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The Progress of Reforms to Insolvency Law and Practice in France

by
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Introduction

France has been a commercial trading nation since the earliest times. The annual fairs held on the plains of Champagne since the late 1100s were a focus for the development of cross-European networks for trade and finance and are said to have contributed directly to the development of a European economic framework. With this trade increasing came undoubtedly the need to regulate for situations of economic hardship. Domestic rules were introduced early to deal with insolvency and the framework for such measures in France has a long and ancient history, one of the first comprehensive ordinances anywhere being that promulgated in 1673 in the reign of Louis XIV. The era of modern insolvency law in France dates from the introduction of the Law of 1967,¹ which reaffirmed the twin-track approach historically seen in French insolvency law that dealt with rescue and liquidation as alternative outcomes dependent on an initial examination of the financial situation of the afflicted debtor. The Law of 1967 updated this approach and reinvigorated the status of some of the officials whose role was to assist in the administration and management of insolvency proceedings. Reform proposals were current during the 1970s and early 1980s seeking variously to deal with the inexorable rise in the number of business failures as well as criticisms of the internal workings of the legislation. Developments in other jurisdictions, chiefly those with which France shared common legal traditions as well as neighbouring countries, influenced the outcome of the last of the reform proposals that secured passage into legislation. Equally, the development in many jurisdictions of institutions that promoted the ideal of 'corporate rescue', especially the United States and contemporary proposals in other Western European jurisdictions, had some influence in the shape of the new rules that were enshrined in the laws enacted in the mid-1980s. The result was to focus attention on legal structures whose purpose was to enhance the concept of corporate rescue as an alternative to liquidation as well as promote the use of pre-insolvency diagnostics tools and informal arrangements allowing for the early prevention and treatment of businesses facing financial difficulties.

The programme of reform began with the Law of 1984,² which introduced pre-insolvency arrangements, while two laws passed in 1985 dealt with the most ambitious part of the reform project in insolvency itself. The reforms resulted in the reshaping of the law and institutions of insolvency in France, the purpose of which was firmly set as being the rescue of companies by the continuation of business activity and the clearance of debts.³ To accompany

¹Law no. 67-563 of 13 July 1967, implemented by Decree no. 67-1120 of 22 December 1967.

²Law no. 84-148 of 1 March 1984, implemented by Decree no. 85-295 of 1 March 1985.

³Law no. 85-98 of 25 January 1985, implemented by Decrees nos. 85-1387 and 85-1388 of 27 December 1985.

the main text on the legal structure of insolvency, a new law was promulgated dealing with the professions of administrators and liquidators, thus installing a new regime to deal with the status, duties and responsibilities of insolvency practitioners.⁴ The framework introduced by the reforms was not destined, however, to remain beyond reproach forever. Following criticism of the Law of 1985, notably by creditors who had felt their rights declining in favour of the debtor, and also due to the greatly increasing number of insolvencies being declared, the 1984 and 1985 texts were the subject of a reform attempt in 1994.⁵ The purpose of this reform was stated as being firstly to reinforce those measures at the pre-insolvency stage dealing with voluntary arrangements. A further aim was to redress some of the rights of creditors during insolvency proceedings as well as to ensure better dividend payments and realisation of assets for the benefit of creditors. Finally, the reforms would ensure greater equity in rescue plans resulting in the sale or transfer of all or part of the business. Many commentators felt that the Law of 1994 merely tinkered with the procedural framework for both pre-insolvency and insolvency measures and had no real effect on the fundamental philosophy underlying the institutions of insolvency. The Law of 1994 furthermore left the situation of insolvency practitioners largely untouched as the practice environment had not attracted, despite some adverse commentary, the need for Government to intervene through further regulation or reforms to the existing framework.⁶ Unfortunately, in retrospect, the further criticisms that emerged in relation to both insolvency procedure as well as practice would have made dealing with this issue desirable. Despite the advice of certain very eminent members of the insolvency profession, it seemed as if overall reform of insolvency law was not a high priority on the Government's agenda at the time, given other pressing considerations of an economic nature.⁷

A - Financial Scandals and Responses: 1996-1997

In the 1990s in France, a number of high-profile cases occurred in the business world, chiefly centring on the misuse of corporate assets,⁸ a catchall offence that covered any use of company funds or goods to further an aim not considered to be in the overall interest of the company... There had been strong censure of the business environment stemming from the close-knit nature of the business community which resulted in an absence of real checks on the exercise of power within French companies. These criticisms were nowhere felt more strongly than in the context of insolvency proceedings, where the life and death of companies was an issue which carried political, economic and social overtones. There had been a few criticisms of the structure of insolvency practice, notably the feeling that real control of

⁴Law no. 85-99 of 25 January 1985, implemented by Decrees nos. 85-1389 and 85-1390 of 27 December 1985

⁵Law no. 94-475 of 10 June 1994, implemented by Decree no. 94-910 of 21 October 1994.

⁶See Vallens J-L., A propos de la réforme de la loi sur les entreprises en difficulté: Le rapport du groupe de travail du ministère de la justice, (in three parts) Les Petites Affiches Nos. 21-23 (18, 21, 23 February 1994). There is an extensive bibliography on the reforms available at para. 2263 et seq. of Lamy Droit Commercial.

⁷See Soinne B., Le Bateau Ivre (A propos de l'évolution récente du droit des procédures collectives), (in two parts) Les Petites Affiches Nos. 58-59 (14, 16 May 1997).

⁸'Abus de biens sociaux'.

insolvency practitioners was absent, leading to a lack of checks in the few instances when abuses occurred.⁹ Furthermore, insolvency practice was, even by French business standards, an unusually close world in which lawyers, practitioners and judges frequently formed close working relationships, particularly in the smaller judicial districts, this world not being immune to political pressures where certain insolvencies had wide implications for employment in local and regional economies. The closeness of the parties involved could also result in rescue plans being used as a vehicle for asset disposals to sympathetic parties, a situation that the Law of 1994 was meant to have resolved. Remuneration was also a consideration with the level of fees charged by practitioners coming in for severe disapproval. In addition, the conflicts that could occur through the different roles of insolvency practitioners acting as administrators and creditors' representatives, especially within the same insolvency, where the remuneration structure conditioned their responses to the steps in proceedings, was a curiosity perpetuated by the legislation of 1994. It may be the case that practice reveals lacunae in the law that result in conventions and understandings arising as to the best method of supplementing the deficiencies of law. Nevertheless, there was some disquiet at the overall level of difficulties inherent in insolvency practice. There was a feeling that it was merely a matter of time before these deficiencies would be used by unscrupulous parties to perpetuate gross abuses.

When eventually scandals occurred, the agenda for reform in insolvency was precipitated in a major way. In 1996-1997, it was alleged that two insolvency practitioners were involved in the disappearance of over FF 200 million from the coffers of companies they administered.¹⁰ This prompted close public scrutiny of the professions and intense press attention. During investigations these revelations occasioned, it was further alleged that a number of fellow insolvency practitioners were using their positions to further their own business interests. At the same time, the nature of the administration of justice in the commercial courts came in for a great deal of adverse comment, prompted by discoveries, made as a result of investigations in a number of judicial districts, indicating that a significant number of commercial judges were suspected of being involved in instances of unprofessional practice and potentially serious misconduct.¹¹ The impact of the reaction to revelations about the Commercial Courts on later developments can not be underestimated given that a very important percentage of the business of the Commercial Courts is in insolvency matters. The overall level of public concern and adverse comment led Elisabeth Guigou, the then 'Garde des Sceaux',¹² to use the occasion of the annual address to the General Conference of Commercial Courts in Paris on 24 October 1997, to announce

⁹It was noted that some insolvency practitioners under investigation would simply resign their practices, thus avoiding professional sanctions entirely.

¹⁰This case, known as "l'affaire Sauvan-Goulletquer" resulted in the arrest of both partners in early 1997 on charges of fraud, illegal acquisition of interests in companies and abetting criminal bankruptcy.

¹¹A journalistic enquiry by Fortin D. et al., published in *Challenges* (January 1998 edition) highlights some of the causes of concern. The courts affected include Paris, Bobigny and Nanterre (two courts just outside Paris) as well as Nice and St. Lô.

¹²Lit. 'Keeper of the Seals', the official title of the Minister for Justice.

a number of wide-ranging reforms. These would initially centre around four main issues. These included the reinforcement of penalties for supervising judges who misuse their influence for personal ends, the closer scrutiny of insolvency practitioners' accounts, a requirement that funds generated by companies in insolvency be deposited with the official deposit-taker as well as a greater role for public prosecutors in insolvency proceedings. Proposals for legislative action mirroring the contents of the announcement were presented to the Council of Ministers on 29 October 1997. Following closely on the events outlined above, the National Assembly began a parliamentary enquiry into the proposed reforms. In addition, the French Government's Inspectorate-General of Finances and Inspectorate-General of Judicial Services were given a mandate to conduct an inspection into the areas of concern outlined by the Minister for Justice in her proposals. The scope of both enquiries, which seemed to range widely, included an examination of the entire legal framework for the administration of commercial justice in France and, in particular, its application to insolvency matters.

The Parliamentary Report, in particular, makes for damning reading, chronicling as it does systemic abuses, ranging from failure to respect basic ethical requirements relating to judicial office to wholesale speculation and conspiracy to pervert the course of justice. The report states in a dispassionate but frank manner the failure of Commercial Court judges to respond to summons to give evidence and wholesale obstruction of the investigation, often by physical means including the refusal to release court documents and records to the officials concerned. Many of the discoveries made during the course of the enquiry resulted in information being laid before the prosecution authorities against Commercial Court judges and their staff. A press statement, issued by the Ministry of the Economy and Finances on 14 October 1998, reporting on the outcome of the enquiries, fleshes out a number of the proposals in light of the conclusions that were reached. Nevertheless, the Government did not accept all of the recommendations made in the enquiry reports. One in particular, suggested by Arnaud de Montebourg, the 'rapporteur' for the Parliamentary Commission, to the effect that the profession of liquidator should be abolished, did not get, in light of its controversial nature, a warm reception.¹³ In all, there are three principal areas that are the focus of attention in the statement, the reform of the commercial justice system, the reform of professions linked to commercial justice and the reform of the framework for insolvency law. Reforms to the justice system itself focused on the introduction of professional magistrates, a move that was likely to be unpopular with the business community as well as a shake up of the framework for court administration. This would also extend to the related professions mentioned, including both insolvency professionals as well as the 'greffiers', custodians of court records and legal service providers. Finally, insolvency law would also be the focus of targeted reforms dealing with particular concerns about the length of proceedings and their integrity.

The statement noted that the reforms represented an important legislative task for Parliament and fixed a timetable for a rolling programme of reforms

¹³See Vidal F., Options Finances No. 507 (6 July 1997).

extending over a five-year period. The press release and statements by the French Government at the time provided an insight into some of the compelling reasons the French Government found to embark upon what was outlined as an extensive reform agenda. The timetable seemed to be remarkably ambitious, given the many other demands on Parliamentary legislative time and resources. As will be seen, the timetable would end up being largely overtaken by later developments in the process, including those consequent on the French Government's explicit statement that the modernisation of the commercial justice system was to be one of its top priorities

Table 1: Initial Reform Timetable

Year	Legislation or Procedural Steps
1998	Legislation on supervision of insolvency practitioners, reform of the Minitel and Internet fee rates for services provided by greffiers
1999 (first semester)	Legislation on reform of the Commercial Courts, reform of the status of Commercial Court judges
1999 (second semester)	Production of draft legislation on the organisation of ad hoc mandates, supervision of greffiers, reform to the Laws of 1984 and 1985, reform to insolvency practitioners' fees (to be conducted in two parts), legislation on insolvency practitioners' fees, reform of insolvency procedures, reform of greffiers' fees, company law reform
2000-2002	Legislation on organisation of Commercial Courts (redrawing the judicial map), introduction of mixed-benches in progressive waves beginning with the Insolvency Division of these courts

B – Interim Measures: Commercial Courts and Insolvency Practice: 1998-1999

In relation to insolvency practice, the Government acted swiftly to produce subsidiary legislation aimed at restoring public confidence through new measures regulating entry and practice conditions for insolvency professionals.¹⁴ The aims of the decree were to improve the training of insolvency professionals, to introduce greater transparency in insolvency practice and to allow for greater supervision and control of practice conditions. In particular, professional training was to be given a boost with the formation of a new commission for professional training as part of the appropriate professional body. The definition of training was explicitly stated as being for the 'practice of activities permitting the acquisition of sufficient experience in the professional domain... as an assistant to and under the direct control of an [insolvency practitioner].'¹⁵ Greater transparency would also be achieved in regulating professional activity by requiring new ethical rules to be drawn up by the professional bodies within six months of the decree being passed.¹⁶

¹⁴Decree no. 98-1232 of 29 December 1998 ('Decree of 1998'), Circular no. 99-4 of 26 January 1999 and Arrêté of 16 August 1999.

¹⁵Articles 6 (administrators) and 21 (liquidators), Decree of 1998. It should be remembered that there are two professions in France: the administrator and the liquidator.

¹⁶Ibid., Article 32.

New rules would require lists to be drawn up every semester of the numbers of cases held by insolvency practitioners, the public prosecutor having here a role to ensure that appointments of insolvency practitioners by the court would be conducted equitably. New rules would also submit insolvency practitioners to a periodic audit on a biennial basis with occasional checks being also possible.¹⁷ The proliferation of secondary offices by insolvency practitioners, a source of contention given that cases might be worked on outside the immediate jurisdiction of the appropriate court, was given a veneer of control by requiring practitioners to make an application to that effect.¹⁸ Finally, financial control would be achieved through requiring new audit and accounting standards and for sums raised through the administration of insolvent companies to be deposited with the 'Caisse des Dépôts et Consignations,' the official deposit-taker in France.¹⁹ These texts were seen as holding measures, pending the introduction of comprehensive legislation to reform both insolvency procedures and practice. Nevertheless, the reforms that they introduced were necessary and did lead to the restoration of more confidence in the system.

With respect to commercial justice, prior to the reform process, this was administered through a network of Commercial Courts, of which there were 227 across France. Where there was no Commercial Court in a particular locality, the situation in 23 judicial districts, commercial matters were heard in a specialist formation of the High Court, which normally hears all other civil issues. Furthermore, there were 14 districts, mostly in the province of Alsace-Lorraine and in the overseas territories, where commercial matters were heard in mixed tribunals. Part of the reform process identified the need to increase the efficient use of resources and would necessarily involve alterations to the number of Commercial Courts. Despite lobbying by Parliamentarians concerned at the impact of the abolition of courts located in their constituencies, a decree in July 1999 provided for the reduction of the number then existing from 227 to 191 as of 1 January 2000.²⁰ This reduction affected courts in six judicial districts and was seen as the first step towards a comprehensive redrawing of the judicial map, the second part of which would take place simultaneously with the remainder of the reform process. A further decree in October 1999 also provided for local consultations in this respect, although it is known that the process of identifying courts to be subjected to the review has been ongoing and that difficulties have arisen because of concerted lobbying by business interests and politicians alike who perhaps failed to organise sufficiently in time for the first round of closures.

C - The Preparatory Orientation Document: 1999

Pursuant to the reform initiative as outlined by the Garde des Sceaux, the Ministry of Justice issued a paper in early 1999 in the form of a 'document

¹⁷Ibid., Article 37.

¹⁸Ibid., Article 64.

¹⁹Ibid. Articles 44-57.

²⁰Decree no. 99-659 of 30 July 1999.

d'orientation préparatoire'.²¹ This text outlined proposals by the French Government with respect to the regulation of insolvency law and was aimed at bringing about substantial reform to the framework for insolvency proceedings. The reforms outlined in the document contain both substantive changes and a number of technical amendments seeking to streamline the rules of insolvency generally. The overall scope of the reforms is aimed at substantive changes in five discrete areas with view to improving the efficiency of insolvency law procedures, these being (in the order they appear in the existing law):

- diagnosis and prevention of financial difficulties at a stage before the formal onset of insolvency;
- informal treatment of business difficulties through compositions and agreements with creditors;
- formal definitions of insolvency;
- proper supervision of rescue plans;
- definition and simplification of liquidation procedures.

The Government's initiatives in the area of diagnosis and prevention look to reforms around three particular points, the role of the auditor, the means of diagnosing financial difficulties and the control of company reporting measures. On the role of the auditor, whose diagnosis and subsequent notification of the appropriate authorities is deemed essential to bring into play prevention measures, the Government seeks to avoid two problems encountered at the time, the first being the question of professional ethics and client confidentiality, the second the delays while steps within the procedure take place. As a compromise, the Government is seeking to reform the structure of the court registry so as to make more use of company information whose filing is required by law. On the control of company reporting measures, the Government wishes to reinforce present arrangements by making the obligation incumbent on auditors to verify whether accounts have been filed and to remind management of their obligations.

As part of its reforms, the Government seeks to redefine the contractual nature of the voluntary arrangements procedure and to emphasise its distinctiveness compared to insolvency proceedings. Reforms would concentrate on the role of the court in approving voluntary arrangements, the use of the moratorium and the status and responsibility of the nominee and the public prosecutor within proceedings. The Government seeks to improve these arrangements by requiring all agreements to be filed in court, even if they are only arrangements with principal creditors and by giving the court discretion not to approve arrangements. On the moratorium, the Government intends to remove access to this institution completely. This is on grounds that, despite its utility as a method of persuading recalcitrant creditors to

²¹Lit. 'preparatory orientation document'. For an exhaustive look at Government proposals from the point of view of business, see Courtière J., *Réforme du droit des entreprises en difficulté: réaction au document d'orientation de la Chancellerie*, Chambre de Commerce de Paris ('CCIP') Report (February 1999). This and other CCIP reports referred to below are available at the CCIP website: <www.ccip.fr>. The comments that follow are largely derived from the contents of this report.

negotiate, debtors often misuse it so as to avoid more formal insolvency proceedings. One compromise the Government is putting forward would allow for recourse to early insolvency proceedings at the instance of the debtor as an alternative to the moratorium, the threat having a similar dissuasive effect on creditors. On the status of the nominee, the Government intends to introduce rules affirming the independence of nominees and supervisors of ad hoc mandates by prohibiting the simultaneous exercise of functions within arrangements and that of a Commercial Court judge or paid employment connected with the company in question as well as a role for the public prosecutor's office in delivering an opinion on the suitability of the person nominated to act. Practice insurance would also become a formal requirement. The Government also wishes to see an enhanced role for the public prosecutor by requiring notice of voluntary arrangements and ad hoc mandates to be served on the court and the public prosecutor's office.

The Government is also looking to reform the formal definition of insolvency, currently stated as being the moment where the business concerned finds it impossible to meet a due debt with the assets available at its disposal.²² The reasons given include the overall technical bias of the definition and its failure to create the right conditions for the opening of insolvency proceedings, leading to anticipated filings in the case of otherwise solvent companies and failure to file by some insolvent companies, with consequent detriment to the debtor and creditors respectively. The government intends to avoid the purely accounting based definition of a comparison of assets and liabilities and to add to the definition a requirement that the business be in a 'situation durablement compromise'.²³ On the question of debtor-led procedures, the view of the Government is that debtors should be permitted to file for rescue as an alternative on the same pre-conditions as for voluntary arrangements, where these latter would not be suitable because of particular needs of the business, for example to conduct redundancies and dispose of major assets. The Government is, however, cautious in that it does not wish to see the rescue regime become a purely business technique for periodic reconsolidation and would require some proof that the business in question has a cogent need for rescue.

At the heart of the formal rescue regime, rescue plans feature on the Government's list of reforms, notably looking at changes in the role of the public prosecutor in proceedings, the nature of supervision of rescue arrangements and, in relation to sales plans, better control of the asset disposal process. On the role of the public prosecutor, the Government will seek to bring in amendments allowing the public prosecutor to scrutinise rescue plan proposals and to be present at hearings at which rescue plans are adopted or dissolved. On the aspect of supervision, the Government contemplates that appointments as supervisors of rescue plans should go to the administrator of rescue proceedings or, in default, to the creditors' representative.²⁴ Furthermore, new powers are to be given to rescue plan

²²Article 3, Law no. 85-98 of 25 January 1985.

²³Lit. 'compromised situation likely to persist'.

²⁴The creditors' representative is usually appointed from among the ranks of the profession of liquidator.

supervisors as well as new obligations, for example to ensure that proceeds of rescue are deposited with the Government's official deposit-taker. On the disposals process in the case of sales plans, the Government wishes to see greater rigour in the examination of proposals, especially in determining whether the offeror has the necessary means to carry the proposal through and are not made on a speculative basis.

The reforms the Government intends to introduce in the area of liquidation concentrate on the purpose of liquidation proceedings, the simplification of its structure and the transparency of asset disposals in the course of liquidation. In connexion with the definition of liquidation, the Government wishes to underline the purpose of liquidation as being to gather in assets with view to satisfying the creditors as far as possible. The Government does not want to change the conditions in which liquidation was reformed in 1994 avoiding the need for prior intervention in the form of rescue proceedings. The prerequisites for insolvency, however, the cessation of business activity and the irremediable state of the company are to be made joint requirements. On the simplification of insolvency, the Government acknowledges a need in the case of insolvencies involving very small asset bases for there to be an appropriate procedure that does not absorb in costs or fees the amount realised by way of assets gathered in for the satisfaction of creditors. On the transparency requirements, the Government is keen to avoid criticisms of liquidation which, at best, did not ensure equality among candidates seeking to acquire assets and, at worst, afforded opportunities for the acquisition of assets at substantial undervalue by unscrupulous parties. The orientation document provides the public prosecutor with an enhanced role in supervising liquidation proceedings by requiring his consent in cases of sales of substantial assets as well as whole units of production.

Reaction to these proposals from the business community was on the whole positive, with many of the recommendations being supported, particularly those dealing with voluntary arrangements and with a new definition for the onset of insolvency. Some reservations, nevertheless, exist, in relation to the articulation between pre-insolvency and insolvency measures, necessarily dependent on the definition of insolvency being made clear. This is so that the courts would be able to uniformly apply this to the determination of the right type of procedure to apply to the debtor in financial difficulties. Other proposals relating to a greater transparency in the sale or transfer of assets are welcomed by the business community as are reforms targeted at reducing the impact of insolvency on business assets by introducing a further simplified procedure. Nevertheless, proposals for a greater role for the prosecutor in the context of informal or voluntary arrangements are strongly resisted on grounds of confidentiality of the process, which, as the Government recognises, should be essentially contractual in nature and thus should only involve the debtor and its creditors. The views of business with respect to this last proposition are positive. Nevertheless, the question of suitable access by the court to administrative documents is felt by business to be one meriting discussion, particularly around the questions of the possibility of early diagnoses and interventions provided business matters could be kept confidential. Similarly, there are suggestions from the business world towards

making the diagnosis and prevention of financial difficulties more efficient by creating a level playing field at national level given existing disparities in treatment between the different commercial courts. Reforms would be enhanced by the creation of specialist groups within commercial courts dealing exclusively with diagnosis and prevention points.

In any event, the reforms outlined in the document are unlikely to remain static. In 2001, the Parliamentary Office of the Evaluation of Legislation issued a report on the state of insolvency law in France since the adoption of the Laws of 1984 and 1985.²⁵ The report, authored by Senator Hyst, who is also the author of reports into the draft texts seeking to reform the administration of commercial justice, provides a number of recommendations about the future of insolvency law and procedures. The report recommends that structural impediments to the use of pre-insolvency procedures be lifted, that participants in the process be made more aware of opportunities for reorganisation and that detection of financial difficulties be made a priority. A clear distinction should be made in the context of pre-insolvency procedures between the informal and judicial phases and legal mechanisms allowing for reconstruction should be brought into line with existing business practice. Nevertheless, increased transparency in the pre-insolvency context should not compromise flexibility and confidentiality for companies experiencing a sensitive situation. Pre-insolvency measures should be made more attractive and opened up to a wider category of user. The essentially liquidation character of insolvency procedures is noted in the report, which recommends the introduction of a new simpler procedure to deal with sales of assets in cases where a low return is likely. The distinction between pre-insolvency and insolvency procedures should be made clearer through the use of a new definition for the moment of insolvency (currently dependent on the business having ceased to make payments) thus prompting more businesses to seek help at an earlier stage. The question of costs and the complex nature of existing procedures is a feature of the report that concludes with an extensive list of specific recommendations for legislative action. It is likely that many of these recommendations will form the basis of proposals that will be issued in due course.²⁶

D - Consolidation of the Commercial Code: 2000-2001

The French Government has been proceeding since 1989 to a re-examination of the body of law codes. These derive largely from the great Napoleonic texts of the first wave of codifications in 1801-1808 and from later codifications of legal texts. The Commercial Code, which originally contained the rules relating to company and insolvency law, over a period of time gradually lost much of its content, leading commentators to observe that it seemed to deconstruct itself as the decades progressed. This trend was noticeable as early as 1867, when the Law of 24 July 1867 was passed to supplement the rules relating to company formations. The Law of 1966,²⁷ which enhanced and

²⁵The 2001 Senate report may be viewed on the Senate website at: www.senat.fr/rap/r01-120/r01-120_mono.html.

²⁶See Section G below.

²⁷Law no. 66-537 of 24 July 1966, implemented by Decree no. 67-236 of 23 March 1967.

replaced the above law, completed the trend with regard to company law by repealing the remaining articles in the relevant section of the Commercial Code. The Law of 1967 performed a similar task in relation to insolvency procedures. Many other areas of commercial law and practice also escaped the confines of the Commercial Code to be enacted in separate texts, including rules governing the sale of business goodwill, charges over business assets, commercial leases and competition. A draft law seeking to restore the Commercial Code to its former glory was submitted to the Senate in the 1992-1993 session, where it was adopted.²⁸ This draft law provided for a substantial new code, annexed to the draft, to come into force together with the then current reforms to the Criminal Code. The draft sought to include company law in Book II of the Code and insolvency law in Book VI. At the same time, some 60 other texts, whose provisions were included in or superseded by the new code, would be repealed. These included the Laws of 1966 and 1985 as well as the truncated remnants of the old Commercial Code. However, the draft law did not progress any further in that or later sessions of Parliament and the measure seemed destined to lie on the shelf together with other abandoned reform projects.

As a corollary to the reform process affecting the administration of commercial justice, a significant development took place in early 1999 when the National Assembly was invited to reconsider the earlier Senate text. The 1992 draft was to be used as the basis for a revived Commercial Code. This text was subsequently referred to the Commission for Laws, one of the standing committees in Parliament. In fact at around the same period of time, the Government had begun to step up its work on revision of codified texts following the submission of another draft law to Senate in late 1998, which was subsequently debated in 1999.²⁹ The contents of the Memorandum attached to this other text stated that the Government was anxious to make progress on the process of re-codification of laws begun in 1989 and in which considerable delay had already occurred. While the Government recognised that the proper role of Parliament was to scrutinise and adopt such legislative measures, the amount of legislation already programmed for that session and likely to be programmed for later sessions made this task well nigh impossible. The Government proposed that it should enact in the form of ordinances those re-codified texts already adopted by the Council of Ministers and submitted to Parliament as well as those under scrutiny by the Higher Commission for Codification and the Council of State. These would include most major codes in the areas of education, public health, administrative justice, environmental law and finance as well as the Commercial Code. The draft law sought Parliamentary approval for this legislative step. The timetable included in the draft provided that the Government would promulgate the ordinance adopting the Commercial Code within nine months of the draft law being passed by Parliament. Approval would still be needed in the form of ratification by Parliament and a further draft law would be laid before

²⁸ Senate draft law no. 1336, adopted on 14 October 1993.

²⁹ Senate draft law no. 438, adopted on 13 October 1999. A copy may be seen at <www.senat.fr/leg/pjl98-438.html>.

Parliament within two months of the ordinance appearing.³⁰ Parliament subsequently approved the draft law in late 1999.³¹ Despite a challenge being brought against the draft law on grounds of unconstitutionality, the argument being that delegation of the power to legislate could not be made to the Government in this way, the Constitutional Court issued a decision upholding the law. The decision was in part motivated by the fact that the Government had agreed to codify the texts based on the existing law, or 'droit constant', thus avoiding the possibility of allegations being made that the Government was in fact legislating by stealth.³²

The way was made clear for the Government to finalise its work on the re-codification process and the first renovated codes began appearing in mid-2000. The Commercial Code itself was the subject of a proposal approved by the Council of Ministers on 13 September 2000. The ordinance to which the revised code was attached was enacted on 18 September 2000 and came into effect the day following its publication in the Official Journal.³³ The entirety of commercial law is now divided up into nine books, including the addition of a new part dealing with the situation of commercial laws applicable in overseas territories. The entirety of the law relating to corporate organisation is now to be found in Book II of the Code, that relating to insolvency law and practice in Books VI and VIII respectively with general commercial law and competition law being sited in Books I and IV respectively. The only texts that are not included in the new Code are those articles dealing with the constitution and procedure of the Commercial Court, which are to be integrated into a revised Code of Judicial Organisation. In fact, the draft proposals outlining reforms to the jurisdiction of the Commercial Courts, included in a text presented to the Council of Ministers in 2000, were transferred to another text, an omnibus law dealing with, inter alia, company law and competition law, that saw light subsequently in 2001.³⁴ This provision amended the Code of Judicial Organisation, inserting new Articles L. 411-4, 411-5, 411-6 and 411-7, restoring the jurisdiction as established in Article 631 of the previous draft of the Commercial Code.³⁵ The provisions have retroactive effect to the dates the provisions were repealed, albeit without prejudice to any decisions that were made by courts other than Commercial Courts purporting to exercise jurisdiction and that were *res judicata*. Briefly, the jurisdiction as re-established covers commercial matters broadly, including, inter alia, banking law, bills of exchange law, company law, competition law and insolvency. Nevertheless, the future position of the Commercial Code is unlikely to remain static because of many outstanding

³⁰In fact, approval did not come until the passing of Article 50, Law no 2003-7 of 3 January 2003 ('Law of 2003'). This law, which also reformed insolvency practice, will be dealt with below.

³¹Law no. 99-1071 of 16 December 1999.

³²Decision 99-421 DC of 16 December 1999.

³³Ordinance no. 2000-912 of 18 September 2000, accompanied by a Report to the President of the Republic, published in the Official Journal on 21 September 2000.

³⁴Law no. 2001-420 of 15 May 2001. These proposals had been outstanding at the time the consolidation of the Commercial Code was attempted.

³⁵*Ibid.* Article 127. This jurisdiction had inadvertently been repealed by Law no. 91-1258 of 17 December 1991, a fact that seemingly escaped unnoticed.

proposals remaining to pass through the legislative process, including those seeking to reform insolvency law and further reform company law.

E – Reorientation of the Overall Reform Strategy: 2000-2002

The reforms to insolvency law and practice had by early 2000 become part of an ongoing reform process affecting the functioning and administration of the entire commercial justice. Over the same period, proposals with view to amending the framework for the administration of companies and company law had also been introduced. It seemed that the range of laws to which corporate bodies were subject were undergoing radical reform designed to adapt them to the needs of a new and thriving economy where globalisation was the watchword. On 18 July 2000, the then Minister of Justice, Mme Elisabeth Guigou, submitted a number of draft laws to the Council of Ministers for consideration. Two of these texts were designed to affect the workings of the Commercial Courts, the third focused on further amendments to the conditions of insolvency practice. All of these texts formed part of what the Ministry of Justice described as: ‘...essential elements of the Government’s plan to adapt [France] to meet the needs of increased economic efficiency’.³⁶ It was notable, however, that reforms to insolvency law, outlined in the ‘preparatory orientation document’ produced in 1999, were not among the first set of finalised texts submitted to the Council of Ministers, although a clause seeking to remove the moratorium does feature in the first of the proposals. In this regard, early comment on the proposals questioned the wisdom of pushing ahead with reforms to practice conditions without waiting for developments in relation to insolvency law. This is despite the fact that changes to insolvency law were considered the most urgent of all the reforms. The three draft laws were approved by the National Assembly in March 2001 and sent to the Senate for discussion shortly afterwards. Progress was halted for a while when the Government failed to table the measures for debate and, it was not in fact until late 2002 that the Senate had the opportunity to consider the texts outlined below.

F – Reforms to the Commercial Court: 2000-2002

The two laws proposed under this heading were titled ‘A law on the organisation of Commercial Courts’ and ‘An organic law on the composition of benches in Courts of Appeal’. The proposals for changes within the Commercial Courts largely reflect the conclusions of the Parliamentary enquiry into the administration of commercial justice that recommended the principle of ‘échevinage’, where mixed benches of lay and professional magistrates would hear commercial matters.³⁷ This principle is not unknown in France, where it is reflected by the practice in Alsace-Moselle, a region that retains laws influenced by the German model. In addition, courts in French overseas territories also use the mixed bench model, as do the courts in

³⁶From the general outline at the Ministry of Justice website at: <www.justice.gouv.fr>.

³⁷Proposal of 18 July 2000. A copy is available at: <www.justice.gouv.fr/publicat/tcloi1807.htm>.

Germany and Belgium.³⁸ The draft texts flesh out the recommendations, further dividing the proposals into three discrete areas. These include the composition of mixed benches in the Commercial Court and Courts of Appeal, the powers of the President of the Commercial Court and the status of lay judges. The first two are of particular importance as they affect the immediate environment of insolvency-related proceedings.

Mixed Benches

The principle of mixed benches is to extend to all Commercial Courts. Mixed benches will consist of a professional judge as chair of the formation, who will sit together with two assessors, appointed from among the ranks of lay judges. The professional judges will be deputed from among the ranks of judges of the High Court for a period of three years. The original proposals intended that mixed benches would have the authority to hear cases involving insolvency matters and litigation underpinning the contractual basis of commercial companies and economic interest groupings, including corporate constitutional matters, partnership disputes and liquidation of companies. Furthermore, mixed benches would also hear cases arising from disputes over financial instruments as well as domestic and European competition law. Differences over whether matters are to be heard by mixed benches or regular formations of the Commercial Court would be the subject of a special dispute resolution mechanism. Although insolvency matters would normally be heard by mixed benches, the draft text reserves the right to act as a supervising judge in individual cases to lay judges. Nevertheless, because the conduct of insolvency cases has aroused grave concerns, new rules are to be introduced preventing a supervising judge or lay judge acting as mediator from subsequently sitting as part of a mixed bench hearing matters arising from the same or related cases.

The second draft text also deals with the issue of mixed benches by introducing, in a spirit of reciprocity, lay judges to Courts of Appeal having jurisdiction in appeals in commercial matters.³⁹ The draft text will amend Ordinance no. 58-1270 of 22 December 1958 by allowing for the recruitment of councillors for Courts of Appeal on a temporary basis. This will permit judges from Commercial Courts, mixed tribunals and elected assessors sitting in High Courts exercising commercial jurisdiction to be given positions in Courts of Appeal and will add significantly to the range of options allowing suitably qualified candidates access to judicial office. The proposals provide for amendments to the Ordinance specifying recruitment conditions and rules governing the status of lay judges acting as councillors in Courts of Appeal. Of the conditions specified, these mostly govern age and experience, appointments being made for a non-renewable period of 5 years with consultation of the Higher Judicial Council necessary. Nevertheless, these

³⁸See 'Les Juridictions Commerciales', a Senate Report produced in October 1998, outlining the position with respect to the practice of Commercial Courts, especially in relation to the hearing of insolvency matters. A copy is available at: <www.senat.fr/lc/lc44/lc44_mono.html>.

³⁹Proposal of 18 July 2000. A copy is available at: <www.justice.gouv.fr/publicat/coloi1807.htm>.

appointments are not subject to the usual rules governing promotion and transparency of the application process.

In any event, the appointments of lay judges are hedged about with rules governing their role within Courts of Appeal. Lay judges appointed in this way may not sit in those Courts of Appeal within whose jurisdiction their Commercial Court of origin is situated, neither may they hold office in the same district where they exercise a professional or business activity. Lay judges will only be able to sit as assessors in cases heard on appeal in commercial matters arising from the usual business of Commercial Courts and mixed tribunals. Any appeal bench may not include more than one participating lay judge. There will also be a requirement for initial training before lay judges may take up their appointments. Nevertheless, the appointment will qualify the lay judge as a member of the judiciary and will subject the lay judge to most of the rules governing the conduct of the judiciary, including the requirement to make a declaration of interests prior to assuming office. Some exceptions are made, in that lay judges may not be transferred or promoted, may not be members of judicial councils or commissions, are not required to take up residence in their judicial district and are, finally, not paid a salary but will receive expenses instead. In light of the last item, lay judges are permitted to exercise a professional or business activity provided their status as a judge is not brought into odium or their independence brought into question.

The Powers of the President of the Commercial Court

In light of concerns expressed at the proposals by the Commercial Court judges, the draft text expressly provides that the President of the Commercial Court will remain elected from among the ranks of lay judges. Powers expressly conferred by statute on the President are preserved, the sole exception being made for powers under insolvency legislation, which devolve to a professional judge in his role as chair of mixed bench formations of the Court. Nevertheless, other insolvency-related powers, especially those deriving from the law on the diagnosis and prevention of business difficulties, remain with the lay judge. A further exception will be the power to order a moratorium, which in light of other reforms to French insolvency law will be abolished. Nevertheless, the role of the President in the day to day administration of the Commercial Court will be modified to take in to account the presence of professional judges. Consultation will be necessary with the President of the High Court (who is a professional judge) as to the assignment and allocation of functions affecting professional judges, with any differences being submitted to the Court of Appeal for arbitration.

The Status of Lay Judges

By far the most interesting application of the reforms is in the conditions of access to the position of lay judge through modifications made to the electoral process. Elections will be held more frequently, on a two-yearly basis, and the two-step approach, by which an electoral college selects the winning candidates, will be replaced by direct elections. The electoral lists will be

widened to include craftworkers (artisans) and, subject to an upper age limit, any qualified elector will be similarly eligible for election as a lay judge. New rules are to be introduced relating to ethical standards of behaviour. There will be a requirement for all newly elected judges to make a declaration of interests from time to time specifying any economic or financial activity in which an interest is held as well as any positions held in civil or commercial companies. In addition, there will be a prohibition on lay judges hearing cases in which he personally or any company in which he has a position has an interest. This incompatibility extends for up to five years even after this interest may have ceased. Strong new disciplinary measures accompany the new requirements and the President of the Court of Appeal may issue warnings relating to behaviour even where disciplinary proceedings are not initiated. Where proceedings are taken, dismissal from office may be accompanied by a period of disqualification from office for up to 10 years. In addition, these powers will be available even in the case of judges who voluntarily leave office. Special training will be provided for lay judges, organised by the National Judicial College, and there will be an obligation placed on judges to continue professional development training.

Responses to the Proposals

It would be an understatement to say that the response to the proposals was negative, certainly from among the ranks of lay judges. The strength of this opposition may be to account for the fact that the original timetable, which provided for most of the reforms to take place in 1999-2000, was ultimately severely delayed. The opposition was most keenly felt from the organisations representing business, such as the CCIP and MEDEF.⁴⁰ The CCIP had in fact produced a paper in 1997 admitting that the efficient use of resources suggested that the number of Commercial Courts be reduced and that there be regular exchanges of professional and lay judges between courts to improve practical experience. It also suggested that more use of information technology and part-time assistants, drawn from the ranks of former or retired judges, would ease the burden felt by these courts.⁴¹ Its 2000 Report was more critical, noting that although the question of mixed benches met with some approval, the overall imperative of the Commercial Courts should be to allow businesspersons to remain in charge of the administration of commercial justice according to their needs. The types of cases to be heard by mixed benches also attracted comment, with the CCIP view being that it would be preferable to limit the jurisdiction to insolvency cases.⁴² Similarly, although at first cautious in welcoming the debate on the question of mixed benches,⁴³ the MEDEF was reported as having supported the judges in a bid to scupper the reforms. In a communiqué issued following the publication of

⁴⁰'Mouvement des Entreprises de France' (formerly the 'Congrès National du Patronat Français').

⁴¹See Courtière J., La réforme des tribunaux de commerce: éléments de réflexion, CCIP Report (15 May 1997).

⁴²See Courtière J., Projet de réforme relatif aux tribunaux de commerce: réactions de la CCIP, CCIP Report (15 June 2000).

⁴³Position Paper of 17 May 1999.

the draft texts,⁴⁴ the MEDEF deplored the maintenance by the Government of reform items expressly 'disavowed by the Commercial Court judges'. It also stated that elections to be held for the position of Commercial Court judges would reveal the determination of the new judges in opposing the progress of reforms as the drafts came to be discussed by Parliament.

A considerable number of commercial judges are known to have expressed their dissatisfaction by resigning before the publication of the drafts as their contents were gradually revealed. Although exact figures are difficult to obtain, the estimate ranges from the 350 given out by the Government to the 700 or 800 reported in the press.⁴⁵ A further number were reported at the time to be considering delaying their decision until publication of the drafts. When these eventually appeared, a further 600 judges are reported to have made the decision to stand down. The consequences on the staffing of a number of Commercial Courts were disastrous with the High Courts in the towns of Laon, Blois, Sens, Pau and Laval having to take on the hearing of commercial matters in addition to their ordinary civil lists. This was because the relevant Commercial Court had ceased to function.⁴⁶ In fact, there was a view about the choice of release date for the draft texts that opined that the Government chose the middle of the summer because this would prevent serious opposition forming before the beginning the new Parliamentary and judicial year.⁴⁷ Nevertheless, by the time the texts came before the National Assembly for discussion, the situation had progressively worsened with 170 Commercial Courts going 'on strike', all hearing being adjourned sine die. The President of the General Conference of Commercial Courts resigned in protest at the reforms and continuing paralysis of the Commercial Court system seemed to be the most likely outcome.

As it turns out, the Senate, to which progress of the draft laws had been remitted, rejected the proposals relating to the Commercial Court in February 2002. The Senate stated that it was declining to pass a measure that, in its view, attacked the foundations of the court system without giving due credit to the many good things it represented. The then impending Presidential and Parliamentary Elections in mid-2002 seemed to offer the opportunity for a period of reflection about the reforms. Despite the hiatus offered by the elections, it was highly probable that the reforms would remain contentious and there might be pressure to see them back on the legislative table, albeit in a form that would attempt to placate the many hostile interests, not least from the magistrates in charge of administering the commercial justice system. The return of a Government of a different composition changed the imperative

⁴⁴Communiqué of 18 July 2000. A copy is available at <www.medef.fr/fr/C/Cdoc/C_07-18_communique.htm>.

⁴⁵The figure of 800 is attributed to Jean-Pierre Mattéi, former President of the Commercial Court in Paris. See Hénisse A., *Les magistrats professionnels arrivent en force dans les tribunaux de commerce*, *Les Echos* (1 June 1999), for a quote attributed also to Judge Mattéi describing the reforms as 'simply unacceptable'.

⁴⁶See National Assembly Report No. 2912, issued 1 February 2001, reporting the evidence of the Garde des Sceaux to the relevant Parliamentary Commission. A copy is available at: <www.assemblee-nationale.fr/2/rapports/r2912.htm>.

⁴⁷See Dufour A., *Tribunaux de Commerce: La Mixité en Marche*, *Les Petites Affiches*, 24 July 2000 at 3.

somewhat with the new Garde des Sceaux, Dominique Perben, making an announcement in a speech given to the Annual Conference of the National Congress of Commercial Courts on 22 November 2002 stating the Government's intention to abandon the reforms to the Commercial Court in their then present form, giving as reasons the apparent lack of consensus and the failure of the proposals to take into account the special nature of the Commercial Court system.⁴⁸ Nevertheless, according to Mr Perben, the French Government remained open to the idea of reform and would do so under the right conditions. It is clear, however, that for the present, these reforms have suffered the same fate experienced by those proposed by Robert Badinter, Garde des Sceaux in the mid 1980s, when interests hostile to the proposals succeeded in getting the reform project derailed and indefinitely shelved.

G – Reforms to the Status of Insolvency Practitioners: 2000-2003

The same speech saw the promise made that the French Government would be embarking on the long-awaited reforms to insolvency law. These proposals, which were the subject of the 'preparatory orientation document' issued in 1999, and which had been updated to take into account the impact of the European Regulation on Insolvency Proceedings,⁴⁹ were to be placed before Parliament for consideration during the course of 2003. Similarly, reforms to insolvency practice, which had been considerably amended by the Senate in February 2002, were to be brought again before Parliament. In fact, these were tabled before the National Assembly in October, where they were the subject of a joint report by the Senate and the National Assembly published in December 2002. The text rapidly progressed through both houses and was enacted in early 2003.⁵⁰ This law makes a number of important changes to the practice conditions for insolvency practitioners, dealing with conditions for access to the profession, control, inspection and discipline, the constitution of guarantee funds and professional liability as well as professional ethics and remuneration and, following on from the interim measures in 1999, are destined to be far-reaching in nature. The reforms are aimed at the following areas:

- the status of insolvency professionals (including practice qualifications, training and professional conduct);
- the conduct of cases (including opening up practice areas to other professions and the requirement for the personal conduct of cases);
- the supervision of practice conditions (including aspects of professional supervision and the guaranteeing of insolvency funds);
- the remuneration of insolvency professionals.

The Status of Insolvency Professionals

⁴⁸The full speech may be accessed through the French Ministry of Justice website at: <www.justice.gouv.fr/discours/d221102b.htm>.

⁴⁹Council Regulation (EC) No 1346/2000 of 29 May 2000 (OJ 2000 L160/1).

⁵⁰Law of 2003, published in the Official Journal on 4 January 2003.

Underlining the changes that these reforms seek to bring in is firstly the introduction of a new title for the liquidator of 'mandataire judiciaire au redressement et à la liquidation des entreprises',⁵¹ replacing the previous 'mandataire judiciaire à la liquidation des entreprises'.⁵² A subtle change but significant in that it moves the emphasis back equally to corporate rescue. The proposals would institute a qualifying examination for entry to the 'stage' and an examination at the end of the stage preparatory to formal admission to practice.⁵³ The stage would last normally for 3 years subject to any dispensations given for existing qualifications or experience, but in any event could not fall below a two-year minimum. Liquidators would now be admitted to practice on a par with administrators at national level.⁵⁴ The nature of insolvency practice would be made more exclusive by prohibiting practitioners from exercising other professions, the option between the qualifications to be made within a year of the proposals coming into force, and liquidators are also prohibited from exercising as lawyers.⁵⁵ Administrators are not, however, similarly prevented from exercising concurrently as lawyers.⁵⁶ Practitioners would also be prohibited from directly or indirectly carrying out business. Furthermore, although not expressly forbidden, consultancies and other work would be strongly discouraged. Initial proposals provided that both administrators and liquidators would no longer qualify for appointment as rescue plan supervisors. This restriction continues to exist for liquidators who may not act as conciliator in informal workouts and liquidator for the same firm unless a year has intervened between appointments. Comments on the proposals indicate that the examination system for qualification meets with the approval of the professions, although the length of the stage falls far short of real life experience, where it is not uncommon for entrants to spend between six and ten years as an employee working for a practitioner.⁵⁷ This, it is argued, considerably helps the candidate gain practical experience of what may be very complex practice conditions through exposure to casework. There is a considerable worry about the prohibition from practising as a lawyer,⁵⁸ given that this was a recently introduced concession.⁵⁹ There is also great concern at the proposed exclusion from appointment as rescue plan supervisors, as this would leave these positions open to be filled by other professions, chiefly lawyers and accountants. The logic for the professions is that they should remain eligible for appointment as the rescue plan is often an

⁵¹ Lit. 'judicial nominee for the rescue and liquidation of businesses'. The change is brought in by Article 13, Law of 2003.

⁵² Lit. 'judicial nominee for the liquidation of businesses'.

⁵³ Article 5, Law of 2003.

⁵⁴ Ibid. Article 1. Previously, they were obliged to register themselves with one of the Courts of Appeal and could only practice within a single judicial district.

⁵⁵ Article 21, Law of 2003.

⁵⁶ Ibid. Article 8.

⁵⁷ See Courtière J., Réforme des professions d'administrateur judiciaire et de mandataire judiciaire à la liquidation des entreprises, CCIP Report (4 May 2000) at 11. The comments that follow are largely derived from the contents of this report.

⁵⁸ This now remains the case only in the instance of the liquidator, the initial worry being that a lawyer would be prevented from acting in a case in which he had given advice to any of the parties, however remotely connected to the insolvency, thus depriving the parties of his skills as an administrator.

⁵⁹ Law no. 90-1259 of 31 December 1990.

integral part of salvage of the entire business or part of it as a going concern and is therefore a continuation of insolvency practice.

The proposals call for the training of insolvency professionals to reflect the importance of insolvency practice in the economy. The reforms would introduce a new obligation for practitioners to report annually on their training and continuing professional development.⁶⁰ This would form part of their professional duties, subject to discipline in cases of failure to abide by requirements introduced by the relevant professional bodies. Comments are as a whole supportive of these proposals and tend further to seek other changes, including more theory-based and interdisciplinary training (with elements of management methods and an understanding of economic principles) as well as the opportunity to spend part of the stage with professionals from other disciplines.⁶¹ In relation to professional conduct, the proposals would introduce a general clause stating that professional liability would be incurred for “any breach of legislation or regulations, any breach of the rules of professional behaviour, any act contrary to probity, honour or social convention, whether or not arising from practice”.⁶² The list of persons entitled to bring a complaint about professional conduct would widen to include public prosecutors and Ministry of Justice officials, perhaps reflecting the need to ensure public protection.⁶³ The range of penalties would be broadly maintained as they are, although a proposal that an order prohibiting a professional from practising could be set for any duration, as opposed to the choice between a one-year suspension and a lifetime ban, was not adopted. Similarly, a suggestion that the limitation period should change from the current ten years from the date of the facts complained of to a five-year period, calculated from the moment the facts are discovered, did not find its way into the final text.⁶⁴ It is known that this very widely drafted clause had aroused some controversy. In fact, although the previous position, under which complaints and actions were comparatively rare, was universally deplored, there was a feeling that too wide a definition offends against the certainty principle. This would lead to an almost unjustifiable situation of blanket coverage of all possible behaviour, whether connected with practice or not, for which alternative disciplinary sanctions are already available. What is curious is that the changes in the range of penalties had met with approval, although there had been a question as to why the list of eligible complainants had been extended. By far the greatest objection was to the changes in the limitation period. There were considerable objections to taking the notional date of discovery as the point at which time begins to run, as this may lead in effect to never-ending liability well beyond the current ten-year period and would therefore offend against general principles of law, including the requirement of legal certainty. This is probably the reason the Law of 2003 omitted this controversial reform.

⁶⁰ Article 32, Law of 2003.

⁶¹ See Courtière J., *op. cit.* (fn. 57 above) at 15.

⁶² Article 10, Law of 2003.

⁶³ *Ibid.* Article 11.

⁶⁴ This was intended to avoid the limitation period from expiring while the facts at the heart of the complaint remain hidden (often intentionally so).

The Conduct of Cases

The proposals would establish the right for courts to appoint from outside the lists of administrators and liquidators professionals from any category appropriate to the case in question. This would enable other professionals to act as the creditors' representative in insolvency proceedings, a position hitherto reserved exclusively for liquidators. The proposals, however, go further than previously was the case, in that they allow the courts to appoint subject pursuant to a simple request made by the public prosecutor or following advice received from him. No longer will special circumstances be necessary before appointments can be made.⁶⁵ The persons appointed will need to display the general competence required of an insolvency professional, but will no longer have to have any particular qualification or expertise. Persons who are appointed will have to swear an oath to perform their duties conscientiously and must attest that they do not have any interest in the cases they act in or any connection to the business in question. They will also be subject to professional supervision. Furthermore, some incompatibilities are provided for in that these persons may not be administrators or liquidators who have retired or been removed from the lists of practitioners.⁶⁶

Here, views from business and the professions are sharply at odds with the Government.⁶⁷ The idea of occasional practice in this form and opening up practice areas to other professionals seems to be anathema. Insolvency professionals are worried that regular appointments in this fashion will see the creation of a separate corps of professionals with competing interests, although not necessarily with the same standards of professional qualification and training. In addition, this may encourage touting for business by other professionals and may serve to further reduce the availability of fee-income for liquidators, who are most severely affected by the competition to be introduced. The question of incompatibility also meets with objection, not in relation to the status of those removed from the practice list for reasons of professional discipline, but to retired administrators and liquidators, who are not necessarily beyond being capable of acting in such cases. The position of low-value cases is highlighted, where it is argued that the result of the effective separation of practice areas into high- and low-value streams will be that competition will tend to focus on the high-value end of the market. As other professionals will wish to exclude lower value cases, they will inevitably end up having to be dealt with by current insolvency professionals with consequences for the viability of their practices in the long run.

The proposals would introduce new rules for dealing with the situation of outside expert advice in the context of insolvency practice. At present, the rule is that insolvency professionals may seek the advice and expertise of other professionals (usually lawyers, experts and bailiffs) on an indemnity basis,

⁶⁵In practice, the courts would look at the qualifications and expertise of the individual concerned in relation to the particular appointment. Instances, however, of appointments tended to be rare.

⁶⁶Articles 2 (administrators) and 15 (liquidators), Law of 2003.

⁶⁷See Courtière J., *op. cit.* (fn. 57 above) at 20.

with the fees being met from the proceeds of insolvency. Court approval is needed for the appointment of persons other than experts for tasks to be delegated by practitioners. The proposals emphasise the personal nature of practice and provide that, in future, outside assistance will only be possible under special conditions and subject in any event to the approval of the court. Insolvency professionals will no longer be entitled as of right to an indemnity but must make allowances for fees for lawyers and experts out of their own remuneration.⁶⁸ Reimbursement of fees for other appointments will only be made where the court has previously approved of the appointment. The comments recognise that abuses of the system have occurred with a number of insolvency practitioners delegating tasks and hiring outside experts where the asset-base of the business in difficulties did not warrant it. As a consequence, many proceedings ended up with more fees being paid out to professionals than distributed in dividends to creditors. Stricter control over the conditions under which outside assistance may be required is welcome by the professions. The proposals, however, make it a condition that the professionals account for these fees as part of their own remuneration. Where the use of outside help is in fact a legal obligation, for example where the presence of a lawyer is required in court, it would be inequitable not to allow these fees as a charge. In any event, discretion could be left to the courts as to what fees to allow.

The Supervision of Practice Conditions

Modifications to practice conditions introduced by the interim measures in 1999 have already brought changes in four areas: increased frequency of practice supervision, greater resources for practice inspections, better definitions of accounting obligation and enforcement of the requirement for insolvency funds to be deposited with the official deposit-taker. The proposals in the draft legislation therefore deal with other aspects of supervision, including the increased role to be given to the professional bodies to enforce obligations attendant upon professional duties and to make special provision in cases of investigations for professional secrecy not to apply.⁶⁹ The views of commentators are broadly in agreement with this aspect of the proposals. According to measures that would be introduced under this rubric, the proposals would also require the current guarantee fund, limited to the insolvency funds in question, to undertake to compensate victims of malpractice where an award has been made in their favour. To that end, increased premiums would, in all likelihood, apply and the possibility is now introduced of a surcharge on insolvency practitioners to reconstitute the guarantee funds.⁷⁰ There has been doubt expressed about the compensation aspect as many insolvency professionals would no doubt prefer to obtain special coverage through practice insurance. In any event, individuals appointed from outside the professions would have to undertake to obtain practice insurance before dealing with cases to which they have been assigned.

⁶⁸ Articles 1 (administrators) and 14 (liquidators), Law of 2003.

⁶⁹ Ibid. Article 9.

⁷⁰ Ibid. Article 27.

Remuneration

It is not surprising that the topic of remuneration should excite the most attention in the debate surrounding reforms to insolvency law and practice. The chief complaint about the proposals is that they do not change the basis on which remuneration is made, consisting of a complicated system of proportionate remuneration for some task and fixed fees for others. It has been noted that, because of the system used, there are occasions when the generation of fees may lead to abuses, for example, the remuneration of administrators as a function of turnover during the observation period could lead to an unscrupulous practitioner unduly prolonging the period to the eventual detriment of the business or an acquirer. In fact, the proposals are content merely to revise the figures to a lower level, this being especially true in the case of liquidators' fees. A reasonable balance between the needs of insolvent businesses and fees to be earned for services supplied by persons who are after all professionals is recognised generally as being a desirable aim. The failure by the Government to address the substance of the remuneration package is deeply deplored, particularly where experience has revealed inconsistencies in practice. In any event, the proposals have not found their way into the final text, with the issue remaining open.

Responses to the Proposals

The responses of the professional bodies and organisations representing the business sector were on the whole more restrained than in the case of the texts dealing with the commercial court system. The views elicited from the professions in particular focused on the many positive aspects of the reforms, while raising legitimate representations regarding the widening of access qualifications that raised issues of competition, especially from outside France. In this context, remuneration was perceived to be a sensitive issue with many of the Government's suggestions for revision of the tariffs attracting serious concern from professionals feeling the threat to their livelihoods. Seriously adverse views were only forthcoming on the issue of liability, where the proposals were felt to extend liability unfairly, and on the issue of ad hoc appointments, where again competition and the consequent effect on remuneration would be an issue. It seems the Senate took many of these views on board in its discussion of the text, as was amply demonstrated when it passed with considerable amendment the draft in February 2002. The effect of the amendments was to curtail the reforms to measures that largely had the support of the professions. The history of the subsequent draft that appeared before Parliament in the course of October 2002 reflects this, with the text being the object of a joint report by both houses and the text proceeding quite swiftly once the necessary compromises on the original text had been worked out by a joint committee of both houses. The final version enacted at the beginning of 2003 represents therefore the best available set of proposals that could be jointly agreed by business and the Government.

Summary

The reform of insolvency law and practice is a project of some considerable magnitude in any jurisdiction. It demands not inconsiderable reflection and its progress is often slow, having to take on the interests of the many participants in the process. In an environment when scandal is perceived as endemic, a rush to produce a cure is not often the best way of finding a solution to an ill seemingly generated by a system unable to check abuses from occurring. What is demanded is a rationale for reform prompted by apparent inadequacies within the system that relate not so much to abuses as to the difficulties in its use. The beginning of the reform process was inauspiciously set against the background of financial and business scandals that rocked France in the early to mid 1990s. At first, it seems the extent of the endemic corruption and systemic failings were not fully appreciated, perhaps explaining the initial statement of the Ministry of Justice in 1997 that set the agenda for limited reforms to the structure of insolvency practice. Through the work of the parliamentary and government enquiries in 1998, many more systemic abuses were identified, leading to considerable public disquiet expressed at the functioning of a major part of the commercial justice framework. The focus of these reforms grew in measure and scope as further refined by the outcomes reported in the Ministry of Justice's statement in 1998. The eventual overall reform package that was constructed contained reforms on a scale not previously seen in the history of the Commercial Court and related professions. At the same time, plans for the overhaul of insolvency law were released, representing important changes to the administration of insolvency matters and a change in emphasis towards more transparency and safeguards in the process. This is perhaps in itself a reflection of the overwhelming importance of insolvency as a tool for managing the economy. As part of the overall changes, the eventual codification of insolvency and other laws in the body of a renewed Commercial Code, a necessary and useful tool for the updating of the commercial justice framework, was attempted.

Coincidentally, the reforms to commercial justice and to commercial law became an important plank of the overall Government strategy to modernise the general legal framework, which also saw reforms in the areas of criminal law, constitutional law, family law and access to justice. Some commentators would suggest that the reform process thus ventured into error by becoming linked to wider reforms, especially those relating to the functioning of Commercial Courts, which by their nature were always likely to be tendentious. Although there were real needs for reform to the business environment, many of which, especially in the corporate and insolvency sectors, were identified early on, this linkage was ultimately to tie two very different issues together and their rise or fall together became inevitable. When in 2002 the Senate sounded the death-knell of the Commercial Court reforms, indirectly they also curbed the ambition of the text on insolvency practice, because the tendency to excess reproached of the former texts coloured perceptions of the latter. Similarly, it is likely that changes to insolvency law heralded by the 'preparatory orientation document' will also be muted. Nevertheless, some of the changes that have occurred to insolvency practice and that may well occur to insolvency law are very necessary in order to achieve the purpose the previous Government set itself of updating the

commercial law environment and which all Governments, despite being of perhaps very different political complexion, must continue. This results from the pressure on French law and institutions to compete on a global basis with other jurisdictions, where only efficient delivery of legal services will prompt users to continue to select particular rules for their legal transactions. It was perhaps no coincidence that the 2000 General Conference of the Commercial Courts chose as its theme: 'Anglo-Saxon (common) law and Romano-Germanic (civil) law: war or peace?' Speaking at this congress, Marylise Lebranchu, Dominique Perben's predecessor as Minister for Justice, put the reforms firmly into context. She stated that: "The reform of commercial justice requires its participants to adapt to new rules. The decisions of the legislators must be put into operation and the new laws must be made to live. The [Commercial Court] judges have known – and they have shown this – how to evolve in the past. I am convinced that the [Commercial Court] judges will also do this for the present reforms."⁷¹ As evidence of the then Government's intention and determination to proceed, this could not be less clear. Although the particular reforms she mentions have now been put into suspension and may or may not be revived, the spirit of her speech is still an important indicator of why the present Government must continue to pay attention to the problems in the insolvency legal environment. Nevertheless, it may be too ambitious to use this as the sole principle by which reforms are to be conducted. The present reforms and anticipated proposals must at the end of the day be treated as initial steps at the beginning of a process that will lead to a reappraisal of French insolvency procedures and practice as well as perhaps, ultimately, to a renovation of the façade of commercial justice in France. Nevertheless, commentators await the results of this process with some anticipation and anxiety about whether further reforms of this important area will be delayed owing to political or other extraneous considerations, as has already been evidenced by the fate of the Commercial Court texts. At the end of the day, without reforms being carried through into legislative action, the business world will continue to undergo uncertainty with the consequent impact being on the ability of firms to organise themselves properly and the ability of courts to properly deliver justice.

⁷¹Speech of 19 October 2000. A copy is available at: www.justice.gouv.fr/discours/d191000.htm.

Table 2: Timetable of Events and Actual Reforms

	1996	1997	1998	1999
Commercial Justice Structure	<p>Media Interest in Commercial Courts in Nanterre, Bobigny, Paris, Nice and St. Lô (collusion and underhand practice)</p> <p>“l’affaire Sauvan-Gouletquer” (criminal fraud and breach of trust, illegal acquisition of companies, abetting criminal bankruptcy)</p>	<p>Minister of Justice Statement 24 October 1997 (reinforcement of penalties for supervising judges, closer scrutiny of insolvency practitioners’ accounts, deposit of insolvency funds, greater role for public prosecutors in proceedings)</p> <p>Council of Ministers 29 October 1997 (reform proposals for commercial courts, insolvency law and practice)</p> <p>CCIP Preliminary Report on Commercial Court Reforms</p>	<p>National Assembly Enquiry Report 1998 (obstruction of the enquiry and destruction of evidence)</p> <p>Press Statement 14 October 1998 (reform of commercial justice, introduction of career judges, reform of professions)</p> <p>Senate Study Paper on Commercial Courts in Europe (October 1998)</p> <p>Preparatory Orientation Document (reforms to insolvency law released for consultation)</p> <p>Decree no. 98-1232 of 29 December 1998 (new practice conditions for insolvency practitioners)</p>	<p>Circular no. 99-4 of 26 January 1999 and Arrêté of 16 August 1999 (further particulars for implementation of Decree no. 98-1232 of 29 December 1998)</p> <p>Decree no. 99-659 of 30 July 1999 (reduction of number of Commercial Courts from 227 to 191)</p>
	2000	2001	2002	2003 and Future
Commercial Justice Structure	<p>Draft Law on Reorganisation of Commercial Courts of 18 July 2000 (introduction of mixed benches, new rules on professional training, new disciplinary structure, declarations of interest)</p> <p>Draft Ordinance on recruitment of Councillors to Courts of Appeal of 18 July 2000 (introducing mixed benches for appeal in commercial matters)</p> <p>Draft Law on Reorganisation of Insolvency Practice of 18 July 2000</p> <p>Ordinance no. 2000-912 of 18 September 2000 introducing new Commercial Code</p> <p>CCIP Report on Commercial Court Reforms</p>	<p>Article 127, Law no. 2001-420 of 15 May 2001 (restoring commercial jurisdiction)</p> <p>Draft Texts introduced into National Assembly (March 2001) and Senate (April 2001)</p> <p>800 commercial judges resign (Laon, Blois, Sens, Pau and Laval Commercial Courts cease to function)</p>	<p>Senate Report on the Implementation of Insolvency Law (January 2002)</p> <p>Rejection of Draft Texts on Commercial Court Reform by Senate and Adoption of Draft Text on Insolvency Practice by Senate (considerably amended) (February 2002)</p> <p>All Commercial Courts on strike</p> <p>National Assembly dissolved for Elections</p> <p>New Draft Text on Insolvency Practice introduced (October 2002)</p> <p>New Garde des Sceaux abandons Reforms of Commercial Courts but New Insolvency Law promised (22 November 2002)</p>	<p>Law no. 2003-7 of 3 January 2003 (new law on insolvency practice)</p> <p>New proposals for reform of insolvency law forthcoming</p>