INTERNATIONAL INSOLVENCY INSTITUTE

French Insolvency Law: A Survey of the 1994 Reforms in Practice

Paul J. Omar

From

The Paul J. Omar Collection

in

The International Insolvency Institute

Academic Forum Collection

http://www.iiiglobal.org/component/jdownloads/viewcategory/647.html

International Insolvency Institute
PMB 112
10332 Main Street
Fairfax, Virginia 22030-2410
USA
Email: *info@iiiglobal.org*

French Insolvency Law: A Survey of the 1994 Reforms in Practice

by

Paul J. Omar
of Gray's Inn, Barrister

and

Anker Sorensen
Borloo Saigne et Associés, Paris

Introduction

Insolvency legislation in France consists of the Insolvency Law, enacted in 1985.[1] This legislation applies to individuals acting in a commercial capacity and to all companies, partnerships and unincorporated associations, other than state controlled companies and bodies. There exist also two institutions at the pre-insolvency stage, which are amicable resolution and the ad hoc mandate,[2] both contained in the Prevention of Business Difficulties Law 1984.[3] The Insolvency Reform Law, enacted in 1994, introduced reforms to all areas of insolvency and pre-insolvency legislation.[4] There exist in addition other laws and decrees which, in addition to the main laws of 1984, 1985 and 1994, make up a large and sometimes complicated code.[5]

The Explanatory Memorandum to the Insolvency Reform Bill recognised that the 1985 law represented a movement away from previous legislation, the purpose of which was to maximise debt-recovery for the benefit of creditors, towards a greater priority for corporate rescue procedures. The Memorandum recognised that this also produced some undesirable results. The 1994 Reform Law was aimed accordingly at shifting the equilibrium to create a more equitable balance between the interests of the company and those of its creditors.

The four essential reforms introduced by the Reform Law were aimed at:

1. improving the mechanism for reaching voluntary arrangement between companies in financial difficulty and their creditors;

2. transforming the transfer or sale of the company and its assets into a more equitable procedure;

3. reinstating a number of creditors' rights; and

---

[1] Law no. 85-98 of 25 January 1985 on the institution of recovery proceedings or liquidation of businesses, implemented by Decrees nos. 85-1387 and 85-1388 of 27 December 1985.

[2] Règlement amiable and mandat ad hoc respectively.

[3] Law no. 84-148 of 1 March 1984 on the prevention and amicable resolution of business difficulties implemented by Decree no. 85-295 of 1 March 1985.

[4] Law no. 94-475 of 10 June 1994 on the prevention and treatment of business difficulties, implemented by Decree no. 94-910 of 21 October 1994.

[5] Other legislation includes Law no. 85-99 of 25 January 1985 on the profession of insolvency practitioner, implemented by two Decrees nos. 85-1389 and 1390 also of 27 December 1985. There exist also a small number of other decrees implementing various articles of the laws.

4. simplifying insolvency proceedings by allowing the immediate liquidation of hopelessly insolvent companies.[6]

Details of the Survey

The survey was conducted by Borloo Saigne et Associés, a cabinet d'avocats, and the Groupe Courtaud, who specialise in executive recruitment. The purpose of this survey was to ascertain the views of those individuals who come into contact with insolvency on a daily basis. To this end, the survey was directed at two groups: on the one hand, insolvency practitioners,[7] administrators and liquidators and on the other hand, creditors,[8] ranging from private companies to institutional creditors, including banks, finance houses and other institutional investors.

I - Corporate Voluntary Arrangements: Introduction[9]

A company which is facing financial difficulties may seek to negotiate an agreement with its principal creditors for the rescheduling of debt. This may be done either directly with the creditors or with the assistance of a court appointed mediator under a procedure known as amicable resolution. The alternative institution of the ad hoc mandate offers greater flexibility for informal negotiations on behalf of the debtor. The request seeking the assistance of the court must attach a plan for the repayment of debt together with the steps the company plans to take to restructure its business to assist recovery. If the proposals are realistic, the court will appoint a mediator and possibly an expert to determine the viability of the proposed scheme.

If the creditors and the company are able to agree on a scheme of arrangement, the mediator will draft an agreement setting out terms and conditions. Once signed, this agreement is registered as a court document and is binding on the parties. The arrangement must be kept confidential by all parties. Breach of confidentiality may entail imprisonment for up to 6 months and/or a fine of up to FF. 8,000. While the scheme is in place, the creditors that are party to the arrangement may neither seek repayment of debts covered by the scheme nor seek new security for those debts. However, if the company does not meet its obligations under the scheme, the creditors may apply to have the scheme of arrangement cancelled and their rights reinstated.

1994 Reforms

The modifications introduced by the Reform Law highlighted the seriousness with which the legislator viewed recourse to pre-insolvency proceedings by emphasising the stay of action and enforcement of judgments already obtained

[6]For an initial view of the effect of the reforms, see Sorensen A. and Mills B., *French Insolvency Law Reform: Same scales, different balances* [1995] 1 ICCLR 6.
[7]Group A below (147 surveys were mailed, the response rate being approximately 15% before the deadline set).
[8]Group B below (402 surveys were mailed, the response rate being approximately 7% before the deadline set).
[9]For further details, see Omar P. and Sorensen A., *The French Experience of Corporate Voluntary Arrangements* [1996] 3 ICCLR 97.

so as to allow serious negotiations to take place between the company and its creditors. The court is now authorised to take any steps that will assist the parties to reach an amicable arrangement, including by settling any debts, the continued existence of which may jeopardise a successful conclusion to proceedings.

If a scheme of arrangement is reached between the company and its principal creditors, the duration of which may not exceed 5 years, all creditors are bound by the scheme. If an agreement is not reached, the procedure is ended, but the company is not automatically placed under judicial administration. The modified scheme is designed to assist creditors willing to negotiate in good faith by preventing impatient or uncooperative creditors from frustrating the negotiation process and by removing the possibility of a creditor gaining an unfair advantage by being first to enforce his debt.

Corporate Voluntary Arrangements: Survey Questions

1. Have you had occasion to use corporate voluntary arrangements (ad hoc mandate and mediation)?

	A	B
Yes	50%	50%
No	50%	50%

2. What has been the approximate rate of success?[10]

	A
Less than one-third	50%
Between one-third and two-thirds	40%
More than two-thirds	10%

3. Do you think that the nomination of an insolvency practitioner to assist in conducting corporate voluntary arrangements is synonymous with the risk of a negative outcome?

	A	B
Yes	80%	20%
No	20%	80%

4. If an insolvency practitioner is appointed, do you think that creditors are more likely to reach an agreement before insolvency proceedings begin?[11]

	B
Yes	60%

[10]This question was aimed at insolvency practitioners who are likely to have a greater experience of voluntary arrangements.

[11]This question was aimed at creditors and lending institutions who are more likely to be interested by the opportunity of a scheme of arrangement before insolvency proceedings take place.

No	40%

5. Do you think it advisable that the roles of mediator or ad hoc nominee be filled by former judges or lawyers?

	A	B
Yes	10%	50%
No	90%	50%

6. Is the moratorium in proceedings involving a mediator likely to:

(a) assist the mediator in reaching an agreement?

	A	B
Yes	60%	50%
No	40%	50%

(b) to harden the position of creditors?

	A	B
Yes	40%	50%
No	60%	50%

7. In the interests of voluntary arrangements, do you think that the debtor should be:

(a) present and active during proceedings?

	A	B
Yes	95%	70%
No	5%	30%

(b) discreet and leave the mediator or ad hoc nominee to the task of resolving the problems faced by the business?

	A	B
Yes	5%	30%
No	95%	70%

8. What are the three most important qualities a mediator or ad hoc nominee should have to ensure the success of corporate voluntary arrangements?[12]

	B
Common sense	20%
Intuitiveness	0%

[12]This question was aimed at creditors and lending institutions who are more likely to appreciate the qualities possessed by ad hoc nominees or mediators attempting to negotiate with them.

Ability to handle several files at once	0%
Organisational skills	20%
Diplomacy and the personal touch	15%
Financial analytical abilities	15%
Ability to synthesise arguments	20%
Independence	10%

9. What, in your opinion, are the three most frequent reasons for the failure of voluntary arrangements?

	A	B
Proceedings initiated too late	35%	30%
The short duration of mediation	15%	0%
Problems in the debtor-creditor relationship	10%	20%
Excessive demands by the debtor	2%	15%
Excessive demands by creditors	20%	10%
Lack of resources (new shareholders/funds/supplies)	15%	15%
Others	3%	10%

10. Do you think that, given the present legislative framework, corporate voluntary arrangements will:

	A	B
Develop	50%	60%
Stagnate	30%	25%
Regress	20%	15%

11. Do you think it necessary that a national list of mediators be created so as to develop a profession?

	A	B
Yes	25%	75%
No	75%	25%

Corporate Voluntary Arrangements: Analysis

It is clear that, despite the attempts of the legislator to promote voluntary arrangements, voluntary arrangements as a whole have not had a great deal of success, either in practical terms or as an instrument aimed at avoiding insolvency proceedings. The practice reveals a gap in the application of the law, in terms of the numbers of pre-insolvency orders actually attempted, the often large variations in practice from court to court and the low success rate for these procedures.[13]

[13] In 1987, there were 145 règlements amiables ordered by 35 Commercial Courts, of which 48 achieved some success. In 1991, the Commercial Court of Paris alone reported granting 7 applications, of which only 2 succeeded (Statistics quoted in Couret A., *Les Nouveaux Règlements Amiables*, Gaz. Pal. 16-17 November 1994 at 2).

What emerges from the responses to the questions is that creditors are more favourable to pre-insolvency institutions, probably as a method for avoiding the inconvenience of insolvency proceedings and the likelihood of a low debt return. Voluntary arrangements offer the opportunity for close negotiation, which enables creditors to appreciate the substance of the arrangement being proposed and the chances of success. Insolvency practitioners are however more cautious about voluntary arrangements, perhaps because of the conditioning of regular insolvency proceedings, which offer the security of a fixed regulatory framework.

Both groups, administrators and creditors, agreed that the role of the debtor was important during voluntary arrangements and that the presence of and participation by the debtor contributed to assuring creditors of the debtor's honest intentions. Similarly, both groups agreed that the likelihood of success of voluntary arrangements was increased if the debtor approached the court at an early stage.

II - Rescue Plans : Introduction[14]

Before the end of the observation period, the administrator forms an opinion as to the long term financial viability of the company and presents a report to the court. The report will contain either a recommendation to adopt one of the rescue plans put forward by the debtor or prospective purchasers or a combination of these. Alternatively, if the administrator considers that no recovery is possible, the report will contain a recommendation that the company be liquidated.

Once the administrator has submitted its report to the court, the court will invite the company's representative, the creditors' representative, the administrator, the employees' representative, secured creditors and any parties, whose contracts with the company are to be transferred, to a final hearing at which it will decide the fate of the company. The court may, at its discretion, either accept or reject the recommendations of the administrator and may choose one of the following options :

(a) continuation of the business of the company,[15] either in its entirety, or with the sale of part of the business:
  (i) with no change in the shareholding of the company,
  (ii) with a sale of the shares; or

(b) transfer of the business,[16] including a transfer of:
  (i) all of the assets,[17] followed by the winding up of the company, or
  (ii) part of the assets,[18] followed by either the liquidation of the remaining assets or, where the partial transfer accompanies a

[14]For further details, see Omar P., *The Administration of Insolvent Companies in France*, Part I in [1996] 2 IL&P [ ] and Part II in [1996] 3 IL&P [ ].
[15]Plan de continuation.
[16]Plan de cession.
[17]Cession totale.
[18]Cession partielle.

continuation plan, the continuation of the remainder of the branches of the business according to the rescue plan; or

(c) liquidation of the company.

The court's order will also include conditions for payment of the company's debts. The creditors' representative will consult individual creditors in relation to their position under the insolvency plan. In the case of a continuation plan, the court will usually offer the option of accepting either part payment over a relatively short period or full payment of their claim over a longer period.

If the insolvency plan provides for continuation of the business, either the administrator or the creditors' representative may be appointed to supervise the carrying out of the plan.[19] The appointment lasts until the end of the continuation plan or the signing of the sale agreements, as the case may be. If subsequently, the company does not meet its obligations under the plan, the creditors may go back to the court to have the insolvency plan annulled and the company liquidated. In the event of liquidation, all claims immediately become due and are met with the proceeds of liquidation in accordance with their ranking.

Continuation Plan

The first variety of continuation plan is that which provides for the purchase of the existing shares for a nominal value. This entails the assumption of the debts by the incoming purchaser and repayment of the creditors in accordance with the continuation plan. The sale of shares may be an amicable one arranged with the shareholders directly or may ordered by the court in the event that the directors are ordered to sell their shares. The second variant allows for a reduction in capital by the cancellation of existing shares followed by an issue of capital, subscribed to by the party wishing to acquire the company. This modification may occur either at the initiative of existing shareholders or may be ordered by the court at the request of the administrator.

Sales Plan

If a court chooses a sales plan as the best option in order to preserve those parts of the business that may be saved, this may be achieved by the sale of all or part of the business. While this is a sale of assets rather than shares, the sale will entail the transfer of an entire commercial operation or unit, including property, equipment, and personnel. This unit may not subsequently be shut down and broken up for resale. Employees involved in the operation have the right to continue their employment or to receive full redundancy payments. The purchaser may incorporate the commercial operation purchased as a new company or absorb it into its existing corporate structure.

As part of a rescue package, a court may designate certain assets, which it deems necessary for the continuation of the business, as key assets which

[19]Commissaire à l'éxécution du plan.

cannot be sold without prior consent of the court. In his report, the administrator will analyse and evaluate all offers received and make a recommendation to the court as to which offer may be preferred. The court will choose the offer which permits the best chance of preserving the business and the jobs of the employees associated with the operation to be sold, and the repayment of creditors.

Factors affecting the Court's choice

The primary objective of the legislation is to rescue companies in financial difficulty and assure continued employment for the workforce. The repayment of the creditors is important, but receives a lower priority. If there is a serious possibility of the rescue of the company in question and repayment of its debts in accordance with a repayment schedule agreed by the creditors, a court will normally choose a continuation plan. If the rescue of the company in its existing form is unlikely, but it may be sold as an ongoing concern, either wholly or as several distinct units, then the court will normally choose a sales plan, the aim being to preserve the existence of as much as possible of the business and employment as well as the repayment of its creditors in that order. Those parts of the business which are not sold will be liquidated.

1994 Reforms

The sale of companies and their assets during judicial administration was an area felt to be open to abuse by unscrupulous raiders. While creditors were asked to make sacrifices to assist the rescue procedures, a number of purchasers profited by selling off company assets in breach of the terms of their offer. The Explanatory Memorandum to the Reform Bill explained the changes to be introduced by the Reform Law as aiming to raise moral standards. The changes were aimed at:

1. preventing collusion between the debtor and the offeror by prohibiting offers from company directors and officers or their relatives, whether directly or through investment companies;

2. setting a minimum period of 15 days between receipt of an offer by the administrator and any decision by a court to allow sufficient time for analysis of its terms. All offers will be required to specify any anticipated sale of assets sales within two years of the acquisition;

3. ensuring respect by the purchaser of his obligations under the terms of its offer by prohibiting the purchaser from reselling any of the assets purchased, within a certain time period to be fixed by the court; and

4. discouraging excessively long rescue plans by limiting the maximum period to ten years.

Recovery Plans : Survey Questions

12. Given that one of the vaunted reasons for the reform was to ensure fairness in the rescue plan and the greater protection of creditors, do you think that the following risks were sufficiently covered in the 1985 Law before reform?

	Sufficiently		Insufficiently		Not at all	
	A	B	A	B	A	B
No privity of contract with the potential buyer	50%	25%	30%	25%	20%	50%
Failure by the buyer to honour the terms of the agreement	25%	0%	50%	50%	25%	50%
Risk of the business being broken up by the buyer	20%	10%	50%	25%	30%	65%

13. Have you ever had the occasion to act in a case where the following problems were raised:

	Never		Occasionally		Frequently	
	A	B	A	B	A	B
No privity of contract with the potential buyer	20%	30%	70%	60%	10%	10%
Failure by the buyer to honour the terms of the agreement	5%	10%	80%	60%	15%	30%
Risk of the business being broken up by the buyer	40%	30%	50%	50%	10%	20%

14. In the cases you have encountered, were they largely:

	A	B
Without serious effect	57%	9%
Serious without affecting future production	12%	26%
Serious with an effect on future production	31%	65%

15. In the absence of agreement between the parties, the delay between the filing of an offer and examination by a court has been set at 15 days. Does this appear to you to be:

	A	B
Sufficient	60%	60%
Too short	0%	30%
Too long	40%	10%

16. Does the prohibition on a former manager from taking part in an offer or having shares in the buyer company appear to you to be:

	A	B
Justified	50%	60%
Unjustified	20%	30%
Needs to be reviewed	30%	10%

17. The 1994 reform law extended the nature of the buyer's promises by giving these an imperative character. It has also increased court supervision and enforcement of these promises. Do you believe that the following are economically:

	Justified		Unjustified		To be reviewed	
	A	B	A	B	A	B
Extension of the legal charges taken over by the buyer	20%	75%	30%	0%	25%	25%
Provision for partial sale of or prohibition from disposal of assets	80%	75%	10%	10%	10%	15%
Prohibition against modifying the price of sale following the confirmation order	60%	80%	20%	10%	20%	10%
Supervision of the buyer's promises by the Commissaire à l'exécution du plan	90%	90%	0%	0%	10%	10%
Resolution of the sale in case of breach of promise	70%	80%	10%	0%	20%	20%

18. Do you think that these measures are enough to ensure a certain equity in sales plans?

	A	B
Sufficient	70%	60%
Insufficient	10%	40%
Too restrictive	20%	0%

19. In your opinion, are these measures likely to discourage offers to purchase an insolvent business?

	A	B
Yes, for all types of offers	30%	10%
Yes, for offers not of a serious nature	50%	75%
No	20%	15%

20. Do the new obligations found in the continuation plan appear to you to be economically

	Justified		Unjustified		To be reviewed	
	A	B	A	B	A	B
Limiting the length of the repayment period to 10 years	60%	90%	30%	5%	10%	5%
Limiting the grace period before first payments are due to a maximum of one year	90%	80%	10%	10%	0%	10%
Non-negotiable nature of the dividends	90%	90%	0%	10%	10%	0%

21. Do you think that these obligations are likely to result in the failure of plans which may need longer payment periods?

	A	B
Yes	50%	25%
No	50%	75%

22. Do you think that the 1994 reforms have made any improvement to the framework for corporate rescue?

Sales Plan	Improvement		No effect		Negative effect	
	A	B	A	B	A	B
Increasing the weight attached to buyer's promises	30%	70%	10%	20%	60%	10%
Supervision of the buyer with possible resolution in cases of breach	70%	85%	20%	15%	10%	0%

Continuation Plan	Improvement		No effect		Negative effect	
	A	B	A	B	A	B
Limit on the length of the repayment period and the grace period	50%	90%	10%	0%	40%	10%
Non-negotiable nature of dividends	60%	70%	30%	20%	10%	10%

23. Do you think that legislative changes are necessary?

	A	B
Yes	50%	50%
No	50%	50%

24. If the answer to the above is yes, to which of the following are changes necessary?

	A	B
Privity of contract with the buyer	30%	30%
Temporary supervision of the seller	10%	10%
Framework of the continuity plan	30%	30%
Other	30%	30%

Recovery Plans : Analysis

The purpose of the reforms was to avoid failing the needs of the business by providing a means of control over the continuation of activity and the transfer of the business to third parties. The sale of assets during insolvency proceedings is extremely attractive as a method for obtaining assets cheaply, which may be sold at a profit. The act made these assets less desirable by introducing limitations on the buyer's rights to sell off certain assets within a particular timeframe and by introducing an obligation on acquirers to anticipate any modifications to assets within two years of purchase. These appear to have largely succeeded in dissuading offers of a less serious nature.

Where the administrators appear to have serious doubts is on the question of sanctions for breach of promise. Despite the apparent wish of the legislator to provide for guarantees in cases of acquisitions, there remains no credible method of enforcing sanctions for breach of promise, particularly in situations where the assets may have been dissipated. Creditors are also concerned by the question of privity as they do not have any right of recourse against the buyer in cases of breach, although this may have a detrimental effect on their position.

III - The Protection of Creditors: Introduction

The rights of creditors in insolvency proceedings often seem very limited. They have a court-appointed representative throughout the proceedings who merely acts as a conduit of information. Creditors may also request the appointment of their own monitor to ensure that insolvency proceedings are properly conducted.[20] In order to be recognised as a creditor, a proof of debt must be lodged within 2 months of the publication of the insolvency judgment in the official bulletin.[21] This period is extended to four months in the case of a foreign-based creditor. Proofs of debt will be scrutinised by the creditors' representative with the assistance of the debtor and may subsequently

[20]Contrôleurs. For further details, see Sorensen A. and Kennedy M.*, French Insolvency Law: Creditors and Monitors* [1995] 2 IL&P 44 and Sorensen A., *Monitors: Dressing up an old Institution* [1996] 1 EBLR 6.
[21]Bulletin Officiel des Annonces Civiles et Commerciales.

challenge some of the claims. The administrator will be given a list of the debts that have been admitted following approval by the juge-commissaire.

The creditors' representative will directly inform all creditors who appear in the company accounts at the time insolvency proceedings are initiated. He will subsequently keep all creditors whose debts are proven informed of the progress of the proceedings. Nevertheless, the creditors do not have any input in the preparation of the rescue plan, nor have they the right to reject the rescue plan which is ultimately put before the court, although creditors may indirectly influence the administrator through their representatives, the monitors.

Creditors merely have the right to be consulted during the preparation of the insolvency plan and to be present, depending on the amount and nature of their claim, at the final hearing at which the court decides the fate of the company. If the court order provides for continuation of business, creditors will usually be given the choice between receiving payment of part of their claim over a relatively short period of time or of the whole of their claims over a longer period. While the company continues to trade, employees' wages, suppliers' accounts and the administrator's fees will be paid as they fall due.

In the case of a sales plan or liquidation, the proceeds of sale will be applied first towards payment of unpaid wages, followed by the fees of administration or liquidation. Proceeds are then applied to repayment of debts arising after the opening of proceedings and lastly towards satisfying the debts of other creditors in accordance with their ranking. Before the reforms, creditors with a property mortgage were treated less favourably than those having a charge over equipment.[22] The reason being that the apportioning of the overall sale price between the various assets sold was discretionary. The value attributed to mortgaged property was often low and insufficient to discharge the debt, which was not the case with a charge over equipment, where the administrator was obliged to repay the creditor the full amount outstanding. This anomaly was removed by the Reform Law.

Lessors were required to lodge a proof of debt and claim title to any equipment within 3 months of the publication of the insolvency judgment. The administrator will either elect to continue the lease and pay rent or terminate the lease, in which case the lessor may then repossess its equipment. In the event the company continues trading and the administrator elects to continue the lease, the lessor will only be paid rent as from the date of commencement of proceedings. Any rent outstanding prior to that date is frozen and will be repaid in accordance with the rescue. In the event of liquidation, the lease will be terminated and the lessor may repossess the equipment. If, however, the lessor does not lodge a claim within the 3 month time limit, his title to equipment may, unless it was subject to publicity, as is the case for leases, be lost.

1994 Reforms

[22] Hypothèque and nantissement respectively.

The Insolvency Reform Law reinstated a number of creditors' rights, the more important of which were :

1. An increased role for monitors appointed to represent creditors by allowing up to 5 appointments to ensure adequate representation for all categories of creditors with mandatory appointment where requested by the creditors and greater participation in the insolvency proceedings and decisions as to the fate of the company and any assets;

2. The right to set off related debts between the company and the creditors, notwithstanding the fact that these debts arose prior to the date of the insolvency judgment;

3. Improvement in the treatment of creditors holding mortgages and charges;

4. The direct preferential payment of sale proceeds to creditors holding security over assets sold during insolvency proceedings rather than being postponed until adoption of the rescue plan;

5. The requirement that all secured creditors be personally notified of the insolvency judgment to permit them to lodge proof of debt in time;

6. The right of lessors to repossess their leased goods is no longer to be forfeit where the lessor fails to lodge proof of debt in time.

The Protection of Creditors: Survey Questions

25. One of the objectives of the reform was to restore certain creditors' rights. Do you believe this has been achieved?

	A	B
Yes	30%	30%
No	70%	70%

26. The restoration of creditors' rights has been justified by the need to ensure the supply of credit to businesses in difficulty. Do you believe the reform has met this objective?

	A	B
Yes	10%	30%
No	90%	70%

27. Which of the following three criteria appear to you to be the most positive in ensuring the protection of creditors' rights?

	A	B
Increase in the power of creditors during proceedings	10%	40%

Improvement in the situation of secured creditors[23]	20%	40%
Rescue of the business' production and activity	70%	20%

28. Does the Article 37 facility for the resolution of contracts appear to you to be a satisfactory measure?[24]

	A	B
Yes	60%	80%
No	40%	20%

29. Following the reforms, where the business is liquidated, Article 40 creditors (debts arising after opening of proceedings) are relegated behind secured creditors. Do you believe that this is:

	A	B
Satisfactory	10%	30%
Unsatisfactory	70%	10%
Necessary	20%	60%

30. Would it have been preferable to postpone the rights of secured creditors to instances of liquidation?

	A	B
Yes	60%	25%
No	40%	75%

31. Do you think that the increased role for monitors is likely to:

	A		B	
	Yes	No	Yes	No
Better defend the interests of all the creditors	10%	90%	60%	40%
Risk creating a division between creditors who are monitors and those who are not	80%	20%	50%	50%
Institute divisions within insolvency proceedings	70%	30%	30%	70%
Serve as a popular measure but have no real effect	70%	30%	20%	80%

32. Does the distinction made in the 1985 law between administrators and liquidators appear to you to protect creditors' rights?

[23]For further details, see Sorensen A. and Kennedy M., *French Insolvency Law Reform: New Rules on Securities* [1995] 5 ICCLR 179.

[24]Article 37 enables the administrator to insist on the continuation of contracts. For further details, see Sorensen A. and Harrison R.*, The Key Role of Article 37 in France's Insolvency Reform Act* [1995] 5 IL&P 126.

	A	B
Yes	50%	30%
No	50%	70%

33. Do you believe that further reforms are necessary?

	A	B
Yes	80%	80%
No	20%	20%

34. If the answer to the above is yes, what reform is particularly necessary?

	A	B
Retention of title clauses[25]	20%	5%
The role of participants in the procedures	20%	35%
Art. 93(2)[26]	25%	5%
Liquidation and Art. 155[27]	10%	5%
Sanctions[28]	5%	25%
Appeals procedures	20%	25%

The Protection of Creditors: Analysis

Creditors are concerned during insolvency to obtain the best rate of dividend payable for the debt contracted by the business. This conflicts with the priorities of the administrator in keeping the business going with available funds and assets, which may include stock, property and other items, over which a creditor may have a security or other interest. The legislator's priority seemed after the 1985 Law to favour the business at the expense of creditors, a situation that practice over the next decade confirmed. The pressure behind the 1994 reforms came from large institutional creditors anxious not to lose out in situations, where the optimism of the court in opting for a rescue plan failed to achieve the necessary results, leading to the liquidation of assets with limited protection for creditors.

The Reform Law aimed to improve this by giving creditors more say during proceedings, by increasing the scope of action of the creditors' representative and by upping the number of monitors to be appointed. This has done little to reduce the competition between creditors. Often it is the lucky or celeritous creditor who is able to get his say, which opinion and information he is able to obtain during the proceedings he is unlikely to want to share with others.

[25]For further details, see Sorensen A. and Smiley E., *French Law Parallels for the Romalpa Clause* [1996] 3 EBLR 58.
[26]Article 93(2) reads: 'The payment of the transfer price is deemed to prevent the exercise of any rights by creditors against the transferee in relation to goods [the subject of the transfer]'.
[27]Article 155 provides for the sale of viable production units during liquidation proceedings.
[28]For further details, see Sorensen A., *The Liability of Company Officers in French Insolvency Procedures* [1996] 1 ICCLR 17.

The creditors who remain most privileged in insolvency are the secured creditors, depending on the nature of their security. They are privileged in recovery proceedings, because the assets over which they have title remain affected to them, although the business is able to make use of any real property and machinery, and any disposal results in payment directly of proceeds to them. Similarly, they are privileged in liquidation even before Article 40 creditors (debts arising during insolvency). Nevertheless, it is only after the 1994 reforms that these creditors enjoyed increased rights such as direct information by the administrator and waiver of giving of notice, including in instances of publicity being given to a contract including a retention of title clause.

The experience of the reforms shows that creditors are nevertheless still concerned by the priorities in insolvency, which remains at an equilibrium between the business and creditors. Some of the issues creditors believe merit reform are the role of the participants in the proceedings, which is a collegiate affair very distant from the sole practitioner approach of common-law jurisdictions, sanctions for mismanagement, which creditors do not feel go far enough to discourage bad practices, and appeals procedures, which in the law as amended remain difficult to follow with delays for responses often very short, leading to some creditors being left out owing to dilatory practices in certain courts in relation to sending out notices and information.

IV - Direct Liquidation Proceedings[29]

If no form of rescue plan is possible, the court will order the liquidation of the company. Liquidation will be the only viable option where the company's cash flow has dried up. In this situation, the administrator will not wish to allow the company to continue trading given personal liability for debts incurred after the commencement of judicial administration. In any event, when the company has reached this stage, it is likely that its suppliers will refuse further supplies without payment, making it impractical to continue trading.

The Reform Law simplified the procedure where liquidation was the only viable option for an insolvent company. Under previous law, it was necessary to open the insolvency proceedings and begin the observation period before ordering liquidation. This led to courts developing the practice of ordering judicial administration and pronouncing the liquidation on the same day in cases of hopeless insolvency. This proved to be unnecessarily cumbersome. Now, a court may order the liquidation of a company directly without placing it under judicial administration. This recognises the reality that, in a great number of cases, liquidation is the outcome of insolvency proceedings.

Summary

The reforms were born in confusion, the law of 1994 initially containing a clause applying the law as of 1 October 1994. The necessary decree to flesh out its provisions did not appear till 21 October in the Official Journal, coming

[29]For further details, see Omar P. and Sorensen A., *The Institution of Liquidation Judiciaire in France* [1996] 1 IL&P 2.

into force the next day. This resulted in some confusion over proceedings initiated during the first three weeks of that month which required a statement in Parliament by the Minister of Justice to clarify matters.[30]

The reforms in 1994 were aimed at substantially improving the lot of creditors during insolvency proceedings. Improvements were also made to pre-insolvency procedures as a means of encouraging recourse by debtors to these procedures before substantial indebtedness made insolvency proceedings inevitable. The status of debtors has not been changed to any great degree. Creditors, however, have acquired greater representation by the increase in the number of monitors and enjoy greater protection through new rules for the realisation of securities and prior acquittal of legal charges as well by the introduction of new rules in instances of claims over goods subject to retention of title clauses.

The experience of the reforms has not been entirely uniform. There is still a wide difference in practice within courts in France, which result in the same rules being applied in an arbitrary fashion, depending on the experience of the court and its judges. Similarly, pre-insolvency institutions are not widely known, which may explain the lack of reliable statistics on the number of voluntary arrangements attempted.

In all, the law is a large and confused mass of legislation that sprawls over a great deal of text. In parts, it is not consonant with practice which has evolved since 1985 and which the 1994 reforms were designed to reflect. The balance between creditors and debtor remains at an equilibrium and neither side may be said to have really profited from the reforms. It remains to be seen whether more reforms may be attempted before the unwieldy mass of laws renders application so difficult and confused that calls come from creditor, debtor and practitioner alike for comprehensive reform and codification.

26th March 1996

[30]The statement suggested that the courts should adopt the policy that reforms would only apply to proceedings begun on or after 22 October 1994.