The EMTEC success story

The cross-border EMTEC insolvency proceedings demonstrate that French insolvency law system is perfectly suitable for handling complex international cases achieving remarkable financial results.

What are the keys factors of success ?

There are essentially two.

First, the legislator has increased the attractiveness of French law by introducing modern safeguard and other pre-insolvency proceedings.

Second, French commercial courts favor a pragmatic approach focusing on the effectiveness of restructuring of companies facing financial difficulties.

With respect to cross-border insolvency cases, the Tribunal of Nanterre, one of the most important commercial courts in France, which is located in the business center of the Parisian region, has played an important role. The EMTEC judgments of February 15, 2006 are landmark decisions, opening for the first time French insolvency proceedings for all entities of an international group of companies, although their registered offices were located in several EU Member states.

I would like to seize the opportunity of my intervention to explain the ingredients of the EMECT success story : firstly, the pragmatic approach of the Commercial court of Nanterre and secondly the attractiveness of French insolvency law.

I. <u>The pragmatic approach of the Commercial Court of Nanterre in the EMTEC case</u>

a) A remarkable end-result

The end result of the EMTEC bankruptcy is remarkable in all aspects :

EMTEC is a former spin-off of the German BASF giant that was bought by a French group in 2004. The EMTEC group is composed of 11 companies established in 8 European countries with branches in other member states and outside Europe, especially in Eastern countries.

EMTEC is distributing magnetic recordable devices like tapes, CD, flash memories and other supports.

Its turnover was approximately 200 millions euros. The group was employing 200 employees all over Europe.

The Court was able to simultaneously sell all the business of all entities to an outside investor for an attractive price, recovering outstanding receivables in the aggregate amount of 30 million Euros and saving 130 jobs.

b) Jurisdiction (COMI)

In its judgments handed down on February 15, 2006 in the EMTEC case, the Commercial Court of Nanterre adopted a dynamic and teleological interpretation of the Regulation as a "tool box" with the objective of finding the best solution for group companies facing financial difficulties.

The Judges in Nanterre have conducted a thorough analysis for each company of the EMTEC group, showing that the financial management and centralized purchase and distribution activities was done by the two French controlling companies of the group. The major creditors and suppliers were dealing with them and were looking to France to obtain the reimbursement of their advances. The employees of the various foreign companies also confirmed that the management of the whole group was conducted out of France. These factors were both objective and ascertainable by third parties. Consequently, the judges found that the COMI of each foreign entity of the EMTEC group was located in France even though the various foreign entities of the group had assets and carried out their day-to-day business at premises located within the territory of the State of their registered offices.

In accordance with the European Regulation, it was therefore possible to open main insolvency proceedings in Nanterre with respect to all the companies of the EMTEC group.

c) A remarkable international cooperation

In its judgment, the court emphasized the need for international cooperation. In particular, in an *obiter dictum*, the court envisaged opening of secondary proceedings in order to provide local creditors with the application of their judge and their law.

Several events demonstrate the implementation of such international cooperation:

With respect to Austria, secondary proceedings were opened in favour of the Austrian subsidiary of the EMTEC group. This led to the application of Austrian law with respect to the terms and conditions of the sale of the assets located in Austria. Since the takeover candidates were looking for a global deal including the Austrian assets, the commercial court of Nanterre invited the Austrian judge and the Austrian liquidator to attend the court hearing in Nanterre at which the takeover candidate for the whole group was selected. The Austrian judge and liquidator were given the opportunity to speak up, explaining to the selected investor how to bid for the Austrian assets, emphasizing that they would use their best endeavours to include Austria into the global deal, which was done in accordance with Austrian law three weeks later. The end-result of the closure of the Austrian secondary proceedings was very favourable. All Austrian local creditors have been paid in full and the remaining amount, of approximately 2 million euros, was transferred to Nanterre.

With respect to Italy, a dialogue was engaged between the French liquidator of EMTEC and the statutory auditors of EMTEC Italy. What was the problem? Under Italian law, the advances made by the group in favour of the Italian subsidiary would have been subordinated to the Italian creditors. The opening of secondary proceedings would have resolved this problem, leading to the application of the Italian law. The reverse side of the coin would have been that the Italian creditors would not have seen a penny for more than 4 years (which is the average time schedule for Italian proceedings). On the other hand, French proceedings would have been much more efficient, leading to the payment of creditors within less than 6 months. A settlement has been entered into, to the benefit of both parties, authorized by the judge of Nanterre. It provided for the immediate payment in full of the Italian local creditors as if secondary proceedings had been opened. The remaining portion of the funds available was immediately transferred to the French mother company. All this was done in the framework of the French main insolvency proceedings except the mother company, thus avoiding the opening of cumbersome Italian insolvency proceedings.

With respect to Germany, Poland, Belgium, Netherlands… secondary proceedings were opened once the business was sold. Thus the local creditors were protected. Different protocols were entered into among the French and all the other liquidators, organizing in particular the production of receivables and the allocation of claims. That was necessary because all the liquidators have come to understand that the European regulation establishes only very general operating principles.

Consequently, the French liquidator and all the secondary liquidators have concluded that they wish to enter into an informal agreement, regarded indicative of achieving good practice, for the purpose of defining a practical means of functioning which would allow for the efficient coordination of the different insolvency proceedings and would respect the general operating principles established by the European regulation such as :

- ***Mutual trust,***
- ***Adherence to the duty to communicate information and to cooperate as defined by Article 32 of the European regulation,***
- ***Precedence of the main proceeding over the secondary proceedings.***

What do the parties agree ?

First of all, they established a practical means of treating the liabilities of each entities of the group. That includes the treatment of :

- ***notifications sent to the local creditors***
- ***the claims lodged by the local creditors (dual verification)***

On the other hand, they established a practical means of treating the assets of each entities of the group. That includes the treatment of :

- ***the recovery***

- ***the distribution of the income from the recovery in order to avoid the risk, incurred by the plurality of insolvency proceedings, of granting a creditor an amount that is greater than his receivable.***

II. Attractiveness of French law

The examples that I just gave demonstrate the efficiency and attractiveness of French insolvency law.

Under French law, the sale of the ongoing business as an asset deal can be implemented with full security for the investor. In particular, the investor can indicate in his offer the contracts to be transferred by court order (without possibility for the co-contractor to oppose). The investor can also determine the number of employees to be transferred. The remaining ones are terminated by the liquidator at the expense of the estate. There is no possibility for these employees to claim a transfer before labour courts, like the situation is in Germany.

Thus, in this particular context, labour law restructuring is very easy and secure in France, contrary to what is generally thought.

The EMTEC case also demonstrates the efficiency and flexibility of French insolvency proceedings. With the authorization of the judge, a liquidation team of former mangers of the EMTEC group has been put in place in order to increase the chances of recovery of outstanding receivables for the benefit of all the creditors. For this purpose, the restructuring proceedings were not closed immediately. The judicial liquidation was opened after the restructuring was completed. Experience shows that a liquidator is not able to efficiently recover the outstanding receivables of the debtor, especially in foreign countries. The flexibility granted by French insolvency proceedings lead to the extraordinary result of a recovery of 90% of the outstanding receivables.

Conclusion

The EMTEC case has demonstrated that French insolvency proceedings can be very efficient at the European level, for the restructuring of a group. This efficiency has even been reinforced by the creation, in 2005, of a new type of insolvency proceedings, called *"procedure de sauvegarde"* (safeguard proceedings), which allows the debtor to benefit from the protection of the court at an early stage of his difficulties. In the recent EUROTUNNEL case, safeguard proceedings have been opened with respect to all the companies of the EUROTUNNEL group, including, in particular, the British companies. In less than 6 months, safeguard proceedings allowed the group to elaborate and negotiate a reorganization plan under the aegis of the Paris commercial court.