-flow test. A company is insolvent (*cessation de paiements*) if it cannot make payment of a debt which is due and payable with its available cash and liquid reserves within the grace period granted by the relevant creditor.

A company may seek informal relief by consensual agreement with its creditors through informal proceedings (*procédure de mandate ad hoc*) or through conciliation proceedings (*procedure de conciliation*) if it is solvent or has been insolvent for less than 45 days when it requests to open conciliation proceedings.

A company may seek formal relief from its creditors and protection from the court through safeguard proceedings (*procedure de sauvegarde*) if it is solvent and encountering actual or anticipated difficulties which it cannot overcome.

A company may seek formal relief from its creditors and protection from the court if it is insolvent, through the opening of administration proceedings (*procedure de redressement judiciaire*).

1.2 Does an automatic stay against creditor action arise upon filing of a bankruptcy case?

Administration proceedings: If a company files for administration proceedings, a stay against all creditors' actions arises automatically when an order is made to open those proceedings. It covers payments by the company for debts due before the proceedings' opening. There are some exceptions by law, notably the set-off payments of connected (*connexes*) claims, to enforcement of security given by the company and to acceleration of credit facilities as a result of the proceedings.

Safeguard proceedings: Similarly, if a company files for safeguard proceedings, there is an automatic stay against all creditors' actions from the opening judgment of safeguard proceedings against a company.

1.3 Who administers the estate following commencement of a voluntary bankruptcy case?

Administration proceedings: In administration proceedings, the Commercial Court appoints an administrator to either assist the debtor or manage the company, in totality or in part.

Safeguard proceedings: In safeguard proceedings, the company's management remains in the debtor's hands. The court-appointed administrator may be granted either a mission of assistance or of supervision.

Section 2: DEBTORS' RIGHTS

2.1 Does the debtor have an exclusive right to propose a reorganisation plan?

– *before July 1 2014*

Under current law, the debtor, with the administrator's assistance, has the exclusive right to propose a reorganisation plan in administration or safeguard proceedings.

If the company satisfies the thresholds required to constitute creditors' committees, the debtor, with the administrator's assistance, presents the proposals to elaborate the safeguard or administration plan to the committees.

– *after July 1 2014*

Under the new provisions of the order dated March 12 2014 reforming French law over insolvency proceedings from July 1 2014 (and not applicable to proceedings ongoing at the date of its implementation), any member of a creditor committee may also submit a draft plan, which will give rise to a report of the administrator and vote by the creditors.

2.2 What are the voting requirements for approval of a plan?

Where there is a financial creditors' committee and a trade creditors committee, the restructuring plan will need to be approved by 66.67% in total value of claims of each committee's members taking part in the vote. Bondholders are not represented on the financial creditors' committees. Bondholders, if any, will vote separately in a bondholders meeting and the plan will need to be approved by 66.67% in total value of bondholders' claims taking part in the vote.

2.3 May a plan be approved over the objection of a creditor or a class of creditors (ie does the concept of a cram-down exist)?

Yes, where the creditors' committees have voted in favour of a restructuring plan and the plan has been approved by the court, the committee members who did not vote in favour of the restructuring plan or who abstained from

voting, will be bound by the court approved plan. This rule is applicable to restructuring plans in the context of safeguard proceedings, administration, or accelerated safeguard proceedings.

Accelerated safeguard proceedings are an expedited procedure applicable to companies that initiate conciliation proceedings and are able to justify to the court that they have elaborated a plan that will likely obtain a sufficient creditor support. The aim of these proceedings is to impose a restructuring plan which has been pre-agreed by 66.67% of creditors within the conciliation proceedings through the accelerated safeguard proceedings where a two-thirds majority is required. Accelerated safeguard proceedings only concern financial creditors.

2.4 Is post-petition financing able to receive super-priority status?

A super-priority payment is granted to persons who have provided new money to the debtor in order to enable its continuation under a conciliation agreement homologated (*accord homologué*) by the court.

The order dated March 12 2014 (applicable from July 1 2014) provides for an extension of the applicability of the new money privilege. It may be granted to any person who has provided new money to the debtor in the framework of a conciliation procedure, which gives rise to an homologated agreement, i.e. prior to court approval of the plan.

2.5 Can the debtor sell all or a portion of its assets through a going concern reorganisation plan or otherwise?

Administration proceedings: In administration proceedings, the court is, indeed, entitled to order the transfer, in full or in part, of the business if the debtor is manifestly unable to ensure the reorganisation of the company.

Safeguard proceedings: In safeguard proceedings, at the request of the debtor only, the court may order a partial (but not total) sale of the business during the observation period.

– from July 1 2014

New provisions applicable from July 1 2014 provide the possibility in conciliation to request to initiate the organisation of a sale process under the supervision of a conciliator.

2.6 What are the duties of directors of an insolvent company?

The directors have a duty to file for insolvency (*déclaration de cessation des paiements*) within 45 days of the company becoming insolvent, unless they have requested the opening of conciliation proceedings within this period. Their general duties do not change as a result of the company becoming insolvent; in particular, they do not have a duty to maximise creditors' returns.

More generally, directors have a duty to cooperate with those involved, such as the administrator, creditors' representative and liquidator, to reorganise or liquidate the company.

Section 3: CONTRACTS AND SUBORDINATION

3.1 How are executory contracts treated?

The continuation of executory agreements (*contrats en cours*) is the principle in safeguard and administration proceedings. The administrator is able to elect to continue executory contracts provided he performs the contract post-opening of safeguard or administration or terminate the contract.

Executory contracts are automatically terminated in several situations, notably if the administrator does not reply within one month to a formal notice (*mise en demeure*) sent by the contracting party requesting that he take position on the continuation of the contract.

Specific provisions apply to lease agreements of premises used to run the business of the debtor.

The termination of lease agreements is effective at the date when the leaser is informed of the administrator's decision not to continue the contract or when the leaser requests the lease's termination because of the lack of payment relating to occupation of the premises posteriori to the opening judgment.

3.2 Is contractual subordination enforceable?

In safeguard and administration proceedings, if the company satisfies the thresholds required to constitute creditors' committees, French law provides that the draft plan will take into account (*prend en compte*) subordination agreements agreed upon between the creditors before the opening of proceedings.

A similar provision provides that subordination agreements agreed upon between the creditors before the opening of proceedings will be taken into account in the context of the vote by the bondholders' meeting on the draft plan.

In practice, challenges can arise between creditors in the interpretation of subordination, turnover and loss-sharing provisions under inter-creditor documentation.

Section 4: OTHER MATERIAL CONSIDERATIONS

4.1 What other major stakeholders (eg governmental or regulatory institutions) could have a material impact on the outcome of the reorganisation?

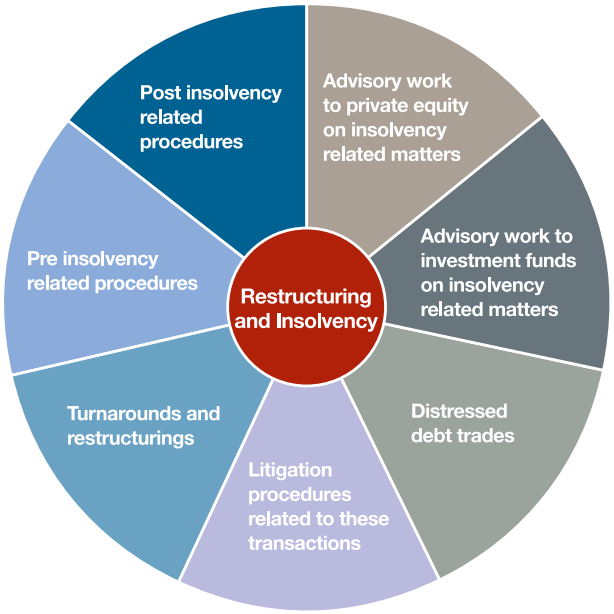
There is no tool to force shareholders to agree, for example, to a debt-equity swap proposed in a restructuring plan.

From July 1 2014, if the minimum equity (*capitaux propres*) of the debtor has not been reconstituted as required by law, the administrator may request the appointment of a mandataire in charge of convening the adequate assembly to vote on the reconstitution of the capitaux propres up to the minimum required by law, in place of the refusing shareholders, when the draft plan provides for a modification of the capital in favour of a person committed to respect the plan.

ALLEN & OVERY

Allen & Overy LLP offers a wide range of services to international and domestic restructurings, with a dual expertise in corporate and banking laws. Allen & Overy and leading French law insolvency practice Santoni & Associés have a strategic arrangement and work together on restructuring and insolvency related work in France. This arrangement covers all types of debt restructurings and work-outs, corporate and fund buy-outs, refinancings, pre- and post-insolvency related procedures and distressed debt trades in France.

The arrangement is the fruit of a close collaboration between Allen & Overy and Santoni & Associés over many years on restructuring and insolvency related matters in France. It enables the two firms to pool their expertise and resources on domestic and international cross-border transactions covering both public and private companies, LBOs and structured transactions.



Gold Award

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During reform discussions, the draft order contained a provision which would have allowed the sale of a controlling shareholder's shares in administration if ordered by the court. This was not retained in the March order. We understand that this is under review and may be introduced at a later stage.

The inter-ministerial restructuring committee plays a very important role in restructuring cases involving companies with more than 400 employees with a view to safeguarding employment and, in certain cases, enabling a governmental loan to be made available to the debtor.

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About the author

Rod Cork has significant experience on restructuring matters in relation to publically quoted companies and also in the private sector. He has been involved in all the major French restructurings in the last decade and has acted for senior creditors and bondholders, steering committees in relation to the restructuring of a number of public companies.

Cork has acted regularly for senior and junior creditors on a number of leveraged buyout workouts, distressed property and commercial mortgage-backed security transactions in France involving cross-border European and US issues.

In addition to his restructuring experience, Cork has a wealth of experience in general corporate lending, leveraged finance, structured and project finance in France, Central and Eastern Europe, Africa and the Middle East, acting primarily for arrangers and senior creditors. He has been involved in most of the major French public-private partnership and concession based financings over the last decade.

Cork is regularly cited in *Chambers, Legal 500, IFLR* and *Best Lawyers*. He is qualified as an English solicitor and is a member of the Paris bar.

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About the author

Since founding Santoni & Associés 20 years ago, Marc Santoni's practice has been devoted to the management of French businesses in difficulty, and advising on investment funds.

Santoni advises buyers interested in companies' turnaround as well as companies under special mediation (*mandat ad hoc*) or safeguard-rehabilitation-liquidation proceedings (*sauvegarde-redressement-liquidation judiciaire*) and accelerated safeguard proceedings. He has been involved in most of the biggest French cases (for example: Meccano; Locatel; Liberation; La Corpo; Eurotunnel Smoby; Virgin Megastores; Saur; and, Jardiland). He intervenes in the treatment of underperforming leveraged buyout on behalf of many investment funds.

In 2007, Santoni concluded an exclusive partnership with the firm Allen & Overy related to the insolvency and restructuring business.

Santoni is the chairman of the Association of Restructuring Lawyers and is also member of the board of the *Association pour le Retournement des Entreprises* (an association dedicated to companies' survival and turnaround).

Key

- Generally favourable to creditors
- Neutral or neither favourable to creditors or debtors
- Generally favourable to debtors
- Creditors' rights
- Debtors' rights
- Contracts and subordination

	CREDITORS' RIGHTS		DEBTORS' RIGHTS					CONTRACTS & SUBORDINATION	
	Automatic stays	Administrator	Reorganisation plan	Voting requirements	Cram-downs	Post-petition financing	Asset sales	Executory contracts	Contractual subordination
Austria Binder Grösswang									
Brazil Felsberg Advogados									
Croatia Macesic & Partners									
Cyprus Andreas Neocleous & Co									
Czech Republic BBH									
France Allen & Overy									
Germany Dentons									
Greece Karatzas & Partners									
Hong Kong Latham & Watkins									
Indonesia DNC Advocates At Work									
Ireland Dillon Eustace									
Mexico Creel García-Cuéllar Aiza y Enriquez									
Norway Kvale Advokatfirma									
Philippines SyCip Salazar Hernandez & Gatmaitan									
Russia Clifford Chance									
South Korea Yoon & Yang									
Spain Baker & McKenzie									
Switzerland Meyerlustenberger Lachenal									
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