

THE RESCUE LAW OF COMPANIES IN DIFFICULTY (« SAUVEGARDE ») FRANCE - JULY 26 2005

The « Sauvegarde » Law has brought important changes to the set of directives applied in France in the treatment of company difficulties.

Before January 1st 2006 this set was made up essentially of two kinds of proceedings: judicial reorganisation and judicial liquidation. Two amicable proceedings also existed: the amicable reorganisation plan and the “ad hoc” counselling proceedings.

The « Sauvegarde » law now in force allows anticipation of the company difficulties as soon as they can be foreseen, even before the cash flow suffers. It also covers the liberal professions, considered as “companies” from now on.

The law envisages different situations, more or less serious, and prescribes the most adequate prevention procedure. Filing for bankruptcy is no longer the only way to treat company difficulties.

Well-founded agreements are sought and concluded between the different players: this proved to be a reliable instrument especially because the debtor is in fact the one who sees, better than anybody else, which is the best rescue plan to be applied in his case.

Thus the domain of amicable treatment of company difficulties is expanded and from now on it can translate into law-secured agreements between creditors, investors and debtors.

The notion of ‘opening of proceedings’ has also been better defined. Before this Law, the openings of proceedings practically never set in motion valid rescue solutions for the company. One of the legal reasons of not opening proceedings was not being in a situation of cessation of payments, even if the company had serious difficulties. This moment of the evolution of the insolvency law was marked by the appearance of counselling and of “ad hoc” conciliators, new kinds of proceedings which favoured prevention and early treatment of difficulties.

The first figures for the 2007-2008 period however show that in the majority of cases the companies concerned by such proceedings are small or medium-sized (90 % of them have less than 50 employees).

This official report demonstrates that the choice of the « sauvegarde » proceedings by the Government was a good one, as in France the basis of the work force lies with these small and medium-sized companies (called “PME”).

However, for 2007 statistics show 49,400 companies in difficulty (+ 5%), out of which only 506 were treated by « sauvegarde » proceedings.

We can draw the conclusion that the new Law was under-used.

Reform

A reform project is ready and normally will be enforced this autumn. It mostly concerns the facilitation of the “sauvegarde” proceedings which have not scored too many successes, in spite of the results obtained with Eurotunnel or the newspaper ‘Libération’.

The definition of ‘cessation of payments’ which prevents the opening of rescue proceedings will be revised, for instance.

Today, in order to be able to open ‘sauvegarde’ proceedings, the difficulties of the company should ‘*lead to the cessation of payments*’ if nothing is done.

The revised text will indicate that “rescue proceedings will be opened if the debtor files for this...even if he is not in a situation of cessation of payments, but considers to be in the impossibility to solve the difficulties” (new Article L620-1), without further details. The debtor *will no longer have to prove a quickly approaching cessation of payments to be protected by the rescue law.*

The Government’s will is to prove that this kind of proceedings is more attractive for the director whose company encounters difficulties.

Another new point is that in both the ‘sauvegarde’ proceedings and judicial administration two creditors’ committees are set up if the company has more than 150 employees and a turnover above twenty million euros.

Their role is to negotiate with the debtor in order to adopt the best possible rescue or reorganisation plan.

The first creditors’ committee is made up of credit establishments. The second reunites the main suppliers of goods or services whose claims amount to more than 5 % of the overall suppliers’ claims.

For debtors who do not fulfil these conditions, the setting up of creditors’ committees is not compulsory and has to be applied for (by the debtor himself or by the judicial administrator) at the Commercial Court, where the judge will decide upon the necessity of such a committee.

In a period of 30 days after the opening order, the administrator informs each credit establishment and each supplier whose claim amounts to more than 5 % of the overall claim figure that they are rightful members of one or the other of the two committees.

The Reform will bring some novelty concerning the composition of these committees too. Article L626-30 will be re-written and it will indicate that ‘*credit establishments*

*and assimilated bodies, as well as all creditors having filed an original claim, are all **rightful members of the committee***'. According to the reform, debenture holders (either from France or abroad) will also be invited to a general meeting which will decide upon the application for 'sauvegarde' proceedings.

The objective is indeed to render this reform as attractive as possible for managers, as efficient as possible, by anticipating difficulties, for creditors, and as simple to understand as possible for us all.

With these aims in view, the 'sauvegarde' proceedings and counselling should be considered as an occasion of a **fresh start** for the companies and must remain a way of preventing difficulties. They must be flexible too and able to come into play well before difficulties appear.

As far as creditors are concerned, transparency and collective discipline should be reinforced: these are the keys to facilitating and simplifying the insolvency proceedings.

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