ALLEN & OVERY

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Important changes to French Insolvency Legislation

Effective 1 July 2014 important changes to French insolvency legislation include:

- ability in conciliation proceedings to prepare a pre-pack sale of all or part of business;
- introduction of a new accelerated safeguard procedure for the purposes of implementing a restructuring plan agreed by affected majority creditors in conciliation;
- right for members of creditors' committees in safeguard and administration to prepare, present and vote on their own restructuring plan;
- power to reconstitute minimum share capital if defaulting shareholder does not participate in share capital reconstitution;
- certain contractual provisions deemed to be null and void (*non-écrite*).

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Article 2 of Law no. 2014-1 of 2 January 2014 enabled the French government to simplify and secure the legislation relating to companies in difficulty.

Following consultation with practitioners, the French government issued an *Ordonnance* (the Order) on 12 March 2014 which was published in the Official Journal on Friday 14 March. The Order takes effect on 1 July 2014 and will apply to pre-insolvency and insolvency proceedings opened after that date; it will not apply to any such proceedings which are in progress on that date.

The purpose of the Order is to facilitate the anticipation and treatment of financial difficulties and to reinforce and improve the efficiency of the existing pre-insolvency and post-insolvency procedures so as to ensure more security, simplicity and efficiency in dealing with companies encountering actual or anticipated financial difficulties.

The changes when effective on 1 July 2014 will have important consequences for creditors and other stakeholders involved in work-outs and restructurings in France. They introduce new tools to facilitate the implementation of restructuring plans more efficiently and improve the creditors' rights in safeguard and in administration as regards formulation of a restructuring plan.

Without being exhaustive, the following changes are introduced pursuant to the new Order.

Mandat ad hoc and Conciliation

- ***Preparation of pre-pack sale of all or part of business***

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

- ***New Money Privilege***

    - The "new money" privilege will now be available for new money made available during the conciliation proceedings prior to formal court approval (*homologation*) of the restructuring plan. The "new money" privilege was previously available only for “new money” provided under the restructuring plan and which was made available after formal court approval of the plan.

    - A debt claim benefiting from a "new money" privilege may be given a different treatment from old money in any subsequent restructuring plan or proceedings.

- ***Contractual provisions deemed null and void***

    - Any contractual provision which modifies performance of a contract in progress by reducing the rights of a debtor or increasing its obligations solely as a result of the appointment of a mandataire ad hoc or conciliator or opening of mandat ad hoc or conciliation proceedings will be deemed to be null and void.

    - Any contractual provision which provides that the fees of any advisor to a creditor will be borne by the debtor solely as a result of the appointment of a mandataire ad hoc or a conciliator or the opening of mandat ad hoc or conciliation proceedings (over and above a percentage amount to be fixed by *arrêté)* will be deemed to be null and void.

- ***Court imposed grace periods***

    - The court will be empowered to impose grace periods of up to two years pursuant to article 1244-1 of the French civil code not only on creditors participating in conciliation proceedings which make a demand for payment or seek to take enforcement action during such proceedings but also on creditors which did not participate in the conciliation proceedings during the performance of a court approved or acknowledged restructuring plan.

- ***Interest on interest***

    - Notwithstanding the provisions of article 1154 of the French Civil Code which permits the capitalisation of interest due for one year or more, interest on interest will not be permitted during the performance of a court approved or acknowledged restructuring plan.

Accelerated Safeguard

- ***New Accelerated Safeguard proceeding***

    - A new procedure "Accelerated Safeguard" is introduced – it will be available to a debtor company which is in conciliation, has drawn up a restructuring plan aimed at ensuring the sustainability of its business, is capable of obtaining sufficiently wide support from the creditors affected by the plan and to make the adoption of the plan likely within a maximum period of three months.

    - The new Accelerated Safeguard procedure will cover all creditors; however, on request by the debtor the court may decide to open Accelerated (Financial) Safeguard proceedings limited to financial creditors (and bondholders (if any)) only, in which case the proceedings must be completed within a period of one month with a possible extension of one month.

    - Importantly, there is no requirement for a company to be solvent if it requests the opening of Accelerated Safeguard or Accelerated (Financial) Safeguard provided it is in conciliation and was not insolvent for more than 45 days when it initially requested the opening of conciliation.

    - Threshold criteria (in relation to turnover and number of employees) will be fixed by subsequent decree to determine eligibility for Accelerated Safeguard or Accelerated (Financial) Safeguard.

Safeguard and Administration

- ***Creditors committee members may propose a restructuring plan***

    - Any member of a creditors' committee will be able to submit a draft plan to the administrator who will submit plans received from the debtor and any creditors to the vote of the creditors' committees.

    - Since bondholders are not members of a "creditors committee" it does not appear that bondholders will be able to submit their own draft restructuring plan.

    - Where a plan is adopted by each creditors' committee and (if any) bondholders in general meeting, the court will make its judgment on this plan and the debtors plan, ensuring that the interests of all creditors are sufficiently protected.

- ***Voting arrangements***

    - Creditors' committee members must inform the administrator of the existence of any agreement making its vote subject to conditions of a third party or whose object is the partial or total payment of the debt by a third party as well as the existence of any subordination arrangements. The administrator will inform the creditor as to the method of calculation of its vote.

- ***Reconstitution of minimum share capital and defaulting shareholder***
    - An administrator may request the court to empower a mandataire to call a shareholders meeting and to vote on the reconstitution of a company's share capital in the minimum amount required by law if the company has lost more than half of its share capital and a shareholder refuses to participate in the reconstitution of the company's share capital.
- ***Transfer of controlling shareholders shares in administration***
    - The *draft order* contained a provision which would have allowed the sale of a controlling shareholders' shares in administration if so ordered by the court. This has **not** been retained in the Order. We understand that this provision, which practitioners were very much in favour of, is under review and may be introduced at a later stage, although there is no certainty that this will be the case.

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