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The Appeals Process in French Insolvency Law

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Introduction

The appeals system in insolvency proceedings in France is very different from that employed in ordinary civil procedure. The rules relating to appeals are the subject of specific mention in Title IV of the Insolvency Law 1985.¹ Ordinary rules of civil procedure continue to apply to any proceedings that are not expressly mentioned as being governed by Title IV, including proceedings with regard to directors' and officers' liability for management mistakes, wrongful trading which brings about the insolvency of the company.

Judicial Hierarchy in Insolvency

There are for the purposes of French insolvency law three levels of courts in France. The courts of first instance are the High Court and the Commercial Court.² There are a number of such courts of first instance in each judicial district.³ The supervising judge is appointed by the court of first instance to hear many of the issues in the context of insolvency proceedings and exercises powers delegated by the Insolvency Law. The supervising judge is normally a member of the relevant court who has certain experience in commercial matters. Appeals from his decisions normally go to the court of first instance appointing him. Immediately above the courts of first instance at the summit of each judicial district, and to which appeals may be made, is a Court of Appeal.⁴ Both courts of first instance and the Court of Appeal hear matters of fact and law. The Supreme Court is at the apex of the hierarchy. Its function is to hear appeals on points of law and thus create uniformity of application of legal principles across the many judicial districts into which France is divided.⁵

Ordinary Appeals

There are a variety of appeals which may be brought, which are classified into ordinary and extraordinary appeals.⁶ Ordinary appeals include the appeal proper,⁷ against a judgment of a court of first instance to an appeal court,

¹L. Arts. 171-177.

²Arts. L. 311-1 and 411-1, Code of Judicial Organisation ('CJO'). The Commercial Court is competent to initiate insolvency proceedings involving a commercial person or business or association with economic activity. The High Court is competent to initiate insolvency proceedings involving private law bodies and associations without economic activity.

³Schedules VII and VIII to the CJO list the competent Commercial and High Courts respectively.

⁴Art. L. 211-1, CJO.

⁵Art. L. 111-1, CJO.

⁶Voies de recours ordinaires et extraordinaires. See Art. 527, New Code of Civil Procedure ('NCPC').

⁷Appel.

which is designed to reform or overturn the first judgment.⁸ This method of appeal is open normally to a person who was a party before the lower court.⁹ In exceptional circumstances, a third party who demonstrates that his interests are affected by the judgment may also appeal.¹⁰ The other ordinary appeal is the appeal to set aside,¹¹ which is heard before the court which gave a judgment by default. This appeal is open only to the party in default.¹²

Extraordinary Appeals

There are three varieties of extraordinary appeals. The first is the third party appeal,¹³ which is designed to offer a third party the opportunity to have the judgment overturned or reformed insofar as it affects the third party.¹⁴ The third party appeal is heard before the court which gave the original judgment.¹⁵ The second is the appeal to vacate,¹⁶ which is designed to offer a party, who must be a party to the original judgment,¹⁷ the opportunity to have the judgment declared of no effect and the matter remitted to the original court for a fresh hearing.¹⁸ The third type of appeal is the appeal on a point of law,¹⁹ which is brought from any court which has given a judgment which is not subject to an ordinary appeal to the Supreme Court.²⁰

Other Rights of Appeal

The appeal to avoid is a procedure that lies outside any of the ordinary or extraordinary appeal routes.²¹ It applies to all decisions made in the context of civil proceedings, including insolvency proceedings, subject to certain conditions being fulfilled. These conditions include the absence of any legal text permitting an appeal to be made, the absence of any other means of appeal to cure the irregularity which is present and the nature of the irregularity is such as to taint the judgment. Irregularities would include a situation of manifest ultra vires and the breach of a fundamental rule of law or procedure.²² Other irregularities may occur where a judgment adopting a rescue plan imposed further obligations on one of the parties.²³

In cases of judicial administration or liquidation, where prior to a decision being made, the prosecutor enjoys a right of information or notice, the prosecutor also enjoys an exceptional right to bring an appeal on a point of

⁸Art. 542, NCPC.

⁹Art. 546, NCPC.

¹⁰Art. 554, NCPC.

¹¹Opposition.

¹²Art. 571, NCPC.

¹³Tierce opposition.

¹⁴Art. 582, NCPC.

¹⁵Art. 587, NCPC.

¹⁶Recours en revision.

¹⁷Art. 594, NCPC.

¹⁸Art. 593, NCPC.

¹⁹Pourvoi en cassation.

²⁰Art. 604, NCPC.

²¹Appel en Nullité.

²²Cassation commerciale, 16 November 1993, JCP éd G 1994.II.21.168.

²³Cassation commerciale, 27 April 1993, Les Petites Affiches 1994.83.44.

law against any decision which is made in the absence of the required information being supplied.²⁴

Limitation Periods

The limitation period which applies to all appeals in insolvency proceedings is ten days from the date the decision is made or notified, depending on the type of decision. The prosecutor attached to the Court of Appeal enjoys a longer period of fifteen days in which to bring his appeals.²⁵

Parties' Rights of Appeal

Parties of necessity must show an interest in appealing decisions. This is so whether or not the parties concerned were parties to the original proceedings or fall under the category of persons affected by a particular decision. In order to prevent proliferation of litigation, the law enumerates strictly the categories of persons entitled as of right to make appeals, reserving many appeals to the administrative authorities in the shape of the public prosecutor. The courts also control access by participants in insolvency proceedings. This was seen in a recent case of the Paris Court of Appeal, where the court clarified almost incidentally the status of the monitor.²⁶

The court conceded that in law, an appeal to avoid a judgment could be exercised even in the absence of a right of ordinary appeal, so as to give a person the opportunity to appeal what might be the violation of a principle of law of public importance. Nevertheless, this right was limited to parties who had taken part in proceedings at first instance and appeals should be brought within the period laid down by law. The court admitted that the role of the monitor had been considerably enhanced following reforms in 1994, which applied to the instant case. Nevertheless, Article 15, which enables monitors to be appointed, only conferred a subsidiary role on monitors in assisting the conduct of insolvency proceedings. It is in this context that a monitor is summoned to attend court and is heard before adoption of a rescue plan.

Although nothing prevents a court from summoning all the monitors to appear before it, it is noteworthy that the law only obliges the court to summon one. The court considered that the monitor could not be considered as part of insolvency proceedings in the same way as the administrator or the debtor, who were essential parties. Monitors, the court decided, were creditors with a particular status and could not exercise any right not accorded to a creditor, especially in the context of the examination of a rescue plan. It was because of this that the court decided that a monitor could not be considered as a party to proceedings for the purpose of appealing.

Appeals in Judicial Administration

²⁴L. Art. 176.

²⁵D. Art. 157 al. 3.

²⁶Re: Banque Commerciale Privée (CA Paris, 3rd chamber, section B, 5 April 1996, RG 96-1470).

Judicial administration begins with a petition following declaration of cessation of payments by a debtor or presentation of a petition by a creditor.²⁷ Both an appeal proper and an appeal on a point of law may be brought against the judgment ordering that judicial administration proceedings be opened. This appeal may be brought by the debtor, a creditor who initiates proceedings and the prosecutor. Appeals against the refusal to open proceedings may be brought by the creditor who initiates proceedings and the prosecutor.²⁸

In addition, a third party appeal may be brought against both a judgment ordering the opening of proceedings or one refusing to do so.²⁹ An appeal by the prosecutor suspends enforcement of the judgment.³⁰ If the appeal court decides to annul the opening of proceedings by a lower court, in effect substituting a fresh finding of insolvency and the opening of new proceedings, this does not necessarily affect steps taken under former proceedings, including the declaration of debts.³¹

Appointment of Insolvency Personnel

The three essential personnel in insolvency are the supervising judge, whose task is to supervise the conduct of proceedings, the administrator, who takes over the management of the company concerned and the creditors' representative, who looks after the creditors' interests in the insolvency. The nomination or replacement of the supervising judge may not be the subject of any appeal.³²

Only the prosecutor may bring an appeal proper against a judgment of the court of first instance which nominates or replaces the administrator, the creditors' representative or experts. He is also the only person authorised to bring an appeal against an order made by supervising judge appointing the monitors.³³ This appeal acts so as to suspend the enforcement of the judgment being appealed against.³⁴ No third party appeal or appeal on a point of law may be brought against any of these judgments.³⁵ The appointment of an administrator does not deprive the debtor of any rights to form appeals that the law permits.³⁶

Decisions of the Supervising Judge

Orders made by the supervising judge may be appealed to the court of first instance. Further appeals may not be brought against any decision of the court which hears an appeal against an order made by the supervising judge,

²⁷For an overview of judicial administration, see Omar P., *The Administration of Insolvent Companies in France* (in two parts) [1996] 2 IL&P 39 and 3 IL&P 81.

²⁸L. Art. 171 al. 1-1.

²⁹L. Art. 171-1 (inserted by the Law of 1994).

³⁰L. Art. 171 al. 2 (inserted by the Law of 1994).

³¹Cassation commerciale, 25 May 1993, Bull. Com. IV No. 208.

³²L. Art. 173 al. 1-1.

³³L. Art. 174 al. 1-1.

³⁴L. Art. 174 al. 4.

³⁵L. Art. 175 al. 1.

³⁶Cassation commerciale, 22 May 1990, D.1990.415.

excepting those which deal with claims against goods and for the restitution of property.³⁷ Orders made by the supervising judge which relate to the sale of property, the sale of viable units and the sale of sundry assets belonging to the company may be the subject of an appeal proper and an appeal on a point of law, which may only be brought by the prosecutor.³⁸

Appeals in the Observation Period

The opening judgment opens an observation period, during which the activities of the company are monitored with view to either ordering a liquidation or adopting a rescue plan. The prosecutor is the only party authorised to bring an appeal against the judgment of the court which fixed or extends the observation period.³⁹ The appeal he brings suspends enforcement of the judgment.⁴⁰ No third party appeal or appeal on a point of law may be brought against any of these judgments.⁴¹ A judgment which requires that the activity of the business continue or that it be brought to an end is subject to an appeal, which may only be brought by the prosecutor. The same applies to any judgment authorising the continuation of activity by means of a contract of lease-management.⁴² No third party appeal or appeal on a point of law may be brought against any of these judgments.⁴³

Appeals over Rescue Plans

No other situation in insolvency creates the opportunity for more conflict than the nature of the rescue plan to be adopted. The administrator's primary objective under the legislation is to preserve, wherever possible, the business of the company in question and its associated employment. The administrator has no direct relationship with the creditors and will favour the continuation of an insolvent company where possible. Conflict may arise, however, as the administrator is normally remunerated by a percentage of the turnover of the company during the observation period and by a commission based on the sale price if the company, or parts of it, are sold. The creditors' representative's main concern is to obtain the best return for the creditors. Additionally, the creditors' representative will be appointed as liquidator if the court chooses liquidation, and will be remunerated by way of commission on the sale price of the company's assets. Where the offers received by the administrator are low, the creditors' representative may tend to push for a liquidation.

The employees' representative obviously has the interests of employees to protect. In the event that a number of offers are received that will give a similar return to the creditors, the employees' representative may be able to influence the court's choice among the offers, by preferring the offer that best secures the future of the employees. The managing director of the company, will have two

³⁷L. Art. 173 al. 1-2.

³⁸L. Art. 173-1 (inserted by the Law of 1994).

³⁹L. Art. 174 al. 1-2.

⁴⁰L. Art. 174 al. 4.

⁴¹L. Art. 175 al. 1.

⁴²L. Art. 174 al. 1-2.

⁴³L. Art. 175 al. 1.

objectives: firstly, the repayment of the company's debt and the maintenance of his or her position. The extent to which he or she will have an influence on the outcome will depend on his or her track record as a manager and the particular court which is hearing the case.

The Continuation Plan

The judgment adopting or rejecting a continuation plan may be appealed (an appeal proper or an appeal on a point of law) against by the debtor, the administrator, the creditors' representative, the employees' representative and the prosecutor.⁴⁴ An appeal by the prosecutor acts so as to suspend enforcement of the judgment.⁴⁵ The judgment adopting a continuation plan may not be the subject of a third party appeal.⁴⁶ Judgments which modify the continuation plan may be the subject of an appeal proper and an appeal on a point of law. The parties entitled to bring these appeals include the debtor, the supervisor of the plan, the employees' representative and the prosecutor.⁴⁷ An appeal which is brought by the prosecutor halts enforcement of the judgment being appealed.⁴⁸ The observation period is extended automatically until the appeal court has heard the case and given its judgment.⁴⁹

The Sales Plan

The judgment which adopts or rejects a sales plan may be appealed against by the prosecutor, the offeror who initiates the take-over and a contracting party, whose contract, one of those mentioned in Article 86,⁵⁰ is to be transferred for the purposes of the business. The prosecutor is not restricted as to what elements of the judgment he may appeal against. Where the judgment is one that adopts a plan, the offeror may only appeal if the judgment imposes additional obligations on him, in violation of the rules under Article 62. The contracting party may only appeal that part of a judgment which transfers the contract.⁵¹ The judgment modifying a sales plan may be the subject of an appeal by the prosecutor and, insofar as any judgment imposed additional burdens on the offeror, by the offeror.⁵² Appeals made by the prosecutor against any of the judgments in connexion with sales plans act so as to suspend execution of the judgment.⁵³ The prosecutor may also bring appeals on a point of law against any of these judgments.⁵⁴ The observation period is extended automatically until the appeal court has heard the case and given its judgment.⁵⁵

⁴⁴L. Art. 171 al. 1-2.

⁴⁵L. Art. 171 al. 2 (inserted by the Law of 1994).

⁴⁶L. Art. 172.

⁴⁷L. Art. 171 al. 1-3.

⁴⁸L. Art. 171 al. 2 (inserted by the Law of 1994).

⁴⁹L. Art. 177 al. 2.

⁵⁰Leasing contracts, property rental contracts and contracts for the supply of goods or services considered essential for the continuation of activity.

⁵¹L. Art. 174 al. 2.

⁵²L. Art. 174 al. 3.

⁵³L. Art. 174 al. 4.

⁵⁴L. Art. 175 al. 2.

⁵⁵L. Art. 177 al. 2.

Appeals in Liquidation

Liquidation may occur either following an initial finding that the company is not viable for the purpose of judicial administration or, where it is viewed as being potentially viable, following an appreciation made by the administrator during the observation period that the business should not continue.⁵⁶ An appeal proper and an appeal on a point of law may be brought against a judgment which considers the case for liquidation, whether this judgment orders or rejects liquidation. Parties entitled to bring these appeals include the debtor, the administrator, the creditors' representative, the employees' representative and the prosecutor.⁵⁷ An appeal brought by the prosecutor stays enforcement of the judgment.⁵⁸ Only the prosecutor may bring an appeal proper against a judgment of the court of first instance which nominates or replaces the liquidator.⁵⁹

Summary

The appeals procedure is complex and may unnecessarily duplicate ordinary rules of civil procedure. Nevertheless, the proposers and draftsman of the Insolvency Law felt that a new system with shorter limitation periods and restricted rights of appeal would do greatly to assist the conduct of insolvency proceedings. However, the practical effect of the same limitation periods is not positive, given that experience shows delays in notification by courts of judgments, leading to some parties, especially creditors, losing by default any right to appeal.

Although the effect of the 1994 Insolvency Reform Law was to provide automatic notice for some creditors, especially those holding securities and rights of retention over assets, creditors, especially where they wish to participate in the reconstruction of the debtor company would do well to take steps to ensure an unimpeded flow of information through the creditors' representative, supplemented by adequate representation by experienced insolvency law practitioners.

13th November 1996

⁵⁶For an overview of liquidation, see Sorensen A. and Omar P., *The Institution of Liquidation Judiciaire in France* [1996] 1 IL&P 2.

⁵⁷L. Art. 171 al. 1-2.

⁵⁸L. Art. 171 al. 2.

⁵⁹L. Art. 174 al. 1-1.