Seeds of change

The final version of France's new insolvency law is a watered down version of the original proposal, but it still greatly enhances creditor rights. Here's how it impacts different restructuring players

On March 14, *ordonnance* no 2014-326 reforming French insolvency law was published in the official journal. The new rules apply to all proceedings that open on or after July 1, but they will have direct influence on negotiations before that date. The changes were eagerly awaited by practitioners, as they reallocate rights to banks and will enhance lender-led restructurings. But the legislator did not promote bondholders' rights and diffused various restrictive provisions. It means that this reform only plants a seed of change in France's insolvency landscape. It will be the responsibility of practitioners to enhance and tailor these new rules to create a dynamic French restructuring market.

Here's how the changes affect different parties in the country's various insolvency and restructuring proceedings.

Restructuring proceedings

Safeguard (*Sauvegarde*) and receivership (*redressement judiciaire*) are two French law, court-controlled restructuring processes with creditors committees. The most significant changes resulting from the new statute affect these type of proceedings by reorganising the rights of shareholders and creditors.

> Practitioners must enhance and tailor these new rules to create a dynamic French restructuring market

Shareholders

The reform significantly modifies the shareholders' existing situation as a result of the new prerogatives granted to creditors that are a part of the committee. For instance, shareholders' majority voting rules can be departed in certain cases.

Bank creditors

The previous insolvency statute did not oblige the debtor to put to a vote restructuring counterproposals put forward by the creditors' committee. It meant creditors were left with no choice but to agree with the debtor's plan or force the company's liquidation. The new statute permits members of the bank committee and suppliers committee to prepare and submit their own restructuring plans for other creditors' approval, to challenge the plan presented by the debtor. These alternative plans must be approved by 66.67% (by value) of banks and suppliers that attend and vote in each committee. The approval of 66.67% of the bondholders committee will also be required.

For debt-for-equity swap organised under safeguard or receivership proceedings, the court will authorise a receiver to convene a shareholders' meeting to vote on subsequent changes to the company's bylaws. Under new article L 626-16-1 of the French Commercial Code, a simple majority of shareholders' approval will be needed instead of the two-third statutory majority. For debt-for-equity swaps organised under receivership, the receiver can also ask competent judges to appoint a third party to vote in place of the shareholders, if they refuse to approve changing the bylaws and the company's equity position shows disproportionate losses. This third party's vote is aimed at adjusting the company's bylaws in line with the restructuring plan proposed by the creditors, suppliers and bondholders (for instance, by modifying the share capital), Under the new statute, any creditor will also be entitled to require the dismissal of the court-appointee if they believe the appointee is not acting properly and independently.

Bondholders

Unlike senior lenders, the new law does not authorise bondholders to present an alternative restructuring plan. However, banks' alternative restructuring plan cannot be put in place without the consent of 66.67% of the bondholders, obliging banks to take into consideration bondholders' interests.

Court appointees

As soon as they are appointed, the creditors' representative can require shareholders pay the full amount of equity set out in the incorporation deed in case this amount is not fully paid when the proceedings are opened. The receiver will also be entitled to organise the vote of the shareholders in certain cases. The court appointee will be authorised to request the conversion of safeguard proceedings into a *redressement judiciaire*, putting the company and its shareholders in a weaker position to negotiate with creditors.

Amicable proceedings

Mandat *ad hoc* and conciliation are the amicable proceedings available under French law. They consist of organising discussions between the debtor and its creditors under the supervision of a court-appointee designated by the president of the Commercial or Civil Court. These two proceedings can only be initiated at the request of the company's director. They are confidential and can only be carried out upon the consensus of all the parties involved. Mandat *ad hoc* is only open to companies that are solvent under French law (which evaluates solvency on a cash basis only, making balance sheet insolvency irrelevant). Conciliation is only open to companies that are insolvent for less than 45 days. Both proceedings are aimed at encouraging directors of companies facing difficulties to enter into discussions with creditors, shareholders, and suppliers to agree an arrangement that will stabilise the company and avoid it being placed under reorganisation proceedings. Most of France's major leveraged buyout debt restructurings over the past five years have taken place via mandat *ad hoc* or conciliation. Saur, Le Groupe Moniteur, and Parkeon are all recent examples of French amicable proceedings being used to reorganise acquisition indebtedness.

Directors

Company directors that initiate mandat *ad hoc* or conciliation will be obliged to inform the company's auditor of such placement. This new rule alters mandat *ad hoc* proceedings' principle of confidentiality. It also forces acknowledgement of the company's difficulties, as it will encourage auditors to trigger formal control procedures over the company (*procedure d'alerte*).

Creditors

Under the new statute, clauses in contracts that worsen the debtor's situation as a direct consequence of opening mandat *ad hoc* or conciliation proceedings will be declared void. This new provision introduces a legal stay of

acceleration for defaults resulting directly from the opening of French amicable proceedings. Despite not appearing in the previous statute, stays of acceleration have been common market practice. Some practitioners expect this provision to be applied more widely, extending to restrictions over increase of interest clauses or set-of clauses which may worsen the debtor's situation. In addition, the new statute provides that accrued interest shall not bear interest were the agreement was made when the debtor was subject to conciliation.

Lawyers and advisors

The new statute prohibits contract clauses that require the company to bear all of the creditors' advisor fees. These fees shall only be borne by the company if they do not exceed a certain amount, which will be specified by a decree yet to be published.

Court appointees

The reforms will streamline the operation of pre-packs by granting the conciliator (being the court-appointee designated to supervise conciliation proceedings) the right to organise the sale of the business. This would be further implemented by subsequent bankruptcy proceedings (being either insolvency, safeguard or judicial liquidation proceedings). This new rule does not describe how the conciliator should organise pre-pack deals, but it gives them a central role in arbitrating discussions. It also sets limits to court appointees' fees which will be reviewed by the public prosecutor and will no longer be calculated in accordance with the amount of debt written off as a result of the discussions.

The most significant changes affect safeguard and receivership proceedings

New money providers

Another meaningful change relates to new money providers. In the past, these lenders could only rank above existing creditors (other than court fees and salaries) if: the cash injection resulted from an agreement reached within the framework of a conciliation; and that agreement was formally approved by the court. Going forward, if the cash is injected during the course of conciliation proceedings, new money providers will be entitled to rank super senior for as long as the parties' agreement is acknowledged by the court (*homologation*). The new statute also states that new money debt, unlike other existing debts, will not be stretched out in the event of further bankruptcy proceedings. Debtors will therefore be obliged to enter into discussions with new money providers while tailoring a reorganisation or safeguard plan. This new provision should encourage new money investments in France since it gives creditors comfort that their rights will be protected in the event of a further bankruptcy.

Employees

Under new article L 611-8-1 of the French Commercial Code, company directors must inform the employees' representatives or workers council (*comité d'entreprise*) of the main terms and conditions of the agreement entered into, where such agreement is subject to the court's approval.

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