A&O SHEARMAN

Restructuring across borders
France

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | JANUARY 2024

Contents

Introduction

The restructuring and insolvency schemes for companies under French law are:

- safeguard proceedings (*sauvegarde*);
- accelerated safeguard proceedings (*sauvegarde accélérée*);
- reorganisation proceedings (*redressement judiciaire*);
- judicial liquidation (*liquidation judiciaire*);
- special mediation (*mandat ad hoc*); and
- conciliation proceedings (*conciliation*).

In addition to these specific restructuring and insolvency proceedings, French courts may, at the request of the debtor and taking into account the debtor's financial position and the creditors' financial needs, grant grace periods (*délais de grâce*) in order to defer or reschedule repayment obligations over a maximum period of two years, at a rate which is lower than the contractual rate, and suspend pending enforcement measures. Any contractual default interest or penalty for late payment will not accrue or be due during the grace periods ordered.

France recently enacted Ordinance n° 2021-1193 of 15 September 2021, which came into force on 1 October 2021 (the **Ordinance**), and which transposes Directive (EU) 2019/1023 on restructuring and insolvency (the **EU Restructuring Directive**).

The main purpose of the EU Restructuring Directive was to establish "preventive restructuring frameworks available for debtors in financial difficulty when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor."

French law was ahead of a number of European jurisdictions with regard to preventive restructuring frameworks, having two types of pre-insolvency amicable proceedings (special mediation (*mandat ad hoc*) and conciliation proceedings (*conciliation*)) and three types of preventive restructuring proceedings (safeguard proceedings (*sauvegarde*), accelerated safeguard proceedings (*sauvegarde accélérée*) and accelerated financial safeguard proceedings (*sauvegarde financière accélérée*)) that have been merged into new accelerated safeguard proceedings (*sauvegarde accélérée*). These preventive restructuring proceedings are intended for use by companies which are not insolvent[1] but face serious financial difficulties. In this context, there was no need to create any new pre-insolvency proceedings.

The main innovations of the Ordinance are the introduction of classes of creditors, a new voting procedure for restructuring plans and the cross-class cram down mechanism, which all come from the EU Restructuring Directive. There are other changes such as the merger of sauvegarde accélérée and sauvegarde financière accélérée proceedings, some timing changes, the creation of a new 'post money' lien, or the reinforcement of stay on enforcement actions. None of these can be seen as radically changing French insolvency law.

[1] Note that "insolvent" in this context means that the debtor is unable to pay its debts as they fall due with its available assets (*état de cessation des paiements*), as explained below. The meaning of being "insolvent" is the same throughout the factsheet and does not vary with context.

Classes of creditors

The Ordinance creates a new voting process for creditors to approve restructuring plans by introducing classes of creditors into French law. The new regime is applicable to accelerated safeguard proceedings (*sauvegarde accélérée*), safeguard proceedings (*sauvegarde*) and reorganisation proceedings (*redressement judiciaire*).

WHICH COMPANIES ARE CONCERNED?

Classes of creditors will be constituted in all accelerated safeguard proceedings (*sauvegarde accélérée*) of companies of whatever size.

For safeguard proceedings (*sauvegarde*) and reorganisation proceedings (*redressement judiciaire*), classes of creditors will only be designated for companies which, together with the companies which they control,[2] reach a certain size (ie either at least 250 employees and a turnover of at least EUR20,000,000, or a turnover of EUR40,000,000).

For companies below these thresholds, the court may authorise classes of creditors to be set up at the request of the debtor (in safeguard proceedings (*sauvegarde*)) or at the request of the debtor or the administrator (in reorganisation proceedings (*redressement judiciaire*)).

HOW ARE CLASSES OF CREDITORS CONSTITUTED?

The concept of classes of creditors is a key component of the EU Restructuring Directive. In France, classes of creditors replaced the existing creditors' committees (*comités de créanciers*), a system which was criticised for being an inefficient voting process for adopting a restructuring plan. Indeed, a majority was sometimes difficult to find since lenders all belonged to the same committee and no distinction was made between secured, unsecured or subordinated creditors.

Under the new law, creditors will be divided into a minimum of two classes by the court-appointed administrator (*administrateur judiciaire*), and each class of creditors must reflect a sufficient commonality of economic interest.[3]

[2] A Note that in this context "control" is defined pursuant to Articles L. 233-1 and L. 233-3 of the French Commercial Code. Article L. 233-1 provides that a company shall be regarded as a subsidiary of another when this latter owns more than half of its share capital. Article L. 233-3 I of the French Commercial Code defines "control" broadly. Indeed, a company is deemed to control another company when: (1) it directly or indirectly holds a fraction of the share capital that gives it a majority of the voting rights at that company's general meetings; (2) it alone holds a majority of the voting rights in that company by virtue of an agreement entered into with other shareholders which is not contrary to the company's corporate interest; (3) it effectively determines the decisions taken at that company's general meetings through the voting rights it holds; or (4) it is a shareholder of that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management or supervisory structures. Pursuant to Article L. 233-3 II, a company is presumed to control another company when it owns directly or indirectly more than 40% of voting rights and no other person holds, directly or indirectly, a greater percentage of voting rights. Unlike the first four control tests, which constitute irrebuttable presumptions of control, the 40% presumption may be rebutted by contrary evidence. Article L. 233-3 III of the French Commercial Code provides that when two or more companies acting in concert effectively determine the decisions taken at the company's general meetings, they are deemed to jointly control it.

[3] Note that this phrase is taken directly from the Regulation. According to the explanatory report of the French Government on the ordinance, a commonality of sufficient interest refers to the idea of a category interest. Such interest is economic in nature. These criteria are assessed according to the status of the claim before the opening of the proceedings. In addition to these criteria, the ordinance predefines a number of classes, being specified that it is not possible to cluster all the creditors into a single class.

Classes of creditors *(cont.)*

Classes of creditors are composed of 'affected parties' (ie creditors whose debt or interest is directly affected by the restructuring plan).[4] Only affected parties may cast a vote on proposed restructuring plans.

Administrators have a relatively wide latitude in organising the classes, provided they use objectively verifiable criteria and comply with the following rules:

- Secured creditors and unsecured creditors must be in different classes.
- Class composition should comply with any subordination agreements entered into prior to the proceedings.
- Equity holders (which include holders of shares of any category and of convertible bonds) will be in one or several specific classes.

CAN CREDITORS CONTEST?

The administrator will submit details about the way the classes of creditors have been constituted and how voting rights have been calculated for each affected party. The affected parties, the debtor and the other official bodies involved in the proceedings may refer objections to the court. The right to contest must be exercised within a specified timeframe.

WHO PREPARES THE RESTRUCTURING PLAN?

In accelerated safeguard proceedings (*sauvegarde accélérée*), the restructuring plan is prepared by the debtor, assisted by the administrator. The Ordinance deleted the possibility for creditors to propose a restructuring plan.

In reorganisation proceedings (*redressement judiciaire*), any affected party may propose a restructuring plan, which will be submitted to the vote of the classes of creditors.

WHAT IS THE VOTING PROCESS AMONG THE CLASSES OF CREDITORS?

The plan must be submitted to the vote of each class of creditors with a majority of two-thirds of the creditors which have voted.

WHEN DOES THE PLAN BECOME BINDING?

When all classes of creditor(s)[5] have adopted the restructuring plan, the plan may then be adopted by the court, provided the court is satisfied, among other things, that:

- creditors having a sufficient common interest within the same class are treated equally;
- in the presence of dissenting creditors (ie affected parties having voted against the plan), no dissenting creditor finds itself in a position which is less favourable within the restructuring plan than the position it would have had either in a judicial liquidation (*liquidation judiciaire*) or if an alternative solution was adopted in the absence of the plan; and
- any new financing necessary for the implementation of the restructuring plan does not unduly prejudice the interest of the affected parties.

The court must also ensure that the interests of all affected parties are adequately protected. The court may not approve a restructuring plan which does not offer a reasonable prospect of preventing the insolvency of the debtor or does not ensure the viability of the business.

When a restructuring plan cannot be approved by all classes of creditors, a new cross-class cram down mechanism can be used to unlock the situation.

WHAT IS THE BENEFIT OF CLASSES OF CREDITORS?

Introducing classes of creditors in the French legal system is a clear improvement. It allows the administrator to adapt the plan to the specific composition of the company's creditors, leaving great flexibility in setting up the classes. It is a means to foster a consensus among creditors having a common interest, thereby facilitating the adoption of a restructuring plan.

[4] The meaning of this phrase will be the same when used elsewhere in this note.
[5] Note that a class can be comprised of a single creditor.

Cross-class cram down

WHEN DOES CROSS-CLASS CRAM DOWN APPLY?

Cross-class cram down may apply in all proceedings where classes of creditors have been set up.

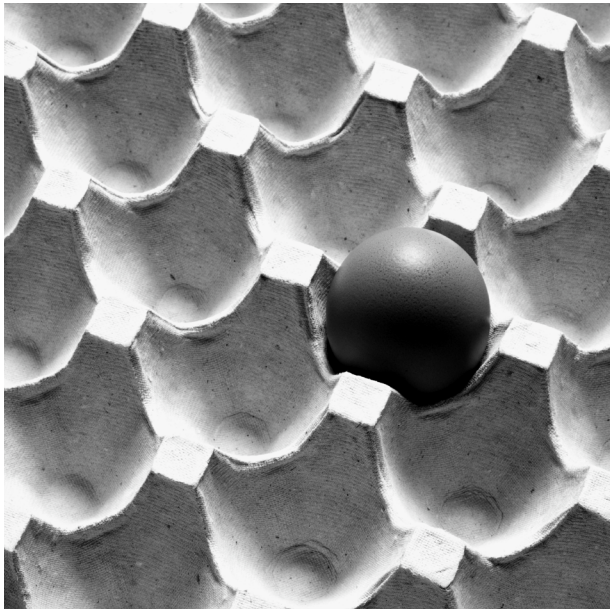
It allows the plan to be imposed on dissenting affected parties by the court but, in relation to accelerated safeguard proceedings (*sauvegarde accélérées*) (or safeguard proceedings (*sauvegarde*) having opted for classes) only if the debtor has consented to this. In reorganisation proceedings (*redressement judiciaire*), cross-class cram down does not require the consent of the debtor.

THE COURT MAY APPLY CROSS-CLASS CRAM DOWN IF THE FOLLOWING CONDITIONS ARE FULFILLED

- The plan has been approved by:
  - a majority of the classes of affected parties, when at least one of such classes is composed of secured creditors; or, failing this,
  - one class of affected parties who are not (i) equity holders, or (ii) creditors who, on the basis of the enterprise value of the debtor, can reasonably be expected not to receive any payment in a liquidation (this is known as 'the best-interest-of-creditors test');
- Dissenting affected parties are satisfied in full when a lower-ranking creditor receives any payment. This principle, which is known as the absolute priority rule, may suffer an exception when the court decides that this is necessary in order to achieve the aims of the plan, provided, however, that such derogation shall not have an "excessive adverse impact"[6] on the rights of any affected parties.
- Further specific protective conditions must be met when equity holders are affected parties.

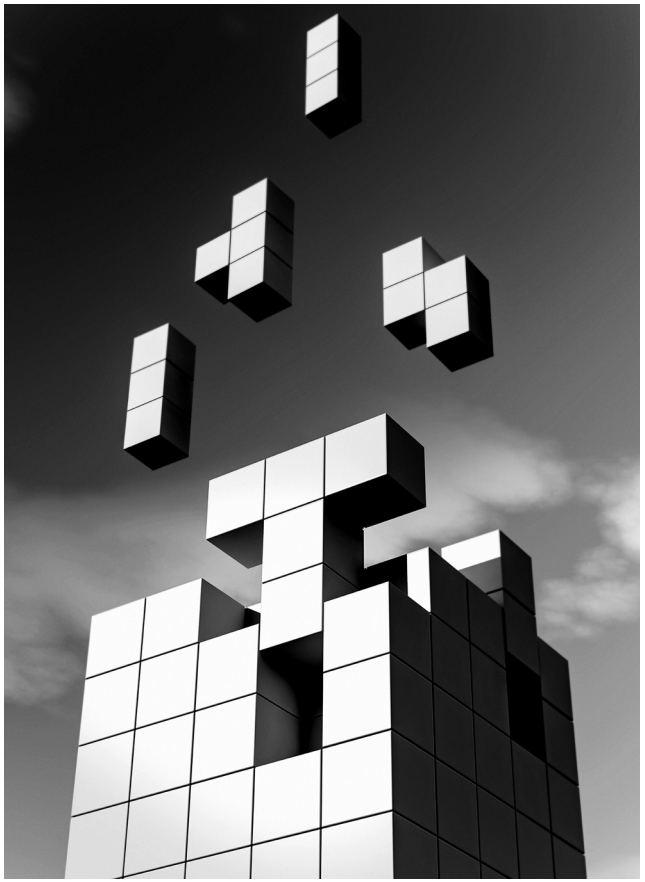
WHAT IS THE BENEFIT OF THE NEW CROSS-CLASS CRAM DOWN MECHANISM?

The new mechanism is a clear improvement of French insolvency law as it will facilitate the adoption of restructuring plans. If classes of creditors are properly structured, a majority is more likely to emerge within a class of creditor(s) having a common interest than in the case where creditors having different interests are mixed into a *comité de créanciers*, as in the system existing prior to the Ordinance.



[6] Note that, in relation to this phrase, the French Government took an option which was provided for in the Regulation. The Regulation states that "Member States may maintain or introduce provisions derogating from the first subparagraph where they are necessary in order to achieve the aims of the restructuring plan and where the restructuring plan does not unfairly prejudice the rights or interests of any affected parties". According to the explanatory report of the French Government's explanatory report, this exemption is designed to give special treatment, for instance, to claims of suppliers, to claims of holders of capital and to claims arising from the debtor's tortious liability. This choice is allowed by the Regulation, which gives the possibility for the court to take into account the situation of these beneficiaries.

Cross-class cram down *(cont.)*



WHAT HAPPENS WHEN NO PLAN CAN BE ADOPTED BY THE CLASSES IN A *SAUVEGARDE ACCÉLÉRÉE*?

If no plan can be adopted in accelerated safeguard proceedings (*sauvegarde accélérée*), the court will end the proceedings.

The court has no means to impose a plan unlike what happens in ordinary safeguard proceedings (*sauvegarde*) or reorganisation proceedings (*redressement judiciaire*).

The debtor may then continue its business in the normal way unless it is insolvent or will, shortly thereafter, become insolvent. In this latter case, the debtor has the duty to file for reorganisation proceedings (*redressement judiciaire*).

In these new reorganisation proceedings (*redressement judiciaire*), the classes of creditors set up in the preceding accelerated safeguard proceedings (*sauvegarde accélérée*) will remain in place. Any new plan proposed (by the administrator, with the assistance of the debtor, or by any affected party) will be presented to these classes.

The cross-class cram down mechanism will also be available, but may then be applied without the consent of the debtor.

If no plan can then be adopted, classes of creditors and cross-class cram down will no longer apply and the court may, as currently provided for in the ordinary safeguard proceedings (*sauvegarde*) or reorganisation proceedings (*redressement judiciaire*), impose payment extensions on creditors. In the absence of any prospect of recovery, the court can also opt for the total or partial transfer of the business of the company and, if necessary, its liquidation.

Safeguard proceedings *(sauvegarde)*

Safeguard proceedings allow those companies which are in financial difficulty, but not yet insolvent (*en état de cessation des paiements)* (ie unable to pay its debts as they fall due with its available assets), to obtain a stay on payments and the suspension of judicial proceedings. The objective is to provide for negotiation with each of the company's creditors and to ensure that the company continues to operate and maintain employment. The creation of safeguard proceedings was inspired by the U.S. Chapter 11 regime.

The debtor may, at its sole discretion, initiate safeguard proceedings (*sauvegarde*) with respect to itself. Creditors of the debtor cannot attend the hearing before the court at which the commencement of safeguard proceedings (*sauvegarde*) is requested. If a court order is made to open safeguard proceedings (*sauvegarde*), this will result in a freeze on the payment of debts and on the acceleration and enforcement of security in the same way it does in reorganisation proceedings (*redressement judiciaire*). The court judgment will also lead to the appointment of an administrator and to an observation period for the purpose of preparing a report on economic and employment issues (*bilan économique et social*). The administrator, with the help of the debtor company and/or experts, is in charge of preparing this report.

The company will continue to manage its business (although it may sometimes be assisted by the administrator). During this period, the debtor company and its creditors will seek to come to an arrangement for the setting up of a safeguard scheme (*plan de sauvegarde*). The scheme is proposed by the debtor, who will be able to submit a draft safeguard plan (including debt remissions, payment terms or debt-for-equity swaps). The administrator will then submit plans received from the debtor to the vote of each creditor, or to each class of creditors if applicable. Generally speaking, each creditor or class of creditors must vote on the plan within six months of the opening of proceedings but the court may, at the request of the administrator, extend this time period once.

Classes of creditors will only be designated for companies which, together with the companies which they control, reach a certain size (please see above "Classes of creditors"). For companies below these thresholds, the court may authorise classes of creditors to be set up at the request of the debtor.

In the absence of classes of creditors, all the creditors who filed a claim will be consulted individually on the draft safeguard plan. In the scenario where creditors refuse to adopt the proposed plan, the court can impose a uniform rescheduling of their claims over a period of ten years. In that case, the restructuring plans must provide that a minimum annual instalment of 5% of the total amounts of the claims should be paid as from the third year (and any subsequent years) of the plan, an amount which is increased to 10% as from the sixth year.

When classes of creditors are constituted, the safeguard scheme proposed must be approved by a majority vote of each class of creditors. The majority within each class is two-thirds of the amount of claims held by members of that class who have voted on the debtor's proposal.

Safeguard proceedings *(sauvegarde) (cont.)*

Where the plan is approved by the relevant classes of creditors, it will bind all members of that class of creditors if the plan is approved by the court. In addition to considering whether there is a serious possibility of the company continuing its business, the court must take into account whether the interests of other creditors are sufficiently protected in deciding whether or not to approve the proposed plan.

Where the plan has not been approved by all classes of creditors, the cross-class cram down mechanism can be applied (please see the "Cross-class cram down" section above).

Cross-class cram down is only available if requested or approved by the debtor.

The French public authorities may grant debt forgiveness (but not for indirect taxes, other than penalties and late interest), providing that competition is not distorted by such debt forgiveness and that the European Commission does not consider such debt forgiveness to be state aid. Public authority debt forgiveness must be carried out in the same manner as the private sector would have agreed in relation to the reduction of debt in the ordinary course of the market.

Such public debt forgiveness will be subject to a ceiling, and only debts which have fallen due at the date of the request can be the subject of forgiveness. Generally, the public authorities prefer to extend the time period in which the debtor will have to pay the relevant public debts, rather than write off debt.

There are other advantages to safeguard proceedings. These include, in particular, that:

- there are no "hardening periods" and transactions entered into during the proceedings cannot subsequently be challenged;
- neither part nor all of the business can be sold without the consent of the management of the company; and
- better protection and greater powers are granted to company directors.

Unlike reorganisation proceedings (*redressement judiciaire*), the Court may terminate safeguard proceedings at the debtor's request at any time during the observation period if the company's difficulties disappear (the safeguard plan therefore becoming unnecessary).

The court may convert safeguard proceedings into reorganisation proceedings (*redressement judiciaire*) if no plan has been adopted by the relevant classes of creditors. It may also convert safeguard proceedings into judicial liquidation (*liquidation judiciaire*) if it appears that the recovery of the debtor is manifestly impossible.

Accelerated safeguard proceedings *(sauvegarde accélérée)*

The Ordinance introduced redesigned accelerated safeguard proceedings by merging the previously existing accelerated safeguard proceedings (*sauvegarde accélérée*) and accelerated financial safeguard proceedings (*sauvegarde financière accélérée*).

The accelerated safeguard proceedings have been designed to fast-track difficulties by a debtor.

A debtor that is engaged in conciliation proceedings (please see "Conciliation proceedings" section below) may initiate accelerated safeguard proceedings (*sauvegarde accélérée*). The debtor must face difficulties which it is not in a position to overcome, without having been insolvent for more than 45 days when it initially requested the opening of conciliation proceedings.

The debtor must have prepared a draft safeguard plan ensuring the continuation of its business as a going concern supported by enough of the classes of creditors involved in the proceedings to render likely its adoption within a maximum of four months following the commencement of accelerated safeguard proceedings (provided that the court has decided to extend the initial two-month duration of the accelerated safeguard proceedings).

Accelerated safeguard proceedings will always involve the constitution of classes of creditors directly affected by the draft safeguard plan prepared by the debtor in the context of its conciliation proceedings (please see the "Classes of creditors" section above).

Where the debtor's accounts show that the nature of the indebtedness makes it likely that a plan can be adopted by only financial creditors and bondholders, the debtor may request the opening of accelerated safeguard proceedings whose effects will be limited to these creditors.

The debtor company will establish a list of claims of each creditor who has taken part in the conciliation and submit the list to the court register. The submission of the list amounts to the filing of a proof of debt in the accelerated safeguard proceedings.

The plan must be approved by the court within two months from the opening of the accelerated safeguard proceedings (with a possible extension of two months).

The voting requirements for approving the draft plan are the same as for safeguard proceedings (*sauvegarde*) involving classes of creditors (please see the 'Classes of creditors' section above). The decision is taken by a majority of two-thirds of the voting creditors by value which have voted.

The plan may provide for debt rescheduling, debt write-offs and equity capital in the debtor debtor.

Cross-class cram down is only available if requested or approved by the debtor, and the court cannot impose a restructuring plan.

If a plan is not adopted by the classes of creditors and approved by the court within the applicable deadline, the court shall terminate the proceedings. The court cannot impose any debt rescheduling as an alternative solution.

Reorganisation proceedings *(redressement judiciaire)*

Reorganisation proceedings (*redressement judiciaire*) are court-based, collective insolvency proceedings which aim at achieving the survival of a company, preserving its activities and employment, and discharging its liabilities. The court will order the opening of reorganisation proceedings if it can be shown that the debtor is insolvent (*en état de cessation des paiements*) and has not ceased its activities or is capable of continuing its business. Any debtor being insolvent will have 45 days to apply to a court to start reorganisation proceedings or to open conciliation proceedings (*Conciliation*). A debtor will not be considered insolvent if it is shown that, because of credit reserves (*réserves de crédit*) and the terms of payment granted by creditors, the debtor can satisfy its liabilities as they fall due from its available assets. If the debtor has ceased its activities or is incapable of being rehabilitated, the court may order the opening of liquidation proceedings (*liquidation judiciaire*).

Unlike safeguard proceedings, a creditor or the public prosecutor are also able to request the opening of reorganisation proceedings, provided that there are no ongoing conciliation proceedings. It is no longer possible for the court to reopen reorganisation proceeds at its own volition where conciliation proceedings have failed and the debtor is insolvent.

When a company is insolvent and reorganisation proceedings (*redressement judiciaire*) or judicial liquidation (*liquidation judiciaire*) have begun, the court will determine the date of insolvency, which is generally deemed to be the date of the court order commencing the insolvency proceedings. However, depending on the circumstances, the court may set an earlier date, which may be up to 18 months before the commencement of the proceedings. This date marks the beginning of the hardening period (*période suspecte*). Certain transactions entered into during the hardening period shall be held void automatically or may be held void by the court.

Transactions which are void automatically typically include the transfer of assets for nominal consideration, the payment of debts which were not due at the time of the payment and security granted for debts previously incurred. For historical reasons, only certain types of securities were quoted in the law.

The Ordinance extends the scope of the transactions which are void automatically when they secure, with assets of the debtor, debts previously incurred.

The following are now included in the scope:

- any form of security interest; and
- any contractual retention rights.

The Ordinance, however, provides exceptions for the following transactions:

- receivables assigned by way of security through a Dailly law assignment (*cession de créances professionnelles*) effected during the hardening period (*période suspecte*), if such assignments were made following an agreement entered into before the beginning of such period; and
- new security which replaces an existing security to the extent the new security is equivalent in nature and scope to the security it replaces.

When opening reorganisation proceedings, the court will begin a period of observation, with the purpose of assessing the company and either: (a) for a plan for the reconstruction of the company (*plan de redressement*), which may take the form of a continuation plan or a transfer plan; or (b) liquidate it under a judicial liquidation, as described below. The observation period may last up to 18 months from the date of the judgment opening the proceedings (*jugement d'ouverture*).

Reorganisation proceedings *(redressement judiciaire) (cont.)*

Classes of creditors will only be designated for companies which, together with the companies which they control, reach a certain size.[7] For companies below these thresholds, the court may authorise classes of creditors to be set up at the request of the debtor or the administrator (please see the "Classes of creditors" section above).

The classes of creditors set up in a preceding *sauvegarde accélérée* will remain in place. Any new plan proposed (by the administrator with the assistance of the debtor or by any affected party) will be presented to these classes (please see the "Cross-class cram down" section above).

In its decision to open the proceedings, the court will appoint the following persons, each with different duties: an administrator (*administrateur judiciaire*) or two co-administrators (provided certain legal thresholds are reached); a representative of the creditors (*mandataire judiciaire*) or two co-representatives of the creditors (provided certain legal thresholds are reached); and a bankruptcy judge (*juge commissaire*) to preside over the administration. The court will also invite the employees to appoint a representative (*représentant des salariés*).

The court can also appoint one to five controllers (*contrôleurs*) among the creditors who ask to be appointed as such. The controllers are entitled to be informed of the procedure and will be asked to give their opinions before any important decision is taken. Those controllers also have the power to take certain actions.

Important features of the reorganisation proceedings are as follows:

- during the observation period, the debtor usually remains in possession of and retains title to its property. The debtor remains in charge of the management of its business in respect of the part that has not been transferred to the administrator in accordance with French law;
- during the observation period, all creditors are barred from filing any actions against the company to obtain payment for claims which arose prior to the court order initiating the reorganisation proceedings;
- only the administrator can elect, under certain conditions, to continue existing contracts (*contrats en cours*) that are necessary for the continuation of the activities of the company, except for small companies (where the debtor can continue existing contracts); and
- where the plan contains provisions for the modification of equity, following which the company does not meet the minimum amount of share capital required by law and one or more shareholder(s) refuses to reconstitute the company's share capital, the administrator can request the appointment of an authorised representative to convene the relevant meetings and vote on the reconstitution of the share capital in place of the opposing shareholders.

The rules relating to creditor consultation and cross-class cram down are broadly the same as in safeguard proceedings (*sauvegarde*) involving classes of creditors, subject to certain specificities. In particular:

- any affected party may propose a restructuring plan which will be submitted to the vote of the classes of creditors; and
- cross-class cram down can be used without the debtor's consent, at the request of the administrator with the approval of a class of creditors.

If no plan can then be adopted, classes of creditors and cross-class cram down will no longer apply and the court may impose payment extensions on creditors.

Restructuring plans imposed by courts are subject to the same minimum amortisations as in safeguard proceedings (*sauvegarde*).

In the absence of any recovery perspective, the court can also opt for the total or partial transfer of the business of the company and, if necessary, its liquidation.

At any time during the observation period, the court will be able to order the transfer of all or part of the debtor's business (*cession partielle de l'activité*) or the start of liquidation proceedings (*liquidation judiciaire*) if there is no plan or if the proposed plans are clearly not sufficient to lead to its reorganisation. The court's decision is only taken after having heard the classes of creditors, the debtor, the administrator, the public prosecutor and the workers' representatives (if any).

7 Note that the notion of control and the thresholds are the same here as detailed above.

Reorganisation proceedings *(redressement judiciaire) (cont.)*

After a period of three months following the opening of reorganisation proceedings (*redressement judiciaire*), the court may order either:

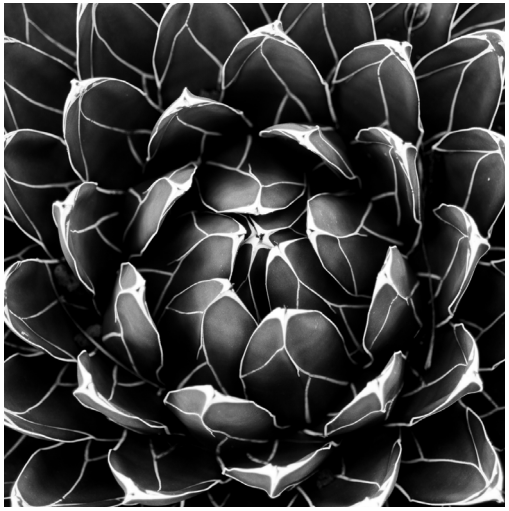
(i) a forced increase of capital (*mécanisme de dilution forcée*); or

(ii) a forced sale of opposing shareholders' shares (*cession forcée*), at the administrator or at the public prosecutor's request,

provided that:

- the company has at least 150 employees or is a dominant company (*entreprise dominante*) in the sense of the French Labour Code (*Code du travail*) over one or more companies employing at least 150 employees;
- the cessation of business of the company is likely to cause serious harm (*trouble grave*) to the national or regional economy and to employment;
- the change in the company's share capital appears to be the only viable option to avoid such harm and to allow the continuation of business after the options of total or partial sales have been examined; and
- the meetings (*assemblées mentionnées au I de l'article L.631-19 of du Code de Commerce*) refused to adopt the change to the company's share capital provided for in the proposed rehabilitation plan in favour of one or several persons committed to perform the plan.

If a forced increase of capital is decided upon, the court may appoint a *mandataire*, whose mission is to convene a shareholders' meeting and to vote on the proposed increase up to the amount provided for in the rehabilitation plan, in place of the opposing shareholders; the capital increase must be carried out within a maximum period of 30 days after the vote. It may be released by the persons who committed themselves to perform the plan by set-off with the claims of the company which have been admitted and limited to their reduction within the plan.



If a forced sale of shares (*cession forcée*) is ordered, those shareholders who agreed to perform the proposed plan will acquire all or part of the shares of the shareholders who refused the capital modification and who hold, directly or indirectly, shares giving them the majority of the voting rights or a blocking minority in the general meetings of the company or have controlling powers by application of an agreement concluded with other shareholders and which is not contrary to the social interest; any provision requiring formal approval (*clause d'agrément*) is deemed null and void. In this situation, any shareholder, other than those described above, is entitled to withdraw from the company and simultaneously request its shares to be redeemed by the transferees.

Where there is to be a forced sale of shares, if the interested parties cannot agree on the value of the shares at stake, this value will be determined by an expert appointed by the president of the court at the request of the most diligent party of the administrator or the public prosecutor.

Judicial liquidation *(liquidation judiciaire)*

Judicial liquidation (*liquidation judiciaire*) applies to private entities which have ceased their activities or are incapable of being rehabilitated. In that sense, it is similar to liquidation in the UK and to Chapter 7 proceedings in the U.S. The court can order the opening of immediate liquidation proceedings without opening reorganisation proceedings first, or the company can go into liquidation following the opening of reorganisation proceedings. The court cannot, of its own motion, open liquidation proceedings where conciliation proceedings have failed and the debtor is insolvent.

Liquidation proceedings will usually result in the immediate cessation of the company's business. However, the court may authorise a temporary continuation of the company's business in preparation for the implementation of a transfer scheme, for a three-month period, renewable for three months upon request of the public prosecutor. The process involves the appointment of one or more liquidators to take control of the company, represent the creditors and to collect, realise and distribute the company's assets or the proceeds of its assets. The court decision ordering compulsory liquidation also normally leads to the immediate dissolution of the company. Unlike reorganisation proceedings, the debtor is immediately and automatically divested of the administration of its business and of its estate.

Liquidation proceedings are simply aimed at terminating the debtor's activities and selling its assets in order to discharge its debts. Simplified liquidation proceedings (*liquidation simplifiée*) are available to businesses with a small number of employees, few funds and no property assets.[8] A transfer scheme can be prepared during the reorganisation proceedings (and during the conciliation procedure, in a pre-pack scenario) but implemented during the liquidation proceedings. The work-out of the transfer scheme has been improved by making the content of offers (*offres de reprise*) more detailed and increasing the transparency of transactions and the transfer.

The rules on ranking of creditors in a liquidation are spread out in different codes and are therefore difficult to follow given the variety of security and liens which exist. A new article of the commercial code has been added by the Ordinance which clearly sets out the rank of each creditor claim in a liquidation. No change of substance has been made to existing ranking rules, but this improved clarity is welcome and will help in ensuring that the best-interest-of-creditors test is complied with.

[8] Note that the maximum threshold for these purposes is turnover of EUR750,000 excl. taxes and fewer than five employees over the six months immediately before the opening of the proceedings.

Post-money lien

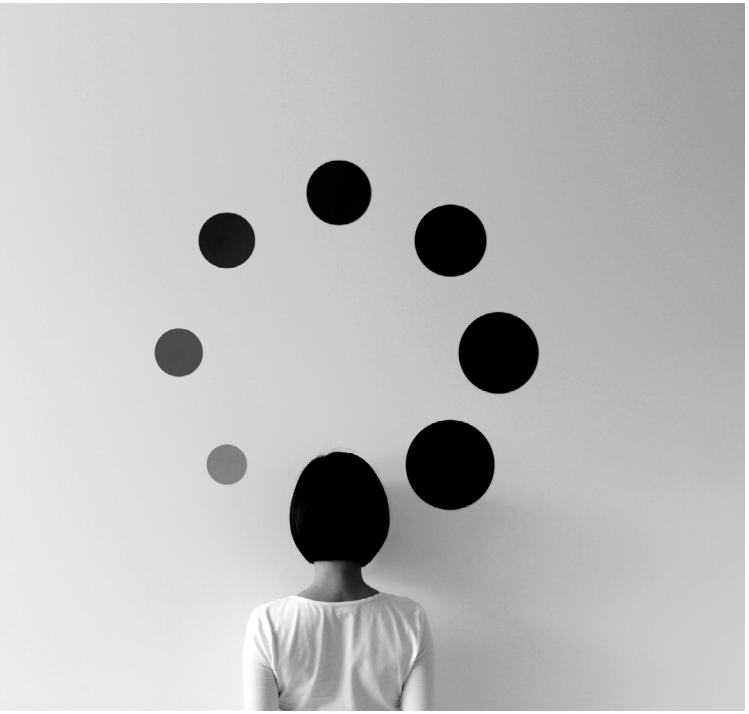
The Ordinance introduced into French law a 'post-money' lien, which was initially adopted as a temporary measure during the Covid-19 pandemic, but has now been introduced into French law permanently.

The 'post-money' lien enables persons having made a new cash contribution to a debtor to enjoy a priority of payment over most pre-proceeding and post-proceeding claims. It applies when new cash contributions, approved by the court, are made either during the period following the opening of insolvency proceedings known as the 'observation period' or in the course of a restructuring plan when first adopted or when modified; in all cases with the approval of the court.

The 'post-money' lien for cash contributions made in the course of a restructuring plan may not benefit shareholders having contributed to a share capital increase.

In addition, the payment date of claims benefiting from a 'post-money' lien may not be rescheduled by the court or restructured in the course of further restructuring proceedings without the consent of the holders of such claims.

Special mediation *(mandat ad hoc)*



The special mediation procedure is the confidential, pre-insolvency procedure which is most often used when a company in France is experiencing difficulties. Instead of conciliation proceedings, or before conciliation proceedings are opened, the legal representative of the company (ie the board of directors or the president of the board) may formally request that president of the court appoint an officeholder referred to as a special mediator (*mandataire ad hoc*). A request to appoint a special mediator may only be made if the company is solvent: a special mediator cannot be appointed if the company is insolvent (*en état de cessation des paiements*), and the legal representatives of the company must certify that the company is solvent when filing for such an appointment.

The debtor is entitled to propose the name of a special mediator to the president of the court.

In practice, the appointment of a special mediator can be used by companies in financial difficulties as a preliminary step to conciliation proceedings. The period for which the special mediator can be appointed is not limited by law. It will usually be for three months and may be extended for further periods. The court decision appointing the special mediator must be communicated to the company's auditors.

The special mediator will report to the president of the court on the economic and financial situation of the company and seek to help the company to come to an arrangement with its main creditors, with a view to preserving the company as a going concern. Management of the company remains in the hands of the chairman and the board; in practice, they are likely to follow the recommendations of the special mediator. The special mediation procedure is not coercive, but in the event that the special mediator's attempted negotiations do not lead to an agreement between the company and its main creditors, there is likely to be a real risk of an insolvency procedure being opened in respect of the company. The procedure is confidential.

Conciliation proceedings *(conciliation)*

Conciliation is a pre-insolvency proceeding whereby a company facing difficulties can request the president of the commercial court to appoint a conciliator to assist in the negotiation of an agreement with all or part of its creditors. Traditionally, the opening of a conciliation did not entail any stay on creditors' rights to enforce an agreement. During the Covid-19 pandemic, a new law provided for the possibility for the court to impose, at the request of the debtor (without notice application), a stay on enforcement actions or a temporary debt extension for the duration of the conciliation proceedings. This was meant to be a temporary measure but has now been permanently introduced into law by the Ordinance, with an amended procedural regime (with notice application). The aim of conciliation proceedings is to legally secure the terms of an arrangement agreed between a company and its main creditors (*principaux créanciers*) in order to put an end to the difficulties of the company.

Conciliation proceedings are available to any company that:

- encounters legal, economic or financial difficulties, actual or anticipated; and
- is not or has not been insolvent (*en état de cessation des paiements*) for more than 45 days.

A company is insolvent (*en état de cessation des paiements*) when it cannot pay its liabilities as they fall due, having regard to its available assets to meet these liabilities.

Under conciliation proceedings, the company can, with the help of a conciliator appointed by the president of the court, renegotiate, in a confidential manner, its debts with its main creditors and renegotiate its debts with its main creditors in a confidential manner and seek any other solution to ensure its continuation.

Upon request of the debtor and after advice from the participating creditors, the conciliator may be tasked with organising a partial or total sale of the company, which could be, if necessary, implemented within the framework of further insolvency proceedings (see below).

The debtor is entitled to propose the name of a conciliator to the president of the court.

The company will be required to provide details of its financial, economic and social situation, including its financing requirements. The conciliator's mission is to seek agreement between the company and its main creditors, and the conciliator may be assisted by experts when reporting on the company's economic and financial situation. The conciliation procedure is for a maximum period of five months (comprising an initial four-month period and a possible one-month extension). A new conciliation proceeding cannot be opened within a three-month period after the end of a previous one. Management of the company remains in the hands of the chairman and the board.

There is no suspension of judicial or legal proceedings during the conciliation period. However, there is a possibility to seek, from the court which opened the conciliation proceedings, extensions of payment periods (*délais de paiement*) up to two years under Article 1343-5 of the French Civil Code, where a creditor makes a demand for payment or seeks to take enforcement action during such proceedings, after having gathered the conciliators observations; the duration of such moratorium may be subject to the conclusion of an arrangement.

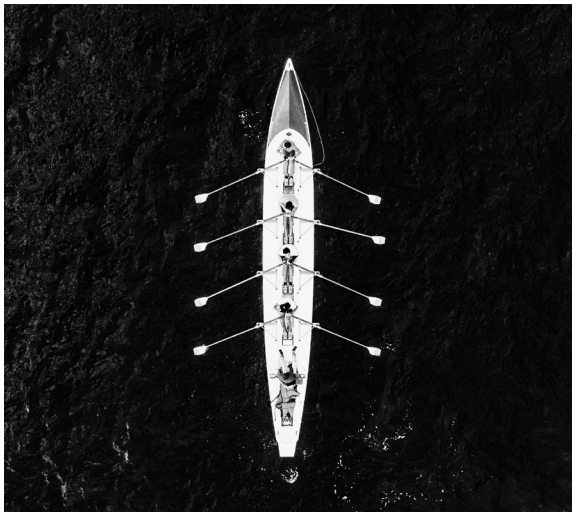
Similarly, if a conciliation arrangement is reached (either recorded or approved – see below), during its period of enforcement there is a possibility for the debtor to seek similar extensions of payment periods (*délais de paiement*) under Article 1343-5 of the French Civil Code if a creditor, having participated in conciliation proceedings, makes a demand for payment or seeks to take enforcement action with respect to a claim which is not covered by the conciliation arrangement.

The French social, tax and public administrations may grant write-offs of their debts as well as payment grace periods. The conciliation procedure is confidential.

Conciliation proceedings *(conciliation) (cont.)*

The arrangement reached between the parties during the conciliation proceedings may be approved (*homologué*) at the request of the debtor company by the commercial court provided that:

- the company is not insolvent, or the arrangement reached by the parties terminates such a situation;
- the terms and conditions of the arrangement are such as to ensure that the company's business will continue; and
- the arrangement does not affect creditors who are not parties to it.



The arrangement reached between the parties may also be recorded (*constaté*) by the president of the court. In such cases, the decision of the president and the arrangement between the parties will remain confidential.

Where the conciliation agreement is approved by a commercial court judgment, the court judgment is filed with the applicable commercial court as a measure of publicity, while the content of the agreement remains confidential. The court approval for the agreement reached during conciliation proceedings will provide protection to creditors in respect of certain lender liability issues. In addition, except in case of fraud, the date on which a company can be deemed by the court to be insolvent (*en état de cessation des paiements*) cannot be date prior to the date of the court judgment approving the agreement reached during conciliation proceedings.

Creditors who provide new money, goods or services designed to ensure the continuation of the business of the debtor (other than shareholders providing new equity in the context of a capital increase) will enjoy priority of payment over all pre-proceeding and post-proceeding claims (except with respect to certain pre-commencement employment claims and post-commencement procedural costs) (*privilège de conciliation*). These provisions do not apply to shareholders making contributions in respect of share capital increases.

If safeguard, reorganisation or liquidation proceedings are opened, this will automatically end any ongoing conciliation proceedings and any conciliation arrangement recorded or approved, if any.

At the request of the debtor and after consultation (*avis*) with the creditors participating in conciliation proceedings, the conciliator may be empowered to prepare the sale of all or part of the debtor's business (a pre-pack sale) which could be implemented later in safeguard, reorganisation or liquidation proceedings.

Any contractual provision providing that the fees of any advisor to a creditor will be borne solely by the debtor as a result of the appointment of an ad hoc agent or a conciliator or the opening of *mandat ad hoc* or conciliation proceedings (over and above a percentage amount to be fixed by *arrêté*) are deemed to be null and void. The nullification of any contractual provision that would accelerate the payment of the company's obligations also applies in the context of special mediation and conciliation proceedings.

Notwithstanding the provisions of Article 1343-2 of the French Civil Code, which permits the capitalisation of interest due for one year, interest on interest is not permitted during the performance of a conciliation arrangement that has been approved or acknowledged by the court.

The conciliator may be appointed as a *mandataire à l'exécution de l'accord* to oversee the execution of the arrangement which has been approved or acknowledged by the court.

Specialised Insolvency Courts *(tribunaux de commerce specialisés)*

Specialised insolvency courts have jurisdiction over the debtor in safeguard proceedings, reorganisation proceedings and liquidation proceedings where:

- the debtor has 250 or more employees and net revenues of at least EUR20,000,000; or
- the debtor has net revenues of at least EUR40,000,000; or
- the debtor is a holding company that, together with its operating subsidiaries, has more than 250 employees and net revenues exceeding EUR250,000,000; or
- the debtor is a holding company that, together with its operating subsidiaries, has net revenues exceeding EUR40,000,000.

They may also have jurisdiction when the insolvency proceeding is subjected to European Insolvency Regulation and the debtor's centre of main interests (**COMI**) is located within the court's jurisdiction.

They may also have jurisdiction over conciliation proceedings, provided that the above conditions are met by the company and that the specialised insolvency courts are applied to by the debtor, or at the Public Prosecutor's request, or by decision of the president of the Commercial Court.

One unique specialised insolvency court will have jurisdiction over the insolvency proceedings if the debtors are a group of companies.

Those specialised insolvency courts are listed in Decree n°2016-217 of 26 February 2016.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017.

The regulation provides for the coordination of cross-border insolvency proceedings within the European Union and contains provisions regarding the recognition and enforcement of judgments in such proceedings.

In particular, the courts of the Member State in which a debtor's "centre of main interests" is located (eg for companies, being the registered office) have jurisdiction to commence main insolvency proceedings relating to such a debtor.

Where main proceedings have been commenced in the Member State in which the debtor has its centre of main interests, any proceedings commenced subsequently in another Member State in which the debtor has an establishment shall be secondary insolvency proceedings. The effects of those territorial proceedings are restricted to the assets of the debtor situated in the territory of this other Member State.

Irrespective of whether the insolvency proceedings are main or secondary insolvency proceedings, such proceedings will, subject to certain exceptions, be governed by the local insolvency law of the court that has assumed jurisdiction over the insolvency proceedings of the debtor. Furthermore, the courts of the Member State within the territory of which insolvency proceedings have been opened shall have jurisdiction for any action that derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.

One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these which are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings, but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, safeguard proceedings (*sauvegarde*), reorganisation proceedings (*redressement judiciaire*), and judicial liquidation (*liquidation judiciaire*) were available as main proceedings under the Original Regulation.

Judicial liquidation (*liquidation judiciaire*) was also available as a secondary proceeding under the Original Regulation.

The above procedures continue to be listed in Annex A of the Recast Regulation, which also lists the accelerated safeguard (*sauvegarde accélérée*) in Annex A.

Special mediation and conciliation proceedings were not listed as either main or secondary proceedings under the Original Regulation and have not been listed under the Recast Regulation.

Key contacts

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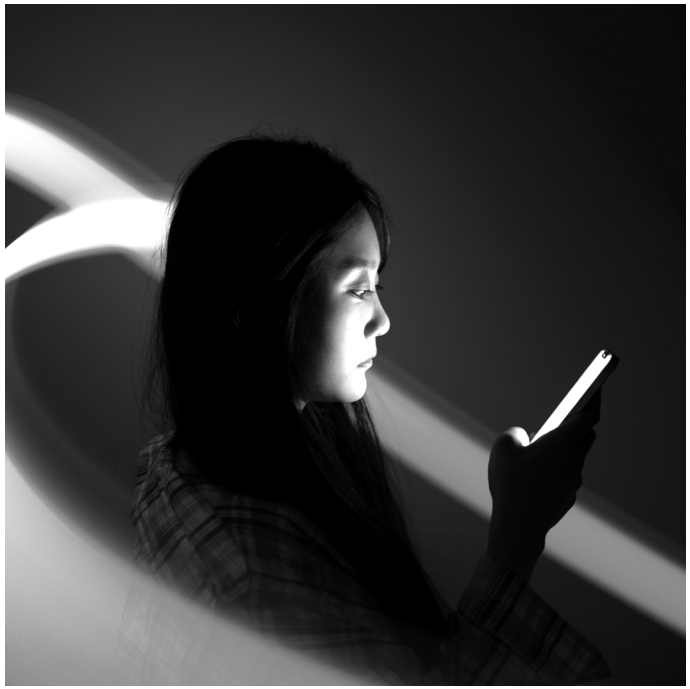
Further information

Developed by A&O Shearman's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.



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