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Corporate Rescue Practitioners in France

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Corporate Rescue Practitioners in France

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Introduction

There is a variety of personnel involved in the conduct of corporate rescue proceedings. Some of these personnel have a professional and legally recognised status, with specific legislation governing all aspects of their profession. This is the case for those involved in the conduct of insolvency proceedings. Appointments under powers contained in legislation dealing with pre-insolvency proceedings or by virtue of the court's inherent powers tend to rely on the discretion of the court and its view of the suitability of the appointee, in the absence of a comprehensive legal framework or organised status.

Pre-Insolvency Proceedings

In pre-insolvency proceedings,¹ there are three categories of persons who may be appointed to assist in the conduct of proceedings. There is the ad hoc nominee, appointed by virtue of the court's inherent powers to act in the context of the ad hoc mandate. There is also the mediator, who is appointed under provisions contained in the Law of 1984 dealing with the prevention of business difficulties.² The court also enjoys the power to appoint an expert to help assist in finding solutions in the context of all pre-insolvency proceedings.

A - Ad Hoc Nominees

This institution is entirely created by case-law,³ although it is briefly mentioned in the Law of 1994.⁴ The appointment of an ad hoc nominee is entirely at the discretion of the President of the relevant Court.⁵ The appointment of an ad hoc nominee is generally viewed as useful, given the flexibility of the institution. In practice, whether it is available differs from court to court and will depend on the experience of the judges. It is noted that judges with more commercial experience are more ready to appoint ad hoc nominees. Because legislation has little to say on the subject of ad hoc nominees, the tendency in practice is to model the institution on that of amicable resolution. Many of the provisions applicable to the mediator in amicable resolution seem to find application to the ad hoc nominee.

¹For an overview of this institution, see Omar P. and Sorensen A., The French Experience of Corporate Voluntary Arrangements [1996] 3 ICCLR 97.

²Law no. 84-148 of 1 March 1984 on the prevention and amicable resolution of business difficulties, implemented by Decree no. 85-295 of 1 March 1985.

³Cassation commerciale, 18 October 1950, JCP 1950 II 6238.

⁴Art. 35, al. 1, Law of 1984 reads: "*Without prejudice to the power of the President of the [Commercial or High] Court to appoint an ad hoc nominee, whose mission he shall determine, there is created a procedure entitled amicable resolution ...*"

⁵High Court or Commercial Court.

B - Mediators

In contrast to other insolvency practitioners, there is no specific profession of mediator. A mediator may be appointed, at the discretion of the court, from among any group of persons it deems capable of fulfilling the duties and responsibilities attached to mediation.⁶ In practice, any member of a recognised profession may be appointed, including lawyers, accountants, auditors and management experts. Any professional who is appointed should however take care to avoid the possibility of a conflict of interest should there be subsequent insolvency proceedings. The request which seeks the initiation of amicable resolution may even specify a particular individual the debtor would like to see nominated, though there is no guarantee the President of the Court will agree to this step.

In practice, the appointment of a person of some stature or experience is likely to assist.⁷ This is due to creditors being persuaded to negotiate if they have confidence in the person suggesting the solutions. The mediator owes a common duty of care in both civil and criminal situations. This is of further benefit to creditors as the mediator will not risk suggesting a course of action that would put him or the business in jeopardy. It is nevertheless important for the would-be mediator to have practice insurance. For this reason, it is normal to appoint mediators from among the ranks of insolvency practitioners. The President of the Court and the debtor are required to come to an agreement about the remuneration of the mediator.⁸

C - Experts

The President of the Court may also appoint an expert, whose task will be to examine the financial state of the business. The choice of expert is entirely at the President's discretion and need not be made from any list of experts usually kept by Courts. Remuneration of the expert is a matter for agreement between the debtor and the President of the Court.⁹ A report prepared by an expert for a firm, which subsequently becomes subject to insolvency proceedings may attract a fee calculated as for experts in insolvency.

Insolvency Proceedings

There are two recognised professions in the context of insolvency proceedings, administrators and liquidators. Both professions are governed by provisions of the Law of 1985 dealing with insolvency practitioners.¹⁰ This

⁶Art. 37 al. 2, Decree of 1 March 1985.

⁷In the case of Eurotunnel, which announced mediation proceedings in early 1996, the mediators appointed were Lord Wakeham and Robert Badinter, perhaps an illustration of the use of appointments to persuade creditors of the negotiating strengths of and backing for the mediators.

⁸Art. 38, Decree of 1 March 1985.

⁹ibid.

¹⁰Law no. 85-99 of 25 January 1985, implemented by Decree no. 85-1389 of 27 December 1985 (References below to articles of a Law ('L') or Decree ('D') will be to this law and decree unless otherwise stated).

law also govern the establishment of lists of experts, who may be appointed to assist the court in determining facts and reaching conclusions about businesses, their assets and liabilities, which are subject to insolvency proceedings.

A: Administrators

Administrators are defined as being nominees appointed by a decision of the court for the purposes of administering the assets of others or to assist or supervise another in the management of these assets.¹¹ Any person who wishes to exercise the profession of administrator in France must be of French nationality. The would-be administrator must be of good conduct and have successfully passed an examination following a professional internship.

Only holders of certain diplomas are entitled to apply for professional internships. An exception may be made for persons who do not necessarily have the required diplomas but who have acquired sufficient experience in or knowledge of business management, who will be permitted to sit for the examination and be dispensed from having to complete all or part of the professional internship. Other professionals may also be admitted to practice the profession of administrator without being required to pass all or part of the entrance examination. Any persons who has acquired a qualification entitling him to practise as an administrator in another European Union country may also be exempted from having to hold the required diploma, apply for a professional internship or take the entrance examination. Nevertheless, a test of the candidate's knowledge will be made.¹²

Qualification for Practice

Only an administrator who appears on the national list is qualified to act in insolvency matters. By way of exception, a court may appoint a person, who is not otherwise enrolled on the list but, who has particular experience or a qualification which makes his appointment as an administrator desirable.¹³ The national list is divided into sections established on a regional basis, which correspond to the seats of the various Courts of Appeal.¹⁴ Nevertheless, an administrator who appears on the national list may exercise his profession anywhere in France.¹⁵

The national list is the responsibility of a committee, which comprises a councillor of the Supreme Court, a judge of the Court of Accounts, a member of the Inspectorate of Finances, a judge of a Court of Appeal, a first-instance judge, a Professor of business, economics or management, two persons qualified in economics or employment matters and three administrators. Appointments of committee members and of an alternative in each category,

¹¹L. Art. 1. For an overview of the system of judicial administration in France, see Omar P., *The Administration of Insolvent Companies in France* [1996] 2 IL&P 39, 3 IL&P 81.

¹²L. Art. 5.

¹³L. Art. 2.

¹⁴L. Art. 3.

¹⁵L. Art. 10.

is for three years. Voting is by a majority. A member of the prosecution service is appointed to serve as Government Commissioner, whose purpose is to follow up requests for admission.¹⁶ Removal of an administrator from the list may occur following a decision of the committee and an opportunity having been given to the administrator to reply. Reasons for removal include that the administrator is no longer fit physically or mentally to continue in practice or that he is otherwise unfit professionally to continue in office.¹⁷

Exercise of the Profession

Administrators may choose to form a sole practice or to group together in the form of a civil professional company, a professional business association or partnership and may form part of a local or European Economic Interest Group.¹⁸ The profession of administrator is not compatible with the exercise of any other profession, saving that of a lawyer. In any event, any person who is the administrator of a company may not equally act as its lawyer. This prohibition also extends to any partner, associate or employee of that person.¹⁹ An administrator who chooses to exercise simultaneously the profession of lawyer is subject to the rules governing qualification for, entry to and exercise of both professions. Nevertheless, if a person has a particular qualification, he may act as a consultant in that field. An administrator may also act as a mediator, supervisor for the plan, liquidator or expert.²⁰

Practice Insurance and Liability

The profession of administrator has its own insurance body, to which every administrator is required to belong and to which premiums are paid annually.²¹ Every administrator must be able to satisfy any request for the production of documents certifying that he has obtained the necessary insurance to cover professional liability.²² This rule also applies to ad hoc appointments and to former administrators who are allowed to continue practice for the purpose of a particular case.²³

Professional Regulation

All administrators are under the supervision of a National Council, which is their professional body and which represents administrators as a profession.²⁴ All administrators, including ad hoc appointments, are also subject to the supervision of the public prosecution service. Regular checks may be carried out by the public administration service, during which administrators are

¹⁶L. Art. 4.

¹⁷L. Art. 6.

¹⁸L. Art. 8.

¹⁹L. Art. 11, al. 1.

²⁰L. Art. 11, al. 2-al. 3.

²¹L. Art. 34.

²²L. Art. 35.

²³L. Art. 36.

²⁴L. Art. 33.

required to co-operate fully and may not rely on professional secrecy rules to avoid supplying information.²⁵

The committee referred to above may also meet as a professional tribunal, in which event the Government Commissioner acts as prosecutor. A number of professional sanctions are available, which include warnings, findings of guilt, temporary suspension from practice for a period not exceeding a year and being struck off. Warnings and findings of guilt may also be accompanied by a requirement for the administrator to follow particular rules of conduct. The tendering of resignation by an administrator from his office does not prevent the institution of disciplinary proceedings which relate to events during his term of office.²⁶

An administrator who is the subject of criminal or disciplinary proceedings may be suspended from practice by the committee. A suspension may be ordered even before proceedings have been instituted if it appears that funds held by the administrator in the performance of his functions may be at risk. The committee may at any time lift the suspension at the request of the administrator or the public prosecutor. The suspension ends if proceedings are not instituted within a month of the suspension being ordered and when proceedings have come to an end.²⁷

There is a limitation period for the bringing of disciplinary proceedings of ten years.²⁸ An administrator who is the subject of suspension from practice or who has been struck off may no longer carry out any professional act. Any acts carried out may be declared void by a court sitting in chambers at the request of the public prosecutor or any interested party. The administrator who has acted notwithstanding this prohibition may be subject to criminal penalties.²⁹ Appeals by administrators against professional sanctions are brought before the Court of Appeal in Paris. The making of an appeal acts so as to suspend enforcement of the disciplinary measure. Appeals are also taken before the Court of Appeal in the case of decisions relating to admission or qualification for the profession.³⁰

The cases in the hands of an administrator who is no longer a member of the profession will be distributed among other practitioners in the same regional section. Nevertheless, if in the interests of justice or good management, the court deems it advisable, the administrator who has previously acted in the matter may be reappointed, except where the reason for his leaving the profession is due to his being struck off. An administrator so reappointed remains subject to professional rules.³¹ The misuse of the title of administrator is a punishable offence as is the use of any title or denomination which may cause confusion in the public's mind with the title of

²⁵L. Art. 12.

²⁶L. Art. 13.

²⁷L. Art. 14.

²⁸L. Art. 16.

²⁹L. Art. 17.

³⁰L. Art. 32.

³¹L. Art. 9.

administrator.³² The penalties provided are a term of imprisonment ranging from six months to two years to which a fine of between FF. 1500 and FF. 40,000 may be added.³³

Remuneration

The fee payable to the administrator for the conduct of insolvency proceedings is in the nature of a flat fee, fixed at FF. 15,000. This fee is reduced to FF. 10,000 in the case of simplified proceedings. In the event that proceedings are brought to an end early and liquidation is ordered, payment will be set by the President of the Court at the suggestion of the supervising judge. The President of the Court will also settle the question of fees in the event of the replacement of one administrator by another.³⁴

The fee payable to administrators for the preparation of the economic and social report as well as any recovery plans is calculated from a unit expressed as equal in value to FF. 450 multiplied by an amount, which is dependent on the number of employees belonging to the business in question.³⁵ This amount may be increased where the number of employees exceeds 1,000 and where the case is complex such that the scale is insufficient to properly account for the work involved.³⁶

Administrators are also paid a fee for their role in administering the business which is calculated as a percentage of the gross turnover. This percentage is reduced if the administrator only assists the debtor in managing the business, the percentage is lower, as it is in cases where the simplified procedure is applied. In any event, a fee which exceeds FF. 450,000 may be taxed by the President of the Court.³⁷ The fees paid to the administrator in the event of a successful sale of the business are calculated as a percentage of the sale, to which a further percentage is added depending on the difference between the liabilities admitted during insolvency and the price obtained for the sale.³⁸

B - Liquidator

Liquidators are defined as being nominees appointed by a decision of the court for the purposes of representing the interests of creditors and the eventual liquidation of a company, subject to the conditions set out in the Law of 1985.³⁹ Only French nationals may exercise the profession of liquidator in France. An applicant must be of good conduct and have successfully passed an examination following a professional internship. Applicants must also establish their professional residence in the territorial jurisdiction of the Court of Appeal before which they are admitted to practice. Only holders of certain

³²L. Art. 18.

³³Art. 259, Penal Code.

³⁴Art. 2, Decree no. 85-1390 of 27 December 1985.

³⁵Art. 3, Decree no. 85-1390 of 27 December 1985.

³⁶Art. 4, Decree no. 85-1390 of 27 December 1985.

³⁷Art. 6, Decree no. 85-1390 of 27 December 1985.

³⁸Art. 7, Decree no. 85-1390 of 27 December 1985.

³⁹L. Art. 19. For an overview of this institution, see Omar P. and Sorensen A., *The Institution of Liquidation Judiciaire in France* [1996] 1 IL&P 2.

diplomas may apply for professional internships. An exemption may be given to persons who have acquired sufficient knowledge of or experience in law and accounting, although they may not have the required educational qualification. Exemption will entitle holders to sit for the examination without having to complete all or part of the professional internship.

Other professionals may also be admitted to practice as liquidators without being required to pass all or part of the entrance examination. Any persons who has acquired a qualification entitling him to practise as a liquidator in another European Union country may also be exempted from having to hold the required diploma, apply for a professional internship or take the entrance examination. Nevertheless, a test of the candidate's knowledge will be made. The successful candidate may apply to be admitted to the list established by the Court of Appeal, in whose jurisdiction he intends to practise.⁴⁰

Qualification for Practice

By way of contrast to the national list established for the profession of administrator, liquidators are enrolled on a list established by a committee which has its seat within the jurisdiction of each Court of Appeal. Only a liquidator who appears on that list may act in insolvency matters. The committee responsible for maintaining the list is composed of a judge of the Court of Appeal, a judge of the relevant regional Court of Accounts, a first-instance judge who regularly sits in the Commercial Court, a Professor of law, economics or management, two persons qualified in economics or employment matters, two liquidators and a an expert in the diagnoses of businesses

Members of the committee are appointed, together with an alternative in each category, to serve for three years. Voting is by a majority. A member of the prosecution service is appointed to serve as Government Commissioner, whose purpose is to follow up requests for admission.⁴¹ A liquidator may be removed from the list following a decision of the committee with an opportunity having being given to the liquidator to form a response. The liquidator may be removed if he is found to be no longer fit physically or mentally to continue in practice or that he is otherwise unfit professionally to continue in office.⁴²

Exercise of the Profession

Liquidators may practice singly or group together in the form of a civil professional company, a professional business association or partnership and may form part of a local or European Economic Interest Group.⁴³ The profession of liquidator is incompatible with the exercise of any other profession. Nevertheless, if a person has a particular qualification, he may act as a consultant in that field.

⁴⁰L. Art. 21.

⁴¹L. Art. 20.

⁴²L. Art. 22.

⁴³L. Art. 23.

A liquidator may also as a mediator, supervisor for the plan, liquidator or expert. In any event, he may not act as liquidator for the same business for which he has previously acted as mediator unless at least a year has elapsed between both events. A liquidator who has acted as an expert may not also act as administrator under the simplified procedure.⁴⁴ A court of first-instance is required to choose a liquidator from the list established by the Court of Appeal to which it is subordinate. Nevertheless, a choice may be made from the list established by a neighbouring Court of Appeal if demand exceed the number of available liquidators to be appointed.⁴⁵

Practice Insurance and Liability

Liquidators have their own insurance body, to which every liquidator is required to belong and to which premiums are paid annually.⁴⁶ Every liquidator must be in the position to produce at any time documents certifying that he has obtained the necessary insurance to cover professional liability.⁴⁷

Professional Regulation

The same rules relating to professional bodies, professional checks and sanctions apply equally mutatis mutandis to the profession of liquidator.⁴⁸ Appeals by liquidators against professional sanctions are brought before the Court of Appeal before which they have been admitted to practise. The fact of an appeal acts so as to suspend enforcement of the disciplinary measure. Appeals are also brought before the local Court of Appeal against decisions on admission or qualification for the profession.⁴⁹

The cases formerly managed by a liquidator who is no longer a member of the profession will be distributed among other practitioners on the same list. A court may, however, deem it advisable to reappoint the liquidator who has previously acted in the matter, unless where the reason for his leaving the profession is due to his being struck off. A liquidator who is reappointed remains subject to professional rules of conduct.⁵⁰ A liquidator may use the title of liquidator followed by the location of the Court of Appeal before which he was admitted. The misuse of the title of liquidator by any other person is a punishable offence as is the use of any title or denomination which may cause confusion in the public's mind with the title of liquidator.⁵¹ The penalties include a term of imprisonment of between six months to two years and a fine of between FF. 1500 and FF. 40,000.⁵²

Remuneration

⁴⁴L. Art. 27.

⁴⁵L. Art. 26.

⁴⁶L. Art. 34.

⁴⁷L. Art. 35.

⁴⁸L. Art. 28.

⁴⁹L. Art. 32.

⁵⁰L. Art. 24.

⁵¹L. Art. 29.

⁵²Art. 259, Penal Code.

A liquidator, where the creditors' representative is nominated to this post, normally receives a flat fee of FF15,000 for the performance of his functions. The liquidator is also paid a fee of five percent of the difference between the value of debts which have been declared and the amount they are proven in.⁵³ If a liquidator is appointed in addition to the creditors' representative, this fee is shared between both parties.⁵⁴ The liquidator is also paid a percentage of the assets recovered as a result of suits he institutes or continues on behalf of the business as well as a percentage of the value of assets which are sold as part of liquidation. To this fee may be added a percentage depending on the amount of moneys available for distribution to creditors.⁵⁵

C - Experts

A court may appoint an expert in the diagnosis of business to establish a report on the economic and financial situation being faced by a business. This may occur in the context of both amicable resolution and judicial administration. An expert may also be required to assist in the production of a report which is required for the purposes of judicial administration. Experts are chosen from a list which is divided according to specialisations.⁵⁶ This list is drawn up by each Court of Appeal on the advice of the committee which also draws up the list of liquidators. The enrolment of an expert is valid for a period of three years. At the end of this period, a request may be made by the expert for the enrolment to continue.⁵⁷

An expert may be removed from the list before the end of the three year period upon a request being made by or advice being received from the regional committee.⁵⁸ A Court of Appeal may also remove an expert from the list if it appears that the expert does not necessarily have the required level of competence or is otherwise unfit to continue in office.⁵⁹ The fee given to an expert who assists the administrator in the preparation of the economic and social report is also calculated according to the amount of personnel employed by the business, multiplied by a coefficient. The same rules which apply in the event that the number of workers exceed 1000 or the case is complex as to merit additional payment also apply.⁶⁰ The experience of the use of experts across the country differs from court to court, with the Paris Court of Appeal being known to resort more frequently to nominations.

Summary

The organisation of insolvency practitioners in France may seem unnecessarily complex with a strict division being made between the procedures in pre-insolvency and insolvency and further, within insolvency

⁵³Art. 15, Decree no. 85-1390 of 27 December 1985.

⁵⁴Art. 12, Decree no. 85-1390 of 27 December 1985.

⁵⁵Art. 18, Decree no. 85-1390 of 27 December 1985.

⁵⁶Art. 2, Law no. 71-498 of 29 June 1971.

⁵⁷L. Art. 30.

⁵⁸Art. 5, Law no. 71-498 of 29 June 1971.

⁵⁹L. Art. 31.

⁶⁰Art. 4, Decree no. 85-1390 of 27 December 1985.

proceedings, between the conduct of judicial administrations and liquidations. There is not a great deal of interest in the formation of a specialist profession of mediators. In practice pre-insolvency proceedings almost always result in the appointment of insolvency practitioners, exceptions only being found in cases where a more specialised form of expertise may be required.

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