The Administration of Insolvent Companies in France (Part I)

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Introduction

The History of Modern Insolvency Law

The modern institutions of insolvency were formed by the provisions of the law of 1967. This retained the concept of a twin procedure, one to be followed if a court was satisfied that the likely outcome of negotiations between the debtor and its creditors was an agreement keeping the debtor in business, the other to liquidate a hapless company, whose chances of survival were in doubt.

The first of these institutions was called règlement judiciaire, first introduced in 1955. Règlement judiciaire was designed to restore the debtor to a position of being able to manage his assets, following an agreement with his creditors, subject to approval by the court. Once the extent of debts was known, the debtor was required to submit to court his proposals for re-establishing the business as well as proposals for the settlement of book debts.

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

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

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

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1Law no. 67-563 of 13 July 1967 on judicial administration, liquidation of goods, personal insolvency and bankruptcy, implemented by Decree no. 67-1120 of 22 December 1967.
2Decree-Law no. 55-583 of 20 May 1955.
3Lamy Droit Commercial, par. 2279.
5Lamy Droit Commercial, par. 2285.
drawn out, often lasting for two to three years, and excluded the workforce, who were the group most affected by the liquidation of the business.\(^6\)

Many reforms were attempted over the succeeding decades, the latest culminating in the current and principal text dealing with the law and institutions of insolvency in France.\(^7\) This law has, however, not escaped criticism, notably by creditors who had felt their rights declining in favour of the debtor. Due to this and the realisation that the number of insolvencies being declared was increasing,\(^8\) a new reform act was introduced in 1994.\(^9\)

**Introduction to Redressement Judiciaire**

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

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

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\(^6\) Lamy Droit Commercial, par. 2292.


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

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

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

\(^11\) *Apurement du passif*, the French term, is used in this sense in the Ordinance of 23 September 1967.

\(^12\) L Art 1 al 2.

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


\(^15\) L Art 1 al 3.
The early commentators were divided as to the effect of the provision expressing the purposes of *redressement judiciaire*, whether the law indicated a hierarchy of purposes, in which the interests of the creditors took a back step as opposed to the economic interest in keeping the business going, or whether the purposes could be read cumulatively, in no specific order. The current view is the latter.\(^{16}\)

The procedures of *redressement judiciaire* and *liquidation judiciaire* are, after the reforms of 1994, applicable to all businesspersons, artisans, farmers and cultivators of agricultural produce and legal persons.\(^{17}\) Prior to the reform, *liquidation judiciaire* was the subject of a separate part of the Law of 1985 and it is purely because a court may now pronounce *liquidation judiciaire* immediately that it is mentioned here in passing.\(^{16}\) The Law of 1985 contains two procedures, one accelerated,\(^{19}\) which applies to all businesses which do not employ more than fifty employees and whose turnover does not exceed the threshold.\(^{20}\) All other businesses must comply with the standard procedure.

**The Institution of Proceedings**

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

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

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

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\(^{16}\) Dictionnaire Permanent Difficultés des Entreprises, Editions Legislatives, p12.

\(^{17}\) L Art 2 al 1.


\(^{19}\) L Arts 137 to 147.

\(^{20}\) Where turnover (“chiffre d’affaires”) is less than 20 million Francs. (D Art 1).

\(^{21}\) L Art 3 al 1.

\(^{22}\) L Art 3 al 2.

\(^{23}\) D Art 6.

\(^{24}\) L Art 6 al 7 (new).

\(^{25}\) Cassation commerciale, 27 April 1993 Bull. Civ. IV No. 147.

\(^{26}\) Cassation commerciale, 2 November 1993 Bull. Civ. IV No. 378.
The procedure may be instigated at the behest of a creditor.\textsuperscript{27} This method is not without some danger, as French law recognises that a debtor may recover damages for an unwarranted suit.\textsuperscript{28} A creditor may find it difficult to prove that the debtor business has ceased all activity or that \textit{redressement judiciaire} is manifestly impossible, both prerequisites for \textit{liquidation judiciaire} to be ordered.\textsuperscript{29} Tactically, a creditor is best advised to seek to place the debtor business in \textit{redressement judiciaire}.

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

\textbf{The Proper Court}

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

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

\textsuperscript{27}L Art 4 al 1.
\textsuperscript{28}Damages for an “action abusive” is a remedy given by Article 1382, Civil Code.
\textsuperscript{29}D Art 7.
\textsuperscript{31}L Art 4 al 2. The “procureur” is a state prosecutor, appearing in civil and criminal cases.
\textsuperscript{32}The institution of the “Comités d’entreprise” (Works Councils) celebrated its 50th anniversary in 1995.
\textsuperscript{33}L Art 6 al 1.
\textsuperscript{34}L Art 6 al 2.
\textsuperscript{35}D Art 14.
\textsuperscript{36}L Art 7 al 1.
\textsuperscript{37}D Art 1.
\textsuperscript{38}A concept to be found in the Brussels Convention 1968.
\textsuperscript{39}D Art 1 al 2.
\textsuperscript{40}D Art 3.
may order the appointment of an interim *administrateur judiciaire*. Orders may also be made for *mises conservatoires*, the inventory of stock and the placing of seals on the business premises.

**Beginning the Observation Period**

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

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

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

**The Procedure and Personnel of Management**

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

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

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41 D Art 3 al 3. The "administrateur judiciaire" will be discussed below.  
42 D Art 3 al 3. "Mises conservatoires" are an order akin to a hybrid between Anton Piller and Mareva orders.  
43 L Art 8 al 1.  
44 D Art 20.  
45 L Art 8 al 2.  
46 L Art 9 al 1.  
47 D Art 21.  
48 L Art 10 al 1.  
49 L Art 10 al 2.
request by one of the parties for the recall of any of the personnel may be made.\textsuperscript{50}

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

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

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

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

\textbf{The Economic and Social Plan}

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

\textsuperscript{50} L Art 12 al 2 (inserted by the Law of 1994).
\textsuperscript{51} L Art 13 al 1.
\textsuperscript{52} L Art 13 al 2.
\textsuperscript{53} L Art 14.
\textsuperscript{54} D Art 25 al 1.
\textsuperscript{55} D Art 24.
\textsuperscript{56} D Art 25 al 3.
\textsuperscript{57} L Art 15.
\textsuperscript{58} D Art 27 al 2 (amended by the Law of 1994).
\textsuperscript{59} L Art 15 al 1.
\textsuperscript{60} L Art 15 al 4 (amended by the Law of 1994).
by the debtor and one or more experts. The administrator will, in light of this report, produce a plan recommending the *redressement judiciaire* or *liquidation judiciaire* of the business. One of the functions of the report is to carefully state the sources, nature and importance of the difficulties the business is facing.

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

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

**Offers to Purchase**

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

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

**Changes in Administration**

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

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61 L Art 18 al 1.
62 L Art 18 al 2.
63 L Art 18 al 3.
64 L Art 18 al 4.
65 L Art 18 al 5.
66 L Art 19.
67 L Art 20.
68 L Art 21 al 1.
69 L Art 21 al 2.
70 L Art 21 al 3 (amended by the Law of 1994).
intermediary of the *conseil d’administration*\textsuperscript{71} call for a general meeting of the shareholders or partners.\textsuperscript{72} The general meeting may be called upon to agree, where the called-up capital is less than the share capital subscribed to, that a further call will be made so as to take the called-up capital to at least fifty percent of the share capital.\textsuperscript{73} Reductions and increases in share capital may also be decided at the meeting, but all agreements, including those in which third parties agree to subscribe to capital, are subject to the approval of the competent court.\textsuperscript{74}

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

**Presentation of the Report**

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

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

**The Observation Period**

**Assessing the Situation**

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

\textsuperscript{71}Equivalent to the board of directors or management body.

\textsuperscript{72}L Art 22 al 1.

\textsuperscript{73}L Art 22 al 2.

\textsuperscript{74}L Art 22 al 3.

\textsuperscript{75}L Art 23 al 1.

\textsuperscript{76}Equivalent to a trustee appointed by court.

\textsuperscript{77}L Art 23 al 2.

\textsuperscript{78}L Art 24 al 1.

\textsuperscript{79}L Art 24 al 2- al 3.

\textsuperscript{80}L Art 25 al 1.

\textsuperscript{81}L Art 25 al 3.
business and production capacity and safeguards the rights of the company against its own debtors.\textsuperscript{82}

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

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

**The Administration of the Business**

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

\textsuperscript{82} L Art 26 al 1.
\textsuperscript{83} L Art 26 al 2.
\textsuperscript{84} D Art 46 al 1.
\textsuperscript{85} D Art 46 al 2.
\textsuperscript{86} L Art 27 al 1.
\textsuperscript{87} L Art 27 al 2.
\textsuperscript{88} L Art 28 al 1.
\textsuperscript{89} L Art 28 al 2.
\textsuperscript{90} L Art 28 al 3.
\textsuperscript{91} L Art 29.
\textsuperscript{92} L Art 30.
\textsuperscript{93} L Art 31 al 1.
\textsuperscript{94} L Art 31 al 2.
\textsuperscript{95} L Art 31 al 4.
\textsuperscript{96} L Art 31 al 3.
\textsuperscript{97} L Art 32.
By far the most important consequence of the administrator assuming his functions is the interdiction, contained in the order commencing the observation period, against paying any business debt incurred before the judgment. The conventional rule is that all creditors, for the purpose of this moratorium, rank equally. Nevertheless, a creditor may be paid by a third party, such as a bank, if a cheque has already been drawn and will be met. Similarly, reciprocal debts may be set off against each other if there is a sufficient nexus, such as contra accounts with one supplier, between the sums due. Where there may be no legal connexion, payment may still be made if the amounts of both debts are ascertainable and payment was due before the date of the judgment instituting redressement judiciaire.

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

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

**Continuing the Business : Contracts**

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

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98. L Art 33 al 1.
101. L Art 33 al 2.
102. L Art 33 al 3.
103. L Art 33 al 2.
104. L Art 33 al 4.
105. L Art 34 al 1.
106. L Art 34 al 2.
107. L Art 34 al 3.
108. L Art 35.
110. L Art 36 al 2.
employment contracts, are the subject of special regulation. The administrator may at any time require that a contract be performed by himself providing the promised consideration. The third party is required to fulfil his part of the bargain, irrespective of any breaches of condition or warranty or failure to perform by the debtor prior to the judgment commencing the observation period.

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

**Determination of Leases**

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

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

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

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111 L. Art 37 al 7.
112 L. Art 37 al 1.
113 L. Art 37 al 4.
115 L. Art 37 al 5.
117 L. Art 38 (unamended).
118 L. Art 38 al 1 (inserted by the Law of 1994).
119 L. Art 39 al 1.
120 L. Art 39 al 2.
121 L. Art 38 al 2.
122 L. Art 38 al 1 (inserted by the Law of 1994).
Debts Acquired after Redressement

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

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

The Employees and the Business

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

Representing the Creditors

Despite the facility offered to creditors to represent their own interests as contrôleurs, appointed to assist the administrator, only the creditors’
representative enjoys a legal role to act on behalf of all creditors. This role is primarily to communicate any information provided by the contrôleurs or other creditors to the juge-commissaire. In addition, the creditors’ representative may act so as to recover any moneys owing to the debtor by third parties, as he enjoys the ability to institute a derivative action, any moneys being recovered going to the credit of the business.

**Stays of Action**

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

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

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

**Declaration of Debts**

This phase of the procedure is considered to be one of the most important in redressement judiciaire as important consequences flow from the ability of the creditor to prove his debt. On judgement placing the business in redressement judiciaire being given, all creditors, with the exception of employees owed their salary, must present a declaration of the existence of a debt to the creditors’ representative, whether in person or via a legal representative.
Secured creditors and those under a leasing contract are notified directly of the existence of the judgment, notification to the other creditors being made by advertisement.\textsuperscript{146} Whether creditors have documentary proof of the debt or not, they must still make their declaration within the specified time.\textsuperscript{147} The declaration must contain an indication of the principal sum due, together with any date on which instalments become due. The declaration must also mention any security or other privilege the creditor is relying on so as to advance his cause.\textsuperscript{148} Debts in foreign currency are expressed in French Francs at the rate of exchange on the date of the judgment placing the business in \textit{redressement judiciaire}.\textsuperscript{149}

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

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

**Legal Charges and Sureties**

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

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

\begin{footnotesize}
\textsuperscript{146}L Art 50 al 1 (last sentence inserted by the Law of 1994).
\textsuperscript{147}L Art 50 al 3.
\textsuperscript{148}L Art 51 al 1.
\textsuperscript{149}L Art 51 al 2.
\textsuperscript{150}L Art 51 al 3.
\textsuperscript{151}L Art 52.
\textsuperscript{152}D Art 69.
\textsuperscript{153}L Art 53 al 1.
\textsuperscript{154}L Art 53 al 2 (inserted by the Law of 1994).
\textsuperscript{155}L Art 53 al 4.
\textsuperscript{156}L Art 56.
\textsuperscript{157}L Art 57 al 1.
\end{footnotesize}
the guarantee.\textsuperscript{158} No contribution between co-sureties may be recovered unless the total amount recovered by the creditor exceeds the nominal value of the guarantee, in which case the excess goes to the surguarantors.\textsuperscript{159} Credit must be given for any amount received by the creditor from any of the joint guarantors, though a joint guarantor may, in respect of a business in \textit{redressement judiciaire}, declare this payment as a debt.\textsuperscript{160}

\textbf{1st February 1996}

\textsuperscript{158}L Art 58.  
\textsuperscript{159}L Art 59.  
\textsuperscript{160}L Art 60.