International Corporate Rescue

ChaseCambria

3-4 SOUTH SQUARE BARRISTERS

UCL LAW FACULTY
CENTRE FOR COMMERCIAL LAW

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

Annual Subscriptions:
Subscription prices 2010 (6 issues)
Print or electronic access:
EUR 695.00 / USD 845.00 / GBP 495.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

French Pre-packs: Key Stages and their Related Issues

Anker Sørensen, Partner, and **Andrew Tetley**,[1] Counsel, Reed Smith, Paris, France

This article should prove essential reading for those with an interest in restructuring businesses and distressed M&A transactions in France and who are looking at the possibilities offered by the new French safeguard procedure. It focuses on key steps of the accelerated turnaround process, commonly known as a 'pre-pack à la française', which can be achieved through the safeguard legislation. Interestingly, the current legislation does not specifically provide for a pre-pack process, but practitioners have recently bent it to this purpose.

> 'Europe appears to be one of the most promising regions for investors in distressed debt', *Financial Times*, 2 October 2009

The above headline reflects the market feeling that in Europe, through the recent crisis, companies have been able to delay but not avoid the need to restructure. In a recently reported survey with respect to France, two thirds of professionals polled were anticipating the number of restructurings over the coming year to double, with 16% anticipating even more than this.[2]

For those having to address distressed debt in Europe, be it as a potential new investor or as a company looking to restructure internally, it is critical to understand the possibilities and limitations of the available legal and quasi-legal procedures in the country where the distressed company operates. Safeguard proceedings are the most recently introduced French mechanism by which a failing company can be speedily and efficiently turned around. Safeguard proceedings take their inspiration from US Chapter 11 proceedings. The concept was introduced into French law in 2005 but was significantly fine-tuned by the French legislator in 2008, with the amended legislation in force as from 15 February 2009. The central feature of safeguard proceedings is that the debtor remains largely in control of the business but under the supervision of a court appointed administrator, and ultimately the Court. One of its key features is that, with the support of major creditors, it enables a debtor to 'cram down' claims by minority creditors through voting procedures available in creditors' committees.

In France, safeguard proceedings have paved the way for some innovative approaches to restructuring distressed companies. In particular, they offer the opportunity to implement 'pre-pack' arrangements – whereby the restructuring plan may be partly prepared in advance of court proceedings with the subsequent court proceedings serving (a) to allow the debtor and its major creditors to impose the plan over protests from minority recalcitrant creditors and (b) to formalise the plan under the protection of a Court process. Such 'pre-packs' à la française are not directly comparable to UK pre-pack administrations or US style pre-pack arrangements. For example, one key difference between a 'pre-pack' arrangement in France and the US Chapter 11 pre-pack equivalent is that the operative voting takes place after commencement of the court process, not before. In this sense, the French 'pre-pack' is more akin to a US styled pre-negotiated plan. Nevertheless, in all three countries the respective processes share the same core objective of achieving turn around of a struggling business in the shortest time possible so as to maximise value for stakeholders.

This article explores the possibilities, and limits, of the developing practice of pre-pack arrangements. At the core, for those considering pursuing this avenue, an important question to ask is what is the best case timetable to drive through a 'pre-pack' plan in France. The short answer to this question is under two months. In one of the first significant cases under the new provisions, involving a company called Autodis, and as recorded in the judgment of the Tribunal de Commerce d'Evry, 6 April 2009, this timetable has already been achieved. However, to succeed by this route, the distressed company and its stakeholders need to anticipate and address a number of issues. What follows is therefore an attempt to offer a blueprint or step plan for this purpose, that must of course be adapted and tailored to the individual circumstances of the case in the question. The timings indicated below reflect a

Notes

1 Andrew Tetley is an associate member of CREOP (EA4332), a business research centre in France.
2 Survey commissioned by Alix Partners, reported in l'AGEFI on 16 October 2009.

best-case scenario. In the process, it should be noted, it may be that the company arrives at a solution that does not require court intervention.

T–4 months: Prepare the pre-pack plan

One of the first considerations to bear in mind is that any successful pre-pack, and more generally, any safeguard procedure will require the debtor to take steps in advance of encountering serious financial difficulties: the debtor may invoke the safeguard procedure where it can show that it is encountering difficulties which it is not in a position to overcome. This is a flexible test, but safeguard proceedings should be invoked prior to the debtor encountering cashflow problems. In French terms, the critical criterion is that of '*cessation de paiements*' – payment failure: where the debtor is no longer able to meet current debts from available assets. Once in '*cessation de paiements*', a debtor may no longer invoke safeguard proceedings and the chance of a pre-pack approach is thereby lost.[3]

Typically, a debtor would look to negotiate with its principal creditors to ascertain that it has the support needed to succeed on a pre-pack approach. In any significant safeguard proceedings,[4] the debtor is required to put its restructuring plan to the vote of two creditors' committees. The first of the committees is made up of financial and assimilated institutions and lenders, while the second is made up of the debtor's principal suppliers. A third body of stakeholders must also approve the plan – the bondholders (if any).

For significant and well planned restructurings, it is common for an ad hoc representative to be involved in the negotiations leading up to the safeguard proceedings. The ad hoc representative is a court appointed third party whose role is confidential and consists in assisting the debtor to find a viable solution for the debtor and his main creditors. Such solutions often take the form of a moratorium, which may be combined with a cash injection by a current or new shareholder and in some instances also loans by financial institutions, together with waiver of debt and debt for equity swaps. It will be important to use the time with the ad hoc representative, which may last for a number of months, to lay the groundwork for a successful pre-pack arrangement through the safeguard proceedings. Indeed, it may be that the ad hoc process leads to an overall solution being reached without the need for court proceedings. But if there is significant minority creditor opposition, such a solution may not be possible. Safeguard proceedings will then be necessary to overcome such opposition and will require the support of major creditors.

One of the attractions of seeking an approved plan through a pre-packaged safeguard process is that there is considerable flexibility in how the plan may be structured. Where the creditors' committees approve a plan, it is possible to escape restrictions that would otherwise apply. Unlike a restructuring plan that does not have committee approval, a committee approved plan may impose obligations on the committee members that cannot be imposed on general creditors. For example, it may provide for debt equity swap, the plan can last more than 10 years, repayment of debt can be programmed to commence at any time, and creditors may be treated differently if justified by circumstances.[5]

T–3 days: File for safeguard proceedings

Once sufficient agreement has been reached with major creditors, the debtor initiates safeguard proceedings by filing application with the local Commercial Court which, in significant cases, involves seeking appointment of a judicial administrator. The debtor is entitled to put forward its preferred administrator and, with a view to expediting matters, it is advisable to propose the ad hoc representative who has assisted the stakeholders to this stage.[6] The application must set out the nature of the difficulties faced by the debtor and the reasons why they cannot be overcome.[7] Typically a hearing date will be set within a few days.

T+0 days: Court pronounces opening of safeguard proceedings

The hearing is in chambers and an employees' representative is entitled to be heard.

The Court has a discretion to hear any other party it considers may be useful[8] and will pronounce the

Notes

3 If a safeguard procedure is commenced and it later becomes apparent that the debtor was in fact in '*cessation de paiements*' when the Court ordered commencement of the proceedings, the Court must convert the proceedings into judicial administration proceedings; Art L.621-12 Commercial Code.

4 Where the debtor has more than 150 employees, or turnover in excess of EUR 20m: Art L.626-29 and R.626-52 Commercial Code.

5 See Art. L.626-30-2 Commercial Code.

6 Art. 621-4 Commercial Code. The Court is not bound to appoint the debtor's proposed administrator but usually will do so. The public prosecutor's office has a right of veto where the debtor seeks to nominate the ad hoc representative as judicial administrator.

7 Art L.620-1 and R621-1 Commercial Code. A number of accompanying documents to inform the Court of the situation are required, including the last annual accounts.

8 Art L.621-1 Commercial Code.

commencement of safeguard proceedings if satisfied that the criteria are met. If it does not have enough information to make a ruling, the Court can appoint a judge to investigate the financial, economic and employment situation of the company. In any pre-pack process, appointment of such a judge is likely to substantially delay and possibly compromise the pre-pack agenda, and care must therefore be taken to prepare the documents and present the position so as to eliminate this possibility.[9]

The safeguard procedure is commenced by the Court issuing a ruling, which gives rise to a general moratorium on claims[10] and an observation period of up to six months ensues. The ruling is subject to publication and the publication date marks the date from which time counts for the purpose of lodging claims.

During the observation period, no claims may be brought against the debtor company for pre-commencement debt and indeed the debtor is not entitled to pay such claims.[11]

The debtor can also require that a creditor perform current contracts, irrespective of any pre-commencement claim the creditor may have.[12] While in theory this six-month period can be renewed for two further six-month periods, in most pre-packs the debtor will be aiming to exit the observation period with a court approved restructuring plan well before the initial maximum six months allowable.[13] The Court will appoint a supervisory judge to oversee proceedings and, for most proceedings, a creditors' representative and judicial administrator will also be appointed.[14]

T+2 days: Ensure constitution of creditors' committees

One aspect, likely to affect bare holding companies whose sole purpose is to hold shares, should be addressed without delay. Where such a holding company is seeking to put in place a pre-pack, it is likely that it will not meet the criteria required for the constitution of creditors' committees – over 150 employees or in excess of EUR 20m turnover.[15] Without creditors' committees, it is not possible to impose a reduction in debt on a recalcitrant creditor. Thus, without creditors' committees, the restructuring plan envisaged by the debtor may be fatally compromised from the outset. In this scenario, it will be vital that application be made immediately upon commencement of the safeguard proceedings for an order that creditors' committees be constituted.[16] While in some cases arguments have been made that the safeguard procedure is not suitable for holding companies on the basis that the objective of the procedure is to maintain employment and pay off debt (Article L.620-1 Commercial Code), the present practice of French courts is to look favourably on applications made by holding companies in such circumstances.[17]

Two creditors' committees are constituted by the judicial administrator: The first comprises financial and assimilated institutions and lenders while the second is made up of the debtor's principal suppliers.[18] With respect to the first committee, in addition to the expected list of financial institutions who feature as of right, 'any other entity with whom the debtor has entered into a credit arrangement' is also entitled to participate. Thus in the case of intra group loans, a parent or sister company may find itself on a creditors' committee with a potentially key role in the vote on the restructuring plan of its related company.

The administrator must notify all qualifying creditors that they are members as of right of the relevant committee. No time limit is set for this but it will be important that notification be given without delay so that the creditors' committees can be constituted and receive the draft plan as early as possible in the proceedings.

Notes

9 It is a requirement of the safeguard process that the administrator draw up a company financial report (which may also need to address environmental issues): L.623-1 Commercial Code. In practical terms, work on this should be commenced as early as possible so that production of the administrator's report does not slow down the process.

10 Art. L.622-21 Commercial Code.

11 Art. L.622-7 Commercial Code. There are certain exceptions to this principle – eg set off with respect to connected claims (*créances connexes*).

12 Art. L.622-13 Commercial Code. Any contractual clause to the contrary is null and void.

13 Art. L.621-3 Commercial Code. The third six-month period extension is exceptional and can only be granted at the request of the public prosecutor.

14 Where a company has fewer than 20 employees and a turnover before tax of less than EUR 3m, the Court is not bound to appoint a creditors' representative or judicial administrator; Art. L.621-4 and R.621-11 Commercial Code.

15 See fn 4.

16 Application must be made to the supervisory judge and may be made by the debtor or the administrator; L.626-29 Commercial Code. No appeal lies from the decision of the supervisory judge to apply the section of the Commercial Code dealing with creditors' committees; R.626-54 Commercial Code.

17 See, for example, the judgment in Autodis, Tribunal de Commerce d'Evry, 6 April 2009. Only the debtor or administrator has standing to apply and application is to the supervisory judge appointed in the commencement order; Art. L.626-29 Commercial Code. In the event the supervisory judge rules in favour of constituting creditors' committees, the ruling cannot be appealed; Art. R.626-54 Commercial Code.

18 Art. L.626-30 Commercial Code. A supplier is entitled as of right to be a committee member if the value of his claim amounts to more than 3% of total supplier claims against the debtor.

T+7 days: Provide draft plan to committee members

The debtor is endowed with the task of making proposals to the creditors' committees with a view to drawing up a restructuring plan.[19] The administrator assists the debtor in this process and members of the creditors' committees may put forward their own proposals. The administrator must also draw up an employment and economic statement, detailing the origin, extent and nature of the difficulties that the company has encountered. The statement may also need to reference environmental matters depending on the type of activity carried out by the debtor.[20] This statement must be filed with the court before any draft restructuring plan can be advanced and any proposed restructuring plan must take the statement into account.[21]

The works council and monitors, if any, must be informed and consulted on the measures that the debtor envisages proposing in the plan and on the statement filed prior to that.[22] This may impact on timing which is why preparatory work prior to filing is so important.

Having complied with these legal requirements, the creditors' committees must then vote on the restructuring plan that emerges from this consultative process.

In practice, with a view to minimising delays in implementing a pre-pack, the administrator should have to hand a ready drafted plan which can accompany the notification advising creditors of their right (and obligation) to be members of the relevant committee. The draft plan and the statement will have been negotiated/prepared in the preceding ad hoc negotiation process. Prior to sending out notification, application should be made to the supervisory judge to reduce the time limit for the vote to 15 days.[23] Such application may be made simultaneously with application for the constitution of creditors' committees, where necessary (see above).

T+25 days: Collect votes of creditors' committees

The creditors' committees must vote on and approve the draft plan by a qualified majority comprising two-thirds of the total amount of claims made by the members who vote.[24] If all has gone smoothly, this vote should take place no later than three to four weeks following the commencement order. If a qualified majority is not obtained, the debtor and administrator may elect to present an amended plan. This will impact adversely on timing and the resulting plan may not then qualify as a pre-pack per se, but the end result may still enable successful turnaround of the debtor in a relatively quick time.

In parallel with steps involving the creditors' committees, the administrator must communicate individual offers to reduce or defer claims of those creditors who do not qualify to be members of a creditors' committee.[25]

T+41 days: Collect vote of bondholders

Bondholders, if any, must then be given the opportunity to vote on the draft plan adopted by the creditors' committees.[26] A general assembly for this purpose must be convened allowing for a minimum of 15 days between the calling of the meeting and the meeting itself.[27] There is no requirement that the administrator communicate the content of the adopted plan to bondholders in anticipation of the vote. However, all bondholders are entitled to inform themselves of its contents either directly or through a duly appointed agent.[28] Indeed, there is a potential timing issue thrown up by this entitlement as the relevant provision of the Commercial Code allows for a period of 15 days during which the bondholders may seek information on the draft plan 'adopted by the creditors' committees'. If this 15-day period is to be observed, the bondholders' meeting and vote can only take place 15 days after the draft plan has been adopted by the creditors' committees.

Notes

19 Art. L.626-30-2 Commercial Code.
20 Art. L.623-1 Commercial Code.
21 Art. L.626-2 Commercial Code.
22 Art. L.626-8 Commercial Code
23 Under normal circumstances, the creditors' committees must vote within 20-30 days from receipt of the debtor's proposals. This time limit can be increased or reduced by order of the supervisory judge, but may not be less than 15 days; paragraph 3, Art. L.626-30-2 Commercial Code.
24 Art. L.626-30-2 Commercial Code, final paragraph.
25 L.626-5 Commercial Code. Such creditors have 30 days in which to respond, failing which they are deemed to have accepted the proposal. In practice, if a pre-pack process is to succeed, the debtor will have to anticipate that small claims will have to be paid in full as it is not possible to 'cram down' such claims.
26 Art. L.626-32 Commercial Code.
27 Art. R.626-60 Commercial Code, final paragraph. If any bonds are bearer bonds, the administrator will need to publicize the meeting through specific legal publications. Otherwise, if there are no bearer bonds, the administrator can opt to notify bondholders of the meeting by simple letter.
28 R.626-61 Commercial Code.

Despite this legislative provision, in Autodis the creditors' committees met to vote the plan in the morning with the bondholders meeting to vote in the afternoon on the same day. Such an approach potentially reduces the time between filing and approval of the restructuring plan by 15 days. However, given the terms of the Commercial Code, this may be a risky strategy as it could invite disaffected minority creditors to challenge the process. The risk of a successful challenge would no doubt be increased if the draft plan underwent significant modification in the closing days prior to voting by the creditors' committees.

In practice, the debtor and administrator will need to be alive to communicating clearly and effectively with bondholders so as to ensure that they will not obstruct passage of the restructuring plan. In that respect, and except in the case of bearer bonds where such an approach may not be possible, prudent practice would suggest that notice of the bondholders meeting be given only after the creditors' committees have voted, with copy of the draft restructuring plan adopted by the creditor's committees accompanying such notice. Only if there were extraordinary need for limiting distribution of the proposed plan or a need to expedite at all costs would any other approach be advisable. Under normal circumstances, significant bondholders should be involved from an early stage in the process so as to best ensure an efficient process and limiting risk. For the restructuring plan to be approved, the vote by the bondholders requires a qualified majority comprising two-thirds of the total amount of debt due to the bondholders who vote, notwithstanding any clause to the contrary under the law applicable to the contract governing the bonds.[29]

T+60 days: Court approves plan

If a committee member or bondholder wishes to challenge any part of the voting process and approval of the plan, be that in connection with the creditors' committees or the bondholders' general meeting, it must do so within 10 days of the applicable vote.[30] Any such challenges will be heard at the same time as the court rules on adoption of the restructuring plan with the only concession to such challenges being that the court hearing cannot take place until five days after the ten-day period has elapsed.[31] In this way, meritless attempts to destabilise the process by disgruntled stakeholders are less likely to succeed than was the case previously. While an appeal may be lodged against the Court decision approving the plan and dismissing any challenges, the number of persons who have standing to lodge an appeal is limited to the debtor, the administrator, the creditors' representative ('*mandataire judiciaire*'), the works council or staff representatives, and the public prosecutor.[32] This Court decision may also be challenged by third party proceedings ('*tierce opposition*').[33]

Court approval of the plan renders proposals accepted by the members of each committee enforceable against all members of that committee.[34] In this way, the plan can 'cram down' minority creditors in committees.

The plan as approved can also be relied upon by guarantors and persons jointly liable with the debtor, provided that they are individuals rather than corporate entities.[35] Thus individual guarantors cannot be called upon by a creditor. Conversely, unless specific agreement is reached with respect to corporate guarantors, nothing in the plan can prevent creditors looking to the guarantors for satisfaction of their claim under the guarantee in place.

T+65 days: Implementation of plan (capital increase etc.)

Once the plan has been approved by the Court, the necessary steps can be taken to implement it under the supervision of a Court appointed commissioner. In particular, where a plan has been approved by the creditors' committees and bondholders, it can in certain circumstances provide for swap of debt for equity.[36] Until recently, it was rare to see banks taking equity in distressed companies in France but in recent times, attitudes have changed and this option is being used and accepted more frequently. This trend extends beyond France with recent cases in the UK, for example, providing instances of this approach – Gala Coral, Styles & Wood, Jessops and Independent News & Media.

Notes

29 Art. L.626-32 Commercial Code, final paragraph.
30 Art. R.626-63 Commercial Code.
31 Arts R.626-34-1 and R.626-63 Commercial Code.
32 Art. L.661-1 Commercial Code.
33 Art. L.661-3 Commercial Code. The judgment in the third party proceeding may be appealed to the Court of Appeal and the Supreme Court by the opposing third party. On the question as to who has standing to bring third party proceedings, only those who were not party or represented in the proceedings may challenge the judgment by this route; Art. 583 Civil Procedure Code. In practice, particularly within collective insolvency proceedings, it is often not easy to determine whether third party proceedings are available, as a decision of the French Cour de Cassation in the Eurotunnel affair has recently illustrated; Cour de Cassation, Chambre Commerciale, 30 June 2009.
34 Art. L.626-31 Commercial Code.
35 Art. L.626-11 Commercial Code.
36 Art. L.626-30-2 Commercial Code.

Debt for equity swap may be imposed on creditors through the committee voting process as part of the approved plan, provided the debtor is a company limited by shares where the shareholders bear losses limited to their capital contribution.[37] In practice, if the debtor is a French company, this means that the debtor must be a *Société Anonyme* (SA) or a *Société par Actions Simplifiée* (SAS). Where the French debtor is incorporated in a different form, it may therefore be necessary to transform it into an SA or SAS as part of the preparatory steps to the pre-pack process. This would entail further delay and a number of legal hurdles, but would in most cases be technically feasible provided the necessary support of management and the shareholders can be relied upon.[38] The debt for equity swap is achieved in the form of an increase in capital and any 'approval clause' (*clause d'agrément*) in the articles of association, whereby issue of shares to new shareholders requires company approval, would be of no effect and would not therefore prejudice timing or feasibility. However, if the debtor is not a French registered company (for example, a foreign company with its centre of main interests in France) or if a foreign creditor's articles of association under the law of incorporation do not allow it to hold shares in a French company, the envisaged swap and plan may face challenging issues of foreign law capable of slowing down the process or, in some cases, preventing use of all the options otherwise available. Any such issues will need to have been identified and addressed at an early stage in the process as they will affect timing and, potentially, feasibility.

In connection with implementation of the plan, the court can if necessary authorise the administrator to call general meetings as required to carry out the plan.[39] And the Court may also appoint an ad hoc representative, as was done in Autodis, to sign necessary documents on behalf of stakeholders who might otherwise be reticent to sign in timeous fashion – such as the signing of share subscription forms for minority creditors who are constrained to accept shares in exchange for debt.

T+2 years: Modification of restructuring plan/ record of safeguard proceedings expunged from register

Unlike conciliation or ad hoc process, safeguard proceedings are made public.[40] However, two years after the plan is approved, and assuming that the plan has been adhered to, the debtor is entitled to request that all mention of the safeguard proceedings be struck off the companies register.[41]

Where significant modification of a plan is required after the initial plan has been court approved, to adapt to changed circumstances, further approval of the Court will be required. Application is by the debtor and the Court must take into account a report drawn up by the Court appointed commissioner overseeing implementation of the plan. The Court will take into consideration any opinion of the public prosecutor's office, and only after hearing or having duly summoned the debtor, the commissioner, any monitors (creditors appointed to oversee proceedings), the works council or staff representatives and 'any interested person').[42]

Employees have limited say

Throughout this process, there is relatively little involvement on behalf of the employees. The employee representative body or nominee (works council or staff representative) is entitled to be kept informed and must be consulted on the proposals that are made as well as on the company financial report drawn up by the administrator, and may make observations.[43] The employee representative must also be informed of any proposals for reducing or deferring claims that may be proposed by the administrator to smaller creditors who are not members of the creditors' committees.[44] But the body of employees has no right to vote on the proposed plan. Nor are the employees entitled to be consulted or give an opinion (through the works council) with respect to the application to commence safeguard proceedings, unlike in judicial reorganisation or liquidation proceedings.[45] In a country known

Notes

37 Art. L.626-30-2 Commercial Code.

38 For example, converting a *Société à Responsabilité Limité* (S.A.R.L.) into an S.A.S. requires unanimity of all those entitled to vote, not just those present at the general meeting convened for that purpose – Art. L.227-3 Commercial Code).

39 L.626-16 Commercial Code.

40 Arts R.621-7 and R.621-8 Commercial Code.

41 Art. R.626-20 Commercial Code.

42 Art. L.626-26 Commercial Code. 'any interested person' will include creditors. What constitutes a significant modification ('*modification substantielle*') will depend on the facts of the matter, but the debtor is well advised to consult with the Commissioner before adopting any modification that might qualify as significant.

43 Art. L.2323-44 Labour Code and Arts L.623-3 and L.626-8 Commercial Code.

44 Art. L.626-5 Commercial Code.

45 Refer Art. L.2323-44 Employment Code. If the company is listed, publicity obligations will continue to apply at the outset and throughout the safeguard procedure – see recommendation of the AMF (*Autorité des Marchés Financiers*) dated 28 July 2009.

for the influence and forthright nature of its trade unions, the decision by the legislature to sideline employees in this way may appear surprising. Yet it was a deliberate decision taken by the French legislator with a view to maximising the chances of success of the safeguard process. To balance this state of affairs, there are no special concessions made to the debtor in the event that redundancies are required as part of the plan that results from the safeguard process.[46]

Final comments

To take advantage of the speedy process offered by the safeguard process, and subject to cashflow constraints, the plan will almost certainly have to provide for payment of small trade suppliers in full within a reasonable time scale as any plan put in place this quickly will risk excluding participation of creditors who declare their claim in time, but after court approval of the plan, which may be of concern to the court. Creditors based in France have two months as from publication of the safeguard commencement order, or in the case of foreign creditors four months, in which to lodge their claims.[47] These time limits have so far not been a barrier to fast tracking a pre-pack, seemingly on the basis that the Court is bound to ensure that all creditors are sufficiently protected before it makes its ruling approving the plan, and where the plan envisages that they be paid in full, the Court can have no reserves.[48] In practice, the concessions on debt will have to be sought amongst the debtor's financiers, principal suppliers and shareholders. New money from outside investors will often be required.[49]

As some of the issues raised above reveal, the French safeguard procedure was not designed with the notion of a pre-pack in mind. Nevertheless, in a well planned and executed safeguard procedure involving a distressed holding company with bondholders and a limited number of creditors, a pre-pack can be put in place in under two months. The changes in the law introduced in 2009, both procedural and substantive, place France high up in the order of developed regimes for restructuring businesses in Europe. Given, as well, that French safeguard proceedings qualify under the EC Insolvency Regulation as collective insolvency proceedings,[50] the developing French pre-pack process (including the moratorium on claims accompanying the safeguard process) may sensibly be deployed where pan European group companies are looking to restructure. As well, the fact that safeguard proceedings must be invoked before the company finds itself in '*cessation des paiements*', and according to flexible criteria, means that French restructuring process, on a European scale, may well be able to obtain a march on other potentially competing jurisdictions. Under the EC Insolvency Regulation, the jurisdiction first seized, unless obviously not competent, will almost inevitably assume control of the restructuring process European-wide. While it is relatively early days, the new horizon in French restructuring process looks promising.

Notes

46 See Art. L.626-2 Commercial Code. Proposals were made during the passage of the 2008 law that provision should be made for simplified redundancy processes, but these proposals were not included in the final law.

47 Art. L.622-24 and R.622-24 Commercial Code. These periods runs from the publication date of the commencement judgment.

48 Art. L.626-31 Commercial Code. In Autodis, the judgment records the creditors' representative indicating that the time for lodging claims had not expired at the time the Court was considering approving the plan. The plan was nevertheless approved.

49 If an outside investor brings in new capital or finance, the investor is likely to want to take advantage of the 'super priority' afforded to 'new money', available where the agreement is concluded in the context of formal conciliation proceedings and approved by the Court: Art. L.611-8. Conciliation proceedings may therefore be led in concert with the main safeguard procedure, with respects to the operating/subsidiary companies falling under the umbrella of a holding company.

50 Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings. The regulation does not apply to Denmark, which elected to opt out.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com