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Reforms to the Framework of Insolvency Law and Practice in France

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3. Reforms to the Framework of Insolvency Law and Practice in France: 1996-2006

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I - INTRODUCTION

The latest phase in a long-running saga of reforms to insolvency law and practice in France has seen the enactment of a new law in 2005.¹ As of 1 January 2006, the date this law comes into force, the landscape of French insolvency law will see a fundamental change that will impact strongly on the way debtors are to seek the protection of the courts in the event of insolvency. France is not alone in seeking to overhaul its insolvency law system, as many Western European states have proceeded to make reforms to the insolvency framework in operation in their jurisdictions,² perhaps in a bid to stem the rising numbers of insolvencies through introducing new and improved procedures that may promote and achieve better possibilities for rescue. Some commentators draw their inspiration for the processes occurring in Europe from the example of Chapter 11 of the United States Bankruptcy Code, which is well-known as a debtor-friendly regime, and point to the similarities between this system and the positions to which European domestic laws are gravitating.³ In France, however, reforms have taken place on a frequency that is unmatched by any other Western European jurisdiction with substantial changes in recent times occurring on average every two decades. This may prompt the observation that the French economy may be experiencing particular conditions that have led to the number of reforms being attempted. This chapter will attempt to detail some of the factors influencing the progress and general rate of reforms and that have emerged as considerations within the overall reform process.

II - HISTORICAL BACKGROUND

France has been a commercial trading nation since the earliest times. The annual fairs held on the plains of Champagne since the late 1100s were a focus for the development of cross-European networks for trade and finance and are said to have contributed directly to the development of a European economic framework. With this trade increasing came undoubtedly the need to regulate for situations of economic hardship. Domestic rules were introduced early to deal with insolvency and the framework for such measures in France has a long and ancient history, one of the first comprehensive

¹Law no. 2005-845 of 26 July 2005 on the preservation of enterprises ('Law of 2005'). This text was published in the Official Journal no. 173 of 27 July 2005 at pages 12187 ff. A copy of this law may be obtained from the Legifrance website at <www.legifrance.gouv.fr>. See Section X below.

²Examples include the United Kingdom in 2002, Spain in 2003 and Finland in 2004. Many of the newer members of the European Union, including Hungary, the Czech Republic and Slovakia have, following accession, engaged in the process of reforms.

³See M. Frison-Roche, L'inéluctable convergence des droits de la faillite, Les Echos (30 September 2002).

ordinances anywhere being that promulgated in 1673 in the reign of Louis XIV. The era of modern insolvency law in France dates from the introduction of the Law of 1967,⁴ which reaffirmed the twin-track approach historically seen in French insolvency law that dealt with rescue and liquidation as alternative outcomes dependent on an initial examination of the financial situation of the afflicted debtor. The Law of 1967 updated this approach and reinvigorated the status of some of the officials whose role was to assist in the administration and management of insolvency proceedings. Reform proposals were current during the 1970s and early 1980s seeking variously to deal with the inexorable rise in the number of business failures as well as criticisms of the internal workings of the legislation. Developments in other jurisdictions, chiefly those with which France shared common legal traditions as well as neighbouring countries, influenced the outcome of the last of the reform proposals that secured passage into legislation. Equally, the development in many jurisdictions of institutions that promoted the ideal of 'corporate rescue', especially the United States and contemporary proposals in other Western European jurisdictions, had some influence in the shape of the new rules that were enshrined in the laws enacted in the mid-1980s. The result was to focus attention on legal structures whose purpose was to enhance the concept of corporate rescue as an alternative to liquidation as well as promote the use of pre-insolvency diagnostics tools and informal arrangements allowing for the early prevention and treatment of businesses facing financial difficulties.

The programme of reform began with the Law of 1984,⁵ which introduced pre-insolvency arrangements, while two laws passed in 1985 dealt with the most ambitious part of the reform project in insolvency itself. The reforms resulted in the reshaping of the law and institutions of insolvency in France, the purpose of which was firmly set as being the rescue of companies by the continuation of business activity and the clearance of debts.⁶ To accompany the main text on the legal structure of insolvency, a new law was promulgated dealing with the professions of administrators and liquidators, thus installing a new regime to deal with the status, duties and responsibilities of insolvency practitioners.⁷ The framework introduced by the reforms was not destined, however, to remain beyond reproach forever. Following criticism of the Law of 1985, notably by creditors who had felt their rights declining in favour of the debtor, and also due to the greatly increasing number of insolvencies being declared, the 1984 and 1985 texts were the subject of a reform attempt in 1994.⁸ The purpose of this reform was stated as being firstly to reinforce those measures at the pre-insolvency stage dealing with voluntary arrangements. A further aim was to redress some of the rights of creditors during insolvency proceedings as well as to ensure better dividend payments and realisation of

⁴Law no. 67-563 of 13 July 1967 ('Law of 1967'), implemented by Decree no. 67-1120 of 22 December 1967.

⁵Law no. 84-148 of 1 March 1984 ('Law of 1984'), implemented by Decree no. 85-295 of 1 March 1985.

⁶Law no. 85-98 of 25 January 1985 ('Law of 1985'), implemented by Decrees nos. 85-1387 and 85-1388 of 27 December 1985.

⁷Law no. 85-99 of 25 January 1985, implemented by Decrees nos. 85-1389 and 85-1390 of 27 December 1985

⁸Law no. 94-475 of 10 June 1994 ('Law of 1994'), implemented by Decree no. 94-910 of 21 October 1994.

assets for the benefit of creditors. Finally, the reforms would ensure greater equity in rescue plans resulting in the sale or transfer of all or part of the business. Many commentators felt that the Law of 1994 merely tinkered with the procedural framework for both pre-insolvency and insolvency measures and had no real effect on the fundamental philosophy underlying the institutions of insolvency. The Law of 1994 furthermore left the situation of insolvency practitioners largely untouched as the practice environment had not attracted, despite some adverse commentary, the need for Government to intervene through further regulation or reforms to the existing framework.⁹ Unfortunately, in retrospect, the further criticisms that emerged in relation to both insolvency procedure as well as practice would have made dealing with this issue desirable. Despite the advice of certain very eminent members of the insolvency profession, it seemed as if overall reform of insolvency law was not a high priority on the Government's agenda at the time, given other pressing considerations of an economic nature.¹⁰

III - FINANCIAL SCANDALS AND RESPONSES: 1996-1997

In the 1990s in France, a number of high-profile cases occurred in the business world, chiefly centring on the misuse of corporate assets,¹¹ a catchall offence that covered any use of company funds or goods to further an aim not considered to be in the overall interest of the company. There had been strong censure of the business environment stemming from the close-knit nature of the business community which resulted in an absence of real checks on the exercise of power within French companies. These criticisms were nowhere felt more strongly than in the context of insolvency proceedings, where the life and death of companies was an issue which carried political, economic and social overtones. There had been a few criticisms of the structure of insolvency practice, notably the feeling that real control of insolvency practitioners was absent, leading to a lack of checks in the few instances when abuses occurred.¹² Furthermore, insolvency practice was, even by French business standards, an unusually close world in which lawyers, practitioners and judges frequently formed close working relationships, particularly in the smaller judicial districts, this world not being immune to political pressures where certain insolvencies had wide implications for employment in local and regional economies. The closeness of the parties involved could also result in rescue plans being used as a vehicle for asset disposals to sympathetic parties, a situation that the Law of 1994 was meant to have resolved. Remuneration was also a consideration with the level of fees charged by practitioners coming in for severe disapproval. In addition, the conflicts that could occur through the different roles of insolvency practitioners acting as administrators and creditors'

⁹See J-L. Vallens, A propos de la réforme de la loi sur les entreprises en difficulté: Le rapport du groupe de travail du ministère de la justice, (in three parts) Les Petites Affiches Nos. 21-23 (18, 21, 23 February 1994). There is an extensive bibliography on the reforms available at para. 2263 et seq. of Lamy Droit Commercial.

¹⁰See B. Soinne, Le Bateau Ivre (A propos de l'évolution récente du droit des procédures collectives), (in two parts) Les Petites Affiches Nos. 58-59 (14, 16 May 1997).

¹¹'Abus de biens sociaux'.

¹²It was noted that some insolvency practitioners under investigation would simply resign their practices, thus avoiding professional sanctions entirely.

representatives, especially within the same insolvency, where the remuneration structure conditioned their responses to the steps in proceedings, was a curiosity perpetuated by the legislation of 1994. It may be the case that because practice revealed lacunae in the law itself, this resulted in conventions and understandings arising as to the best method of supplementing the deficiencies of law. Nevertheless, there was some disquiet at the overall level of difficulties inherent in insolvency practice. There was a feeling that it was merely a matter of time before these deficiencies would be used by unscrupulous parties to perpetuate gross abuses.

When eventually scandals occurred, the agenda for reform in insolvency was precipitated in a major way. In 1996-1997, it was alleged that two insolvency practitioners were involved in the disappearance of over FF 200 million from the coffers of companies they administered.¹³ This prompted close public scrutiny of the professions and intense press attention. During investigations these revelations occasioned, it was further alleged that a number of fellow insolvency practitioners were using their positions to further their own business interests. At the same time, the nature of the administration of justice in the commercial courts came in for a great deal of adverse comment, prompted by discoveries, made as a result of investigations in a number of judicial districts, indicating that a significant number of commercial judges were suspected of being involved in instances of unprofessional practice and potentially serious misconduct.¹⁴ The impact of the reaction to revelations about the Commercial Courts on later developments can not be underestimated given that a very important percentage of the business of the Commercial Courts is in insolvency matters. The overall level of public concern and adverse comment led Elisabeth Guigou, the then 'Garde des Sceaux',¹⁵ to use the occasion of the annual address to the General Conference of Commercial Courts in Paris on 24 October 1997, to announce a number of wide-ranging reforms. These would initially centre around four main issues. These included the reinforcement of penalties for supervising judges who misuse their influence for personal ends, the closer scrutiny of insolvency practitioners' accounts, a requirement that funds generated by companies in insolvency be deposited with the official deposit-taker as well as a greater role for public prosecutors in insolvency proceedings. Proposals for legislative action mirroring the contents of the announcement were presented to the Council of Ministers on 29 October 1997. Following closely on the events outlined above, the National Assembly began a parliamentary enquiry into the proposed reforms. In addition, the French Government's Inspectorate-General of Finances and Inspectorate-General of Judicial Services were given a mandate to conduct an inspection into the areas of concern outlined by the Minister for Justice in her proposals. The scope of both enquiries, which seemed to range widely, included an examination of the entire legal

¹³This case, known as "l'affaire Sauvan-Gouilletquer" resulted in the arrest of both partners in early 1997 on charges of fraud, illegal acquisition of interests in companies and abetting criminal bankruptcy.

¹⁴A journalistic enquiry by D. Fortin et al., published in *Challenges* (January 1998 edition) highlights some of the causes of concern. The courts affected include Paris, Bobigny and Nanterre (two courts just outside Paris) as well as Nice and St. Lô.

¹⁵Lit. 'Keeper of the Seals', the official title of the Minister for Justice.

framework for the administration of commercial justice in France and, in particular, its application to insolvency matters.

The Parliamentary Report, in particular, makes for damning reading, chronicling as it does systemic abuses, ranging from failure to respect basic ethical requirements relating to judicial office to wholesale peculation and conspiracy to pervert the course of justice. The report states in a dispassionate but frank manner the failure of Commercial Court judges to respond to summons to give evidence and wholesale obstruction of the investigation, often by physical means including the refusal to release court documents and records to the officials concerned. Many of the discoveries made during the course of the enquiry resulted in information being laid before the prosecution authorities against Commercial Court judges and their staff. A press statement, issued by the Ministry of the Economy and Finances on 14 October 1998, reporting on the outcome of the enquiries, fleshed out a number of the proposals in light of the conclusions that were reached. Nevertheless, the Government did not accept all of the recommendations made in the enquiry reports. One in particular, suggested by Arnaud de Montebourg, the 'rapporteur' for the Parliamentary Commission, to the effect that the profession of liquidator should be abolished, did not get, in light of its controversial nature, a warm reception.¹⁶ In all, there were three principal areas that were the focus of attention in the statement, the reform of the commercial justice system, the reform of professions linked to commercial justice and the reform of the framework for insolvency law. Reforms to the justice system itself focused on the introduction of professional magistrates, a move that was likely to be unpopular with the business community, as well as a shake up of the framework for court administration. This would also extend to the related professions mentioned, including both insolvency professionals as well as the 'greffiers', custodians of court records and legal service providers. Finally, insolvency law would also be the focus of targeted reforms dealing with particular concerns about the length of proceedings and their integrity.

The statement noted that the reforms represented an important legislative task for Parliament and fixed a timetable for a rolling programme of reforms extending over a five-year period. The press release and statements by the French Government at the time provided an insight into some of the compelling reasons the French Government found to embark upon what was outlined as an extensive reform agenda. The timetable seemed to be remarkably ambitious, given the many other demands on Parliamentary legislative time and resources. As will be seen, the timetable would end up being largely overtaken by later developments in the process, including those consequent on the French Government's explicit statement that the modernisation of the commercial justice system was to be one of its top priorities

Table 3.1: Initial Reform Timetable

Year	Legislation or Procedural Steps
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¹⁶See F. Vidal, Options Finances No. 507 (6 July 1997).

1998	Legislation on supervision of insolvency practitioners, reform of the Minitel and Internet fee rates for services provided by greffiers
1999 (first semester)	Legislation on reform of the Commercial Courts, reform of the status of Commercial Court judges
1999 (second semester)	Production of draft legislation on the organisation of ad hoc mandates, supervision of greffiers, reform to the Laws of 1984 and 1985, reform to insolvency practitioners' fees (to be conducted in two parts), legislation on insolvency practitioners' fees, reform of insolvency procedures, reform of greffiers' fees, company law reform
2000-2002	Legislation on organisation of Commercial Courts (redrawing the judicial map), introduction of mixed-benches in progressive waves beginning with the Insolvency Division of these courts

IV – INTERIM MEASURES: COMMERCIAL COURTS AND INSOLVENCY PRACTICE: 1998-1999

In relation to insolvency practice, the Government acted swiftly to produce subsidiary legislation aimed at restoring public confidence through new measures regulating entry and practice conditions for insolvency professionals.¹⁷ The aims of the decree were to improve the training of insolvency professionals, to introduce greater transparency in insolvency practice and to allow for greater supervision and control of practice conditions. In particular, professional training was to be given a boost with the formation of a new commission for professional training as part of the appropriate professional body. The definition of training was explicitly stated as being for the 'practice of activities permitting the acquisition of sufficient experience in the professional domain... as an assistant to and under the direct control of an [insolvency practitioner].'¹⁸ Greater transparency would also be achieved in regulating professional activity by requiring new ethical rules to be drawn up by the professional bodies within six months of the decree being passed.¹⁹ New rules would require lists to be drawn up every semester of the numbers of cases held by insolvency practitioners, the public prosecutor having here a role to ensure that appointments of insolvency practitioners by the court would be conducted equitably. New rules would also submit insolvency practitioners to a periodic audit on a biennial basis with occasional checks being also possible.²⁰ The proliferation of secondary offices by insolvency practitioners, a source of contention given that cases might be worked on outside the immediate jurisdiction of the appropriate court, was given a veneer of control by requiring practitioners to make an application to that effect.²¹ Finally, financial control would be achieved through requiring new audit and accounting standards and for sums raised through the administration of insolvent companies to be deposited with the 'Caisse des Dépôts et

¹⁷Decree no. 98-1232 of 29 December 1998 ('Decree of 1998'), Circular no. 99-4 of 26 January 1999 and Arrêté of 16 August 1999.

¹⁸Articles 6 (administrators) and 21 (liquidators), Decree of 1998. It should be remembered that there are two professions in France: the administrator and the liquidator.

¹⁹Ibid., Article 32.

²⁰Ibid., Article 37.

²¹Ibid., Article 64.

Consignations,' the official deposit-taker in France.²² These texts were seen as holding measures, pending the introduction of comprehensive legislation to reform both insolvency procedures and practice. Nevertheless, the reforms that they introduced were necessary and led in the short term to the restoration of greater confidence in the system.

Commercial justice, prior to the reform process, was administered through a network of Commercial Courts, of which there were 227 across France. Where there was no Commercial Court in a particular locality, the situation in 23 judicial districts, commercial matters were heard in a specialist formation of the High Court, which normally hears all other civil issues. Furthermore, there were 14 districts, mostly in the province of Alsace-Lorraine and in the overseas territories, where commercial matters were heard in mixed tribunals. Part of the reform process identified the need to increase the efficient use of resources and would necessarily involve alterations to the number of Commercial Courts. Despite lobbying by Parliamentarians concerned at the impact of the abolition of courts located in their constituencies, a decree in July 1999 provided for the reduction of the number then existing from 227 to 191 as of 1 January 2000.²³ This reduction affected courts in six judicial districts and was seen as the first step towards a comprehensive redrawing of the judicial map, the second part of which would take place simultaneously with the remainder of the reform process. A further decree in October 1999 also provided for local consultations in this respect, although it is known that the process of identifying courts to be subjected to the review had been ongoing for some time and that difficulties had arisen because of concerted lobbying by business interests and politicians alike who perhaps failed to organise sufficiently in time for the first round of closures. It remains the case that further reforms of the judicial map are in abeyance.

V - THE PREPARATORY ORIENTATION DOCUMENT: 1999

Pursuant to the reform initiative outlined by the Garde des Sceaux, the Ministry of Justice issued a paper in early 1999 in the form of a 'document d'orientation préparatoire'.²⁴ This text outlined proposals by the French Government with respect to the regulation of insolvency law and was aimed at bringing about substantial reform to the framework for insolvency proceedings. The reforms outlined in the document contained both substantive changes and a number of technical amendments seeking to streamline the rules of insolvency generally. The overall scope of the reforms was aimed at substantive changes in five discrete areas with view to improving the efficiency of insolvency law procedures, these being (in the order they appeared in the law then current):

²²Ibid., Articles 44-57.

²³Decree no. 99-659 of 30 July 1999.

²⁴Lit. 'preparatory orientation document'. For an exhaustive look at Government proposals from the point of view of business, see J. Courtière, *Réforme du droit des entreprises en difficulté: réaction au document d'orientation de la Chancellerie*, Chambre de Commerce de Paris ('CCIP') Report (February 1999). This and other CCIP reports referred to below are available at the CCIP website: <www.ccip.fr>. The comments that follow are largely derived from the contents of this report.

- diagnosis and prevention of financial difficulties at a stage before the formal onset of insolvency;
- informal treatment of business difficulties through compositions and agreements with creditors;
- formal definitions of insolvency;
- proper supervision of rescue plans;
- definition and simplification of liquidation procedures.

The Government's initiatives in the area of diagnosis and prevention looked to reforms around three particular points, the role of the auditor, the means of diagnosing financial difficulties and the control of company reporting measures. On the role of the auditor, whose diagnosis and subsequent notification of the appropriate authorities was deemed essential to bring into play prevention measures, the Government sought to avoid two problems encountered at the time, the first being the question of professional ethics and client confidentiality, the second the delays while steps within the procedure took place. As a compromise, the Government was seeking to reform the structure of the court registry so as to make more use of company information whose filing is required by law. On the control of company reporting measures, the Government wished to reinforce arrangements by making the obligation incumbent on auditors to verify whether accounts have been filed and to remind management of their obligations.

As part of its reforms, the Government sought to redefine the contractual nature of the voluntary arrangements procedure and to emphasise its distinctiveness compared to insolvency proceedings. Reforms would concentrate on the role of the court in approving voluntary arrangements, the use of the moratorium and the status and responsibility of the nominee and the public prosecutor within proceedings. The Government sought to improve these arrangements by requiring all agreements to be filed in court, even if they were only arrangements with principal creditors and by giving the court discretion not to approve arrangements. On the moratorium, the Government intended to remove access to this institution completely. This was on grounds that, despite its utility as a method of persuading recalcitrant creditors to negotiate, debtors often misused it so as to avoid more formal insolvency proceedings. One compromise the Government put forward would have allowed for recourse to early insolvency proceedings at the instance of the debtor as an alternative to the moratorium, the threat having a similar dissuasive effect on creditors. On the status of the nominee, the Government intended to introduce rules affirming the independence of nominees and supervisors of ad hoc mandates by prohibiting the simultaneous exercise of functions within arrangements and that of a Commercial Court judge or paid employment connected with the company in question as well as a role for the public prosecutor's office in delivering an opinion on the suitability of the person nominated to act. Practice insurance would also become a formal requirement. The Government also wished to see an enhanced role for the public prosecutor by requiring notice of voluntary arrangements and ad hoc mandates to be served on the court and the public prosecutor's office.

The Government was also looking to reform the formal definition of insolvency, stated as being the moment where the business concerned finds it impossible to meet a due debt with the assets available at its disposal.²⁵ The reasons given included the overall technical bias of the definition and its failure to create the right conditions for the opening of insolvency proceedings, leading to anticipated filings in the case of otherwise solvent companies and failure to file by some insolvent companies, with consequent detriment to the debtor and creditors respectively. The government intended to avoid the purely accounting based definition of a comparison of assets and liabilities and to add to the definition a requirement that the business be in a 'situation durablement compromise'.²⁶ On the question of debtor-led procedures, the view of the Government was that debtors should be permitted to file for rescue as an alternative on the same pre-conditions as for voluntary arrangements, where these latter would not be suitable because of particular needs of the business, for example to conduct redundancies and dispose of major assets. The Government was, however, cautious in that it did not wish to see the rescue regime become a purely business technique for periodic reconsolidation and would require some proof that the business in question had a cogent need for rescue.

At the heart of the formal rescue regime, rescue plans featured on the Government's list of reforms, notably looking at changes in the role of the public prosecutor in proceedings, the nature of supervision of rescue arrangements and, in relation to sales plans, better control of the asset disposal process. On the role of the public prosecutor, the Government sought to bring in amendments allowing the public prosecutor to scrutinise rescue plan proposals and to be present at hearings at which rescue plans were adopted or dissolved. On the aspect of supervision, the Government contemplated that appointments as supervisors of rescue plans should go to the administrator of rescue proceedings or, in default, to the creditors' representative.²⁷ Furthermore, new powers were to be given to rescue plan supervisors as well as new obligations, for example to ensure that proceeds of rescue are deposited with the Government's official deposit-taker. On the disposals process in the case of sales plans, the Government wished to see greater rigour in the examination of proposals, especially in determining whether the offeror had the necessary means to carry the proposal through and that offers were not made on a speculative basis.

The reforms the Government intended to introduce in the area of liquidation concentrated on the purpose of liquidation proceedings, the simplification of its structure and the transparency of asset disposals in the course of liquidation. In connexion with the definition of liquidation, the Government wished to underline the purpose of liquidation as being to gather in assets with view to satisfying the creditors as far as possible. The Government did not want to change the conditions in which liquidation was reformed in 1994 avoiding the need for prior intervention in the form of rescue proceedings. The

²⁵Article 3, Law of 1985.

²⁶Lit. 'compromised situation likely to persist'.

²⁷The creditors' representative is usually appointed from among the ranks of the profession of liquidator.

pre-requisites for insolvency, however, the cessation of business activity and the irremediable state of the company were to be made joint requirements. On the simplification of insolvency, the Government acknowledged a need in the case of insolvencies involving very small asset bases for there to be an appropriate procedure that did not absorb in costs or fees the amount realised by way of assets gathered in for the satisfaction of creditors. On the transparency requirements, the Government was keen to avoid criticisms of liquidation which, at best, did not ensure equality among candidates seeking to acquire assets and, at worst, afforded opportunities for the acquisition of assets at substantial undervalue by unscrupulous parties. The orientation document provided the public prosecutor with an enhanced role in supervising liquidation proceedings by requiring his consent in cases of sales of substantial assets as well as whole units of production.

Reaction to these proposals from the business community was on the whole positive, with many of the recommendations being supported, particularly those dealing with voluntary arrangements and with a new definition for the onset of insolvency. Some reservations, nevertheless, existed, in relation to the articulation between pre-insolvency and insolvency measures, necessarily dependent on the definition of insolvency being made clear. This was so that the courts would be able to uniformly apply this to the determination of the right type of procedure to apply to the debtor in financial difficulties. Other proposals relating to a greater transparency in the sale or transfer of assets were welcomed by the business community as were reforms targeted at reducing the impact of insolvency on business assets by introducing a further simplified procedure. Nevertheless, proposals for a greater role for the prosecutor in the context of informal or voluntary arrangements were strongly resisted on grounds of confidentiality of the process, which, as the Government recognised, should be essentially contractual in nature and thus should only involve the debtor and its creditors. The views of business with respect to this last proposition were positive. Nevertheless, the question of suitable access by the court to administrative documents was felt by business to be one meriting discussion, particularly around the questions of the possibility of early diagnoses and interventions provided business matters could be kept confidential. Similarly, there were suggestions from the business world towards making the diagnosis and prevention of financial difficulties more efficient by creating a level playing field at national level given existing disparities in treatment between the different commercial courts. Reforms would be enhanced by the creation of specialist groups within commercial courts dealing exclusively with diagnosis and prevention points.

In any event, the reforms outlined in the document were unlikely to remain static. In 2001, the Parliamentary Office of the Evaluation of Legislation issued a report on the state of insolvency law in France since the adoption of the Laws of 1984 and 1985.²⁸ The report, authored by Senator Hiest, who was also the author of reports into the draft texts seeking to reform the administration of commercial justice, provided a number of recommendations

²⁸The 2001 Senate report may be viewed on the Senate website at: www.senat.fr/rap/r01-120/r01-120_mono.html.

about the future of insolvency law and procedures. The report recommended that structural impediments to the use of pre-insolvency procedures be lifted, that participants in the process be made more aware of opportunities for reorganisation and that detection of financial difficulties be made a priority. A clear distinction should be made in the context of pre-insolvency procedures between the informal and judicial phases and legal mechanisms allowing for reconstruction should be brought into line with existing business practice. Nevertheless, increased transparency in the pre-insolvency context should not compromise flexibility and confidentiality for companies experiencing a sensitive situation. Pre-insolvency measures should be made more attractive and opened up to a wider category of user. The essentially liquidation character of insolvency procedures was noted in the report, which recommended the introduction of a new simpler procedure to deal with sales of assets in cases where a low return is likely. The distinction between pre-insolvency and insolvency procedures was to be made clearer through the use of a new definition for the moment of insolvency (currently dependent on the business having ceased to make payments) thus prompting more businesses to seek help at an earlier stage. The question of costs and the complex nature of existing procedures was a strong feature of the report, which concludes with an extensive list of specific recommendations for legislative action. As far as may be judged in hindsight, many of these recommendations were to lie at the root of the proposals that eventually saw light in 2003.²⁹

VI - CONSOLIDATION OF THE COMMERCIAL CODE: 2000-2001

The French Government has been proceeding since 1989 to a re-examination of the body of law codes. These derive largely from the great Napoleonic texts of the first wave of codifications in 1801-1808 and from later codifications of legal texts. The Commercial Code, which originally contained the rules relating to company and insolvency law, over a period of time gradually lost much of its content, leading commentators to observe that it seemed to deconstruct itself as the decades progressed. This trend was noticeable as early as 1867, when the Law of 24 July 1867 was passed to supplement the rules relating to company formations. The Law of 1966,³⁰ which enhanced and replaced the above law, completed the trend with regard to company law by repealing the remaining articles in the relevant section of the Commercial Code. The Law of 1967 performed a similar task in relation to insolvency procedures. Many other areas of commercial law and practice also escaped the confines of the Commercial Code to be enacted in separate texts, including rules governing the sale of business goodwill, charges over business assets, commercial leases and competition. 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.³¹ This draft law provided for a substantial new code, annexed to the draft, to come into force together with the then current reforms to the Criminal Code. The draft sought to include company

²⁹See Section X below.

³⁰Law no. 66-537 of 24 July 1966 ('Law of 1966'), implemented by Decree no. 67-236 of 23 March 1967.

³¹Senate draft law no. 1336, adopted on 14 October 1993.

law in 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 the Laws of 1966 and 1985 as well as the truncated remnants of the old Commercial Code. However, the draft law did 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.

As a corollary to the reform process affecting the administration of commercial justice, a significant development took place in early 1999 when the National Assembly was invited to reconsider the earlier Senate text. The 1992 draft was to be used as the basis for a revived Commercial Code. This text was subsequently referred to the Commission for Laws, one of the standing committees in Parliament. In fact at around the same period of time, the 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, which was subsequently debated in 1999.³² The contents of the Memorandum attached to this other text stated that the 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. While the Government recognised that the proper role of Parliament was to scrutinise and adopt such legislative measures, the amount of legislation already programmed for that session and likely to be programmed for later sessions made this task well nigh impossible. The Government proposed that it should enact in the form of ordinances those re-codified texts already adopted by the Council of Ministers and submitted to Parliament as well as those under scrutiny by the Higher Commission for Codification and the Council of State. 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 draft law sought Parliamentary approval for this legislative step. The timetable included in the draft provided that the Government would promulgate the ordinance adopting the Commercial Code within nine months of the draft law being passed by Parliament. Approval would still be needed in the form of ratification by Parliament and a further draft law would be laid before Parliament within two months of the ordinance appearing.³³ Parliament subsequently approved the draft law in late 1999.³⁴ Despite a challenge being brought against the draft law on grounds of unconstitutionality, the argument being that delegation of the power to legislate could not be made to the Government in this way, the Constitutional Court issued a decision upholding the law. The decision was in part motivated by the fact that the Government had agreed to codify the texts based on the existing law, or 'droit constant', thus avoiding the possibility of allegations being made that the Government was in fact legislating by stealth.³⁵

³²Senate draft law no. 438, adopted on 13 October 1999. A copy may be seen at <www.senat.fr/leg/pjl98-438.html>.

³³In fact, approval did not come until the passing of Article 50, Law no 2003-7 of 3 January 2003 ('Law of 2003'). This law, which also reformed insolvency practice, is dealt with below in Section IX.

³⁴Law no. 99-1071 of 16 December 1999.

³⁵Decision 99-421 DC of 16 December 1999.

The way was made clear for the Government to finalise its work on the re-codification process and the first renovated codes began appearing in mid-2000. The Commercial Code itself was the subject of a proposal approved by the Council of Ministers on 13 September 2000. The ordinance to which the revised code was attached was enacted on 18 September 2000 and came into effect the day following its publication in the Official Journal.³⁶ The entirety of commercial law is now divided up into nine books, including the addition of a new part dealing with the situation of commercial laws applicable in overseas territories. The entirety of the law relating to corporate organisation is now to be found in Book II of the Code, that relating to insolvency law and practice in Books VI and VIII respectively with general commercial law and competition law being sited in Books I and IV respectively. The only texts that are not included in the new Code are those articles dealing with the constitution and procedure of the Commercial Court, which are to be integrated into a revised Code of Judicial Organisation. In fact, the draft proposals outlining reforms to the jurisdiction of the Commercial Courts, included in a text presented to the Council of Ministers in 2000, were transferred to another text, an omnibus law dealing with, *inter alia*, company law and competition law, that saw light subsequently in 2001.³⁷ This provision amended the Code of Judicial Organisation, inserting new Articles L. 411-4, 411-5, 411-6 and 411-7, restoring the jurisdiction as established in Article 631 of the previous draft of the Commercial Code.³⁸ The provisions have retroactive effect to the dates the provisions were repealed, albeit without prejudice to any decisions that were made by courts other than Commercial Courts purporting to exercise jurisdiction and that were *res judicata*. Briefly, the jurisdiction as re-established covers commercial matters broadly, including, *inter alia*, banking law, bills of exchange law, company law, competition law and insolvency. Nevertheless, the future position of the Commercial Code is unlikely to remain static because of many outstanding proposals remaining to pass through the legislative process, including a number seeking to further reform company law.

VII – REORIENTATION OF THE OVERALL REFORM STRATEGY: 2000-2002

The reforms to insolvency law and practice had by early 2000 become part of an ongoing reform process affecting the functioning and administration of the entire commercial justice. Over the same period, proposals with view to amending the framework for the administration of companies and company law had also been introduced. It seemed that the range of laws to which corporate bodies were subject were undergoing radical reform designed to adapt them to the needs of a new and thriving economy where globalisation was the watchword. On 18 July 2000, the then Minister of Justice, Mme

³⁶ Ordinance no. 2000-912 of 18 September 2000, accompanied by a Report to the President of the Republic, published in the Official Journal on 21 September 2000.

³⁷ Law no. 2001-420 of 15 May 2001. These proposals had been outstanding at the time the consolidation of the Commercial Code was attempted.

³⁸ *Ibid.*, Article 127. This jurisdiction had inadvertently been repealed by Law no. 91-1258 of 17 December 1991, a fact that seemingly escaped unnoticed.

Elisabeth Guigou, submitted a number of draft laws to the Council of Ministers for consideration. Two of these texts were designed to affect the workings of the Commercial Courts, the third focused on further amendments to the conditions of insolvency practice. All of these texts formed part of what the Ministry of Justice described as: ‘...essential elements of the Government’s plan to adapt [France] to meet the needs of increased economic efficiency’.³⁹ It was notable, however, that reforms to insolvency law, outlined in the ‘preparatory orientation document’ produced in 1999, were not among the first set of finalised texts submitted to the Council of Ministers, although a clause seeking to remove the moratorium does feature in the first of the proposals. In this regard, early comment on the proposals questioned the wisdom of pushing ahead with reforms to practice conditions without waiting for developments in relation to insolvency law. This was despite the fact that changes to insolvency law were considered the most urgent of all the reforms. The three draft laws were approved by the National Assembly in March 2001 and sent to the Senate for discussion shortly afterwards. Progress was halted for a while when the Government failed to table the measures for debate and, it was not in fact until late 2002 that the Senate had the opportunity to consider the texts outlined below.

VIII – REFORMS TO THE COMMERCIAL COURT: 2000-2002

The two laws proposed under this heading were titled ‘A law on the organisation of Commercial Courts’ and ‘An organic law on the composition of benches in Courts of Appeal’. The proposals for changes within the Commercial Courts largely reflected the conclusions of the Parliamentary enquiry into the administration of commercial justice that recommended the principle of ‘échevinage’, where mixed benches of lay and professional magistrates would hear commercial matters.⁴⁰ This principle was not unknown in France, where it is reflected by the practice in Alsace-Moselle, a region that retains laws influenced by the German model. In addition, courts in French overseas territories also use the mixed bench model, as do the courts in Germany and Belgium.⁴¹ The draft texts fleshed out the recommendations, further dividing the proposals into three discrete areas. These included the composition of mixed benches in the Commercial Court and Courts of Appeal, the powers of the President of the Commercial Court and the status of lay judges. The first two were of particular importance as they affected the immediate environment of insolvency-related proceedings.

Mixed Benches

The principle of mixed benches was to extend to all Commercial Courts. Mixed benches would consist of a professional judge as chair of the formation, who would sit together with two assessors, appointed from among the ranks

³⁹From the general outline at the Ministry of Justice website at: <www.justice.gouv.fr>.

⁴⁰Proposal of 18 July 2000. A copy is available at: <www.justice.gouv.fr/publicat/tcloi1807.htm>.

⁴¹See ‘Les Juridictions Commerciales’, a Senate Report produced in October 1998, outlining the position with respect to the practice of Commercial Courts, especially in relation to the hearing of insolvency matters. A copy is available at: <www.senat.fr/lc/lc44/lc44_mono.html>.

of lay judges. The professional judges would be deputed from among the ranks of judges of the High Court for a period of three years. The original proposals intended that mixed benches would have the authority to hear cases involving insolvency matters and litigation underpinning the contractual basis of commercial companies and economic interest groupings, including corporate constitutional matters, partnership disputes and liquidation of companies. Furthermore, mixed benches would also hear cases arising from disputes over financial instruments as well as domestic and European competition law. Differences over whether matters were to be heard by mixed benches or regular formations of the Commercial Court would be the subject of a special dispute resolution mechanism. Although insolvency matters would normally be heard by mixed benches, the draft text reserved the right to act as a supervising judge in individual cases to lay judges. Nevertheless, because the conduct of insolvency cases had aroused grave concerns, new rules were to be introduced preventing a supervising judge or lay judge acting as mediator from subsequently sitting as part of a mixed bench hearing matters arising from the same or related cases.

The second draft text also dealt with the issue of mixed benches by introducing, in a spirit of reciprocity, lay judges to Courts of Appeal having jurisdiction in appeals in commercial matters.⁴² The draft text would have amended Ordinance no. 58-1270 of 22 December 1958 by allowing for the recruitment of councillors for Courts of Appeal on a temporary basis. This would permit judges from Commercial Courts, mixed tribunals and elected assessors sitting in High Courts exercising commercial jurisdiction to be given positions in Courts of Appeal and would add significantly to the range of options by allowing suitably qualified candidates access to judicial office. The proposals provided for amendments to the Ordinance specifying recruitment conditions and rules governing the status of lay judges acting as councillors in Courts of Appeal. Of the conditions specified, these mostly governed age and experience, appointments being made for a non-renewable period of 5 years with consultation of the Higher Judicial Council necessary. Nevertheless, these appointments were not made subject to the usual rules governing promotion and transparency of the application process.

In any event, the appointments of lay judges were hedged about with rules governing their role within Courts of Appeal. Lay judges appointed in this way would not be able to sit in those Courts of Appeal within whose jurisdiction their Commercial Court of origin is situated, neither would they hold office in the same district where they exercises a professional or business activity. Lay judges would only be able to sit as assessors in cases heard on appeal in commercial matters arising from the usual business of Commercial Courts and mixed tribunals. Any appeal bench could not include more than one participating lay judge. There would also be a requirement for initial training before lay judges took up their appointments. Nevertheless, the appointment would qualify the lay judge as a member of the judiciary and would subject the lay judge to most of the rules governing the conduct of the judiciary, including

⁴²Proposal of 18 July 2000. A copy is available at: www.justice.gouv.fr/publicat/coloi1807.htm.

the requirement to make a declaration of interests prior to assuming office. Some exceptions would be made, in that lay judges could not be transferred or promoted, could not be members of judicial councils or commissions, could not be required to take up residence in their judicial district and finally, would not be paid a salary but will instead receive expenses. In light of the last item, lay judges would be permitted to exercise a professional or business activity provided their status as a judge was not brought into odium or their independence brought into question.

The Powers of the President of the Commercial Court

In light of concerns expressed at the proposals by the Commercial Court judges, the draft text expressly provided that the President of the Commercial Court would remain elected from among the ranks of lay judges. Powers expressly conferred by statute on the President were preserved, the sole exception being made for powers under insolvency legislation, which devolved to a professional judge in his role as chair of mixed bench formations of the Court. Nevertheless, other insolvency-related powers, especially those deriving from the law on the diagnosis and prevention of business difficulties, remained with the lay judge. A further exception was to be the power to order a moratorium, which in light of other reforms to French insolvency law then current would be abolished. Nevertheless, the role of the President in the day to day administration of the Commercial Court would be modified to take in to account the presence of professional judges. Consultation would be necessary with the President of the High Court (normally a professional judge) as to the assignment and allocation of functions affecting professional judges, with any differences being submitted to the Court of Appeal for arbitration.

The Status of Lay Judges

By far the most interesting application of the reforms was to be in the conditions of access to the position of lay judge through modifications made to the electoral process. Elections would be held more frequently, on a two-yearly basis, and the two-step approach, by which an electoral college selects the winning candidates, would be replaced by direct elections. The electoral lists would be widened to include craftworkers (artisans) and, subject to an upper age limit, any qualified elector would be similarly eligible for election as a lay judge. New rules were to be introduced relating to ethical standards of behaviour. There would be a requirement for all newly elected judges to make a declaration of interests from time to time specifying any economic or financial activity in which an interest is held as well as any positions held in civil or commercial companies. In addition, there would be a prohibition on lay judges hearing cases in which he personally or any company in which he had a position had an interest. This incompatibility would extend for up to five years even after this interest may have ceased. Strong new disciplinary measures would accompany the new requirements and the President of the Court of Appeal would be able to issue warnings relating to behaviour even where disciplinary proceedings were not initiated. Where proceedings were taken, dismissal from office could be accompanied by a period of disqualification from office for up to 10 years. In addition, these powers would

be available even in the case of judges who voluntarily left office. Special training would be provided for lay judges, organised by the National Judicial College, and there would be an obligation placed on judges to continue professional development training.

Responses to the Proposals

It would be an understatement to say that the response to the proposals was negative, certainly from among the ranks of lay judges. The strength of this opposition may be to account for the fact that the original timetable, which provided for most of the reforms to take place in 1999-2000, was ultimately severely delayed. The opposition was most keenly felt from the organisations representing business, such as the CCIP and MEDEF.⁴³ The CCIP had in fact produced a paper in 1997 admitting that the efficient use of resources suggested that the number of Commercial Courts be reduced and that there be regular exchanges of professional and lay judges between courts to improve practical experience. It also suggested that more use of information technology and part-time assistants, drawn from the ranks of former or retired judges, would ease the burden felt by these courts.⁴⁴ Its 2000 Report was more critical, noting that although the question of mixed benches met with some approval, the overall imperative of the Commercial Courts should be to allow businesspersons to remain in charge of the administration of commercial justice according to their needs. The types of cases to be heard by mixed benches also attracted comment, with the CCIP view being that it would be preferable to limit the jurisdiction to insolvency cases.⁴⁵ Similarly, although at first cautious in welcoming the debate on the question of mixed benches,⁴⁶ the MEDEF was reported as having supported the judges in a bid to scupper the reforms. In a communiqué issued following the publication of the draft texts,⁴⁷ the MEDEF deplored the maintenance by the Government of reform items expressly 'disavowed by the Commercial Court judges'. It also stated that elections to be held for the position of Commercial Court judges would reveal the determination of the new judges in opposing the progress of reforms as the drafts came to be discussed by Parliament.

A considerable number of commercial judges are known to have expressed their dissatisfaction by resigning before the publication of the drafts as their contents were gradually revealed. Although exact figures are difficult to obtain, the estimate ranges from the 350 given out by the Government to the 700 or 800 reported in the press.⁴⁸ A further number were reported at the time to be

⁴³'Mouvement des Entreprises de France' (formerly the 'Congrès National du Patronat Français').

⁴⁴See J. Courtière, *La réforme des tribunaux de commerce: éléments de réflexion*, CCIP Report (15 May 1997).

⁴⁵See J. Courtière, *Projet de réforme relatif aux tribunaux de commerce: réactions de la CCIP*, CCIP Report (15 June 2000).

⁴⁶Position Paper of 17 May 1999.

⁴⁷Communiqué of 18 July 2000. A copy is available at <www.medef.fr/fr/C/Cdoc/C_07-18_communique.htm>.

⁴⁸The figure of 800 is attributed to Jean-Pierre Mattéi, former President of the Commercial Court in Paris. See A. Hénisse, *Les magistrats professionnels arrivent en force dans les*

considering delaying their decision until publication of the drafts. When these eventually appeared, a further 600 judges are reported to have made the decision to stand down. The consequences on the staffing of a number of Commercial Courts were disastrous with the High Courts in the towns of Laon, Blois, Sens, Pau and Laval having to take on the hearing of commercial matters in addition to their ordinary civil lists. This was because the relevant Commercial Court had ceased to function.⁴⁹ In fact, there was a view about the choice of release date for the draft texts that suggested the Government chose the middle of the summer because this would prevent serious opposition forming before the beginning the new Parliamentary and judicial year.⁵⁰ Nevertheless, by the time the texts came before the National Assembly for discussion, the situation had progressively worsened with 170 Commercial Courts going 'on strike', all hearing being adjourned sine die. The President of the General Conference of Commercial Courts resigned in protest at the reforms and continuing paralysis of the Commercial Court system seemed to be the most likely outcome.

As it turns out, the Senate, to which progress of the draft laws had been remitted, rejected the proposals relating to the Commercial Court in February 2002. The Senate stated that it was declining to pass a measure that, in its view, attacked the foundations of the court system without giving due credit to the many good things it represented. The then impending Presidential and Parliamentary Elections in mid-2002 seemed to offer the opportunity for a period of reflection about the reforms. Despite the hiatus offered by the elections, it was highly probable that the reforms would remain contentious and there might be pressure to see them back on the legislative table, albeit in a form that would attempt to placate the many hostile interests, not least from the magistrates in charge of administering the commercial justice system. The return of a Government of a different composition changed the imperative somewhat with the new Garde des Sceaux, Dominique Perben, making an announcement in a speech given to the Annual Conference of the National Congress of Commercial Courts on 22 November 2002.⁵¹ This confirmed the Government's intention to abandon the reforms to the Commercial Court in their then present form, giving as reasons the apparent lack of consensus and the failure of the proposals to take into account the special nature of the Commercial Court system. Nevertheless, according to Mr Perben, the French Government remained open to the idea of reform and would do so under the right conditions. It is clear, however, that for the present, these reforms have suffered the exact same fate experienced by similar proposals brought forward by Robert Badinter, Garde des Sceaux in the mid 1980s, when interests hostile to the proposals succeeded in getting the reform project derailed and indefinitely shelved.

tribunaux de commerce, *Les Echos* (1 June 1999), for a quote attributed also to Judge Mattéi describing the reforms as 'simply unacceptable'.

⁴⁹See National Assembly Report No. 2912, issued 1 February 2001, reporting the evidence of the Garde des Sceaux to the relevant Parliamentary Commission. A copy is available at: <www.assemblee-nationale.fr/2/rapports/r2912.htm>.

⁵⁰See A. Dufour, *Tribunaux de Commerce: La Mixité en Marche*, *Les Petites Affiches*, 24 July 2000 at 3.

⁵¹The full speech may be accessed through the French Ministry of Justice website at: <www.justice.gouv.fr/discours/d221102b.htm>.

IX – REFORMS TO THE STATUS OF INSOLVENCY PRACTITIONERS: 2000-2003

The same speech saw the promise made that the French Government would be embarking on the long-awaited reforms to insolvency law. These proposals, which were the subject of the 'preparatory orientation document' issued in 1999, and which had been updated to take into account the impact of the European Regulation on Insolvency Proceedings,⁵² were to be placed before Parliament for consideration during the course of 2003. Similarly, reforms to insolvency practice, which had been considerably amended by the Senate in February 2002, were to be brought again before Parliament. In fact, these were tabled before the National Assembly in October, where they were the subject of a joint report by the Senate and the National Assembly published in December 2002. The text rapidly progressed through both houses and was enacted in early 2003.⁵³ This law makes a number of important changes to the practice conditions for insolvency practitioners, dealing with conditions for access to the profession, control, inspection and discipline, the constitution of guarantee funds and professional liability as well as professional ethics and remuneration and, following on from the interim measures in 1999, are destined to be far-reaching in nature. The reforms are aimed at the following areas:

- the status of insolvency professionals (including practice qualifications, training and professional conduct);
- the conduct of cases (including opening up practice areas to other professions and the requirement for the personal conduct of cases);
- the supervision of practice conditions (including aspects of professional supervision and the guaranteeing of insolvency funds);
- the remuneration of insolvency professionals.

The Status of Insolvency Professionals

Underlining the changes that these reforms seek to bring in is firstly the introduction of a new title for the liquidator of 'mandataire judiciaire au redressement et à la liquidation des entreprises',⁵⁴ replacing the previous 'mandataire judiciaire à la liquidation des entreprises'.⁵⁵ A subtle change but significant in that it moves the emphasis back equally to corporate rescue. The proposals would institute a qualifying examination for entry to the 'stage' and an examination at the end of the stage preparatory to formal admission to practice.⁵⁶ The stage would last normally for 3 years subject to any dispensations given for existing qualifications or experience, but in any event could not fall below a two-year minimum. Liquidators would now be admitted

⁵²Council Regulation (EC) No 1346/2000 of 29 May 2000 (OJ 2000 L160/1).

⁵³Law of 2003, published in the Official Journal on 4 January 2003.

⁵⁴Lit. 'judicial nominee for the rescue and liquidation of businesses'. The change is brought in by Article 13, Law of 2003.

⁵⁵Lit. 'judicial nominee for the liquidation of businesses'.

⁵⁶Article 5, Law of 2003.

to practice on a par with administrators at national level.⁵⁷ The nature of insolvency practice would be made more exclusive by prohibiting practitioners from exercising other professions, the option between the qualifications to be made within a year of the proposals coming into force, and liquidators are also prohibited from exercising as lawyers.⁵⁸ Administrators are not, however, similarly prevented from exercising concurrently as lawyers.⁵⁹ Practitioners would also be prohibited from directly or indirectly carrying out business. Furthermore, although not expressly forbidden, consultancies and other work would be strongly discouraged. Initial proposals provided that both administrators and liquidators would no longer qualify for appointment as rescue plan supervisors. This restriction continues to exist for liquidators who may not act as conciliator in informal workouts and liquidator for the same firm unless a year has intervened between appointments. Comments on the proposals indicate that the examination system for qualification meets with the approval of the professions, although the length of the stage falls far short of real life experience, where it is not uncommon for entrants to spend between six and ten years as an employee working for a practitioner.⁶⁰ This, it is argued, considerably helps the candidate gain practical experience of what may be very complex practice conditions through exposure to casework. There is a considerable worry about the prohibition from practising as a lawyer,⁶¹ given that this was a recently introduced concession.⁶² There is also great concern at the proposed exclusion from appointment as rescue plan supervisors, as this would leave these positions open to be filled by other professions, chiefly lawyers and accountants. The logic for the professions is that they should remain eligible for appointment as the rescue plan is often an integral part of salvage of the entire business or part of it as a going concern and is therefore a continuation of insolvency practice.

The proposals call for the training of insolvency professionals to reflect the importance of insolvency practice in the economy. The reforms would introduce a new obligation for practitioners to report annually on their training and continuing professional development.⁶³ This would form part of their professional duties, subject to discipline in cases of failure to abide by requirements introduced by the relevant professional bodies. Comments are as a whole supportive of these proposals and tend further to seek other changes, including more theory-based and interdisciplinary training (with elements of management methods and an understanding of economic principles) as well as the opportunity to spend part of the stage with

⁵⁷ *Ibid.*, Article 1. Previously, they were obliged to register themselves with one of the Courts of Appeal and could only practice within a single judicial district.

⁵⁸ *Ibid.*, Article 21.

⁵⁹ *Ibid.* Article 8.

⁶⁰ See J. Courtière, *Réforme des professions d'administrateur judiciaire et de mandataire judiciaire à la liquidation des entreprises*, CCIP Report (4 May 2000) at 11. The comments that follow are largely derived from the contents of this report.

⁶¹ This now remains the case only in the instance of the liquidator, the initial worry being that a lawyer would be prevented from acting in a case in which he had given advice to any of the parties, however remotely connected to the insolvency, thus depriving the parties of his skills as an administrator.

⁶² Law no. 90-1259 of 31 December 1990.

⁶³ Article 32, Law of 2003.

professionals from other disciplines.⁶⁴ In relation to professional conduct, the proposals would introduce a general clause stating that professional liability would be incurred for “any breach of legislation or regulations, any breach of the rules of professional behaviour, any act contrary to probity, honour or social convention, whether or not arising from practice’.⁶⁵ The list of persons entitled to bring a complaint about professional conduct would widen to include public prosecutors and Ministry of Justice officials, perhaps reflecting the need to ensure public protection.⁶⁶ The range of penalties would be broadly maintained as they are, although a proposal that an order prohibiting a professional from practising could be set for any duration, as opposed to the choice between a one-year suspension and a lifetime ban, was not adopted. Similarly, a suggestion that the limitation period should change from the current ten years from the date of the facts complained of to a five-year period, calculated from the moment the facts are discovered, did not find its way into the final text.⁶⁷ It is known that this very widely drafted clause had aroused some controversy. In fact, although the previous position, under which complaints and actions were comparatively rare, was universally deplored, there was a feeling that too wide a definition offends against the certainty principle. This would lead to an almost unjustifiable situation of blanket coverage of all possible behaviour, whether connected with practice or not, for which alternative disciplinary sanctions are already available. What is curious is that the changes in the range of penalties had met with approval, although there had been a question as to why the list of eligible complainants had been extended. By far the greatest objection was to the changes in the limitation period. There were considerable objections to taking the notional date of discovery as the point at which time begins to run, as this may lead in effect to never-ending liability well beyond the current ten-year period and would therefore offend against general principles of law, including the requirement of legal certainty. This is probably the reason the Law of 2003 omitted this controversial reform.

The Conduct of Cases

The proposals would establish the right for courts to appoint from outside the lists of administrators and liquidators professionals from any category appropriate to the case in question. This would enable other professionals to act as the creditors’ representative in insolvency proceedings, a position hitherto reserved exclusively for liquidators. The proposals, however, go further than previously was the case, in that they allow the courts to appoint subject pursuant to a simple request made by the public prosecutor or following advice received from him. No longer will special circumstances be necessary before appointments can be made.⁶⁸ The persons appointed will

⁶⁴See J. Courtière, *op. cit.* (fn. 60 above) at 15.

⁶⁵Article 10, Law of 2003.

⁶⁶*Ibid.*, Article 11.

⁶⁷This was intended to avoid the limitation period from expiring while the facts at the heart of the complaint remain hidden (often intentionally so).

⁶⁸In practice, the courts would look at the qualifications and expertise of the individual concerned in relation to the particular appointment. Instances, however, of appointments tended to be rare.

need to display the general competence required of an insolvency professional, but will no longer have to have any particular qualification or expertise. Persons who are appointed will have to swear an oath to perform their duties conscientiously and must attest that they do not have any interest in the cases they act in or any connection to the business in question. They will also be subject to professional supervision. Furthermore, some incompatibilities are provided for in that these persons may not be administrators or liquidators who have retired or been removed from the lists of practitioners.⁶⁹

Here, views from business and the professions are sharply at odds with the Government.⁷⁰ The idea of occasional practice in this form and opening up practice areas to other professionals seems to be anathema. Insolvency professionals are worried that regular appointments in this fashion will see the creation of a separate corps of professionals with competing interests, although not necessarily with the same standards of professional qualification and training. In addition, this may encourage touting for business by other professionals and may serve to further reduce the availability of fee-income for liquidators, who are most severely affected by the competition to be introduced. The question of incompatibility also meets with objection, not in relation to the status of those removed from the practice list for reasons of professional discipline, but to retired administrators and liquidators, who are not necessarily beyond being capable of acting in such cases. The position of low-value cases is highlighted, where it is argued that the result of the effective separation of practice areas into high- and low-value streams will be that competition will tend to focus on the high-value end of the market. As other professionals will wish to exclude lower value cases, they will inevitably end up having to be dealt with by current insolvency professionals with consequences for the viability of their practices in the long run.

The proposals would introduce new rules for dealing with the situation of outside expert advice in the context of insolvency practice. At present, the rule is that insolvency professionals may seek the advice and expertise of other professionals (usually lawyers, experts and bailiffs) on an indemnity basis, with the fees being met from the proceeds of insolvency. Court approval is needed for the appointment of persons other than experts for tasks to be delegated by practitioners. The proposals emphasise the personal nature of practice and provide that, in future, outside assistance will only be possible under special conditions and subject in any event to the approval of the court. Insolvency professionals will no longer be entitled as of right to an indemnity but must make allowances for fees for lawyers and experts out of their own remuneration.⁷¹ Reimbursement of fees for other appointments will only be made where the court has previously approved of the appointment. The comments recognise that abuses of the system have occurred with a number of insolvency practitioners delegating tasks and hiring outside experts where the asset-base of the business in difficulties did not warrant it. As a consequence, many proceedings ended up with more fees being paid out to

⁶⁹ Articles 2 (administrators) and 15 (liquidators), Law of 2003.

⁷⁰ See J. Courtière, *op. cit.* (fn. 60 above) at 20.

⁷¹ Articles 1 (administrators) and 14 (liquidators), Law of 2003.

professionals than distributed in dividends to creditors. Stricter control over the conditions under which outside assistance may be required is welcome by the professions. The proposals, however, make it a condition that the professionals account for these fees as part of their own remuneration. Where the use of outside help is in fact a legal obligation, for example where the presence of a lawyer is required in court, it would be inequitable not to allow these fees as a charge. In any event, discretion could be left to the courts as to what fees to allow.

The Supervision of Practice Conditions

Modifications to practice conditions introduced by the interim measures in 1999 have already brought changes in four areas: increased frequency of practice supervision, greater resources for practice inspections, better definitions of accounting obligation and enforcement of the requirement for insolvency funds to be deposited with the official deposit-taker. The proposals in the draft legislation therefore deal with other aspects of supervision, including the increased role to be given to the professional bodies to enforce obligations attendant upon professional duties and to make special provision in cases of investigations for professional secrecy not to apply.⁷² The views of commentators are broadly in agreement with this aspect of the proposals. According to measures that would be introduced under this rubric, the proposals would also require the current guarantee fund, limited to the insolvency funds in question, to undertake to compensate victims of malpractice where an award has been made in their favour. To that end, increased premiums would, in all likelihood, apply and the possibility is now introduced of a surcharge on insolvency practitioners to reconstitute the guarantee funds.⁷³ There has been doubt expressed about the compensation aspect as many insolvency professionals would no doubt prefer to obtain special coverage through practice insurance. In any event, individuals appointed from outside the professions would have to undertake to obtain practice insurance before dealing with cases to which they have been assigned.

Remuneration

It is not surprising that the topic of remuneration should excite the most attention in the debate surrounding reforms to insolvency law and practice. The chief complaint about the proposals is that they do not change the basis on which remuneration is made, consisting of a complicated system of proportionate remuneration for some task and fixed fees for others. It has been noted that, because of the system used, there are occasions when the generation of fees may lead to abuses, for example, the remuneration of administrators as a function of turnover during the observation period could lead to an unscrupulous practitioner unduly prolonging the period to the eventual detriment of the business or an acquirer. In fact, the proposals are content merely to revise the figures to a lower level, this being especially true

⁷²Ibid., Article 9.

⁷³Ibid., Article 27.

in the case of liquidators' fees. A reasonable balance between the needs of insolvent businesses and fees to be earned for services supplied by persons who are after all professionals is recognised generally as being a desirable aim. The failure by the Government to address the substance of the remuneration package is deeply deplored, particularly where experience has revealed inconsistencies in practice. In any event, the proposals have not found their way into the final text, with the issue remaining open.

Responses to the Proposals

The responses of the professional bodies and organisations representing the business sector were on the whole more restrained than in the case of the texts dealing with the commercial court system. The views elicited from the professions in particular focused on the many positive aspects of the reforms, while raising legitimate representations regarding the widening of access qualifications that raised issues of competition, especially from outside France. In this context, remuneration was perceived to be a sensitive issue with many of the Government's suggestions for revision of the tariffs attracting serious concern from professionals feeling the threat to their livelihoods. Seriously adverse views were only forthcoming on the issue of liability, where the proposals were felt to extend liability unfairly, and on the issue of ad hoc appointments, where again competition and the consequent effect on remuneration would be an issue. It seems the Senate took many of these views on board in its discussion of the text, as was amply demonstrated when it passed with considerable amendment the draft in February 2002. The effect of the amendments was to curtail the reforms to measures that largely had the support of the professions. The history of the subsequent draft that appeared before Parliament in the course of October 2002 reflects this, with the text being the object of a joint report by both houses and the text proceeding quite swiftly once the necessary compromises on the original text had been worked out by a joint committee of both houses. The final version enacted at the beginning of 2003 represents therefore the best available set of proposals that could be jointly agreed by business and the Government.

X – REFORMS TO INSOLVENCY LAW: 2003-2005

Although a reform text was promised for 2003,⁷⁴ it was not until the end of that year that a first draft appeared. This first draft was rapidly replaced by a second version submitted to the Conseil d'Etat for its advice and comments in early 2004. This second text contained a number of new proposals, some cosmetic, including the introduction of a new title for pre-insolvency procedures,⁷⁵ but others more substantial in nature, including the introduction of a new procedure called 'sauvegarde' ('preservation').⁷⁶ A third and final draft, produced on 12 May 2004, formed the basis of the working text introduced into

⁷⁴See footnote 51 above.

⁷⁵Formerly 'amicable settlement', now to be called 'conciliation'.

⁷⁶See P-M. Le Corre, Présentation générale du projet de réforme des entreprises en difficulté: de l'avant-projet au projet de loi de sauvegarde des entreprises, Gazette du Palais 2004.56-57.4.

Parliament in early 2005.⁷⁷ Although much amended during the course of its progress through Parliament, the substance of the 2004 proposals has seen enactment in the Law of 2005.⁷⁸ A last-minute challenge by means of a reference to the Constitutional Court on 14 July 2005 did not have a great impact on the changes heralded by the text.⁷⁹ The substance of the reforms in the Law of 2005, divided among 196 articles,⁸⁰ can be divided into six distinct areas:

- Definitions and jurisdiction;
- Pre-insolvency measures;
- The new procedure of preservation;
- Judicial rescue;
- Liquidation; and
- Sanctions.

Definitions and Jurisdiction

The Law of 2005 introduces a new timetable designed to distinguish, in a reasonably clear manner, the options for debtors from among the new and updated procedures contained in the reforms. The choice among procedures will continue to be dependent on whether the formal definition of cessation of payments has been met.⁸¹ A debtor must now declare the onset of insolvency within forty-five days, this being an improvement on the previous allowance of fifteen days under the Law of 1985.⁸² However, as the following table illustrates, the boundaries between pre-insolvency and formal insolvency proceedings has been rendered indistinct because conciliation will continue to be available to debtors for a period of up to forty-five days, despite the fact that they may be technically being insolvent.⁸³ Furthermore, a critical element, first introduced in the Law of 1985, the definition of the purpose of rescue,⁸⁴

⁷⁷The final 2004 text, an accompanying 'Exposé des Motifs' ('Explanatory Memorandum'), a Press dossier and a marked up version of how the changes would affect Book VI of the Commercial Code are available from the Ministry of Justice website at <www.justice.gouv.fr>.

⁷⁸The legislative history of the Law of 2005, including the various drafts, reports and summaries of debate, is available from the National Assembly website at <www.assemblee-nationale.fr>. By the time of its enactment, however, Dominique Perben, who initiated the process leading to the Law of 2005, had himself been replaced by Pascal Clement.

⁷⁹See the Constitutional Court's decision no. 2005-522 DC of 22 July 2005, published in the Official Journal of the same date. The challenge arose out of objections by the Socialist group in Parliament to the privilege accorded to post-commencement financing and the exemption from liability for improper support where creditors supply funds.

⁸⁰In anticipation of the production of a consolidated version of the changes, it is necessary to note that Article 1, Law of 2005 first alters the Commercial Code (by repealing certain provisions and renumbering others as noted in the annexed Table I) before the rest of the text goes on to amend existing provisions by reference to their new numbering as well as introduce new provisions.

⁸¹See P. Omar, *Defining Insolvency: The Evolution of the Concept of 'Cessation de Paiements'* in French Law [2005] 2 EBLR 311.

⁸²Articles 89 (judicial rescue) and 97 (liquidation), Law of 2005.

⁸³*Ibid.*, Article 5.

⁸⁴Article 1, Law of 1985 (later Article L. 620-1, Commercial Code): 'There is created a procedure known as judicial administration destined to permit the rescue of a business, the maintenance of activity and employment and the clearance of debts.'

has been removed, with separate definitions of the purpose of each of the new and overhauled procedures put into place.

Table 3.2: Rescue Timetable and Available Procedures

Financial Difficulties	Post Cessation of Payments	
	(0-45 days)	(45+ days)
Ad Hoc Mandate		
Conciliation		
Preservation		
	Judicial Rescue	
	Liquidation	

The jurisdiction of courts has also been extended to cover the position of independent professionals, a category principally including those practising a regulated profession, for example lawyers, doctors and architects. Under the Law of 1985, professionals in this category could only be subjected to insolvency if they practised under the umbrella of a civil professional firm subject to the terms of that law. This extension is viewed as being one of the major contributions of these reforms.⁸⁵ Nevertheless, jurisdiction will be shared between the commercial courts and the ordinary civil courts, with the latter only being permitted to hear matters in cases of conciliation.⁸⁶ International jurisdiction in insolvency is not dealt with to any extent in the Law of 2005, as the terms of the European Insolvency Regulation are directly applicable. However, the Law of 2005 does provide that creditors will recover their right to pursue the debtor where territorial proceedings have been opened in France.⁸⁷ In a bid to streamline procedures, the Law of 2005 also introduces considerable amendments to procedural rules governing hearings and appeals before the Commercial Courts and superior courts in the hierarchy.⁸⁸

Pre-Insolvency Procedures

⁸⁵See P-M. Le Corre, *op. cit.* at 4. However, in the case of independent professionals, the opening of procedures will be tied in to information being supplied to the professional regulatory body.

⁸⁶Article 5, Law of 2005.

⁸⁷*Ibid.*, Article 122.

⁸⁸*Ibid.*, Articles 147-159.

An alteration in nomenclature has seen the former term ‘amicable settlement’ being replaced by ‘conciliation’.⁸⁹ Although seemingly cosmetic, this change may betoken the underlying purpose of the changes. The provisions introduced here by the Law of 2005 are quite significant. Courts ordinarily have a duty to intervene by using the failure to file accounting documents in the Commercial Court registry as a trigger for action. Business managers will now have injunctions directly imposed on them where default has occurred to require filings to take place within a prescribed period.⁹⁰ In the event a business is experiencing difficulties, managers may be compelled to attend court so that an investigation can be made into whether proceedings need to be opened. Where those summoned fail to turn up, a court will be able to request any information held by public bodies on the business with view to determining whether the business remains viable. Furthermore, the institution of the ad hoc mandate, a development begun by courts in Paris in the early 1950s using their inherent jurisdiction, has now been given statutory footing so that an appointment can be made under the terms of the Law of 2005.⁹¹ The Law of 2005 also institutes a guarantee of the impartiality of any conciliator or holder of an ad hoc mandate by limiting the scope of appointments and preventing those remunerated by the business as well as judges of the Commercial Court from acting within a prescribed period (two years for individuals, five years for judges).⁹² Appointees must also certify their compliance with the rules and agreement to being bound by the requirement of confidentiality with respect to information acquired during proceedings.⁹³ The Law of 2005 underlines the contractual nature of the pre-insolvency procedure by extending the time limit for the conclusion of an agreement from three to four months.⁹⁴ The role of the court is significantly enhanced by requiring it to validate any agreement that has been reached between debtor and creditors. At the request of the debtor, it may also validate any agreement where its terms would not affect the interests of any creditors declining to participate in its terms.⁹⁵ One of the provisions the object of the challenge before the Constitutional Court will institute new payment priorities so that parties who provide new funding during pre-insolvency proceedings will be paid in priority to creditors relying on debts acquired prior to the opening of proceedings or arising post-commencement. The same priority will inure to the benefit of creditors in the context of any later proceedings opened after the failure of conciliation or because of further difficulties experienced by the business.⁹⁶

Preservation

⁸⁹The 2003 text opted for the term ‘redressement amiable’ (amicable rescue). This was changed because of the probable confusion with ‘redressement judiciaire’ (judicial rescue), which remains as one of the available procedures.

⁹⁰Article 4, Law of 2005, introducing new paragraph II in Article L. 611-2, Commercial Code.

⁹¹Ibid., Article 5, introducing new Article L. 611-3, Commercial Code.

⁹²Article 10, Law of 2005, introducing new Article L. 611-13, Commercial Code.

⁹³Idem., introducing new Article L. 611-15, Commercial Code.

⁹⁴Article 5, Law of 2005, introducing new Article L. 611-6, Commercial Code.

⁹⁵Idem., introducing new Article L. 611-8, Commercial Code.

⁹⁶Article 8, Law of 2005, introducing new Article L. 611-11, Commercial Code.

The core of the reform project is the new procedure of preservation. Preliminary views regard preservation in substance as closely approaching the American Chapter 11 model.⁹⁷ However, procedurally, preservation is closely based on the existing judicial rescue model with some innovations. In fact, the Law of 2005 grafts the provisions dealing with preservation onto the section of the Commercial Code containing provisions dealing with judicial rescue, thus taking over the framework of this procedure with amendments being made to its operations. Judicial rescue will continue to be available as a freestanding procedure. The Law of 2005 in fact inserts a section following preservation to cover judicial rescue with a number of references back to preservation rules in the case of common provisions. The result of this complicated drafting technique is that there are in effect two rescue-type procedures running side by side, the fundamental difference between preservation and rescue being the debtor's qualification for resort to either one of these procedures. In fact, for preservation, the debtor must be able 'to justify [being in] difficulties, that [the debtor] is not able to surmount and that are capable of leading to a cessation of payments', but must not actually be in cessation of payments, which remains the pre-condition for judicial rescue.⁹⁸ The availability of two rescue models, one prior to formal insolvency, leads commentators to term preservation an 'anticipatory rescue procedure'.⁹⁹ The overall effect is to shift the emphasis on rescue in its broadest sense to a time before the debtor becomes unable to meet its contingent liabilities and incidentally affords the debtor a greater choice of procedures appropriate to its condition. In essence, the ad hoc mandate may be seen as an upstream precursor to the more formal conciliation with the latter procedure itself lying at a point in time where the business' difficulties have not arrived at the stage of requiring an actual rescue-type procedure such as preservation.

Preservation is conceived as a type of debtor-in-possession procedure permitting the management to continue running the business and hopefully to overcome the difficulties being experienced by the business. This option is available to businesses under a threshold to be defined by decree, while those above will see the appointment of an administrator to supervise the debtor-in-possession or to assist the debtor in the performance of some or all management tasks.¹⁰⁰ The procedure will include an automatic moratorium and will allow the debtor to propose a rescue plan with the assistance of its creditors. The content of the plan, which will normally include the reorganisation of the business, will be subsequently validated by the courts. The Law of 2005 contains an incentive for debtors to seek early help by resorting to preservation by preventing courts from removing directors, a sanction often imposed on an automatic basis in rescue procedures previously, if the Public Prosecutor makes a request to this end.¹⁰¹ However, there will be a procedural safeguard requiring the court to scrutinise any petitions for the opening of preservation proceedings made by businesses that have already been subject to conciliation or an ad hoc mandate in the

⁹⁷ See P-M. Le Corre, *op. cit.* at 7.

⁹⁸ Article 12, Law of 2005, introducing new Article L. 620-1, Commercial Code.

⁹⁹ See P-M. Le Corre, *op. cit.* at 6.

¹⁰⁰ Article 23, Law of 2005, amending Article L. 622-1, Commercial Code.

¹⁰¹ *Ibid.*, Article 62, amending Article L. 626-4, Commercial Code.

presence of the Public Prosecutor.¹⁰² Further enhancing the incentive, rescue and preservation will be distinguished by limiting the impact of the rules relating to voidable transactions, which will only apply in the event of judicial rescue procedures being opened.¹⁰³ Similarly, the sanctions section of the Commercial Code has been rewritten to underline the idea that resort to preservation should not unduly expose business managers to the risk of sanctions.

The early phases of preservation are similar to the way in which judicial rescue has operated. However, important changes brought in by the Law of 2005 surround the process leading to the adoption of the rescue plan. For businesses below a certain threshold to be defined, the process of producing a rescue plan resembles that in judicial rescue, where the administrator, with the assistance of the debtor, submits a proposal to court for consideration following consultation of and approval by creditors individually. However, exceeding the threshold will bring into effect one of the innovations of the Law of 2005, the use of the creditors' committees, which will have a role to play in the approval of the rescue plan. The purpose of the committees, one of financial creditors and one of principal suppliers, is to pronounce on the viability of the plan presented by the debtor-in-possession, assisted, it being the case, by an administrator. A strict time limit is set requiring the committees to be given the draft rescue plan within two months of their being constituted, the objective being that subsequent exchanges of opinion and observations will contribute to the final draft submitted to court. Voting on the committees will take place within a further period of thirty days and will be by a special majority, calculated according to the amount of debt certified by the company auditors, a positive vote by both committees (amounting to at least two-thirds of the value of the total debt) being required for the plan to be presented to court for validation. Once the creditors signify their approval, the role of the court is limited to ensuring that all interests are duly taken into account, dissenting and non-participating creditors will become bound.¹⁰⁴

Judicial Rescue

The Law of 2005 makes independent provision for judicial rescue to remain available for businesses that are technically insolvent. The section dealing with judicial rescue contains just nine, albeit lengthy, articles dealing with judicial rescue in its new form and that apply, *mutatis mutandis*, the rules on preservation to judicial rescue.¹⁰⁵ As noted above, the two signal differences between preservation and rescue are the precondition for opening proceedings and the limitation on the use of voidable transactions rules to instances of judicial rescue. Judicial rescue will continue to be useful for businesses that have not accurately forecast the consequences of financial difficulties and have thus missed opportunities for conciliation or preservation. The availability of a rescue option at the post-declaration of insolvency stage is thus a sensible alternative to being required to liquidate these firms.

¹⁰²Ibid., Article 14, introducing new Article L. 621-1, Commercial Code.

¹⁰³Articles L. 632-1 and -2 (formerly Articles L. 621-107 and -108), Commercial Code.

¹⁰⁴Article 83, Law of 2005, introducing new Articles L. 626-29 to -35, Commercial Code.

¹⁰⁵Ibid., Articles 88-96.

Nevertheless, a new purpose is envisaged for judicial rescue as an ante-chamber to liquidation of the company through the use of a rescue plan involving the sale of the constituent business or component asset grouping. This can cover instances where continuation of the business by existing management may not be a desirable option and also where a straightforward liquidation would not offer the opportunity for the elaboration of a rescue plan providing for a better realisation of the assets and repartition of the consequent sales price among the creditors.¹⁰⁶

Liquidation

in recognition of the prevailing economic climate, which sees about 90% of all procedures begin or end as liquidation proceedings, an important part of the Law of 2005, Articles 97 to 125, is devoted to the liquidation procedure. This is not to undermine rescue, which remains an important purpose of the overall framework as altered by the 2005 reforms, but is aimed at streamlining the liquidation procedure so as to maximise creditor benefit. Liquidation is given status as an independent procedure with its own purpose, defining it as a procedure open to any debtor in a state of cessation of payments and whose rescue is manifestly impossible, the purpose of liquidation being to bring an end to business activity through the realisation of assets.¹⁰⁷ The opening of proceedings must be requested within forty-five days of the debtor entering the state of cessation of payments unless the debtor has opted for conciliation as an alternative.¹⁰⁸ The Law of 2005 underlines the issue of creditor benefit by making new rules for the continuation of business activity during liquidation, which will be permitted where either a sale of the business or a collection of assets is envisaged. Ordinarily, business will be conducted by the liquidator unless the company exceeds a certain size threshold, when an administrator may be appointed.¹⁰⁹ Conversely, asset-poor liquidations will be the subject of a simplified liquidation regime.¹¹⁰ In a bid to accelerate the speed of procedures, courts will be invited at the opening of proceedings to fix a recall date to determine a closure date or the need for an extension of time. The lack of any further asset operations that may be carried out will be a clear indication of the need to bring proceedings to an end.¹¹¹ In simplified procedures, speed is enhanced by requiring the liquidator to conduct asset verification and proof of debts procedures within three months. Furthermore, the debts that may be proved will be limited to those that, in the opinion of the liquidator, are likely to obtain some dividend from the process. Finally, an overall time-limit of one year is set, at which date the liquidation is brought to an end, subject to there being an exceptional case for a limited extension of time subject to a maximum of three months.¹¹²

¹⁰⁶The latter purpose may be compared with that in the United Kingdom under section 8(3)(d), Insolvency Act 1986 (pre-2002 reforms).

¹⁰⁷Article 97, Law of 2005, introducing new Article L. 640-1, Commercial Code.

¹⁰⁸Idem., introducing new Article L. 640-4, Commercial Code.

¹⁰⁹Article 105, Law of 2005, amending Article L. 641-10, Commercial Code.

¹¹⁰Ibid., Article 99, introducing new Article L. 641-2, Commercial Code.

¹¹¹Ibid., Article 121, introducing new Article L. 643-9, Commercial Code.

¹¹²Ibid., Article 125, introducing new Articles L. 644-1 to -5, Commercial Code.

Dealing with the issue of transparency in asset disposals, where the simplified system is used, the liquidator proceeds to a sale of the assets at will or at public auction without the need to obtain the approval of the supervising judge for every transaction. At the end of this period, any remaining assets have to be disposed of by public auction. If, instead, the normal procedure is used, sales will be subject to enhanced security to avoid the possibility of fraud occurring, thus addressing one of the major criticisms of liquidation as an opportunity for the acquisition of assets by phoenix companies or at substantial undervalue. Under the new regime,¹¹³ opportunities for such behaviour are limited by preventing the directors and related persons from making offers to acquire assets directly or indirectly and, for a period of five years, from acquiring these assets or the shares of any company holding these assets as part of its portfolio. Control over asset acquisition by third parties will also be strict with greater detail required when offers to acquire assets are made. Where the business involved is over the defined threshold, the hearing considering the offer must take place in the presence of the Public Prosecutor. Even after acquisition, there is still a measure of control, in that courts will enjoy the facility to bring any contract to an end upon failure by the offeror to perform any obligation.

Sanctions

The main sanctions regime under the Law of 1985 and as later codified in the Commercial Code included two types of civil claims (claim for a contribution and extension of proceedings), two types of civil sanctions (personal bankruptcy and disqualification from management) as well as criminal sanctions (criminal bankruptcy and various other offences).¹¹⁴ The Law of 2005 will alter when various sanctions of this highly complex liability regime will be available dependent on what procedure is instituted.¹¹⁵ Although there are limited changes to the criminal parts of the sanctions regime, one important change is the removal of the extension of proceedings from the list of sanctions. Where insolvency affects a corporate body, whose partners or members are liable for payment of its debts, courts will no longer have the option to extend proceedings automatically to these individuals.¹¹⁶ The extension of proceedings will be replaced instead by a finding of liability for all or part of business debts. There will be two types of finding, the first, a more general finding, will be available in cases of liquidation and where a rescue plan adopted in the context of preservation or judicial rescue proceedings comes to an end prematurely by default.¹¹⁷ A second type, depending on the existence of specific examples of fault set out in the law, will only be available in instances of liquidation proceedings.¹¹⁸ The logic behind this move is that findings of liability and claims

¹¹³Ibid., Article 111, introducing new Articles L. 642-1 to -17, Commercial Code.

¹¹⁴See P. Omar, France: The Regime Governing Directors' Liability in Insolvency and Reform Perspectives (2004) 25 Co Law 378.

¹¹⁵Under the Law of 1985, although little used, the sanctions regime was in theory universally applicable in all insolvencies.

¹¹⁶Table I, Law of 2005, repealing former Articles L. 624-1, -4.

¹¹⁷Articles 127-130, Law of 2005, retaining Articles L. 624-2, -3, -7 (renumbered L. 651-1, -2, -4), and introducing new Article L. 651-3, Commercial Code.

¹¹⁸Ibid., Article 131, introducing new Articles L. 652-1 to -5, Commercial Code. The specific instances are similar to those in former Article L. 624-5 and include directors using the

for a contribution are deemed incompatible with rescue-type proceedings, whether judicial rescue or preservation. the adoption of a rescue plan being likely to see creditors' claims satisfied.

The personal bankruptcy regime is also the subject of changes. Courts will no longer enjoy the right to take action *ex officio*, but must await a decision by the insolvency practitioner or Public Prosecutor to bring an action. This change was motivated by concerns raised about the impartiality of courts sitting as prosecutor and judge and compliance with human rights standards in relation to trials.¹¹⁹ The article setting out fact situations constitutive of personal bankruptcy has also been redrafted to include two further fact situations: voluntarily abstaining from co-operating with those responsible for insolvency proceedings by 'forming a manifest obstacle to its good 'progress' and making accounting documents belonging to the company disappear or failing to keep accounts or having kept fictitious accounts, including those 'manifestly incomplete or irregular in the eyes of the applicable law'.¹²⁰ Certain disqualification provisions, omitted from the Commercial Code because of a successful challenge before the Constitutional Court at the time of the consolidation, have been reintroduced. One procedural safeguard ensuring compliance with human rights concerns will attach in that any court hearing a personal bankruptcy matter must expressly make a decision imposing the prohibition.¹²¹ The maximum duration of sanctions under this chapter has been fixed at fifteen years for personal bankruptcy and five years for disqualification from involvement in management and public office. As a consequence of this, the enforcement provisions of the Law of 2005 bring to an end any disqualifications under previous law where the overall term of fifteen years has expired and limit any unexpired disqualifications to fifteen years from the date judgment was given.¹²²

Within the revised sanctions section, the Law of 2005 addresses one of the concerns that banks and financial institutions have raised about 'soutien abusif' (improper support), a doctrine that deems a credit-provider liable to other creditors for providing funds that lead to the continuation of business activity later deemed unlawful. The Law of 2005 introduces a new article limiting liability for any supply of credit, except in cases of fraud, deliberate interference in the management of the debtor company as well as where any guarantees acquired by the creditor are deemed disproportionate to the credit supplied. One of the consequences of liability being established on the part of

company's assets as their own, using the company to carry out their personal business, using the company's assets or credit for personal gain contrary to the company's interest or for the benefit of another company in which they have a direct or indirect interest, conducting the business of the company in an abusive manner for personal gain, resulting in the insolvency of the company as well as misappropriating or concealing company assets or fraudulently increasing the company's debts.

¹¹⁹One of the methods used to avoid this conflict in future will be that the supervising judge, whose role is to oversee the day-to-day running of proceedings, may not sit as part of any court hearing a sanctions application.

¹²⁰Article 136, Law of 2005, amending Article L. 653-5, Commercial Code.

¹²¹*Ibid.*, Article 139, introducing new Article L. 653-10, Commercial Code.

¹²²*Ibid.*, Article 190.

a creditor is that any guarantees given to this creditor will be deemed void.¹²³ This provision was one of two challenged before the Constitutional Court, the other being the priority for post-commencement financing, on grounds that it infringes the constitutional principle of the equality of treatment of creditors.

XI – SUMMARY

The reform of insolvency law and practice is a project of some considerable magnitude in any jurisdiction. It demands not inconsiderable reflection and its progress is often slow, having to take on the interests of the many participants in the process. In an environment when scandal is perceived as endemic, a rush to produce a cure is not often the best way of finding a solution to an ill seemingly generated by a system unable to check abuses from occurring. What is demanded is a rationale for reform prompted by apparent inadequacies within the system that relate not so much to abuses as to the difficulties in its use. The beginning of the reform process was inauspiciously set against the background of financial and business scandals that rocked France in the early to mid 1990s. At first, it seems the extent of the endemic corruption and systemic failings were not fully appreciated, perhaps explaining the initial statement of the Ministry of Justice in 1997 that set the agenda for limited reforms to the structure of insolvency practice. Through the work of the parliamentary and government enquiries in 1998, many more systemic abuses were identified, leading to considerable public disquiet expressed at the functioning of a major part of the commercial justice framework. The focus of these reforms grew in measure and scope as further refined by the outcomes reported in the Ministry of Justice's statement in 1998. The eventual overall reform package that was constructed contained reforms on a scale not previously seen in the history of the Commercial Court and related professions. At the same time, plans for the overhaul of insolvency law were released, representing important changes to the administration of insolvency matters and a change in emphasis towards more transparency and safeguards in the process. This is perhaps in itself a reflection of the overwhelming importance of insolvency as a tool for managing the economy. As part of the overall changes, the eventual codification of insolvency and other laws in the body of a renewed Commercial Code, a necessary and useful tool for the updating of the commercial justice framework, was attempted.

Coincidentally, the reforms to commercial justice and to commercial law became an important plank of the overall Government strategy to modernise the general legal framework, which also saw reforms in the areas of criminal law, constitutional law, family law and access to justice. Some commentators would suggest that the reform process thus ventured into error by becoming linked to wider reforms, especially those relating to the functioning of Commercial Courts, which by their nature were always likely to be tendentious. Although there were real needs for reform to the business environment, many of which, especially in the corporate and insolvency sectors, were identified early on, this linkage was ultimately to tie two very

¹²³Ibid., Article 126, introducing a new Article L. 650-1, Commercial Code.

different issues together and their rise or fall together became inevitable. When in 2002 the Senate sounded the death-knell of the Commercial Court reforms, indirectly they also curbed the ambition of the text on insolvency practice, because the tendency to excess reproached of the former texts coloured perceptions of the latter. On a positive note, however, the hiatus offered by the Senate's treatment of these texts and the subsequent elections of 2002, probably provided the necessary breathing space, during which many of the ideas now seen in the Laws of 2003 and 2005 were developed. The Law of 2005 is certainly the product of a wider consultation exercise and the evolution of its contents between late 2003 and its enactment in July 2005 is ample testimony to the influence of business in the lead up to the legislative process. In fact, when in 2002, Dominique Perben, then Garde des Sceaux, promised that insolvency law would be the subject of a new text, he did so by appealing to the need to correct the negative effects in the Law of 1985, which sought at all costs to achieve rescue, with the price being paid by the creditors. In his view, however, the necessity of adapting procedures to economic reality meant that this process has to be pursued by re-legitimizing liquidation whilst streamlining it for efficiency considerations, by reaffirming rescue procedures to allow for the saving of businesses albeit in an advised manner, by underlining prevention and diagnosis to ensure that intervention occurs in good time as well as by simplifying the overall legislative framework to remove lacunae, reduce unnecessary complexities and thereby costs. Indications are that the greater emphasis on prevention and cure at an early stage find favour with the business sector, from which group the rising tide of insolvencies, approximately 45,000 each year, is drawn.¹²⁴ Whether as a whole, the measures introduced by the Law of 2005 will have the desired effect of arresting the trend towards liquidation and of promoting instead an emphasis on rescue-type procedures remains to be seen. This is a process the practitioners of French insolvency law and its commentators will be keenly observing, particularly the articulation between preservation and conciliation at the pre-insolvency stage, whether the chances of business rescue have been improved overall and whether transparency within the asset disposal process has been enhanced. There will also be a keen eye kept out for statistics illustrating the take-up of the procedures available and the articulation between procedures available at pre- and post-insolvency stages.

In any event, it may be said that the changes that have occurred to insolvency practice and insolvency law are very necessary in order to achieve the purpose previous Governments set of updating the commercial law environment and which all Governments, despite being of perhaps very different political complexions, must continue. This results from the pressure on French law and institutions to compete on a global basis with other jurisdictions, where only efficient delivery of legal services will prompt users to continue to select particular rules for their legal transactions. It was perhaps no coincidence that the 2000 General Conference of the Commercial Courts chose as its theme: 'Anglo-Saxon (common) law and Romano-Germanic

¹²⁴See Y. Gallois, *Près de 45000 défaillances en France*, *Le Monde* (1 October 2002) reporting 42000 insolvencies in 2001 and a progression of some 6.4%, leading to an assumption of 45000 insolvencies occurring in the 2002 period. Sectors worst affected included construction, industry, transport and textiles.

(civil) law: war or peace?’ Speaking at this congress, Marylise Lebranchu, Dominique Perben’s predecessor as Minister for Justice, put the reforms firmly into context. She stated that: “The reform of commercial justice requires its participants to adapt to new rules. The decisions of the legislators must be put into operation and the new laws must be made to live. The [Commercial Court] judges have known – and they have shown this – how to evolve in the past. I am convinced that the [Commercial Court] judges will also do this for the present reforms.”¹²⁵ As evidence of the then Government’s intention and determination to proceed, this could not be less clear. Although the particular reforms she mentions have now been put into suspension and will probably now not be revived, the spirit of her speech is still an important indicator of why the present Government has continued to pay attention to the problems in the legal environment of insolvency and why it has persevered in bringing to the table for discussion the texts that eventually became the Laws of 2003 and 2005. Initial reaction to the Law of 2005 is positive and there is much optimism about its potential success. Whether in the long run, the framework that results from this long decade of reforms will serve to promote the ideal of rescue and whether it will be able to withstand the test of time, all this remains to be seen. Nonetheless, it is deserving of some support and sympathy as it attempts to provide the solution that the French economy desperately needs in order to stand a chance of competing with other keener economies in this globalised world.

¹²⁵Speech of 19 October 2000. A copy is available at: www.justice.gouv.fr/discours/d191000.htm.

Table 3.3: Timetable of Events and Actual Reforms

	1996	1997	1998	1999	2000
Commercial Justice Structure	<p>Media Interest in Commercial Courts in Nanterre, Bobigny, Paris, Nice and St. Lô (collusion and underhand practice)</p> <p>“l’affaire Sauvan-Gouletquer” (criminal fraud and breach of trust, illegal acquisition of companies, abetting criminal bankruptcy)</p>	<p>Minister of Justice Statement 24 October 1997 (reinforcement of penalties for supervising judges, closer scrutiny of insolvency practitioners’ accounts, deposit of insolvency funds, greater role for public prosecutors in proceedings)</p> <p>Council of Ministers 29 October 1997 (reform proposals for commercial courts, insolvency law and practice)</p> <p>CCIP Preliminary Report on Commercial Court Reforms</p>	<p>National Assembly Enquiry Report 1998 (obstruction of the enquiry and destruction of evidence)</p> <p>Press Statement 14 October 1998 (reform of commercial justice, introduction of career judges, reform of professions)</p> <p>Senate Study Paper on Commercial Courts in Europe (October 1998)</p> <p>Preparatory Orientation Document (reforms to insolvency law released for consultation)</p> <p>Decree no. 98-1232 of 29 December 1998 (new practice conditions for insolvency practitioners)</p>	<p>Circular no. 99-4 of 26 January 1999 and Arrêté of 16 August 1999 (further particulars for implementation of Decree no. 98-1232 of 29 December 1998)</p> <p>Decree no. 99-659 of 30 July 1999 (reduction of number of Commercial Courts from 227 to 191)</p>	<p>Draft Law on Reorganisation of Commercial Courts of 18 July 2000 (introduction of mixed benches, new rules on professional training, new disciplinary structure, declarations of interest)</p> <p>Draft Ordinance on recruitment of Councillors to Courts of Appeal of 18 July 2000 (introducing mixed benches for appeal in commercial matters)</p> <p>Draft Law on Reorganisation of Insolvency Practice of 18 July 2000</p> <p>Ordinance no. 2000-912 of 18 September 2000 introducing new Commercial Code</p> <p>CCIP Report on Commercial Court Reforms</p>

	2001	2002	2003	2004	2005
Commercial Justice Structure	<p>Article 127, Law no. 2001-420 of 15 May 2001 (restoring commercial jurisdiction)</p> <p>Draft Texts introduced into National Assembly (March 2001) and Senate (April 2001)</p> <p>800 commercial judges resign (Laon, Blois, Sens, Pau and Laval Commercial Courts cease to function)</p>	<p>Senate Report on the Implementation of Insolvency Law (January 2002)</p> <p>Rejection of Draft Texts on Commercial Court Reform by Senate and Adoption of Draft Text on Insolvency Practice by Senate (considerably amended) (February 2002)</p> <p>All Commercial Courts on strike</p> <p>National Assembly dissolved for Elections</p> <p>New Draft Text on Insolvency Practice introduced (October 2002)</p> <p>New Garde des Sceaux abandons Reforms of Commercial Courts but New Insolvency Law promised (22 November 2002)</p>	<p>Law no. 2003-7 of 3 January 2003 (new law on insolvency practice)</p> <p>First Draft Insolvency Text appears (October 2003)</p>	<p>Second Draft Insolvency Text submitted to Conseil d'Etat (March 2004)</p> <p>Third Draft Insolvency Text appears (12 May 2004)</p>	<p>Insolvency Text in Progress (March-June 2005)</p> <p>Final version of insolvency law adopted in both Senate and National Assembly (13 July 2005)</p> <p>Constitutional challenge rejected (22 July 2005)</p> <p>Law no. 2005-845 of 26 July 2005 (new insolvency law)</p>