



Europe, Middle East and Africa Restructuring Review 2019



EUROPE, MIDDLE EAST AND AFRICA

RESTRUCTURING REVIEW 2019

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Contents

Preface	v
EU Regulations on Insolvency and Brexit	1
Scott Morrison <i>Orrick, Herrington & Sutcliffe (UK) LLP</i>	
Cyprus	10
Anastasios A Antoniou and Christina McCollum <i>Antoniou McCollum & Co</i>	
France	20
Céline Domenget Morin and Bruno Pousset <i>Goodwin</i>	
Greece	30
Petros Fatouros and Lilian Chimonas <i>Phi Lambda Law Firm</i>	
Italy	39
Vittorio Lupoli and Lucio Guttilla <i>BonelliErede</i>	
Mauritius	50
Ashvan Luckraz and Bhavna Fowdur <i>Venture Law</i>	
Netherlands	62
Nicolaes Tollenaar and Thomas Bil <i>RESOR NV</i>	
Portugal	70
Maria João Ricou and Manuel Requicha Ferreira <i>Cuatrecasas</i>	
Slovenia	80
Matjaž Ulčar and Blaž Prinčič <i>Ulčar & Partners</i>	

Contents

Spain: Prepetition Restructuring Agreements 90

Ignacio Buil, Iñigo de Luisa, Fedra Valencia and Andrea Perelló

Cuatrecasas

Spanish Sales of Business Units and UK Pre-Pack Sales Compared 104

Adrián Thery, Borja García-Alamán, Juan Verdugo and Juan María Jiménez

Garrigues

Switzerland: Freezing Orders and Asset Tracing 116

Gion Christian Casanova

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Preface

Welcome to the *Europe, Middle East and Africa Restructuring Review 2019* – a Global Restructuring Review special report.

Global Restructuring Review is the online home for all those who specialise in cross-border restructuring and insolvency, telling them all they need to know about everything that matters.

Throughout the year, the GRR editorial team delivers daily news, surveys and features; organises the liveliest events ('GRR Live'); and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments than our journalistic output is able.

The *Europe, Middle East and Africa Restructuring Review 2019*, which you are reading, is part of that series.

It contains insight and thought leadership from 26 pre-eminent practitioners from these regions.

Across 12 chapters and 126 pages, it provides an invaluable retrospective and primer. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, these contributors discuss recent changes and what they mean, with footnotes and relevant statistics. Others provide a primer on the tools available in their home-state, along with their benefits and shortcomings.

This edition covers Cyprus, France, Greece, Italy, Mauritius, the Netherlands, Portugal, Slovenia, Spain and Switzerland; evaluates the updated EU Insolvency Regulation, along with the UK's chances outside it ('a retrogressive step for the UK insolvency market'); and compares Spain's version of the pre-pack with the UK's.

Among the gems, it contains:

- details of the new Dutch scheme, which 'takes elements of' the UK's schemes and the US's Chapter 11 'and improves on both';
- Italy's extensive new code;

Preface

- Slovenia's steady improvement in the World Bank's rankings, following eight amendments to its law; and
- the emergence of credible restructuring and pre-pack tools in Portugal, Italy, France, Mauritius and Spain.

Along the way, you will encounter a host of helpful information and details, including an innovative suggestion that Dutch schemes should be both inside, and outside, the EU Insolvency Regulation (depending on what the debtor elects) and the art of asset tracing in Switzerland.

Enjoy!

If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you.

Please write to insight@globalrestructuringreview.com.

David Samuels

Publisher

May 2019

France

Céline Domenget Morin and Bruno Pousset

Goodwin

Brief overview of insolvency proceedings

Enhanced by no less than five reforms over the past 15 years, French insolvency law now provides a comprehensive set of tools designed to efficiently handle the legal, economic and financial difficulties that companies are facing. The whole insolvency architecture hinges on the key concept of cessation of payments (ie, inability of the debtor to pay its debts as they fall due with its available assets).

Court-assisted restructuring proceedings

Common features

Mandat ad hoc and conciliation proceedings are often referred to as amicable proceedings as their purpose is to facilitate the negotiation of an agreement between the debtor and its creditors, which usually consists of basic measures such as rescheduling or reducing the debtor's indebtedness, but may also implement sophisticated schemes such as debt-for-equity swap.

Negotiations are undertaken by a court-appointed mediator usually proposed by the debtor within the list of judicial administrators.

The attractiveness of amicable proceedings depends on:

- discretion, as stakeholders are bound by a duty of confidentiality (even though the statutory auditor has to be notified of the commencement order);
- consensus, as creditors cannot be coerced to accept any proposal and those not willing to take part cannot be bound by the agreement; and
- voluntariness, insofar as only the debtor can request the appointment of a mediator who will not be able to interfere with its management.

Mandat ad hoc

Mandat ad hoc's effectiveness relies on flexibility. The president of the court may appoint a *mandataire ad hoc* upon the request of a debtor that, though not insolvent, encounters

difficulties. Both the *mandataire ad hoc*'s mission and duration are freely determined by the president of the court having regard to the debtor's application.

Conciliation proceedings

Conciliation proceedings are more closely regulated. These proceedings apply to debtors that, though not insolvent for more than 45 days, are facing actual or foreseeable legal, economic or financial difficulty. The conciliator is appointed for a period not exceeding four months, which can be extended by the president of the court so the proceedings can last up to five months.

The agreement reached, which is intended to put an end to the difficulties faced by the business, may be either acknowledged and made enforceable by the president of the court or approved by the court. Only the judgment approving the agreement is public.

However, the agreement's approval enables: (i) to grant legal privilege in case of subsequent insolvency proceedings to creditors that provided new money at the time of the conciliation proceedings ('new money privilege'); and (ii) to prevent the clawback period from starting prior to this judgment.

Combination of amicable proceedings

Since *mandat ad hoc* is not subject to any time constraint, it is usually advisable to conduct negotiations within this framework. Then, when an agreement is about to be reached, the debtor shall request for the opening of conciliation proceedings in order for the arrangement to be either acknowledged or approved by the court.

Court-controlled rescue proceedings

French insolvency law offers a range of court-controlled proceedings, each of them being designed to handle a specific degree or nature of difficulty. The emergence of 'pre-pack' proceedings strengthens the whole legal arsenal, creating a bridge between court-assisted and court-controlled proceedings.

Safeguard proceedings

Safeguard proceedings are commenced at the request of a debtor that can prove that, although it is not insolvent, it has difficulties that it is unable to overcome on its own.

The debtor still runs the business (even though an administrator can be appointed to either supervise or assist the management), while preparing a safeguard plan to be negotiated with its creditors.

The negotiations take place through two creditors' committees, gathering, respectively: all credit institutions and holders of bank debt, and main trade creditors.

The different bondholders are all gathered in a single general assembly.

For the first time, in June 2017, safeguard proceedings were considered as a 'foreign main proceeding' under the US Bankruptcy Code, allowing a company to file for its recognition in the United States under Chapter 15.

Accelerated safeguard and accelerated financial safeguard proceedings

Both proceedings are opened at the request of a debtor involved in ongoing conciliation proceedings justifying that the restructuring plan negotiated during conciliation proceedings is already supported by a sufficient majority of its creditors to ensure its adoption by the creditors' committees and the general assembly of bondholders, if any. The plan is then submitted to the court for its approval within a short time period (three months in accelerated safeguard and one month in accelerated financial safeguard).

Reorganisation proceedings

Reorganisation proceedings are commenced upon the request of a debtor that is insolvent, a creditor or the public prosecutor.

As in safeguard proceedings, the debtor generally stays in possession while preparing a reorganisation plan with its creditors. If it appears that a reorganisation plan is not possible, the court may decide to have the debtor's business sold through an open bid process organised by the judicial administrator.

Reorganisation proceedings provide greater involvement of the judicial administrator, who can be appointed in rare cases to administer the company.

Judicial liquidation proceedings

Judicial liquidation proceedings apply to a debtor that is insolvent and whose restructuring is obviously impossible.

The debtor is no longer in possession, and the liquidator is therefore charged to sell the assets as a whole or piecemeal.

Combined use of court-assisted and court-controlled proceedings

The introduction of pre-pack proceedings to the legal arsenal came alongside the increasing use, during the financial crisis, of court-assisted proceedings by distressed companies, especially leveraged buyouts where a debtor could not obtain unanimous consent considering the multiplicity of its creditors (banks, collateralised loan obligations, hedge funds, alternative funds).

They consist of the combination of a negotiation phase in conciliation proceedings (which are confidential) and through the vote of the plan by the creditors' committees and the general assembly of bondholders in safeguard proceedings to cram down dissenting minority creditors.

Procedural timelines are kept to a minimum to limit the negative impact on the business of the opening of court-controlled proceedings.

Accelerated financial safeguard proceedings are suitable for restructuring only financial debts without freezing the suppliers' debts.

Shaped by the insolvency practitioners, pre-pack proceedings also include a pre-pack sale, which is particularly suitable when the debtor's indebtedness does not make a reorganisation plan possible. This specific type of pre-pack seeks potential purchasers under *mandat ad hoc* or conciliation proceedings, taking advantage of the confidentiality, and then, once

a satisfying offer is made, in implementing the sale of the company's business within a few weeks in subsequent reorganisation or judicial liquidation proceedings.

Creditors within insolvency proceedings

Court-assisted restructuring proceedings

Given their specific nature, the opening of amicable proceedings does not trigger the same effects as the opening of safeguard or reorganisation proceedings: there is no automatic stay and no need for creditors to file a proof of claim.

However, even if the conciliator cannot coerce the creditors to negotiate, the court may grant the debtor a grace period that is a maximum of 24 months if a dissenting creditor takes legal action or sends a formal notice to pay.

Contractual provisions that would trigger detrimental consequences (such as acceleration clauses) for the debtor upon the sole opening of amicable proceedings are considered null and void.

Court-controlled rescue proceedings

Freezing of debts and claims

As of the opening of such proceedings, the debtor is prevented from making payments (and creditors from demanding payments) in respect of any debts incurred before the commencement of the insolvency proceedings, except in limited circumstances such as the set-off of closely related claims.

Meanwhile, all actions and proceedings against the debtor will be stayed insofar as they relate to the payment by the debtor of any debt incurred prior to the insolvency proceedings or the termination of a contract for default (as for amicable proceedings, events of default related to insolvency or similar events will be null and void).

These prohibitions are subject to limited exceptions (see 'Securities immune to insolvency proceedings', below).

Assessment of liabilities

Creditors are required to file their claims within two months (four months for creditors domiciled outside France) from the publication of the judgment opening the proceedings in the *Bulletin Officiel des Annonces Civiles et Commerciales*.

Failure to file the claim within this time limit results in the relevant creditors being barred from receiving distributions in the insolvency proceedings.

Specific provisions for special claims

Claims arising for the needs of the proceedings or the observation period, or as consideration for a service provided to the debtor during this period, shall be paid as they fall due.

Claims benefiting from the new money privilege are highly ranked just after the employees' super-priority claims and court fees incurred after the judgment commencing the insolvency proceedings, and they cannot be rescheduled or reduced by the reorganisation plan.

Participation of the creditors in the outcome of safeguard and reorganisation proceedings

The creditors' committees and the general assembly of bondholders provide the discussion and negotiation interface between the debtor and its creditors.

The plan is approved when members of each committee voting in favour of the plan account for at least two-thirds of the outstanding claims of the creditors expressing a vote. Any member of one of the two creditors' committees (the bondholders have not been granted this possibility) can propose an alternative safeguard or reorganisation plan to the debtor's plan.

The plan must take into account subordination agreements entered into prior to the opening of the proceedings. Each creditor must inform the judicial administrator of the existence of any agreement that makes the exercise of its vote subject to any conditions, or whose purpose is the full or partial payment by a third party of its claim.

Debt-to-equity swap

If a change in the equity structure seems to be the sole solution to avoid cessation of business, an opposing shareholder may be diluted by a capital increase approved at a shareholder assembly convoked by a court-appointed trustee, who will exercise the voting rights of the opposing shareholder.

The court may also coerce the dissenting shareholder to sell its shares of the debtor to a new shareholder who commits to comply with the restructuring plan. An expert will be designated by the court to estimate the value of the shares.

The dilution or sale process applies in cases where: the debtor and the companies it controls have more than 150 employees; liquidation would cause serious disruption to national or regional economy and to regional employment; and a dilution or sale process is the only solution to avoid cessation of business. These conditions may seem restrictive, but were necessary in order to abide by the French Constitution, which protects, among other fundamental rights, the right of ownership.

Ranking of creditors in judicial liquidation proceedings

The proceeds of the realisation of the assets are distributed among creditors in accordance with the statutory order of priority:

- employees' super-priority claims, being wages (including certain allowances and holiday pay) for the 60 days prior to the judgment commencing insolvency proceedings;
- court fees incurred after the judgment commencing the insolvency proceedings;
- claims of creditors benefiting from new money privilege;
- claims of secured creditors with the benefit of mortgages and pledges that give a right of retention over the charged assets limited to the proceeds of the realisation of the charged assets;
- certain debts incurred by the debtor after the opening of the insolvency proceedings that meet the criteria provided for by law, including the expenses of the insolvency proceedings; and
- other claims.

Where assets are sold piecemeal, several separate rankings shall apply depending on the nature of the asset.

Creditors secured by pledges may escape from the ranking of creditors by requesting the court the assignment of the encumbered asset prior to the authorisation to sell this asset granted by the supervising judge.

Securities immune to insolvency proceedings

Despite the insolvency proceedings, some securities remain particularly effective.

First, the encumbered assets were, prior to the opening of insolvency proceedings, transferred as a guarantee outside the debtor's estate. These assets are therefore outside the scope of insolvency proceedings, allowing the creditor to freely enforce its security. This is the case with *fiducie*, Daily assignment of receivables and leasing.

Secondly, the encumbered assets appear necessary for the purpose of the efficient conduct of the proceedings or the pursuit of the debtor's business activity. During safeguard and reorganisation proceedings, the supervising judge may therefore authorise the payment of debts incurred prior to the proceedings to obtain the return of such assets. This is the case for *fiducie*, retention right and leasing.

Thirdly, in case of sale of the business as a whole in reorganisation or liquidation proceedings, liability for special securities over immovable and movable assets guaranteeing the repayment of a loan granted to the business for the financing of the encumbered asset shall be conveyed to the new purchaser of the business.

Corporate groups within insolvency proceedings

Internal aspects

Major enhancements to handle corporate groups in insolvency have been introduced by the Macron Law.

Specialised courts for insolvency proceedings have been created for large companies exceeding certain thresholds and for the opening of proceedings pursuant to European regulation on insolvency proceedings.

A debtor can request the transfer to another court and, in particular, to a specialised court.

The court that opened insolvency proceedings for a member of a corporate group has jurisdiction over all the other members of this group. Consequently, a court can supervise the insolvency proceedings of the whole group and may, for this purpose, appoint a single judicial administrator for all proceedings.

Cross-border aspects

Most of the provisions of Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings became effective on 26 June 2017. The Regulation applies in all member states (except Denmark) and establishes the principle that main insolvency proceedings may be opened in the member state where the debtor has its centre of main interests.

The Regulation allows insolvency procedures opened in any EU member state to be automatically recognised in the other EU member states and secondary proceedings in another EU member state are no longer limited to winding-up proceedings.

The Regulation aims, among other things, to prevent fraudulent or abusive forum shopping and creates different mechanisms for cooperation (i) between jurisdictions, and (ii) between jurisdictions and insolvency practitioners.

It also provides a legal framework on the cooperation and communication, and coordination of insolvency proceedings in order to facilitate the restructuring of group of companies.

Restructuring trends

The development of conciliation proceedings and pre-pack proceedings

Since the financial crisis in 2008, very few large restructurings have been implemented through defensive or hostile safeguard proceedings. Most of them have been negotiated through amicable proceedings, which have progressively become the customary frame for negotiations between companies, the lenders and their shareholders. The introduction of pre-packaged proceedings contributes to the development of these proceedings by strengthening their efficiency through a cramdown of dissenting minority creditors in accelerated (financial) safeguard.

The pre-pack sale perfectly supplemented the toolkit and improved largely the conditions of the sale of distressed businesses in terms of number of employees and proceeds obtained for the creditors.

In recent years, conciliation proceedings have also been used in order to face various new kinds of issues, such as complex sales of business, tax issues or plant closure. In using these proceedings, companies find an efficient tool to provide them with legal certainty.

These developments definitely contribute to the global decrease in the number of reorganisation and liquidation proceedings.

Emergence of new players

Under the pressure of Basel III, banks logically reviewed their portfolio of debts. Alternative capital providers and hedge funds took this opportunity to buy distressed loans.

These players being less reluctant to act as shareholders of distressed companies and their increasing presence around the table of negotiations in amicable proceedings has given rise to lender-led transactions since 2013. Their ability to provide new money to distressed companies enables them to play a significant role in major restructuring matters.

As a result of the repeated reforms of previous years, which have greatly modernised French insolvency law, creditors, and especially alternative capital providers, are able to play a greater role in French insolvency proceedings and, more generally, in French restructurings.

EU Preventive Restructuring Frameworks Directive

The EU institutions agreed on the final draft of the Preventive Restructuring Frameworks Directive (2016/0359) in December 2018. It was adopted by the European Parliament on 28 March 2019 and will be enacted into each member state's law within the next two years.

The French Parliament is in the process of adopting a law (on the Action Plan for Business Growth and Transformation) that will allow a very quick transposition of this Directive into French domestic law, in addition to a substantial reform regarding its security legal framework. The transposition of the Directive will most probably include modifications to the current safeguard proceedings to implement classes of creditors and the possibility to use cross-class cramdown.



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Prior to joining Goodwin in 2019, she was a partner at White & Case LLP, where she was in charge of the Financial Restructuring and Insolvency practice.

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Céline co-heads the turnaround committee at France Invest, a French private equity association, and serves on the editorial board of the Global Restructuring Review. She is also a member of the Association pour le Retournement des Entreprises (ARE) and the Turnaround Management Association (TMA).



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