



Pre-Packs à la française and Cross-Channel Influences

Paul Omar brings us up to date with a new procedure available for use by business debtors



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In France, a new insolvency tool has been made available through the introduction of a new procedure called “accelerated financial preservation” (*sauvegarde financière accélérée*). Designed as a variation on the existing preservation (*sauvegarde*) procedure, which was introduced in 2005 and reformed again in 2008, the new procedure resulted from a package of reforms to the banking and financial sectors contained in proposals which were enacted in 2010. The new procedure will be made available for use by business debtors from 1 March 2011.¹

The new procedure is designed for the use of debtors who have been undergoing a conciliation procedure under Article L. 611-4 of the Commercial Code. Similar in concept to the corporate voluntary arrangement, the purpose of conciliation is normally to lead to the conclusion of a restructuring plan and its endorsement by the court. Conciliation, which can be conducted in privacy and without adverse publicity, is available to debtors who are not yet in cessation of payments (*cessation de paiements*) or who have only ceased making payments to creditors within the 45 days prior to the application being made. The utility of conciliation is evident, with upwards of 1,500-2,000 being initiated yearly and with a success rate of over 60%.² The main defect of conciliation is that it does not have a cram-down effect on dissenting creditors, whose claims are merely suspended for the duration of the implementation of the agreement and which revive when this comes to a close or fails for some reason.³

In fact, a conciliation agreement cannot be approved by the court unless it has no impact on the interests of dissenting creditors.⁴ As an alternative to conciliation, preservation was available to debtors who were not yet in a state of cessation of payments. This procedure would attract a moratorium absent in conciliation and achieve a cram-down effect through the adoption of the rescue plan by at least 2/3rds of the creditors, who would normally meet and vote in two separate committees formed of financial institutions and suppliers respectively. Bondholders could also be summoned where their interests were affected by a proposed plan. The duration of preservation, which could last for up to 18 months, made it unattractive when compared to conciliation, which could only last for up to a maximum of five months.

What will happen under the new procedure is that debtors, who are in conciliation and who can demonstrate the criterion for entry to preservation (that they are facing difficulties they cannot surmount) and who are required to have creditors’ committees formed for the purposes of approving a rescue plan,⁵ will be able to apply to court for the opening of an accelerated financial preservation procedure. This is subject to their having drafted a plan that will assure the continuation of the business and that they believe will command the support of a majority of financial creditors and, it being the case, bondholders.⁶ The court will take into account the views of the conciliator on the progress of conciliation and the likelihood of adoption of the draft

plan by the relevant creditors.⁷ If the court agrees to open a procedure, it may appoint the conciliator as administrator or any other person it deems fit subject to reasons being given.⁸ Normally the same court before which conciliation proceedings are taking place will deal with the request for the opening of accelerated financial preservation proceedings.⁹ After proceedings have opened, the administrator will then summon committees of financial creditors and bondholders with the minimum notice for the meeting being 8 days (reduced from the 15 days applicable to the standard preservation procedure).¹⁰ For the purposes of voting at the meetings, creditors will be required to prove their debts unless this has already taken place within prior conciliation proceedings.¹¹ Once approval has been obtained, the court will adopt the plan, which it will normally do within a month of proceedings being opened, but may extend time up to a maximum of 60 days before giving judgment. If approval is not forthcoming, the procedure is terminated.¹²

Preservation was designed as a hybrid of the American Chapter 11 model and pre-existing French judicial rescue procedure with elements of the creditors committee function within United Kingdom administration. It was conceived as an anticipatory rescue procedure designed to encourage upstream rescue. The new accelerated financial preservation procedure also appears to draw on practice in the United Kingdom with regard to pre-pack administrations, which are not without their criticisms.



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Experience in practice in France has revealed that, since at least 2009, debtors who wished to benefit from an arrangement similar in structure to a pre-pack often conducted restructurings, with or without the benefit of a conciliation, and would announce the (usually) favourable outcome at the same time as applying for the opening of a preservation procedure, in which the outcome would be adopted in the form of a rescue plan.¹³

Under the new accelerated financial preservation procedure, which stands between conciliation and preservation, a “pre-pack” would occur within a more concise time frame. This is of great advantage to debtors, who might

experience difficulties in securing post-commencement financing if arrangements took too long to progress, as might be the case under the standard preservation procedure, and also has the benefit of the cram-down effect. It is also advantageous in that it need not involve creditors other than the financial institutions and bondholders, incidentally downgrading the status of suppliers and some say infringing the *pari passu* principle normally at the heart of collective insolvency proceedings.¹⁴ Nonetheless, the introduction of this procedure has been welcomed by practitioners and the business press, which would appear to augur reasonably well for its use.

Footnotes

1. Articles 57-58, Law no. 2010-1249 of 22 October 2010.
2. Information supplied by Maître Anker Sorensen, partner, Reed Smith, Paris.
3. Article 611-10, Commercial Code.
4. *Ibid.*, Article L. 611-8.
5. Articles L. 620-1 and L. 626-29, Commercial Code.
6. *Ibid.*, Article L. 628-1 (new).
7. *Ibid.*, Article L. 628-2 (new).
8. *Ibid.*, Article L. 628-3 (new). The conciliator can only be appointed if on the list of approved administrators under Article L. 811-2, Commercial Code.
9. *Ibid.*, Article L. 628-7 (new).
10. *Ibid.*, Article L. 628-4 (new).
11. *Ibid.*, Article L. 628-5 (new).
12. *Ibid.*, Article L. 628-6 (new).
13. Y. Le Galès, Comment fonctionne la procédure de sauvegarde financière accélérée, *Le Figaro* (11 January 2011).
14. J-C. Simon, La sauvegarde financière accélérée: un nouveau outil de restructuration au service du dirigeant, *Les Echos* (23 November 2010).