

Global Restructuring & Insolvency Guide

France

Overview and Introduction

France has two separate regimes operating in respect of the insolvency of an individual and a corporation.

The main objective of these regimes is to “save” the debtor in financial difficulties by offering several ways to renegotiate its debts with its creditors as soon as possible.

Applicable Legislation

French Bankruptcy Law is codified as follows:

- The personal insolvency regime is governed by articles L330-1 of the French Consumer Code;
- The corporate insolvency regime is governed by Book VI of the Commercial Code¹ (*Des Entreprises en Difficultés*). Several laws and orders have modified this regime; primary recent legislation is dated 26 July 2005,² 18 December 2008, 22 October 2010 and 12 March 2014.

Personal Over-Indebtedness

The procedure of processing a situation of over-indebtedness was reformed for the fifth time in 2010. The objective of the law is to avoid excessive debts of the private individual by establishing a faster and more efficient procedure.

Type of Debtor Concerned

The over-indebtedness procedure is available to natural persons who are well-intentioned and facing “the manifest impossibility” of meeting “either all of his personal debts due now and in the future or fulfilling an undertaking he has given to guarantee or jointly and severally settle the debt of an individual contractor or a company when he was not a de facto or de jure executive thereof”.

Steps of the Proceeding

The debtor may file a petition before the commission of over-indebtedness in order to obtain the suspension of execution’s procedures against his assets.

The debtor delivers the file and reveals his assets and details of his holdings to the commission.

The commission will then start a preliminary investigation and hearings. The commission rules on the case’s admissibility within three months.

If the petition is granted, the automatic suspension of the creditors’ rights of recourse and the interruption of the debtor’s payments for a maximum one year is declared.

A mission of conciliation is implemented by the elaboration of a conventional plan of recovery approved by the debtor and his main creditors. The debt rescheduling measures provided for in the plan cannot exceed eight years.

¹ Article L. 610-1 of the Commercial Code.

² *Loi de Sauvegarde des Entreprises*.

If the mission of conciliation fails, at the debtor's request the commission can impose either ordinary measures (e.g. a rescheduling of the payment of debts of all kinds) or extraordinary measures (e.g. the suspension of the obligation to pay the debts).

If, while executing the plan or the measures imposed by the commission, the situation of the debtor becomes irremediably compromised, the commission may recommend:

- A measure of relief from debts without liquidation;
- A measure of relief from debts with liquidation, if the debtor has sufficient assets.

Both cases lead to the suspension of the rights of recourse for actions made against the debtor, and eventually to the total erasing of its non-professional debts.

Corporate Insolvency

Types of Procedure

A company that faces financial difficulties may be placed into the following procedures:

- *Ad hoc* mandate;
- Conciliation;
- Safeguard;
- Accelerated financial safeguard;
- Accelerated safeguard;
- Reorganisation;
- Liquidation.

The first five procedures mainly concern companies that are not in cessation of payments (*cessation des paiements*) (or, in conciliation cases, if it has suspended its payments for less than 45 days). A company is in cessation of payments when it is not able to pay its debts with its available assets.

The last two procedures apply to companies in cessation of payments. The liquidation of the company is a terminal procedure ordered when the company has no chance of recovery.

Ad Hoc Mandate

The *ad hoc* mandate (*mandat ad hoc*) is an attempt to prevent bankruptcy whereby an *ad hoc* representative is appointed by the President of the Commercial Court to devise possible solutions to the debtor's financial problems.

Only the legal representative of the company can request the opening of such proceedings. The legal representative files a petition before the President of the Commercial Court.

Usually, the *ad hoc* representative is chosen from the official list of judicial administrators.

The appointment of an *ad hoc* representative has no binding effect on third parties or participants. There is no stay of legal proceedings, and the effects of any negotiated settlement are purely contractual in nature.

The assignment can be quite varied, ranging from solving a single problem to providing a wide array of assistance and support.

The representative can also conduct negotiations or mediation for the purpose of restructuring the company.

Such a procedure is strictly confidential.

Conciliation Proceeding

Any company that is facing actual or foreseeable difficulties can apply to the President of the Commercial Court to request the opening of a conciliation proceeding. The company may even request the opening of a conciliation proceeding if it is already in cessation of payments, provided that it has suspended its payments for less than 45 days. Only the legal representative of the company can request the opening of such proceedings.

The President of the Commercial Court appoints a conciliator, who is usually chosen from the official list of judicial administrators, for a maximum of four months. (This period can be exceptionally extended, provided that the whole conciliation period does not exceed five months.)

The conciliator's assignment is to try to resolve the financial difficulties of the debtor by seeking an agreement between the debtor and its main creditors. Such an agreement usually provides the payment of debts in several instalments and/or the abandonment of part of the debts.

Conciliation is a purely contractual proceeding between the debtor and its creditors. There is no stay of claims or legal actions for payment.

The payment plan, agreed between the debtor and its creditors, may be:

- Recorded (*constaté*) by the President of the Court (in this case, it remains confidential); or
- Approved (*homologué*) by the court provided that: the debtor is not in cessation of payments; the agreement allows the durability of the business to be ensured; and the agreement does not harm the creditors who are not party to it.

In the latter case, if, at a later date, the debtor is placed under reorganisation (*redressement judiciaire*) or liquidation (*liquidation judiciaire*) proceedings, the court cannot determine the date of cessation of payments to be earlier than the time of the approval of the agreement.

Furthermore, companies which provided new cash to the debtor under the agreement are privileged in case of further reorganisation or liquidation proceedings (*privilège de l'argent frais*). As they are given priority in repayment, the debtor will have an easier time convincing the creditors to participate in the financial restructuring of the company.

The judgment approving the agreement is published. In such a case, the agreement will not be confidential.

The advantage of conciliation for an insolvent company is that it provides invaluable help in avoiding bankruptcy.

Safeguard Proceeding and Reorganisation Proceeding

The safeguard and the reorganisation proceedings both allow a company to reorganize its outstanding debts and continue to operate its business while a draft plan of safeguard or plan of reorganisation is being established. The safeguard and reorganisation proceedings engender highly similar effects (see below). The respective requirements to open the proceedings are, however, to be distinguished.

A safeguard proceeding (*sauvegarde*) can be started only at the request of the company's legal representative upon justification that the company has difficulties that it cannot overcome. Therefore, the company's legal representative is not entitled to file a petition for safeguard proceedings if the company is already in cessation of payments.

A reorganisation proceeding (*redressement judiciaire*) must be initiated when the company is already in cessation of payments. There are two main ways of initiating reorganisation proceedings:

- Voluntary filing: the company's legal representative *must* petition the court to open reorganisation proceedings within 45 days from the date on which the company became unable to pay its debts as they become due; or
- Third party filing: any unpaid creditor may request the opening of reorganisation proceedings.

Observation Period

The opening judgment initiates the commencement of a six-month observation period, which may be extended once by the court for an additional six-month period.

During the observation period, the company's financial, economic and employment situation is assessed and a proposed rescue plan is drafted.

Debts incurred during the observation period for the purposes of the business are paid as they mature and upon liquidation or transfer of all the assets in preference over all other claims, including certain privileged or secured claims, with the exception of privileged labour claims.

Role of the Administrator and the Creditors' Representative

The creditors' representative (*mandataire judiciaire*) and the administrator(s) are appointed by the court in the opening judgment.

The creditors' representative represents all creditors (except employees) in the proceeding.

The judicial administrator's role is to evaluate the economic and financial situation of the company, to supervise or assist (*mission de surveillance ou d'assistance*) the managers of the company who remain in charge of the management of the company, and to analyse the draft rescue plan.

In reorganisation proceedings, the powers of the company's directors may be suspended.

Ongoing Contracts

During the observation period, the administrator may demand that existing contracts with both vendors and customers continue to be honoured, notwithstanding any legal or contractual provision to the contrary.

The administrator may select which contracts are to be continued on the grounds that they have a positive effect on the bankruptcy cash flow or improve the chances of finding a successor or continuing the operation.

If the administrator decides to continue a contract, he must comply with the terms and conditions of the contract in effect at the date of the opening judgment.

The administrator may also decide to terminate unilaterally and without prior notice any contract with both vendors and customers if he considers that it is not necessary or has a negative effect on the situation of the company. In such cases, the contracting party may claim for damages resulting from the termination of the contract. However, such damages are considered as pre-bankruptcy claims which have to be filed with the creditors' representative.

Claims

Creditors to whom the company became indebted prior to the commencement of the insolvency proceedings are required to file (declare) their claims in the insolvency proceedings within two months (four months for creditors domiciled outside France) of the publication in the BODACC (*Bulletin Officiel des Annonces Civiles et Commerciales*) of the judgment opening the proceedings. The declaration must specify the nature and amount of the claim. Failure to file the claim within this time limit bars the creditor barred from receiving distributions in the insolvency proceedings. However, the debtor must provide to the administrator and the creditors' representative a list of the creditors to whom the company became indebted prior to the commencement of the insolvency proceedings. The debtor is presumed to have filed claims on behalf of the listed creditors until the creditors file their claims.

Moratorium

This procedure grants an automatic stay of all actions against the company and individuals acting as guarantors and joint debtors.

The proceeding entails:

- A prohibition, during the observation period, against paying any debt that arose before the opening judgment;
- Contractual and legal interest on debts ceasing to accrue (except in respect of loans for a term of one year or longer);
- A stay of proceedings for judgment on debt payments; these proceedings resume once the judicial administrator has been joined to the action, but the purpose of the proceedings is then only to fix the amount of the claim declared by the creditor;
- A stay on termination of contracts on the basis of payment default;
- A stay on enforcement measures by existing creditors;
- Prohibition of any new enforcement measures; and
- Possible debt waiver from tax and administrative bodies (but not for indirect taxes other than penalties and late interest).

The following exceptions to the automatic stay are provided:

- Set-off between connected claims: the French Supreme Court held that obligations are connected when they (i) result from a single contract, (ii) are carried out under a contract setting out the business relationship between the parties, or (iii) are carried out under separate contracts which constitute a single global contractual arrangement;
- Claims secured by a security interest conferring a retention right: during the observation period, at the request of the administrator, the insolvency judge may exceptionally authorize the payment of a pre-filing creditor to obtain from that creditor the surrender of the retained asset to the estate. The asset must be necessary to the debtor's pursuit of its business activity. Note that creditors with a retention right resulting from possession of an asset belonging to the debtor company (and not from a security interest) have the same rights; and
- Claims assigned by way of Dailly assignment of receivables: Dailly assignment refers to the assignment for security by a credit institution of any claim that it may hold against a third party private-law or public-law legal entity or individual (if the claim relates to his business activities), simply upon submission of an advice note. The credit institution to which the debtor's receivables have been assigned by way of Dailly assignment can directly seek payment of the assigned receivables, notwithstanding any filing for safeguard or reorganisation proceedings.

Safeguard/Reorganisation Plan

The draft safeguard/reorganisation plan must be submitted to the creditors, who then vote on the plan.

Two creditors' committees must be created if the accounts of the creditors have been either certified by statutory auditors or prepared by chartered accountants and the debtor has more than 150 employees or an annual turnover greater than EUR 20 million. Upon request of the debtor or the judicial administrator, the court can order the creation of creditors' committees even though these criteria are not met.

There are two categories of creditors: credit institutions and major suppliers (i.e. suppliers holding more than 3% of the total of the suppliers' claims), which are organized through committees.

The committees can discuss and vote on the safeguard plan proposed by the company. The safeguard/reorganisation plan can involve debt-restructuring, recapitalisation of the company, debt-for-equity swaps, sales of assets and partial sale of the business. A differential treatment of the creditors may be provided for if the differences in situation justify it; subordination agreements and agreements submitting a creditor's vote to specific conditions are enforced. For a committee to approve the plan, the creditors representing at least two-thirds of the amount of claims held by the members of that committee must vote in favour.

Bondholders, although not members of the committees, must be consulted separately as a group once the committees of creditors have approved the plan.

If both committees and the general meeting of bondholders accept the draft plan and the court is satisfied that the plan protects the interests of the creditors as a whole, the court will approve the safeguard plan. From the date of the judgment approving the plan, the plan will be binding on all members of the committees and on the bondholders, including those who voted against the draft plan.

The court's decision approving the plan must occur within six months of the opening judgment. Failing that, the creditors' consultation will be undertaken according to the standard consultation process (i.e. the creditors will be consulted individually). If one or both of the committees or the general meeting of the bondholders rejects the plan, or the committees or the bondholders do not vote within the period provided for by law, or the court does not approve the draft plan notwithstanding the approval of the committees, the committees will be dissolved and the safeguard/reorganisation proceedings will continue. The judicial administrator will seek individual agreements with each creditor to cancel or reschedule their debts as if they were creditors outside the committees.

Regarding the creditors who are not members of the committees or bondholders, the administrator makes individual arrangements with them to reschedule and/or waive part of their claims. With respect to dissenting creditors (i.e. creditors who are individually consulted and do not accept the proposition made by the administrator), the court can reschedule repayment of their debts over a maximum period of 10 years, except for debts with maturity dates of more than 10 years, in which case the maturity date will remain the same. In such a case, the first payment must be made within a year of the judgment adopting the plan. In the third and subsequent years, the amount of each annual instalment must constitute at least 5% of the total amount of the debt. The court cannot force a dissenting creditor that is not a member of a committee or a bondholder to waive part of its claim or to swap debt for equity.

If a safeguard plan is approved, the court appoints an insolvency practitioner (*commissaire à l'exécution du plan*) who ensures that the safeguard plan is implemented in accordance with its terms.

Accelerated Financial Precautionary Procedure, or the French Pre-Packaged Restructuring

Objectives

The objective of the law of 22 October 2010, which created the accelerated financial precautionary procedure, is to facilitate the recovery of companies whose operational activities are not in deficit, but which have a financial debt not conveniently adapted to their capacity of repayment.

The law's purpose is also to enable companies whose activities are viable but which are strongly indebted to their financial creditors (financial institutions and bondholders) – and for which a conciliation procedure did not succeed in overcoming their difficulties because of recalcitrant minority creditors – to attain a safeguard plan that will bind only the debtor and its financial creditors.

The ordinance dated 12 March 2014 has extended this procedure to creditors other than financial creditors by creating the accelerated precautionary procedure.

Duration

The proceedings last a maximum of one month starting from the opening judgment of the safeguard proceedings for accelerated financial precautionary procedure (it is possible to renew this period once) and three months starting from the opening judgment of the safeguard proceedings for accelerated precautionary procedure.

Conditions of the Company's Eligibility for the Accelerated Financial Precautionary Procedure

To request such proceedings, the company must fulfil the following conditions:

- Have more than 20 employees, or an annual turnover above EUR 3 million;
- Not be in cessation of payments;
- Face serious financial difficulties;
- Have started a conciliation procedure; and
- Have in place a sustained plan for future activities and financing, a list of debts elaborated by the auditor and a list of goods and services.

The Procedure

- Introduction of a demand, by the debtor, to the court;
- Report issued by the conciliator;
- Decision by the court as to whether to open the procedure;
- Setting up of the meeting of the financial creditors and, if applicable, of the bondholders' meeting on the day of the opening judgment (L. 628-4);
- List of the debts drawn up by the debtor and transmitted to the court within 10 days from the opening judgment (L. 628-7 & R. 628-8);
- Proposals by the debtor submitted to the concerned creditors (L. 626-30-2), who vote on the proposals within 20 to 30 days following the transmission of the proposals; the court may reduce this timescale to **8 days** for the meeting of the financial creditors and to **10 days** for the bondholders' meeting (L. 628-10);
- Plan adopted within **one month** (renewable once) from the opening judgment; if this deadline passes, the court will terminate the procedure.

Conditions of the Company's Eligibility for the Accelerated Precautionary Procedure

To request such proceedings, the company must fulfil the following conditions:

- Have more than 20 employees, and an annual turnover greater than or equal to EUR 3 million or a balance sheet greater than or equal to EUR 1.5 million;
- Not having been in cessation of payments (for more than 45 days);
- Face serious financial difficulties;
- Have started a conciliation procedure; and
- Have in place a sustained plan for future activities and financing, a list of debts elaborated by an auditor and a list of goods and services.

The Procedure

- Introduction of a demand, by the debtor, to the court;
- Analysis by the court of the report issued by the conciliator;
- Decision by the court as to whether to open the procedure;

- If the court decides to open the procedure, setting up of the creditors' committees (if the committees have not already been set up);
- List of the debts drawn up by the debtor and transmitted to the court within 10 days from the opening judgment;
- Proposals made by the debtor submitted to the concerned creditors (L. 626-30-2), who vote on the proposals within 20 to 30 days following the transmission of the proposals; the court may reduce this timescale to 15 days;
- Plan adopted within **three months**; if this deadline passes, the court will terminate the procedure.

Liquidation

If it is obvious that the company in cessation of payments has no chance for recovery, the court immediately orders its judicial liquidation.

Furthermore, at any time during the observation period, the court can order the liquidation of the company if it appears that the company has no more money to continue operating.

In case of liquidation, there is also an immediate stay of claims. Contracts entered into by the debtor are automatically terminated, except if the court orders a temporary continuation of the business.

The employees must be dismissed within 15 days of the judgment ordering the liquidation.

Clawback Mechanisms

The opening judgment determines the date on which the company effectively became unable to pay its debts as they came due.

This date, which may be a maximum of 18 months before the date of filing, is of particular importance because certain payments made, or commitments entered into, by the company during the period between that date and the date of the opening judgment (the clawback period (*période suspecte*)) are subject to cancellation by the court if they are not found to be in the interest of the company.

Sanctions

The sanctions hereafter described apply to official and *de facto* managers. Consequently, if the judicial liquidator considers that a person has intervened in the day-to-day management of the company, said person may be subject to the same criminal/civil sanctions as if he had been a duly appointed legal manager of the company.

This could be the case, for instance, for an officer or director of the parent entity/affiliate company. In such cases, the liquidator may consider that the parent entity/affiliate company was a *de facto* manager since it made decisions on behalf of the company.

Financial Sanctions

The sanction hereafter described only applies in case of judicial liquidation or cancellation of a continuation plan. It does not apply when a continuation plan is approved by the court and successfully completed. If the proceedings reveal that the insufficiency of assets results from a failure of management (*faute de gestion*), the court may decide that the debts of the company should be borne, in whole or in part, by its legal or *de facto* managers (*comblement de l'insuffisance d'actif*).

Under French statutory law, there is no definition of mismanagement. However, analysis of French case law shows that lack of investments, transfer of customers, continuation of a business in deficit, lack of restructuring of the company, incomplete accounting, etc. may be considered mismanagement.

Professional Sanctions

As described herein, and under a series of other causes for action, the court may, notably, forbid the managers to manage or control any company for at least five years (*faillite personnelle*).

Faillite personnelle may arise where managers misappropriate or conceal assets or fraudulently increase liabilities, having omitted to make the declaration of cessation of payments within the time limit of 45 days.

Criminal Sanctions

Managers will be charged with bankruptcy (*banqueroute*) if they have, notably, misappropriated or concealed assets, fraudulently augmented liabilities or, with intent to avoid or postpone the commencement of the judicial reorganisation, made purchases in order to resell them below the market price or employed ruinous methods to obtain funds. The managers charged with *banqueroute* are subject to imprisonment of five years and a fine of EUR 75,000.

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