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ARTICLE

Prepacks under French Insolvency Law

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Synopsis

The concept of prepack refers to different transactions whether you are in the United States where a prepack is a pre-negotiated plan of reorganisation implemented in subsequent insolvency proceedings or in the United Kingdom where a prepack is an assets or business sale transaction prepared ahead of administration.[1] French insolvency law was inspired by both regimes and the concept of prepack may refer to prepack reorganisation plan or prepack sale plan. The common characteristic of French prepacks is that a debtor, together with a court-appointed third party, will prepare the contemplated plan under an amicable and confidential proceedings and implement it under subsequent insolvency proceedings.

Introduction

French insolvency law or *droit des entreprises en difficulté* is a constantly evolving branch of law, from a purely punitive set of rules against failing debtors in the first 'Napoleonic commercial code' in 1807 to a regime focusing on rescuing distressed businesses and saving jobs through reorganisation or sale process. Since the major 2005 law reform, which *inter alia* introduced the so-called 'French chapter 11',[2] 14 laws and ordinances,[3] almost one per year, have been passed and have amended, more or less thoroughly, the French pre-insolvency and insolvency regime, the last major reform passed being the transposition of the European directive on restructuring and insolvency by ordinance No. 2021-1193 dated 15 September 2021.

This constant evolution may partly be explained by the difficulty of the French legislator to find the right balance between opposed interests, mainly debtors and shareholders vs. creditors.[4] But on a more positive note, it may be viewed as the demonstration of the awareness of the importance to have an effective insolvency regime and therefore the result of the constant search for improvement.

The result is a comprehensive toolbox composed of four rescuing proceedings[5] which can be split between amicable proceedings (*mandat ad hoc* and *conciliation*) for private or out-of-court restructuring, and judicial proceedings (*safeguard* and *reorganisation proceedings*) which are court-driven processes to implement a restructuring plan ultimately approved by the court.

Recent improvements include the introduction of pre-packaged plans, also called prepack plans, which, under French law, combine amicable and judicial proceedings.

Overview of the French rescuing proceedings

On the one hand, amicable proceedings are confidential proceedings which purpose is to provide a negotiation framework under the aegis of an independent court-appointed third party (namely *mandataire ad hoc or conciliateur*) for the debtor to negotiate with their main creditors and solve their difficulties at an early stage with little involvement of the court. Typically, the measures discussed with the assistance of the *mandataire ad hoc* or *conciliateur* relate to debt rescheduling/forgiveness.

If the debtor reaches an agreement with their main creditors for the restructuring of its indebtedness, they will enter into a private agreement. Under conciliation, the agreement will enjoy some legal protection if it is acknowledged (*constat*) by the President of the court or approved (*homologation*) by the court. The court approval of the conciliation agreement allows parties who have granted the debtor additional financing in the form of debt during the conciliation or pursuant to the conciliation agreement to benefit from a so-called new money first priority rank vis-à-vis other

Notes

1 Jacqueline Ingram and Damilola Odetola, 'United Kingdom; Core elements of a Pre-Pack Administration' (2022) *Global Restructuring Review*.
2 The safeguard proceedings have been called that way because the debtor must not be insolvent to be eligible for them.
3 Set aside the numerous temporary measures enacted during the Covid-19 crisis.
4 French insolvency law being regarded as debtor-friendly.
5 As opposed to liquidation proceedings.

creditors in case the debtor eventually becomes insolvent afterwards.

The confidentiality of the amicable proceedings allows preservation of the goodwill of the debtor, facilitates the exchange of financial information between the debtor and the parties involved in the proceedings and limit the negative publicity resulting from the situation. But because those proceedings are mainly amicable, the debtor and the court appointed third party have very limited coercive capacity against dissenting stakeholders which can hinder the restructuring. Also, the debtor does not benefit from a general protection against actions launched by creditors, especially those not involved in the proceedings.[6]

On the other hand, judicial proceedings are public and aim to offer the debtor a safe haven to address operational issues and work on a reorganisation plan with an insolvency practitioner appointed by the court called *administrateur judiciaire*. It implies stronger court supervision and may affect, depending on the proceedings, the capacity of the Management to act alone. Moreover, as soon as they are opened by court, judicial proceedings automatically and instantly affect third parties' rights (automatic stay) which, together with the publicity of the proceedings, necessarily alters relationships with suppliers, banks and, depending on the business, with clients, and often provokes an employee drain. Those negative effects increase as the proceedings last.

Pre-packaged solutions or the building of bridges between amicable and judicial proceedings

Initially, amicable and judicial proceedings were fully separate procedures serving different goals and aiming at different outcomes. However, the French restructuring market and French legislator have progressively drawn from the US and the UK prepackaged solutions and built bridges between out-of-court and judicial proceedings to try and overcome the drawbacks of both.

In a nutshell, the US prepack plan relates to a pre-negotiated plan of reorganisation that is ultimately implemented with the benefit of the pre-approval of the requisite creditor groups under a chapter 11 procedure whereas in the UK, prepack relates to the prearranged sale of a business as a going concern or assets, which is ultimately implemented under administration.

Both regimes inspired French insolvency law.

The first illustrations of prepackaged reorganisation plans in France are the restructuring of Autodis, a French car parts supplier, in 2009, and Technicolor (formerly known as Thomson) in 2010 which were implemented without a specific legal framework. In both cases, the inability to reach unanimous consent (which was required pursuant to the credit documentation) made it impossible for a work-out under conciliation. However, the broad support of the proposed plans of reorganisation drafted during the conciliation by involved creditors lead the debtors to file for safeguard proceedings in order to have the proposed plan approved by creditors' committees with a two-thirds majority rule.

Acknowledging the efficiency of what was quickly called the '*à la française prepacked plan*' and to ease the use of such process, the French legislator introduced the prepack reorganisation plan in 2010 with the creation of the so-called accelerated financial safeguard (*SFA*[7]).

Few years later, in 2014, the French legislator introduced the prepack sale plan which was called for by market players to shorten the public phase of a sale of assets plan by completing the preliminary and preparatory steps (marketing the business, due diligence processes, negotiations with bidders...) under a confidential framework.[8]

As always, these Anglo-Saxon-inspired procedures remain different from their *alter ego* and it is worth exploring the specificities of the French interpretation of the prepack solutions: the prepack reorganisation plan which implies debt restructuring and the prepack sale plan which implies the sale of the business.

1. The French version of the prepack reorganisation plan

The prepack reorganisation plan was brought in by Law No. 2010-1249 of 22 October 2010 through the introduction of the SFA which was initially reserved for financial restructuring – as its name suggests – and for large companies.[9] The prepack reorganisation plan has been made gradually accessible to smaller companies and now also allows the restructuring of non-financial debts. It's a two-step process: first the proposed plan is drafted and negotiated under conciliation proceedings and then implemented within the accelerated safeguard proceeding which has replaced the former SFA.

Notes

6 Under conciliation proceedings, on a case-by-case basis, it is possible to obtain from the court the freeze of non-participating creditors' claims.
7 *Sauvegarde financière accélérée*.
8 Which is similar to the US 363 sale process.
9 Company with a total balance sheet exceeding 25 million euros or 10 million euros for companies controlling a company with more than 250 employees or a turnover exceeding 20 million euros.

Phase 1: Negotiation under amicable proceedings

The accelerated safeguard proceeding is only eligible to debtors involved in an ongoing conciliation proceeding opened by the President of the commercial court. Therefore, it means that the accelerated safeguard proceeding is not availaible for companies being insolvent[10] for more than 45 days before the opening of the conciliation. Often a *mandat ad hoc* precedes a conciliation proceeding to extend the negotiation period which would otherwise be limited to five months.

During this preliminary phase, the debtor, together with the conciliator, will try and reach an agreement with their creditors and the opening of the accelerated safeguard will be considered only if the debtor fails to reach a unanimous consent for the proposed work-out because of dissenting or simply unknown creditors.

When the opening of an accelerated safeguard is contemplated, the debtor and the conciliator will work on the proposed reorganisation plan which will be discussed with the creditors involved in the conciliation. Because the duration of the subsequent judicial proceedings is very short, the debtor and the conciliator will also need to work on the definition of the creditors committees which will vote on the proposed plan in order to be able to gather them immediately after the opening of the accelerated safeguard.

Once the debtor and the conciliator are ready, they file a motion with the bankruptcy court (usually the commercial court) for the opening of the accelerated safeguard proceedings.

Phase 2: Implementation under accelerated safeguard proceedings

Opening of the proceedings – To be eligible to the accelerated safeguard proceedings, besides being involved in a conciliation, the debtor only needs to have their accounts drawn up by a chartered accountant or certified by a statutory auditor (L.628-1 of the Commercial Code). Thus, it is, legally speaking, no longer a procedure reserved for large companies. Also, the debtor will need to demonstrate to the court that the proposed plan drafted during the conciliation is likely to be adopted, with the requisite majorities, by the parties impaired by the proposed plan within the provided time limit i.e., two months renewable once.

The conciliator will submit to the court a report where they will give their opinion on the likelihood of the approval of the proposed plan by impaired creditors.

In addition to being an expedite proceeding, or '*a flash restructuring*',[11] – the plan needs to be approved within two to four months whereas non-prepack plans were generally approved after 12 to 14 months[12] – the accelerated safeguard is also a simplified and semi-collective version of the safeguard proceedings.

Simplified because within the accelerated safeguard regime, *inter alia*:

- ongoing contracts are not affected by the proceedings (no early termination);
- creditors involved in the conciliation proceedings and impaired by the proposed plan do not have to file proof of claims to have their claims acknowledged by the proceedings, and
- owners of goods within the possession of the debtor (because of a retention of title clause for instance) do not need to have their ownership acknowledged.

Semi-collective because the opening of this safeguard only affects the rights of creditors impaired by the proposed plan. Typically, when the debtor only faces too heavy a financial burden, the accelerated safeguard may only affect financial creditors and leave the debtor's suppliers unaffected.[13]

Vote of the proposed plan – Before the transposition in France of the European directive on Restructuring and Insolvency on 1 October 2021, the proposed plan had to be approved by the committee of financial institutions and alike, the bondholders' committee, if any, and by the main suppliers' committee if the proposed plan was not limited to financial restructuring. Each committee had to vote in favor of the proposed plan for the court to be able to approve it. In other words, each committee called to vote had a right of veto disregarding the real value of each claim.

Since the above-mentioned reform, those three committees have been replaced by classes of affected parties, also inspired by their Anglo-Saxon counterparts, which gather into class parties having similar claims or interests. Affected parties may be creditors but also equity holders. These classes of creditors are designated by the debtor and the insolvency practitioner appointed by the court (usually the former conciliator) on a case-by-case basis taking into account the nature of the claim or interest.[14]

To be sanctioned by the court, the proposed plan needs to be approved by all classes of affected parties by the majority of two thirds. However, unlike the

Notes

10 A debtor is insolvent when unable to pay their outstanding debts with available assets.
11 In the words of Françoise Perrochon in F. Perochon, *Entreprise en Difficulté* (11th edn, LGDJ, 2022) 1815.
12 Despierre, Epaulard et Zapha, Les PC de traitement des difficultés financières des entreprises en France (période 2008-2014), avril 2018, France Stratégie, 9 à 11.
13 Article L.628-1 and L.628-6 of the commercial code.
14 Article L.626-29 et Seq. of the commercial code.

previous regime, each class of affected parties does not hold a right of veto since the new regime allow a cross-class-cram-down, the possibility to impose a plan to dissenting classes, if certain conditions are met.[15]

Approval of the proposed plan by the court – After the vote of the proposed plan by the classes of affected parties, the court may approve the safeguard plan as long as it believes that the proposed plan will allow the sustainability of the debtor and that the rights of the affected parties, especially the ones which voted against the proposed plan, are sufficiently protected.

If the debtor fails to have a plan approved within four months following the opening of the accelerated safeguard, the court will terminate the accelerated safeguard proceeding which is likely to result in the insolvency of the debtor (as the automatic stay will end) and make the opening of a regular reorganisation proceeding within 45 days mandatory.

Case study – Since the entry into force of the transposition of the European directive on Restructuring and Insolvency, few cases have used the prepack plan regime but it is worth mentioning the recent Pierre & Vacances-Center Parcs Group ('PVCP') restructuring case which gives a good illustration of the French prepack reorganisation plan under the new regime and its mains steps.

PVCP is the European leader in local tourism which was strongly affected by the Covid-19 crisis leading to significant losses and huge indebtedness including state guaranteed loans, RCF, bonds…

From 2 February 2021 to 31 May 2022, PVCP was the subject of successive amicable proceedings during which they discussed with their financial creditors and searched for new financing. Under these amicable proceedings, PVCP reached an agreement with their main creditors and a group of new investors but the consent of a specific category of creditors, the so-called ORNANE holders was impossible to obtain because of the difficulty to identify them. Consequently, PVCP filed a motion with the commercial court of Paris for the opening of an accelerated safeguard proceeding opened on 31 May 2022.

Immediately after the opening of the accelerated safeguard, the classes of affected parties, defined during the conciliation, were convened as early as on 3 June 2022 and every class voted in favour of the proposed plan on 8 July 2022. Ultimately, the commercial court of Paris approved the safeguard plan on 29 July 2022, less than two months after the accelerated safeguard was opened.

The prepack reorganisation plan proves to be a useful and efficient procedure but which requires real anticipation and may appear complex for SMEs, especially since the introduction of affected parties classes.

2. The French version of the prepack sale

Under French insolvency law, the sale of the business as a going concern has always been a solution to allow the continuity of the business (with a strong focus on saving jobs rather than repaying of creditors) when it is acknowledged that a reorganisation plan will not be viable mainly because of the amount of the prepetition claims, the need for new money or the need for deep reorganisation of the operations and business including redundancy plans.

Therefore, because it is a subsidiary solution under the regular procedure, the sale process is often not launched right after the opening of the proceedings but after a few months – i.e. when the difficulties of the company are widely known by the various stakeholders: customers, suppliers, competitors… – and it is conducted under the constraints of the remaining available cash, which often melt away overnight. The time constraint and the public nature of the process necessarily imply strong value destruction.

To try and mitigate this effect, the prepack sale was introduced by the legislator by order No. 2014-326 dated 12 March 2014, mainly the combination of articles L.611-7 and L.642-2 of the commercial code which respectively provide that:

(i) during the conciliation, the conciliator may be entrusted by the President of the court, at the request of the debtor and after consultation of the participating creditors, with the mission of organising a total or partial transfer of the business which could be implemented, if necessary, within the framework of a subsequent safeguard, reorganisation proceeding or liquidation; and

(ii) if the offer(s) received during the conciliation is/are deemed satisfactory, the court which opened the reorganisation proceeding may decide within the opening judgment not to set a new period of time for submission of offers and immediately set a date of examination of the offer(s) already received,

At the opening of the amicable proceeding, the prepack sale procedure is rarely the preferred route but it becomes the option when it is acknowledged by the debtor's Management and the conciliator that (i) a standalone solution is not viable (mainly because the existing shareholder(s) cannot or do not want to extend their financial support) and that, after a regular M&A process, (ii) a share deal is not possible because:

Notes

15 Article L.626-32 of the commercial code: mainly a majority of classes approved the proposed plan including at least one having security rights or at least one class 'in the money'.

(i) the debt restructuring required by third party investors is refused by creditors, and/or

(ii) the contemplated investors are not ready to finance the necessary redundancy plan.

The debtor and the conciliator may also start a prepack process as leveraged in their discussions with the creditors for which a prepack sale could be detrimental as it limits their chance of recovery.

The objective of the prepack sale is to prepare the transfer of the business as a going concern to a third party under a confidential process and implement it under accelerated court-driven proceedings which will allow the purchaser:

– to precisely define the scope they wish to take over (assets, contracts and employees) leaving to the liquidator the responsibility and cost of termination of contracts and redundancy plans for employees not taken over,

– to leave behind the prepetition claims.

The sequence of the prepack sale is the following:

Phase 1: preparation of the sale under amicable proceedings

The prepack sale process starts with the opening by the President of the court of an amicable proceeding, often a conciliation. The conciliator may be entrusted with the mission of seeking bidders at the very beginning or during the proceeding, after requesting the opinion of participating creditors. The creditors' consent is not a required condition for the approval of the debtor's request by the commercial court and they are not at the initiative of the process.

The bidding process is conducted by the conciliator (or the *mandataire ad hoc*) whose first mission is to identify potential candidates for the acquisition of the debtor's business. Pursuant to article L.642- 40 of the commercial code, the conciliator must take measures to ensure sufficient publicity to identify potential purchasers. Although the notion of 'sufficient publicity' is not legally defined, the respect of these provision is controlled by the court and the public prosecutor. In fact, the court will want to ensure that, even if hasted, the process remained as competitive as possible in order to get the best possible offer.

In practice, to make sure that the bidding process will be deemed satisfactory by the court, the conciliator will often rely on the support of an investment bank which will conduct and document the entire process.

The conciliation proceeding cannot last more than five months and it is not possible to open two conciliation proceedings consecutively. However, if it is anticipated that five months may not be enough to complete the process, a *mandat ad hoc*, which can be renewed as many times as needed, can precede the opening of the conciliation proceeding.

During the conciliation, bidders will submit their offers with the conciliator. These first offers need to be satisfactory enough to allow the conciliator to ask the court for an expedite process but they will not be the definitive offers as they can be improved (but not altered) during the next step. Neither the conciliator nor the debtor can preselect an offer amongst others. As long as they meet the legal requirements, all offers need to be presented to the court. On the contrary, the court may be reluctant to accept an expedite process if only one offer has been filed during the conciliation.

Phase 2: implementation under expedite court-driven proceedings

Once the conciliator and the debtor believe they have received satisfactory offers, the debtor files a motion for the opening of a court-driven proceeding, usually a reorganisation proceeding, to implement the sale.

During the opening hearing, if the court considers that the offers submitted during the conciliation are close enough to the legal requirements and that the bidding process benefited from sufficient publicity to generate offers, the court will decide to discard the public bidding process and immediately set a hearing date for the examination of the offers.

The hearing for the examination of the offers will often take place around one month after the opening of the proceedings. During this period, the employees' representatives will be informed and consulted on the offers submitted and, as the case may be, a redundancy plan implied. Bidders have until up to two days before the hearing to improve their offers mainly by increasing the price and/or the number of employees taken over. Also, it must be noted that it is theoretically possible for bidders not involved during the conciliation proceedings to submit offers. In practice, bidders involved in the preceding confidential process are clearly a step ahead of such newcomers.

The court examines the offers, as for any other sale in the context of an insolvency proceeding, based on the following criteria: (i) sustainability of the activity, (ii) preservation of jobs and (iii) the price offered for the repayment of creditors.

Within two to three weeks, the court will approve a sale of assets plan granting the best bidder the business as a going concern. The judgment approving the sale of the assets plan will authorise the layoff of employees not taken over and order the transfer of contracts needed to keep the business on going. The liquidator will distribute the proceed of the sale amongst the creditors pursuant to their respective ranks.

Case study

One of the first implementations of a prepack sale in France was the sale of Fram, a travel agency, in 2015.

Under successive *mandats ad hoc* and conciliations, Fram's primary goal was to identify new capital partners and restructure the business through the sale of non-strategic assets. However, due to the deterioration of the business performance following terrorist attacks in France, such outcome became unrealistic. Therefore, under the conciliation proceeding, Fram launched a sale of assets process to be implemented within a subsequent insolvency proceeding.

The confidentiality of the process was crucial to avoid a client drain which would have worsened the situation. When the process became public, when the court opened the reorganisation proceedings, Fram could announce that three bidders were interested in buying their assets which was reassuring for their stakeholders.

Only two weeks after the opening of the insolvency proceeding on 30 October 2015, the court examined the offers and approved a sale of assets plan.

Conclusion

Although difficult to measure, the efficiency of prepack solutions is not really questioned as it limits the time spent under public insolvency proceedings and encourage consensual solution rather than plan imposed to shareholders or creditors by court decision which increase the likelihood of a turnaround. Moreover, beyond the number of actual prepack plans achieved since their introduction under French law, prepack plans also play a major a role in out of court restructuring as it is used as a threat to encourage stakeholders to reach an agreement under amicable proceedings.

However, the confidentiality of the preparatory phase should not turn into a lack of transparency to support solution for the benefit of a specific group of people (management, shareholders, specific creditors…) but detrimental to the business and/or the other stakeholders. Also, practitioners should always consider the risk of failure of the prearranged solution and keep sufficient financial leeway to contemplate regular insolvency proceedings.

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