

DISCUSSION OF THE DRAFT LAW ON INSOLVENCY IN FRANCE

ISABELLE DIDIER Présidente du GRIP21

Core provisions for an effective and efficient insolvency law

A/ Application and commencement criteria

B/ The insolvency estate

C/ Participants

D/ Proceedings

- **Prevention**
- **Reorganization**

A/ Application and commencement criteria

1. Debtors to be covered by an insolvency law

1985 law

Eligible to file, according to L620-2: merchants, craftsmen entered in the Crafts Register, farmers, legal persons from the point of view of business law, associations not conducted for profit, banks.

Ineligible : legal persons from the point of view of civil law, independent professionals.

*Perben
draft law*

The same categories are eligible to file, plus all natural persons conducting an independent profession.

Ineligible : legal persons from the point of view of civil law.

A/ Application and commencement criteria

2. Jurisdiction

1985 law

The Commercial Court has jurisdiction, the judges being elected by their peers.
The Civil Court has jurisdiction in certain cases.
The address of the registered office or of the place of operations counts.

**Perben
draft law**

No evolution concerning court jurisdiction. The centre of main interests counts in cross-border insolvencies according to rule N° 1346/2000 of the EU.

A/ Application and commencement criteria

3. Parties who may apply for the commencement of proceedings

1985 law

- **Debtor:** by a statement of cessation of payments;
- **Creditor:** by an application for commencement;
- **Court:** by Court order without further notice.

*Perben
draft law*

No change.

A/ Application and commencement criteria

4. Commencement standards

1985 law

Cessation of payments (Article 3 of the 1985 law) based on the fact that the debtor's liabilities exceed the value of the assets.

Perben draft law

General cessation of payments.

Jurisprudence

Cass.com, 28/01/04, n°01.10.005, n°232 D, Bottalico c/ Massiani ès qual. (The debtor is not obliged to prove that he cannot meet his liabilities as they fall due with the immediately available assets).

Cass.com, 14/01/04, n°02.18.213, n°96 D, Pons c/ CMSA des Alpes-de-Haute-Provence et des Hautes-Alpes (The failure of an attempt at mediation does not allow the court to issue an order without further notice).

A/ Application and commencement criteria

5. Commencement in the case of debtors with insufficient assets

1985 law

60% of the proceedings in Paris concern debtors with insufficient assets. The percentage is slightly lower in the rest of the country.

*Perben
draft law*

The law still provides for liquidation proceedings for debtors with insufficient assets, but also introduces an expedited liquidation proceedings whose administrative cost is partially covered by a contribution of 1 500 € from a special fund administered by the Caisse des Dépôts et Consignations (CDC).

B/ The insolvency estate

1. Assets constituting the insolvency estate

Assets belonging to the debtor/owner of the business or encumbered assets

Personal and household assets of the debtor

1985 law

All assets, encumbered assets included.

All depends on the judicial form of the business or on the occasional sanctions imposed on the directors.

Perben
draft law

No change.

Commencement of proceedings is no longer automatic in certain cases.

B/ The insolvency estate

2. Protection and preservation of the insolvency estate

1985 law

- General and automatic stay is applied only to claims submitted prior to commencement of reorganization or liquidation proceedings. Obligation to submit a claim.
- **The protection of secured creditors is relative, limited by the play of securities and by the priority given to creditors who financed the voluntary restructuring.**

*Perben
draft law*

The same situation: the creditors who financed the voluntary restructuring have utmost priority ('new money').

C/ Participants

1. The Court

1985 law

Non-professional judges, issued from the economic community, elected by their peers; key role of the commercial court in all administration and material-disposal decisions.

These judges make autonomous decisions within their realm of competences.

*Perben
draft law*

The commercial court has an increased role thanks to the failure prevention and business rescue proceedings ('sauvegarde').

C/ Participants

2. The « debtor in possession »

1985 law

Theoretically, it exists in simplified reorganization proceedings.

In practice, it is only occasionally used in Paris. More in the other French courts.

*Perben
draft law*

The notion of the non-divestment of the debtor is provided by the draft law in rescue proceedings ('sauvegarde').

C/ Participants

3. The insolvency representative

1985 law

Independent practitioner according to the terms of his appointment. 450 IPs in France. In order to become an insolvency representative it is necessary to follow training courses, to pass an exam and to be included in a Court's list. The overruling authority is the Ministry of Justice. IPs are court-appointed. Above 69 000€ in administrative expenses and costs, the fees are subject to a tax applied by the President of the commercial court or the Grand Court (TGI). These fees are of utmost priority.

*Perben
draft law*

National jurisdiction for liquidators. In expedited liquidation proceedings the liquidator's fee is fixed at 1 500€.

C/ Participants

4. Public Prosecutor's Office representative

1985 law

The Prosecutor's Office representative is not only just the defender of the law and order, he must widen his functions with regard to the safeguarding of employment. He receives and diffuses information, is able to intervene in any proceedings and can exert grounds for appeal. He is charged with supervising the court-appointed professionals. He can appeal against the judgments concerning commencement, plan, sale, or liquidation as well as the judgment relating to the appointment and the replacement of the other participants in the proceedings. His appeal provokes a stay of proceedings.

*Perben
draft law*

No modifications of the representative's role, with the exception that he is allowed to scrutinize proceedings such as 'conciliation' (mediation), 'mandat ad-hoc' (counseling) and 'sauvegarde' (rescue proceedings). His appeal will no longer provoke suspension of rescue proceedings.

Jurisprudence

Cass.com, 08/07/03, n°01.13.693, le Procureur général de la CA de Paris c/ Tapie et autres (With regard to reorganization or liquidation proceedings, the grounds for appeal remain subject to the appropriate conditions of form and time. The Public Prosecutor must observe these conditions).

C/ Participants

5. The creditors

1985 law

Obligation of the creditors to submit their claims.

Individually: a creditor can be a 'contrôleur' (supervisor). He can assist the insolvency representative and the court in its surveillance mission. He will not be paid.

Collectively: no power.

*Perben
draft law*

Individually: *According to Article L653-7 of the draft law, at any stage of the proceedings the creditor appointed as supervisor may inform the court if the trustee appointed according to the conditions fixed by decree of the State Council ('Conseil d'Etat') did not observe the obligations provided in the same Article.*

Collectively: *Creditors have a real role in rescue proceedings. The committees may negotiate, have the right to access information and to participate in finding a solution.*

C/ Participants

6. The employees

1985 law

The employees' representative is elected by the employees. He must be present when the list of claims is verified. The list of claims can be challenged by the employees.

An employee can take action alone against the creditors' representative. Employees must submit their claims which are divided into 3 parts: 'superprivilege'; secured; and unsecured.

Perben draft law

Dismissals will depend on the general legal clauses.

Jurisprudence

Cass.soc, 07/09/04, n°02.21.384, n°1382 P, Société France Télécome c/ AGS (The company is obliged to insure its employees against the risk of non-payment of wages).

Cass.soc, 07/04/04, n°02.04.231, n°782 PB, Laravine c/ Picc ès qual. (The AGS is not allowed to demand the reclassification of an employee from a fixed contract to a permanent contract, except in the case of fraud).

D/ Proceedings

1. Failure prevention

1985 law

There are two possible kinds at the disposal of the directors: **counseling** (mandat ad hoc) or **voluntary restructuring negotiations** (confirmed by the President of the Commercial Court). No specific test for commencement.

Perben
draft law

Counseling (mandat ad hoc) is preserved as an option but mediation (conciliation) replaces the voluntary restructuring negotiations in treating all present or foreseen difficulties. No cessation of payments test. Filed by the directors. Length: 4+1 months. Prosecutor's Office is informed.

Jurispru
dence

Cass.com, 02/06/04, n°03.11.090, n°876 PBI, Bauland ès qual. c/ société Bellecour grill et autres (The former legal representative of the company dissolved as a consequence of a sale is qualified, in the same way as any interested party, to ask for the appointment of an 'ad hoc' counselor to represent the company for the purpose of exercising the company's own rights).

Cass.com, 08/07/03, n°00.15.918, n°1231 P, Neveu c/ Grandjean ès qual. (The opening of a voluntary restructuring proceedings does not exempt the managing director from carrying out a declaration of cessation of payments when conditions are met, and the director may not be sanctioned or condemned to paying any social debts for having proceeded tardily).

D/ Proceedings

2. Rescue proceedings ('sauvegarde')

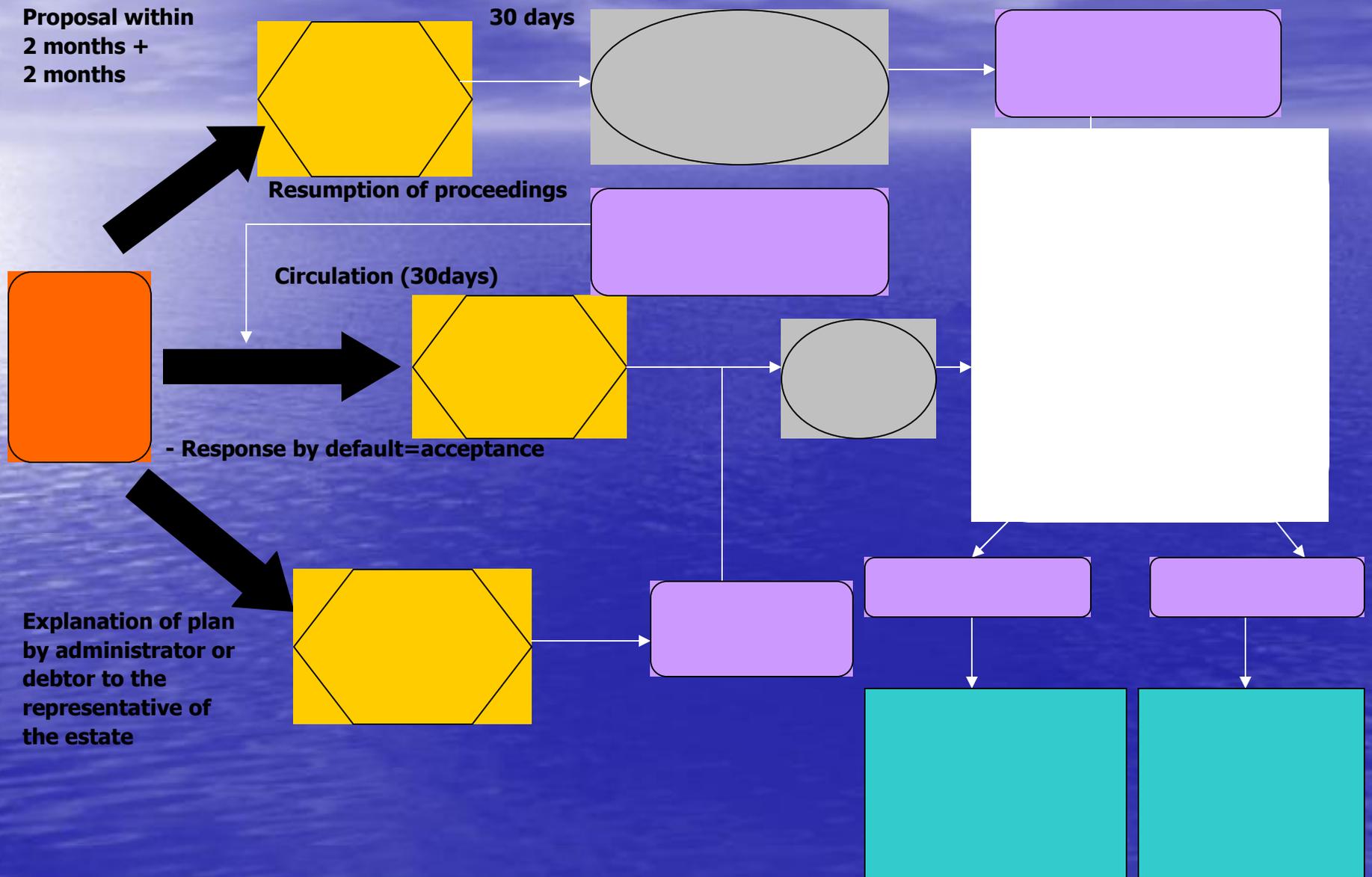
1985 law

No provision for expedited restructuring proceedings.

*Perben
draft law*

The debtor may request the opening of a rescue proceedings if the difficulties can be justified. The opening of a rescue proceedings allows for a temporary stay. The debtor, together with the creditors, may work out a plan for the reorganization of the company. The Court will enforce the plan. The Administrator does not manage the company; this is left to the director ("debtor in possession"). The rescue proceedings can lead to a new distribution of the share capital and, at the same time, the settlement of some of the company's debt. The plan must be negotiated between the debtor and the creditors. If the plan is adopted by the committees, the agreed propositions are binding to all creditors. As for the other smaller creditors, not belonging to the above committees, the plan is enforced according to civil law. As soon as some settlements are allowed by certain creditors, the tax authorities may reduce all or a part of their direct claims, default interests, surcharges, penalties and all other forms of tax penalties. Rescue proceedings allow for the separate transfer of the autonomous branches of activities. The Public Prosecutor must be present during the proceedings and must be fully informed of the draft plan. The Public Prosecutor must provide his or her advice on the proposed plan.

Plan for rescue proceedings



D/ Proceedings

3. Judicial reorganization

1985 law

Judicial reorganization means: a continuation plan or a sale. The company is potentially for sale from the time the application for commencement is filed. The debtor conceives a plan for the judicial administrator who submits it to the court. The creditors are consulted and the absence of a reaction means approval. The court can impose the delays and confirm the plans, sometimes in spite of the creditors' disapproval.

Perben
draft law

From now on the only outcome is a continuation plan, the plan of business transfer belongs to liquidation proceedings only.