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French "Fast Track" Restructuring Reforms

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French 'fast track' restructuring reforms

Drawing lessons from recent experiences, notably the financial restructurings of Autodis and Technicolor (formerly Thomson), the French legislature has just amended the insolvency law to facilitate the implementation of restructuring plans.

THE PROCÉDURE DE SAUVEGARDE FINANCIÈRE ACCÉLÉRÉE

The key point of this reform is the creation of the 'accelerated financial safeguard procedure' (*sauvegarde financière accélérée*) which will become available to debtors from 1 March 2011. This new procedure will enable a debtor to implement a restructuring plan without affecting the position of its trade creditors. Only financial creditors will be involved with such a procedure. One of the main advantages of the new 'accelerated financial safeguard procedure' is the fact that it already has European-wide recognition under EC Regulation n°1346/2000 (unlike conciliation, the safeguard procedure has been listed in Annex A of the Regulation).

This reform resolves a practical issue. In the general framework of French pre-insolvency procedures (*mandat ad hoc and conciliation*), the unanimous consent of creditors restructured is necessary. The only way to impose a restructuring on dissenting creditors was to commence an 'ordinary' safeguard procedure (procédure de sauvegarde), which involves all creditors, including the debtor's ordinary trade creditors. By contrast from the English law perspective, complex restructurings have taken place which generally seek to preserve the position of ordinary unsecured trade creditors, so that, effectively the restructuring takes place at a level that affects only financial creditors. Mechanisms used to achieve this include consensual arrangements, company voluntary arrangements ('CVAs') and for very complex cases, schemes of arrangement (*schemes*). For both CVAs and schemes creditor unanimity is not required, but provided the relevant voting thresholds are met and the arrangements are fair and reasonable, dissenting creditors can be bound by the restructuring. It is equally valid from the English law perspective to be able to promote a scheme of arrangement only with those classes of creditor that are affected by the scheme – so that those that remain unaffected, including those that do not have any economic interest in the company, can be left out of the restructuring altogether.

Similarly, in the US Chapter 11 Bankruptcy process the court may approve a plan of reorganisation if the requisite majorities of creditor in each class vote in favour. Furthermore, under US bankruptcy law, even if a class of creditor does not achieve the requisite voting majority, under limited and defined circumstances the plan may be confirmed by the court over the objection of such dissenting class under the so-called 'cram down' provisions of the US Bankruptcy Code.

The main differences between the new and existing procedures are:

Only 'financial creditors' (mainly credit institutions and bondholders) are involved in the procedure. The other creditors are not affected. Therefore, unlike in 'classical' safeguard procedures, no suppliers' committee is created: only the credit institutions' committee (that in reality includes not only credit institutions, but also entities that have provided credit facilities to the debtor) and the bondholders' committee (if any) will vote on the financial restructuring plan.

This procedure allows a debtor to move directly from a conciliation procedure to the accelerated safeguard procedure when it has proved to the court that the restructuring plan has a good chance of being approved by a majority of two-thirds of the claims in both committees.

Under the new accelerated procedure, the conciliator is – in principle – appointed as judicial administrator (*administrateur judiciaire*) and the court supervising the conciliation procedure also has jurisdiction.

Regarding the filing of claims, the situation is different depending on whether creditors have already participated in the conciliation. Those who have participated in the conciliation procedure are deemed to have filed their claims. It is for the debtor to establish a document detailing their respective amounts, save that the creditors concerned can update the amount of their claims if necessary. Those who were not involved in the *conciliation* have to file their claims in the ordinary way.

The duration of this procedure is shorter than that of an 'ordinary' safeguard procedure, which generally takes between six and 18 months. Article L 628-6 of the Commercial Code provides that the accelerated financial safeguard procedure cannot take more than a month from the opening of the procedure (with a possible extension of a further month).

RECOGNITION OF SUBORDINATION ARRANGEMENTS

Other aspects of French insolvency law have also been amended. In particular, art L 626-30-2 of the Commercial Code now provides that the draft financial restructuring plan must take into consideration subordination agreements concluded before the opening of insolvency proceedings. Thus it is now officially recognised that restructuring plans have to reflect the existing priority among creditors. However, the legislation is not explicit in relation to whether the plan should fulfill all the provisions of such agreements.

NEXT STEPS

The present reform could be considered as a first step to be followed by a reform of the composition and functioning of the creditors' committees in safeguard procedure. The distinction between the credit institutions' committee and the bondholders' committee appears to be somewhat artificial and does not reflect the fundamental difference between secured, unsecured and subordinated creditors. A proposal that is currently being discussed would be to create homogeneous classes of creditors, and to allow French courts to impose a plan over the objections of some dissenting classes of creditors, which appears to be modelled on the US approach and to a more limited extent the English approach taken in schemes of arrangement.

The introduction of the fast track restructuring reforms certainly seems to be promoting France as a jurisdiction where effective business rescue can take place. That the new accelerated procedure will also benefit from international recognition under the EC Insolvency Regulation may also in appropriate circumstances give it the competitive edge over English schemes of arrangement. ■

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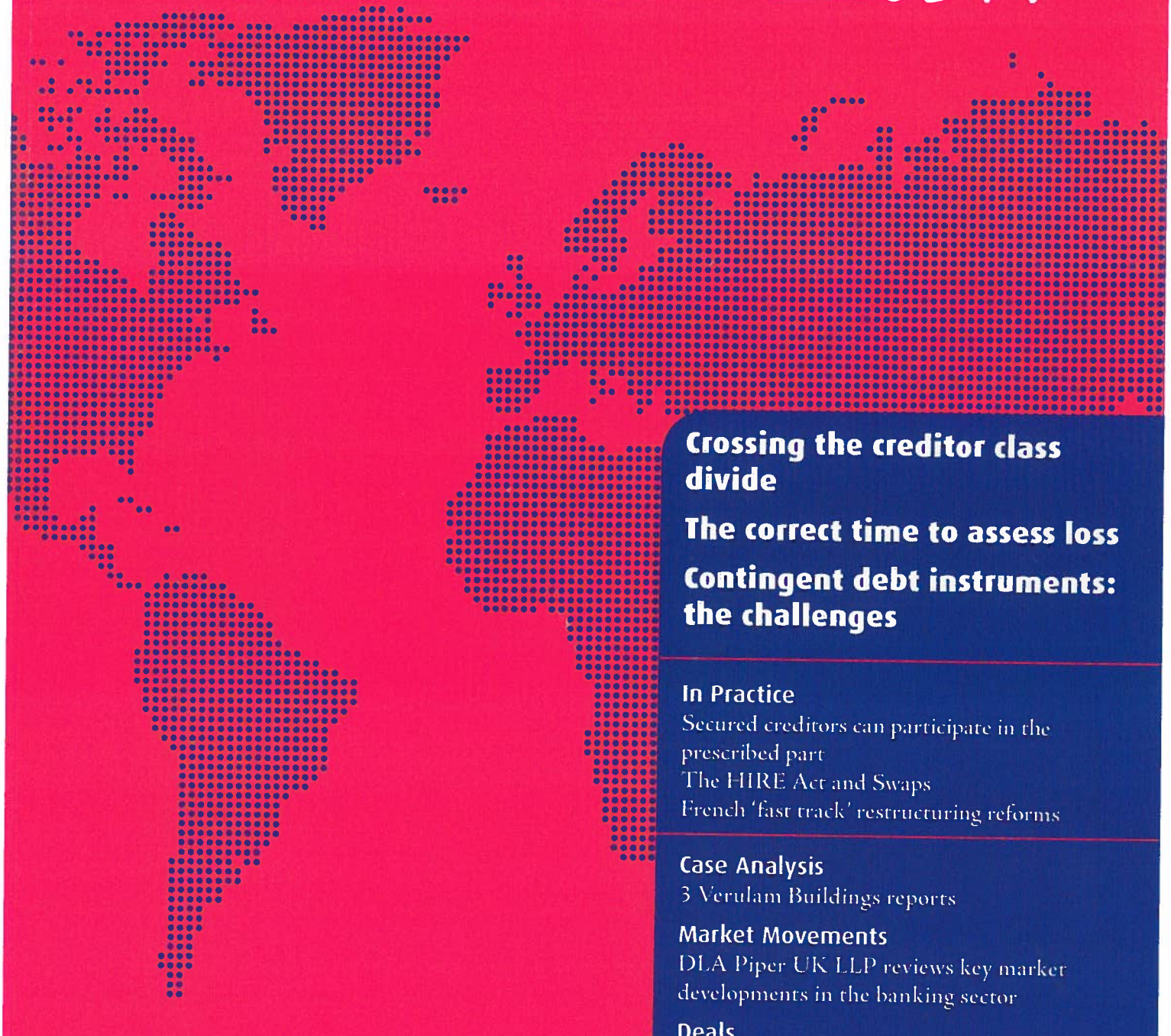

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