



INTERNATIONAL INSOLVENCY INSTITUTE

Insolvency Law Reform in France: Reconstruction of the Commercial Code

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

Insolvency Law Reform in France: Reconstruction of the Commercial Code

by
Paul J. Omar
of Gray's Inn, Barrister

Introduction

The history of insolvency law reform in France begins with the modern law of insolvency introduced in 1967,¹ itself revised and replaced with a new framework introduced in two parts consisting of a law in 1984 and two laws in 1985,² the first dealing with the diagnosis of financial difficulties and pre-insolvency measures and the later texts with insolvency proceedings and the rules relating to insolvency practice. Revision of these laws, particularly in light of criticisms by creditors and financial institutions, led to a further law in 1994 which attempted to reinvigorate parts of the framework for pre-insolvency measures and insolvency proceedings but was not meant to act as a vehicle for wholesale reforms.³ Pressure for wider reform came, however, in the wake of scandals occurring in 1996-1997 prompting closer scrutiny of insolvency practitioners when allegations were made relating to the dissipation of funds from companies in judicial administration and the abuse of official positions for personal business interests.⁴ The administration of justice in the commercial courts also came in for much adverse comment in the media following allegations charging some commercial judges with involvement in serious misconduct by using their privileged positions for business ends.⁵

The French Government, embarking on a reform agenda of its own, was compelled to intervene to add reforms of the commercial justice systems and changes to company and insolvency law to an already extensive set of policies to translate into legislation. An announcement made by Elisabeth Guigou, the Minister for Justice, on 24 October 1997, promised reforms introducing greater penalties for judges misusing their influence for personal ends, closer scrutiny of insolvency practitioners' accounts and the destination of funds as well as a greater role for public prosecutors in insolvency

¹Law no. 67-563 of 13 July 1967 ('Law of 1967').

²Law no. 84-148 of 1 March 1984 (Prevention of Business Difficulties Law), Law no. 85-98 of 25 January 1985 (Insolvency Law) and Law no. 85-99 of 25 January 1985 (Insolvency Practitioners Law).

³Law no. 94-475 of 10 June 1994 (Insolvency Reform Law). See Vallens, A propos de la reforme de la loi sur les entreprises en difficulte: Le rapport du groupe de travail du ministere de la justice, (in three parts) Les Petites Affiches, 18, 21 and 23 February 1994, Nos. 21-23, at 11, 4, 15 respectively.

⁴The "Affaire Sauvan-Gouletquer" resulted in the arrest of two insolvency practitioners in 1997 on charges of fraud, illegal acquisition of assets and abetting criminal bankruptcy.

⁵Instances of misconduct in the Commercial Courts of Paris, Bobigny and Nanterre were mentioned in an enquiry published in Challenges (January 1998 edition) at 48.

proceedings. Proposals were presented to the Council of Ministers on 29 October 1997 and enquiries launched by the National Assembly and the French Government's Inspectorate-General of Finances and Inspectorate-General of Judicial Services, reports produced by the latter being the subject of a press statement on 14 October 1998, promising key changes to the commercial justice system, the reform of professions linked to commercial justice and the reform of the framework for insolvency law.⁶

Background to Codification Proposals

There are at present two types of legislative codes in France that can be identified: the first originating from the initial wave of codifications in 1801-1808 sponsored by Napoleon Bonaparte as his testament in law-making terms, the second from later codifications of legal texts occurring sporadically over the intervening years and more particularly after the end of the Second World War. The Commercial Code of 1807 is one of the original great codes, reflecting the trend in France, noticeable since the late Middle Ages towards codification of commercial law and the separation of commercial courts, and which survived the Revolution. The text contained in its heyday 648 articles covering the rules relating to the general structure of commerce, commercial methods of payment, commercial freight and transport rules and maritime trade. Rules about business vehicles formed an integral part of this text covering what would now be termed company and insolvency law.⁷ It has in the intervening period, however, gradually lost much of its content, leading commentators to observe that it seemed to deconstruct itself.⁸ Despite the formation in 1947 of a commission for the reform of the Commercial Code and company law, the 1960s saw the process of consolidation of commercial subjects in separate laws, including company law in the Law of 1966,⁹ insolvency law in the Law of 1967 and the remaining codified text dwindling to some 160 articles.

It is well known that successive French Governments have examined the case for reform and re-codification of existing texts. A series of proposals dating back to 1989 have led to a re-examination of the body of law codes that are currently in operation. As part of this reform process, a draft law seeking to restore the Commercial Code to its former glory was submitted to the Senate in the 1992-1993 session, where it was adopted.¹⁰ The draft law provided for a substantial new code, annexed to the draft, to come into force together with then current reforms to the Criminal Code. The draft would include company law provisions as Book II of the Code and insolvency law in Book VI. At the same time, some 60 other texts, whose provisions were included in or superseded by the new code, would be repealed. These included texts dealing with company and insolvency law as well as the truncated remnants of the old Commercial Code. However, the draft law did

⁶See Omar, *Proposals for the Reform of Insolvency Practice in France* (1999) 2 IL&P 56.

⁷Former Arts 18-46 of the Commercial Code.

⁸See Oppetit, *La décodification du droit commercial français*, Mélanges Rodière 1981 at 196.

⁹Law no 66-537 of 24 July 1966 ('Law of 1966').

¹⁰Senate draft law no. 1336, adopted on 14 October 1993. See Terré and Oudin-Adam, *Codifier est un art difficile (à propos d'un Code de Commerce)*, D.1994.chron.99.

not progress any further in that or later sessions of Parliament and the measure seemed destined to lie on the shelf together with other abandoned reform projects.

Developments in the Codification Process

Significant developments took place in early 1999 when the Assemblée Nationale was invited to reconsider the earlier Senate text, which was revised and reintroduced in January of that year. This text was subsequently referred to the Commission des Lois, one of the standing committees in Parliament, for scrutiny preparatory to completing the legislative process. In fact, in a parallel development, the French Government had begun to step up its work on revision of codified texts following the submission of another draft law to Senate in late 1998. This second law was subsequently debated in mid-1999 and adopted by the Senate later in the year.¹¹ The contents of the Memorandum attached to this latter text stated that the French Government was anxious to make progress on the process of re-codification of laws begun in 1989 and in which considerable delay had already occurred. Nevertheless, the French Government recognised that the amount of legislation already programmed for the 1999 session and likely to be programmed for later sessions made the task of obtaining Parliamentary time for such obviously major texts well nigh impossible. Although it was properly the role of Parliament to scrutinise and adopt these legislative measures, the case was made by the French Government for the use of an alternative legislative technique.

This alternative technique would involve the French Government enacting in the form of ordinances those re-codified texts already adopted by the Conseil des Ministres and submitted to Parliament as well as those under scrutiny by the Commission supérieure de codification and Conseil d'Etat. These would include most major codes in the areas of education, public health, administrative justice, environmental law and finance as well as the Commercial Code. The law sought Parliamentary approval for this legislative step and gave assurances that the codification would take place according to principles of "droit constant", i.e. the law in force at the moment of codification. The schedule contained in the law provided that the French Government would issue an ordinance in respect of each code according to a strict timetable, that adopting the Commercial Code to be produced within nine months of the law completing its Parliament stages and being promulgated. Approval would still be sought from Parliament through ratification of these ordinances with further draft laws being laid before Parliament within two months of each ordinance appearing. Parliament subsequently approved the law in late 1999.¹² Although a challenge was brought against it on grounds of non-compliance with constitutional protocol, the argument being that delegation of legislative power could not be made in this way, the

¹¹Senate draft law no. 438, adopted on 13 October 1999. A copy may be seen at <www.senat.fr/leg/pjl98-438.html>.

¹²Law no. 99-1071 of 16 December 1999, published in the Official Journal no. 296 of 22 December 1999. A copy may be accessed at the Legifrance website: <www.legifrance.gouv.fr>.

Constitutional Court issued a decision upholding the law.¹³ The way was apparently made clear for the French Government to finalise its work on the re-codification process and the first texts have started to appear from May 2000.

Summary

The situation of overall company and insolvency law reforms now seems to be dependent on the success of French Government initiatives seeking to reform the codification framework and chiefly the planned revival of the Commercial Code. There is a risk that this revival is too ambitious a project and that, in the event of the French Government failing to meet its current legislative targets, there may not again be the opportunity to effect company and insolvency law reforms in the lifetime of the present Parliament. French Government targets will be dependent on not just legislative will, but the need to ensure that the public and practitioners are convinced of the utility of the Commercial Code being brought back into use. Some of the doubts that have been expressed relate to fears that legislating in this way signals a return to Government interventionism and to the difficulties in keeping up with international moves towards harmonisation across boundaries.

Although the negotiation process allowing the French government to bypass the ordinary legislative process stipulates the reconstitution of this code on the basis of existing law, one of the obvious advantages will be the gathering of related laws together in a single accessible place. There may also be an opportunity in the long term based on current developments in the use of legal technology. Both in terms of legal practice and academic research and study, codification can be seen to be a natural consequence of the electronic age, when texts can be compressed and synthesised in ways that a century ago would have seemed extraordinary. As law reform becomes a simpler undertaking and improvements a matter of the intercalation of text without compromising the integral structure of the code, the revival of the Commercial Code may well provide further opportunities for the modernising of legal language and principles in a way that reflects changes that have already occurred in corporate life and business practice.

15 May 2000

¹³Decision 99-421 DC of 16 December 1999.