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The Administration of Insolvent Companies in France (Part I)

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**The Administration of Insolvent
Companies in France (Part I)**

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Introduction

The History of Modern Insolvency Law

The modern institutions of insolvency were formed by the provisions of the law of 1967.¹ This retained the concept of a twin procedure, one to be followed if a court was satisfied that the likely outcome of negotiations between the debtor and its creditors was an agreement keeping the debtor in business, the other to liquidate a hapless company, whose chances of survival were in doubt.

The first of these institutions was called *règlement judiciaire*, first introduced in 1955.² *Règlement judiciaire* was designed to restore the debtor to a position of being able to manage his assets, following an agreement with his creditors, subject to approval by the court. Once the extent of debts was known, the debtor was required to submit to court his proposals for re-establishing the business as well as proposals for the settlement of book debts.

Creditors were consulted as to the content of the proposals, in particular whether they would sanction delayed payment or payment by instalment. Once the consultation period had ended, the creditors voted formally on the acceptance of the proposals, provided, in the view of the court, these proposals were sufficiently serious in nature and represented a genuine effort on the part of the debtor to re-establish his business.³

A later reform in 1967 introduced a new law to govern the *redressement* of certain enterprises.⁴ The law applied to businesses, whose insolvency had grave consequences on regional or national economies and which were, while insolvent, not in an irretrievable situation. A moratorium was possible for up to four months and all suits stayed. Proposals for the settlement of debts, which could not last longer than three years, were made by the debtor, subject to the agreement of the court, which would enforce the plan even on dissenting creditors. Once payments had ended, the court would lift any suspension on the management of the company.⁵

The Law of 1967 was designed to meet the needs of an economically prosperous world. The procedures, however, failed to meet their target, saving very few businesses from collapse, resulting in increased hardship to the creditors following the inevitable liquidation of the debtor. The procedures were

¹Law no. 67-563 of 13 July 1967 on judicial administration, liquidation of goods, personal insolvency and bankruptcy, implemented by Decree no. 67-1120 of 22 December 1967.

²Decree-Law no. 55-583 of 20 May 1955.

³Lamy Droit Commercial, par. 2279.

⁴Ordinance no. 67-820 of 23 September 1967, implemented by Decrees nos. 67-1254 and 67-1255 of 31 December 1967.

⁵Lamy Droit Commercial, par. 2285.

drawn out, often lasting for two to three years, and excluded the workforce, who were the group most affected by the liquidation of the business.⁶

Many reforms were attempted over the succeeding decades, the latest culminating in the current and principal text dealing with the law and institutions of insolvency in France.⁷ This law has, however, not escaped criticism, notably by creditors who had felt their rights declining in favour of the debtor. Due to this and the realisation that the number of insolvencies being declared was increasing,⁸ a new reform act was introduced in 1994.⁹

Introduction to Redressement Judiciaire

Redressement Judiciaire is the term in French insolvency law given to the period during which the activities of a company or individual facing bankruptcy are monitored by the competent courts. The purposes for which *redressement judiciaire* was introduced are the safeguarding of the business, the continued maintenance of the activities of the business and the employment of its workers and, lastly, the clearance of its debts.¹⁰ In this context, the clearance of a business' debts does not necessarily mean the full payment of all debts owing, but the placing of the business in the situation of being able to acquit its debts.¹¹

Redressement judiciaire is instituted according to the provisions of a plan, which is given the force of a court judgment, which is drawn up by the end of a period, known as the observation period. The plan must include the end result of the procedure, either the continuation of the business or its sale.¹² Before the reforms of 1994, where neither of these results were likely, a court could order that the procedure move on to the next phase, that of *liquidation judiciaire*.¹³ However, there was no recorded instance where a court could dispense with the need for *redressement judiciaire*, which led to an ingenious device, sanctioned by the *Cour de Cassation*, of pronouncing the *redressement judiciaire* of a company, immediately followed by its liquidation.¹⁴ Following the reforms, the conditions under which a business could be liquidated were expressed as where the business had ceased all activity or where *redressement judiciaire* was manifestly impossible.¹⁵ Where this is the case, there is no need for an observation period and judgment can be entered immediately.

⁶Lamy Droit Commercial, par. 2292.

⁷Law no. 85-98 of 25 January 1985 on judicial administration and liquidation of businesses, implemented by Decrees nos. 85-1388 and 85-1389 of 27 December 1985.

⁸In 1993, 70,000 businesses became insolvent, with liquidation being ordered in 93% of cases. This resulted in the loss of 300,000 jobs and only 5% of debts ever being recovered, (statistics quoted in Lamy Droit Commercial, par. 2312).

⁹Law no. 94-475 of 10 June 1994 on the prevention and treatment of business difficulties and also Law no. 94-679 of 8 August 1994 with the same title, the former implemented by Decree no. 94-910 of 21 October 1994, which entered into effect the next day.

¹⁰L Art 1 *al* 1. (All references to articles of a law or decree which follow will be to the Law no. 85-98 of 25 January and Decree no. 85-1388 of 27 December 1985).

¹¹"Apurement du passif", the French term, is used in this sense in the Ordinance of 23 September 1967.

¹²L Art 1 *al* 2.

¹³L Art 1 *al* 2 (last line deleted by the law of 1994).

¹⁴Cassation commerciale, 4 November 1986 Bull. Civ. IV No. 198.

¹⁵L Art 1 *al* 3.

The early commentators were divided as to the effect of the provision expressing the purposes of *redressement judiciaire*, whether the law indicated a hierarchy of purposes, in which the interests of the creditors took a back step as opposed to the economic interest in keeping the business going, or whether the purposes could be read cumulatively, in no specific order. The current view is the latter.¹⁶

The procedures of *redressement judiciaire* and *liquidation judiciaire* are, after the reforms of 1994, applicable to all businesspersons, artisans, farmers and cultivators of agricultural produce and legal persons.¹⁷ Prior to the reform, *liquidation judiciaire* was the subject of a separate part of the Law of 1985 and it is purely because a court may now pronounce *liquidation judiciaire* immediately that it is mentioned here in passing.¹⁸ The Law of 1985 contains two procedures, one accelerated,¹⁹ which applies to all businesses which do not employ more than fifty employees and whose turnover does not exceed the threshold.²⁰ All other businesses must comply with the standard procedure.

The Institution of Proceedings

In order for *redressement judiciaire* to begin, the business must be in a situation, where it is unable to meet its debts with the assets available for its use.²¹ A debtor in this situation must ask for an order, the effect of which will be to begin the observation period, at the very latest fifteen days after being first unable to meet its debts.²²

The request must be filed by the debtor with the court office together with all pertinent information and accounts.²³ The reforms of 1994 have added the requirement, where *liquidation judiciaire* is being sought, for the debtor to provide proof of the business having ceased all activity or why *redressement judiciaire* is not an adequate remedy for the business.²⁴

The opening of this procedure does not automatically provide a stay from suits filed before the commencement of the observation period. A stay operates only from the pronouncement of a judgment declaring the business to be in *redressement judiciaire*.²⁵ The inability of the business to meet its debts does not include the situation where a business, for whatever reason, refuses to pay a particular debt, and is a legal concept distinct from an accounting one.²⁶

¹⁶Dictionnaire Permanent Difficultés des Entreprises, Editions Legislatives, p12.

¹⁷L Art 2 *al* 1.

¹⁸See Omar PJ and Sorensen A, Terminal Decline of a Business: The Institution of Liquidation Judiciaire in France [1996] 1 IL&P 4.

¹⁹L Arts 137 to 147.

²⁰Where turnover ("chiffre d'affaires") is less than 20 million Francs. (D Art 1).

²¹L Art 3 *al* 1.

²²L Art 3 *al* 2.

²³D Art 6.

²⁴L Art 6 *al* 7 (new).

²⁵Cassation commerciale, 27 April 1993 Bull. Civ. IV No. 147.

²⁶Cassation commerciale, 2 November 1993 Bull. Civ. IV No. 378.

The procedure may be instigated at the behest of a creditor.²⁷ This method is not without some danger, as French law recognises that a debtor may recover damages for an unwarranted suit.²⁸ A creditor may find it difficult to prove that the debtor business has ceased all activity or that *redressement judiciaire* is manifestly impossible, both prerequisites for *liquidation judiciaire* to be ordered.²⁹ Tactically, a creditor is best advised to seek to place the debtor business in *redressement judiciaire*.

It is not necessary that a creditor has already sought to recover his debt by orthodox means, the institution of a suit for an amount owing.³⁰ However, the absence of any other action may be a factor in persuading the court that the appropriate remedy for the creditor is a civil suit and not an order for *redressement judiciaire*. It is also open to the court to commence proceedings either *ex proprio motu* or at the request of the *procureur de la République*.³¹ The order fixing the commencement of the observation period is made by the court after hearing representations from the debtor as well as representatives of the *comité d'entreprise*³² or the employees.³³ The court is able to call any other interested party to give evidence.³⁴ Judgment is given in open court and takes effect instantly.³⁵

The Proper Court

The institution of proceedings before the appropriate jurisdiction is dependent on the identity of the debtor. In the case of a business or artisan, the appropriate court is the *tribunal de commerce*. In all other instances, the appropriate jurisdiction is that of the *tribunal de grande instance*.³⁶ The location of the seat of the business in the territorial jurisdiction of a particular court determines where the case is to be heard.³⁷ In the event that a debtor does not have a seat in France, the appropriate factor is the location of his principal business interests.³⁸

If a business has changed its seat within the six months preceding the commencement of proceedings, the competent court is that of the former location.³⁹ It is also possible that the court first seized of the case may order its transfer to another court within the same *ressort* or in another judicial district entirely.⁴⁰ This transfer may be made at the request of the *procureur* or *ex proprio motu*. While the transfer of the file is in progress, the court first seized

²⁷L Art 4 *al* 1.

²⁸Damages for an "action abusive" is a remedy given by Article 1382, Civil Code.

²⁹D Art 7.

³⁰CA Paris, 8 October 1986 Gaz. Pal 1986, 2, 780.

³¹L Art 4 *al* 2. The "procureur" is a state prosecutor, appearing in civil and criminal cases.

³²The institution of the "Comités d'entreprise" (Works Councils) celebrated its 50th anniversary in 1995.

³³L Art 6 *al* 1.

³⁴L Art 6 *al* 2.

³⁵D Art 14.

³⁶L Art 7 *al* 1.

³⁷D Art 1.

³⁸A concept to be found in the Brussels Convention 1968.

³⁹D Art 1 *al* 2.

⁴⁰D Art 3.

may order the appointment of an interim *administrateur judiciaire*.⁴¹ Orders may also be made for *mésures conservatoires*, the inventory of stock and the placing of seals on the business premises.⁴²

Beginning the Observation Period

The purpose of the observation period is to initiate moves for the survival of the business. A plan is drawn up which affords a complete picture of the economic and social circumstances of the business. Proposals are also drawn up with view to the continuation of business or its sale to an interested party.⁴³ If neither of these solutions is feasible, an order for *liquidation judiciaire* is made.

The duration of the observation period is, in the first instance, six months.⁴⁴ It may be renewed for a further period up to six months long, following a request to that effect by the debtor, the administrator or the *procureur* and may also be extended by the court's own motion. If the *procureur* so asks, the renewal may be made for a maximum of eight months, provided the court justifies in its order the reasons for so doing.⁴⁵

At the first hearing of the case, the court will establish the date at which the business first became unable to meet its debts, provided this is not earlier than eighteen months before the date of the judgement instituting *redressement judiciaire*.⁴⁶ In the absence of any specific date being established, the date is taken as that of the date of the judgment. In both instances, this fact is advertised on the company registers and in the legal gazette,⁴⁷ as procedural steps are timed from this moment.

The Procedure and Personnel of Management

Following the order commencing the observation period, the court will nominate a *juge-commissaire* and two *mandataires de justice* to oversee the activities of the company. The role of the *juge-commissaire* is that of liaison between the court and the business in *redressement judiciaire*. The *mandataires*, whose role is that of managing the business in difficulties, will normally be the administrator and a representative of the creditors.

The employees of the business will also be asked to elect in secret ballot one of their number as their representative.⁴⁸ The administrator may also require the appointment of one or more experts to assist with the management of the business.⁴⁹ The court may replace any of the personnel at any time. Similarly, a

⁴¹D Art 3 *al* 3. The "administrateur judiciaire" will be discussed below.

⁴²D Art 3 *al* 3. "Mésures conservatoires" are an order akin to a hybrid between Anton Piller and Mareva orders.

⁴³L Art 8 *al* 1.

⁴⁴D Art 20.

⁴⁵L Art 8 *al* 2.

⁴⁶L Art 9 *al* 1.

⁴⁷D Art 21.

⁴⁸L Art 10 *al* 1.

⁴⁹L Art 10 *al* 2.

request by one of the parties for the recall of any of the personnel may be made.⁵⁰

The law requires the administrator and the creditors' representative to keep the *juge-commissaire* informed at all times of any material fact pertaining to the management of the company.⁵¹ The civil authorities, in the person of the *procureur*, are also under a similar obligation, notwithstanding any other legal rule to the contrary.⁵² In this way, the court is informed at all times and is best placed, in theory, to take all the necessary decisions about the future of the company in *redressement judiciaire*.

The *juge-commissaire* is responsible at law for the smooth and rapid functioning of the procedure and for the protection of the interests of all parties involved.⁵³ His role is to decide on aspects of procedure, generally matters involving appeals from decisions of the administrator and actions taken by the other parties.⁵⁴ In the event of the court having to decide matters, whether those within its area of jurisdiction or arising from appeals from decisions made by the *juge-commissaire*, it does not do so without a report by the *juge-commissaire* first having been filed.⁵⁵ All decisions by the *juge-commissaire* are the subject of notification to all interested parties.⁵⁶

The reforms of 1994 increased the number of *contrôleurs* to be appointed by the *juge-commissaire* from among those interested creditors.⁵⁷ The function of these participants is different from that of the creditors' representative, whose main function is to assure the communication of information on all aspects of the procedure, including the major decisions taken to establish a plan, appoint new officials, sell one of the units of production or place the business in *liquidation judiciaire*.⁵⁸

The *contrôleurs* are appointed from the ranks of those creditors who have made a formal demand at the court office. If more than one *contrôleur* is appointed, the *juge-commissaire* must ensure that they represent the varying classes of creditors, whether secured or unsecured.⁵⁹ No remuneration is given for those acting in this capacity, whether they choose to act in person or through an agent or lawyer.⁶⁰

The Economic and Social Plan

The drawing up of a report, setting out the economic and social status of the business, is primarily the responsibility of the administrator, who may be assisted

⁵⁰L Art 12 *al* 2 (inserted by the Law of 1994).

⁵¹L Art 13 *al* 1.

⁵²L Art 13 *al* 2.

⁵³L Art 14.

⁵⁴D Art 25 *al* 1.

⁵⁵D Art 24.

⁵⁶D Art 25 *al* 3.

⁵⁷L Art 15.

⁵⁸D Art 27 *al* 2 (amended by the Law of 1994).

⁵⁹L Art 15 *al* 1.

⁶⁰L Art 15 *al* 4 (amended by the Law of 1994).

by the debtor and one or more experts.⁶¹ The administrator will, in light of this report, produce a plan recommending the *redressement judiciaire* or *liquidation judiciaire* of the business. One of the functions of the report is to carefully state the sources, nature and importance of the difficulties the business is facing.⁶²

A realistic picture is taken of the problems facing the business and the likelihood of any plan succeeding, together with any finance available.⁶³ The plan must provide for the gradual extinction of the business' debts and steps must be taken by the management of the business to ensure the success of the plan's objectives.⁶⁴ Any plans, which involve the slimming down of the business and the eventual redundancy of workers, must be stated.⁶⁵

The key to the accurate projection of the business' chances of survival is information. In this context, the *juge-commissaire* is of vital importance as he alone has unparalleled access to information held by State and public bodies, including the Treasury and Social Security, as well as to information held by private individuals, banks and other interested parties, including the workers and management of the company. This right of access is enjoyed, any legislative rule to the contrary notwithstanding.⁶⁶ In turn, this information may be made available to the administrator.⁶⁷

Offers to Purchase

The administrator may at any time after the procedures have been instituted entertain offers from third parties desirous of taking over and continuing the business of the enterprise concerned.⁶⁸ These offers may be the subject of specific mention and analysis in the report by the administrator and may not be modified or withdrawn once this report has been filed with the court.⁶⁹

Information which may enable an offeror to stipulate as to the conditions, under which he will take over the business, is available from the court office and a register is kept relating to the assets and debts of the firm, which will also state the time within which an offer must be made. No offers may be made by persons related or in close connexion to the debtor or to members of the management of the business unless by the leave of the court.⁷⁰

Changes in Administration

The administrator has the duty to consider whether to include in a plan proposals for changes in company structure and management. In the case of a change in the share capital of a business, the administrator may himself or through the

⁶¹L Art 18 *al* 1.

⁶²L Art 18 *al* 2.

⁶³L Art 18 *al* 3.

⁶⁴L Art 18 *al* 4.

⁶⁵L Art 18 *al* 5.

⁶⁶L Art 19.

⁶⁷L Art 20.

⁶⁸L Art 21 *al* 1.

⁶⁹L Art 21 *al* 2.

⁷⁰L Art 21 *al* 3 (amended by the Law of 1994).

intermediary of the *conseil d'administration*⁷¹ call for a general meeting of the shareholders or partners.⁷² The general meeting may be called upon to agree, where the called-up capital is less than the share capital subscribed to, that a further call will be made so as to take the called-up capital to at least fifty percent of the share capital.⁷³ Reductions and increases in share capital may also be decided at the meeting, but all agreements, including those in which third parties agree to subscribe to capital, are subject to the approval of the competent court.⁷⁴

A court may, on the application of the administrator, order that, in the best interests of the business' survival, one or more of the directors and managers of the business should be replaced.⁷⁵ The court may order that shares held by the directors should be held on their behalf by a *mandataire de justice*⁷⁶ appointed for that purpose as well as to exercise any voting rights which attach to those shares. The court may also order the sale of those shares to third parties at a price to be fixed by an expert.⁷⁷

Presentation of the Report

One of the preconditions to the presentation of the report by the administrator is that he has provided to the representative of the creditors, the *contrôleurs* and the *comité d'entreprise* an outline of the proposals he considers just for the settlement of the business' debts.⁷⁸ The role of the creditors' representative is to act as an intermediary, presenting to each creditor the proposals as formulated and receiving each creditor's response, which he forwards to the administrator, and which will feature in the report.⁷⁹

The debtor has a right to be consulted on the contents of the report, though it is not clear whether he may formally object to its conclusions.⁸⁰ Copies are provided for the use of the *comité d'entreprise* or representatives of the workforce and also for the use of the *procureur*.⁸¹

The Observation Period

Assessing the Situation

The administrator, once appointed, may, personally or through the offices of the managing director, assume control of the business. The first priority will be to take such necessary action as will preserve the continued running of the

⁷¹Equivalent to the board of directors or management body.

⁷²L Art 22 *al* 1.

⁷³L Art 22 *al* 2.

⁷⁴L Art 22 *al* 3.

⁷⁵L Art 23 *al* 1.

⁷⁶Equivalent to a trustee appointed by court.

⁷⁷L Art 23 *al* 2.

⁷⁸L Art 24 *al* 1.

⁷⁹L Art 24 *al* 2- *al* 3.

⁸⁰L Art 25 *al* 1.

⁸¹L Art 25 *al* 3.

business and production capacity and safeguards the rights of the company against its own debtors.⁸²

In this context, the administrator has the right to act on behalf of the business to assent to any mortgage, lien or other charge that the managing director may have neglected to grant or renew.⁸³ The administrator has wide powers of access to business premises, files, documents and employees to enable him to carry out the task of assessing the financial state of the business.⁸⁴ This includes the right of access to third parties in possession of company documents.⁸⁵

The first legal obligation is that of carrying out an inventory.⁸⁶ This does not, however, prevent any creditor claiming *in rem* from instituting proceedings before the inventory has been established.⁸⁷ In addition, the administrator also establishes a list of shares, stock, debentures and other documents of title held by directors and managers, which represent their interest in the company.⁸⁸ These interests are subsequently frozen in a special account held by the business or its financial agent.⁸⁹ Mention is made on the company registers of the judgment of the court and the interests to which it applies.⁹⁰ Concurrently, the *juge-commissaire* will order that all communications addressed to the debtor be transmitted to the administrator.⁹¹ The *juge-commissaire* will fix the level of remuneration for the work to be carried out by any business manager the administrator chooses to leave in place.⁹²

The Administration of the Business

The court will establish a clear statement of objectives for the administrator. These will include the overseeing of the management of the business, the assisting of the debtor in relation to some or all of the management of the business or the taking on of the management of the business.⁹³ During the period of management, the administrator is bound by all conventional legal rules that circumscribe the activities of an ordinary business manager,⁹⁴ especially those rules relating to the bank accounts of the business.⁹⁵ The statement of objectives may be modified at any time by the court.⁹⁶ The debtor retains, even when the administrator is in place, the right to manage all personal funds as well any of the functions of management of the business not within the administrator's province.⁹⁷

⁸²L Art 26 *al* 1.

⁸³L Art 26 *al* 2.

⁸⁴D Art 46 *al* 1.

⁸⁵D Art 46 *al* 2.

⁸⁶L Art 27 *al* 1.

⁸⁷L Art 27 *al* 2.

⁸⁸L Art 28 *al* 1.

⁸⁹L Art 28 *al* 2.

⁹⁰L Art 28 *al* 3.

⁹¹L Art 29.

⁹²L Art 30.

⁹³L Art 31 *al* 1.

⁹⁴L Art 31 *al* 2.

⁹⁵L Art 31 *al* 4.

⁹⁶L Art 31 *al* 3.

⁹⁷L Art 32.

By far the most important consequence of the administrator assuming his functions is the interdiction, contained in the order commencing the observation period, against paying any business debt incurred before the judgment.⁹⁸ The conventional rule is that all creditors, for the purpose of this moratorium, rank equally. Nevertheless, a creditor may be paid by a third party, such as a bank, if a cheque has already been drawn and will be met.⁹⁹ Similarly, reciprocal debts may be set off against each other if there is a sufficient nexus, such as contra accounts with one supplier, between the sums due.¹⁰⁰ Where there may be no legal connexion, payment may still be made if the amounts of both debts are ascertainable and payment was due before the date of the judgment instituting *redressement judiciaire*.¹⁰¹

Derogations from the rule are permissible if, in the opinion of the *juge-commissaire*, it is necessary for the business to pay a particular debt, for example that of a supplier.¹⁰² Equally, mortgages, liens or other charges may be granted over the property of the business if essential.¹⁰³ All other payments in breach of this rule are voidable at the instance of any interested party who brings a suit within 3 years of the payment being made.¹⁰⁴ The sale of any property of the business, which is the subject of a legal charge, entails the payment of part of the purchase price into a special account, from which creditors with guarantees or special privileges may be paid in order of their ranking.¹⁰⁵

Nevertheless, this payment is subject to the beneficiary obtaining a letter of guarantee against repayment in the event of their claim being contested, the cost of which is borne by the creditor.¹⁰⁶ Short of payment, the debtor or administrator may agree with the creditors that any guarantees they hold may be substituted by fresh guarantees, a system which may be enforced even without agreement having been reached by order of the *juge-commissaire*.¹⁰⁷

Continuing the Business : Contracts

Maintenance of the business is treated as a priority by the administrator.¹⁰⁸ Nevertheless, the court may order that all or part of the business be ceased or that the business be placed in *liquidation judiciaire*.¹⁰⁹ If the latter solution is adopted, the court will terminate the administrator's appointment and conclude the period of observation.¹¹⁰ Contracts with third parties, not including

⁹⁸L Art 33 *al* 1.

⁹⁹Cassation commerciale, 18 December 1990 Bull. Civ. IV No. 326.

¹⁰⁰L Art 33 *al* 1 (amended by the Law of 1994). Solution confirmed in Cassation commerciale, 19 March 1991 Bull. Civ. No. 105.

¹⁰¹Cassation commerciale, 29 November 1988 Bull. Civ. IV No. 325.

¹⁰²L Art 33 *al* 3.

¹⁰³L Art 33 *al* 2.

¹⁰⁴L Art 33 *al* 4.

¹⁰⁵L Art 34 *al* 1.

¹⁰⁶L Art 34 *al* 2.

¹⁰⁷L Art 34 *al* 3.

¹⁰⁸L Art 35.

¹⁰⁹L Art 36 *al* 1.

¹¹⁰L Art 36 *al* 2.

employment contracts,¹¹¹ are the subject of special regulation. The administrator may at any time require that a contract be performed by himself providing the promised consideration.¹¹² The third party is required to fulfil his part of the bargain, irrespective of any breaches of condition or warranty or failure to perform by the debtor prior to the judgment commencing the observation period.¹¹³

The performance is not completely unilateral in nature. The administrator is bound to provide immediate payment for services rendered unless the third party agrees to accept a delay. On the other hand, if the contract is one for payment by tranche, the administrator may still resile from the contract if it appears to him that he will not have the means to make all payments when due.¹¹⁴ Where the administrator does not use the facility to perform the contract, his failure may give rise to damages, which will be calculated less any amount already paid in performance of the contract.¹¹⁵ Any calculation of damages will be made by the *juge-commissaire*.¹¹⁶

Determination of Leases

The reforms of 1994 removed the qualification to the right of a lessor to demand the surrender of a lease in the event of the lessee becoming insolvent. Previously, a lessor could not demand that the lease be surrendered unless rental had not been paid for more than three months after the date of the judgment placing the business in *redressement judiciaire*.¹¹⁷

Following the reforms, the lessor has the right to require the surrender of the lease for non-payment of rental or other charges on property occupied by the business, provided he exercises this right within two months of the judgment in *redressement judiciaire*.¹¹⁸ In any event, the claim is limited to rental overdue for the two years prior to judgment,¹¹⁹ together with any damages for breach of the terms of the lease a court may award.¹²⁰

The surrender of a lease may not be required merely because the business has ceased using those premises for its purposes.¹²¹ In addition, the law permits the transfer of the benefit of a lease to a third party with the debtor retaining the burden.¹²² The surrender of a lease effected by a judgment of the court prior to the *redressement judiciaire* of the business is valid.¹²³

¹¹¹ L Art 37 *al* 7.

¹¹² L Art 37 *al* 1.

¹¹³ L Art 37 *al* 4.

¹¹⁴ L Art 37 *al* 2 (inserted by the Law of 1994).

¹¹⁵ L Art 37 *al* 5.

¹¹⁶ Cassation commerciale, 8 December 1987 Bull. Civ. Nos. 266, 267.

¹¹⁷ L Art 38 (unamended).

¹¹⁸ L Art 38 *al* 1 (inserted by the Law of 1994).

¹¹⁹ L Art 39 *al* 1.

¹²⁰ L Art 39 *al* 2.

¹²¹ L Art 38 *al* 2.

¹²² L Art 38-1 (inserted by the Law of 1994).

¹²³ Cassation commerciale, 19 December 1989 Bull. Civ. IV No. 320.

Debts Acquired after Redressement

Debts acquired by the business after it has been placed in *redressement judiciaire* are payable as they fall due provided they are due to business being continued.¹²⁴ Before 1994, whatever happened to the business, whether it was ultimately sold or placed in *liquidation judiciaire*, these debts were paid in priority to all others except those contracted by reason of employment legislation.¹²⁵ Following the reforms in 1994, only where the business was sold would these debts still be paid in priority to others.¹²⁶

If, however, the business was placed in *liquidation judiciaire*, other debts acquired as a result of guarantees given in relation to property, including where a right to retain title was conferred, are paid in priority.¹²⁷ Post-redressement debts are generally paid in the following order: 1. Salaries; 2. Legal Costs; 3. Loans by Financial Institutions; 4. Advances on Salaries and 5. All other debts.¹²⁸ All sums of money, received by the administrator, which are not immediately needed for the purposes of carrying on business are retained in a special bank account.¹²⁹ The *juge-commissaire* may modify the percentage that may be retained by the business for its purposes.¹³⁰

The Employees and the Business

Business debts which represent salaries due to employees are calculated by the administrator and verified by the creditors' representative. The workers' representative may be consulted in case of difficulty.¹³¹ By far the more difficult question is in the situation where one or more redundancies are required for the sake of the continuation of business. Where these redundancies, made for economic reasons, are urgent, the administrator may be authorised by the *juge-commissaire* to proceed. The administrator should consult the works council or representatives of the workforce before applying to the *juge-commissaire* for authorisation.¹³² Once the *juge-commissaire* has ordered that a certain number of employees be made redundant and made precise the categories from which they are to be drawn, the works council is advised.¹³³ The selection is made by the administrator and may be the subject of appeal to the competent court.¹³⁴

Representing the Creditors

Despite the facility offered to creditors to represent their own interests as *contrôleurs*, appointed to assist the administrator, only the creditors'

¹²⁴L Art 40.

¹²⁵L Art 40 (unamended).

¹²⁶L Art 40 *al* 1.

¹²⁷L Art 40 *al* 2 (inserted by the Law of 1994).

¹²⁸L Art 40 *al* 3.

¹²⁹L Art 41.

¹³⁰D Art 62.

¹³¹L Art 44.

¹³²L Art 45.

¹³³D Art 63.

¹³⁴In this case, the Conseil des Prud'hommes. See Cassation sociale, 3 October 1989 Bull. Civ. V No. 559.

representative enjoys a legal role to act on behalf of all creditors.¹³⁵ This role is primarily to communicate any information provided by the *contrôleurs* or other creditors to the *juge-commissaire*.¹³⁶ In addition, the creditors' representative may act so as to recover any moneys owing to the debtor by third parties, as he enjoys the ability to institute a derivative action, any moneys being recovered going to the credit of the business.¹³⁷

Stays of Action

Directly judgment placing a business in *redressement judiciaire* is pronounced, all suits commenced prior to the judgment, whether for sums due for debts arising before the date of judgement or with view to dissolving a contract for reason of non-payment, are automatically stayed. The execution of judgments obtained prior to *redressement judiciaire* is also stayed.¹³⁸ This stay does not apply to suits against co-sureties or guarantors, nor does it apply to actions on other issues.¹³⁹

If the court subsequently adopts the plan for the *redressement judiciaire* of the business, any actions which have been stayed are rendered nugatory. Any funds collected in court pursuant to these judgments are transferred for the benefit of the business.¹⁴⁰ If, however, the court decides to place the business in *liquidation judiciaire*, any judgment-debts are placed in a central pool for apportionment among all creditors who have proved their debts.¹⁴¹

All suits in progress are stayed pending the creditor furnishing a declaration of the alleged indebtedness. Thereafter, they may proceed for the purposes of establishing the existence of a debt and any amount owed but not for the purposes of execution.¹⁴² Any other suit, not relating to as money debt, may proceed as normal, provided the administrator or creditors' representative is duly notified or takes up the suit.¹⁴³

Declaration of Debts

This phase of the procedure is considered to be one of the most important in *redressement judiciaire* as important consequences flow from the ability of the creditor to prove his debt. On judgement placing the business in *redressement judiciaire* being given, all creditors, with the exception of employees owed their salary, must present a declaration of the existence of a debt to the creditors' representative,¹⁴⁴ whether in person or via a legal representative.¹⁴⁵

¹³⁵L Art 46 a/1.

¹³⁶L Art 46 a/2.

¹³⁷L Art 46 a/3.

¹³⁸L Art 47.

¹³⁹For example, an injunction against non-performance. See Cassation commerciale 12 May 1992 Bull. Civ. IV No. 181.

¹⁴⁰D Art 65-1 a/1.

¹⁴¹D Art 65-1 a/3.

¹⁴²L Art 48.

¹⁴³L Art 49.

¹⁴⁴L Art 50 a/1.

¹⁴⁵L Art 50 a/2 (inserted by the Law of 1994).

Secured creditors and those under a leasing contract are notified directly of the existence of the judgment, notification to the other creditors being made by advertisement.¹⁴⁶ Whether creditors have documentary proof of the debt or not, they must still make their declaration within the specified time.¹⁴⁷ The declaration must contain an indication of the principal sum due, together with any date on which instalments become due. The declaration must also mention any security or other privilege the creditor is relying on so as to advance his cause.¹⁴⁸ Debts in foreign currency are expressed in French Francs at the rate of exchange on the date of the judgment placing the business in *redressement judiciaire*.¹⁴⁹

The creditor's declaration need only be made in simple form, though for sums over a certain limit, an attestation of a commissioner may be required, as well as in situations where the *juge-commissaire* deems it necessary.¹⁵⁰ The debtor is also required to provide a list of his creditors to the creditor's representative,¹⁵¹ a copy of which is submitted to court.¹⁵² If the declaration is not submitted in time, the *juge-commissaire* may order that they be excluded from any dividend or payment made from the creditors' fund unless he accepts the reason given. Creditors excused by the *juge-commissaire* may only participate in any dividend payments made after they have been readmitted to the list of creditors.¹⁵³

Exclusion from the list does not apply to creditors who are required to be informed personally under Article 50, and have not received notice.¹⁵⁴ Failure to be mentioned on the creditors list results in the extinction of the debt.¹⁵⁵ The existence of the judgment placing the business in *redressement judiciaire* does not determine any debt, which was not due at the date of judgment.¹⁵⁶ Creditors must still prove their debt in the ordinary way.

Legal Charges and Sureties

No mortgages, liens or other legal charges may be created over the property of the business after the date of the judgment placing the business in *redressement judiciaire*, except by authority of the *juge-commissaire*.¹⁵⁷ Any charges registered before that date and which are not defeated by reason of falling within the period prior to *redressement judiciaire* may stand for the benefit of third parties.

A creditor holding a guarantee, subscribed to jointly and severally by the business as well as other parties, may declare a debt for the nominal amount of

¹⁴⁶L Art 50 *al* 1 (last sentence inserted by the Law of 1994).

¹⁴⁷L Art 50 *al* 3.

¹⁴⁸L Art 51 *al* 1.

¹⁴⁹L Art 51 *al* 2.

¹⁵⁰L Art 51 *al* 3.

¹⁵¹L Art 52.

¹⁵²D Art 69.

¹⁵³L Art 53 *al* 1.

¹⁵⁴L Art 53 *al* 2 (inserted by the Law of 1994).

¹⁵⁵L Art 53 *al* 4.

¹⁵⁶L Art 56.

¹⁵⁷L Art 57 *al* 1.

the guarantee.¹⁵⁸ No contribution between co-sureties may be recovered unless the total amount recovered by the creditor exceeds the nominal value of the guarantee, in which case the excess goes to the surguarantors.¹⁵⁹ Credit must be given for any amount received by the creditor from any of the joint guarantors, though a joint guarantor may, in respect of a business in *redressement judiciaire*, declare this payment as a debt.¹⁶⁰

1st February 1996

¹⁵⁸L Art 58.

¹⁵⁹L Art 59.

¹⁶⁰L Art 60.