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by
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Introduction

The renovation of commercial justice is an endeavour that has preoccupied the French Government, the personnel and operatives of the commercial justice system as well as the business community since the middle of the 1990s. The trigger for the reforms was the occurrence of a number of high-profile financial scandals that came out of the business environment and affected the political and judicial worlds. As these events were brought to light by a combination of media attention and court investigations and prosecutions, the commercial world in France became somewhat preoccupied with the task of putting its house in order. At first, the perceived need to address public concerns involved the Government in proposing legislation to reform the substance of insolvency law and practice, in which many of the perceived deficiencies of the system were most apparent. The incidental opportunity to reform other commercial laws, including those governing corporate activities, capital and securities and competition was a by-product of this activity. Nevertheless, the amplitude of discoveries as a result of investigations by the Government and Parliamentary authorities prompted radical proposals for reforms to the structure, composition and jurisdiction of the Commercial Courts so as to restore systemic integrity. Furthermore, the scope and scale of the reforms, which had grown incrementally but which by 2002 had reached an apparent impasse, led to more and more unease, particularly from the various participants in the process about who was in charge of the reforms and in which direction they were going.

History of the Commercial Court

The Commercial Court in France is an institution whose origins can be traced to an edict of 1563. Unique among courts at this level in France and indeed in Western Europe, the judges of this court are elected to their office from among the ranks of the business community. The changes effected in other areas by the French Revolution and the consolidation under Napoléon I of commercial rules into the body of a code have had little effect on the constitution of commercial courts and the result is an almost anachronistic system for the administration of justice in commercial law. The ideal of the commercial courts was that they facilitated access to justice by merchants and brought the resolution of disputes into the hands of experts in business, so as to produce a truly commercial solution to litigation. The commercial courts remain one of the few courts where career magistrates are not found within the structure, the judges being mostly businessmen, directors, partners and employees of firms who contribute, largely without remuneration, to the functioning of the court system in the commercial justice field. There are said

to be over 3250 lay judges regularly sitting in the Commercial Courts.¹ The remit of the commercial courts, in contrast with the organisation of the courts themselves, has changed over the centuries. The jurisdiction of the courts is no longer exclusively limited to litigation between businessmen or to matters pertaining to the law of trade. Within the jurisdiction is now to be found such legal areas as competition law, the law relating to the issue of financial instruments by public companies, commercial leasing operations, partnership disputes and also for tort claims arising out of commercial transactions. It can be seen, therefore, that the interests at stake before the commercial courts are no longer limited to those of commercial persons but may affect a wider section of society, including the interests of consumers, employees and the state. The reality of the administration of commercial justice is now that the courts are no longer the exclusive province of business. Other factors affecting the administration of commercial justice are the need for commercial courts to be brought into line with other courts in France as well as the need to adapt to a legal environment that is increasingly complex and operates on a global basis.

A - The Impetus for Reform: Scandal and Enquiries

A number of events prompted the French Government to consider reform to the administration of the commercial courts. Part of this impetus came from business scandals in the corporate world, which saw many leading figures in public life being indicted for misuse of corporate assets,² 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. As far as corporate insolvency was concerned, professionals were the subject of close public scrutiny and intense press attention during 1996-1997 when it was alleged that two insolvency practitioners were involved in the disappearance of over FF 200 million from the coffers of companies they administered.³ 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.⁴ The impact of the reaction to revelations about the Commercial Courts on later developments cannot be underestimated given that a very important percentage of the business of the Commercial Courts is in insolvency matters.

¹See Orange, La réforme Guigou s'attaque aux carences des tribunaux de commerce, Le Monde (18 July 2000).

²'Abus de biens sociaux'.

³This case, known as "l'affaire Sauvan-Goulletquer" resulted in the arrest of both partners in February and April 1997 on charges of fraud, illegal acquisition of interests in companies and abetting criminal bankruptcy.

⁴A journalistic enquiry published in Challenges (January 1998 edition) at p48 passim highlighted some of the causes of concern. The courts said to be affected included Paris, Bobigny and Nanterre (two courts just outside Paris) as well as Nice and St. Lô.

The overall level of public concern led Elisabeth Guigou, the Minister for Justice, to announce on 24 October 1997, during the General Conference of Commercial Courts in Paris, a raft of wide-ranging reforms which would centre around four key issues: the reinforcement of penalties for supervising judges who misuse their influence for personal ends, the closer scrutiny of insolvency practitioners' accounts and 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. These reforms were also the subject of legislative proposals presented to the Council of Ministers on 29 October 1997. Following closely on these events, the National Assembly opened a parliamentary enquiry into the proposed topics of reform. The French Government's Inspectorate-General of Finances and Inspectorate-General of Judicial Services were also 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 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 speculation 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 informations being laid before the prosecution authorities against Commercial Court judges and their staff.

B – Initial Proposals for Structural Reform

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. 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 a shake up of the framework for court administration. This shake up would also extend to related professions, including both insolvency professionals as well as the greffiers.⁵ Finally, insolvency law, the main staple of business of the Commercial Courts, would be the focus of targeted reforms dealing with particular concerns about the length of proceedings and their integrity. An ambitious timetable was appended to the statement, which would have seen the reform process completed in stages by the end of 2001. As far as the commercial justice system was concerned, the proposals in this area

⁵These are akin to registrars, their function being to maintain court records, register pleadings and provide official transcripts of court documents, for which fees are charged. The most important source of revenue is the provision of electronic data, especially company searches.

were headlined under three topics, reforms to the structure of the Commercial Courts, reforms to the composition of these courts, including the introduction of professional magistrates, a move that was likely to be unpopular with the business community, and reforms to the status of Commercial Court judges.

At the time, the French Government made an explicit statement that the modernisation of the commercial justice system was one of its top priorities. It was aware that the number and location of commercial courts often did not match the reality of the economic situation, this situation often being the result of historical accident. Furthermore, the redrawing of the judicial map was perceived as necessary in order to avoid one of the more frequent criticisms in smaller judicial districts, where commercial judges were likely to be too closely connected to parties or with the issues in individual cases. The French Government entrusted the task of reforming the structure of Commercial Courts to a commission, whose main aim was to ensure that proposals for reform correctly identified structural weaknesses and that changes would correspond to the actual needs of economic and business activity in each judicial district. This would also allow for better resource management by optimising the use of professional judges and ensuring that the Public Prosecutor's office enjoyed a more effective presence. The commission's work was to be carried out in consultation with representatives of the judicial hierarchy and local business groups. As the introduction to the press statement noted, France was unique among European countries for having Commercial Courts staffed completely by lay judges, these being elected from among the ranks of businessmen in the relevant judicial districts. An acknowledged advantage was that businessmen would often have an intimate understanding of commercial factors having a bearing on cases and thus would give a practical edge to their judgments. However, a disadvantage was often that those elected would have very little knowledge of law and might be hopelessly out of depth in larger cases with complex issues, especially given the wide jurisdiction of the courts in complicated commercial matters such as banking and competition law. This would not be such an impediment were the judges to gain experience over a number of years in hearing cases. The French Government nevertheless recognised that the system no longer assured sufficient independence or impartiality, factors which might also lead to breaches of the provisions of the European Convention on Human Rights guaranteeing a fair trial.

For these reasons, the French Government was determined to introduce mixed courts, staffed with both lay and professional judges. This would in the first instance be geared to the Commercial Courts, although if successful as a pilot scheme could be extended to other civil courts. The benefit from the French Government's point of view was to combine legal knowledge of substantive and procedural law with expertise in economic affairs. The introduction of mixed courts was to be progressive and the French Government would encourage the panels of lay judges then in post to participate in the process. A new law was to be drafted to provide for the restructuring of Commercial Courts and the introduction of experienced professional judges. At the same time, the commission would also consider the proper means to allow for particularly experienced lay judges to sit in

Courts of Appeal for matters on appeal from Commercial Courts. The commission would also set the progress and speed of reforms, given the increased numbers of professional judges that would be required so as to permit all Commercial Courts to be staffed with mixed benches. The enquiry reports initially determined that an extra 350 professional judges would be required. The demand was to be met in part through further places being made available at the National Judicial College and also via other statutory means, which would allow recruitment from related professions, especially the legal profession. In addition, the curriculum for judicial training would be expanded to include more business and economic topics. Questions relating to the progressive introduction of mixed benches and the access of lay judges to Courts of Appeal were to be the subject of specific consultation with all interested bodies. It was this consultation process that revealed the extent of dissatisfaction with the proposals.

The French Government also considered that urgent attention should be given to the problems of insufficient training affecting lay judges and those caused by absence of a proper code of conduct by which standards for lay judges would be enhanced. The statement envisaged giving lay judges a more professional aspect by defining their status more completely. A number of matters would be the target of specific legislative proposals, including the creation of new rules governing the incompatibility of judicial office with the conduct of business and the exercise of a profession, which would also apply to former judges. Specific legislation would also include an obligation for all lay judges to declare all financial interests and the strengthening of disciplinary rules so as to ensure more effective sanctions for breaches of duty by both serving and former judges. Furthermore, the rules governing eligibility for office and the election method would be made more open and transparent, the aim being to encourage greater participation by the wider business community. So as to counter the lack of proper familiarity with legal matters, the National Judicial College would be required to undertake a programme of training for lay judges.

C – The Initial Reform Timetable

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.

Table 1: Initial Reform Timetable

Year	Legislation or Procedural Steps
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; Production of draft legislation on the organisation of ad hoc mandates, supervision of greffiers, reform to the Insolvency Law and Prevention of Business Difficulties Law, reform to insolvency practitioners' fees (first part)
1999 (second semester)	Legislation on insolvency practitioners' fees, reform of insolvency procedures, reform of greffiers' fees, company law reform
2000	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
2002	The introduction of mixed-benches to be completed

D - Interim Measures: Redrawing the Map in 1999

Prior to the reform process, commercial justice 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 2000.⁶ 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 has been ongoing and that difficulties have 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.

E - Finalising the Reforms: The 2000 Draft Laws

The Minister for Justice had entrusted the examination of the question of the introduction of mixed benches in the Commercial Courts to a commission headed by two distinguished judges. They were Michel Bernard, honorary president of a chamber of the Council of State and Christian Babusiaux, councillor at the Audit Court. Their report was submitted in April 2000 and used as the basis for drafts produced by the Government and aimed at reforms to the overall structure of the Commercial Courts and to related areas of commercial law. These draft laws were presented to the Council of Ministers on 18 July 2000 together with further proposals for the redrawing of

⁶Decree no. 99-659 of 30 July 1999.

the judicial map in the commercial justice arena. There were three separate draft texts, two of which concerned the organisation of the Commercial Courts. These related to the functioning of the Commercial Courts themselves and to proposals to introduce on a reciprocal basis mixed benches into Courts of Appeal hearing appeals in commercial matters. 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'.⁷ 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 is despite the fact that changes to insolvency law were considered the most urgent of all the reforms.⁸ These drafts were to be submitted for Parliamentary approval as soon as practicable, the intention being that they should enter into force by the beginning of 2002 and be implemented during the course of the year.

The proposals for changes within the Commercial Courts largely reflected the headlines contained in the press statement and were in line with the recommendations of the report looking into the question of the introduction of mixed benches in Commercial Courts. The proposals also 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.⁹ This principle is 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.¹⁰ 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 are of particular importance as they affect the immediate environment of insolvency-related proceedings.

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 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. Mixed benches

⁷See the general outline at the Ministry of Justice website at: <www.justice.gouv.fr>.

⁸See Courtière, *Réforme des professions d'administrateur judiciaire et de mandataire judiciaire à la liquidation des entreprises*, Chambre de Commerce et d'Industrie de Paris ('CCIP') Report (4 May 2000). Copies of this and other CCIP reports referred to below are available at the CCIP website at: <www.ccip.fr>.

⁹Proposal of 18 July 2000. A copy is available at: <www.justice.gouv.fr/publicat/tcloi1807.htm>.

¹⁰See '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>.

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. Furthermore, competition law would form part of the diet of these formations, with litigation under both domestic and European law being heard by mixed benches.¹¹ Differences over whether matters would 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 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 much disquiet, 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.

Proposals issued by the Minister for Justice also aimed at introducing, in a spirit of reciprocity, lay judges to Courts of Appeal having jurisdiction in appeals in commercial matters.¹² The second draft text would amend 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 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, with candidates needing to justify between 8 and 12 years of judicial experience depending on whether they have legal qualifications. Appointments would be made for a non-renewable period of 5 years with consultation of the Higher Judicial Council being necessary. Nevertheless, these appointments would not be subject to the usual rules governing promotion and transparency of the application process.

In any event, the appointments of lay judges would be hedged about with rules governing their role within Courts of Appeal. Lay judges appointed in this way could not sit in those Courts of Appeal within whose jurisdiction their Commercial Court of origin was situated, neither might they hold office in the same district where they exercised 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 the lay judges acceded to the appointment. Nevertheless, the

¹¹ Ordinance 86-1243 of 1 December 1986, now consolidated in Book IV of the restored Commercial Code, and Articles 81-82 of the EC Treaty.

¹² Proposal of 18 July 2000, a copy of which may be seen at: <www.justice.gouv.fr/publicat/coloi1807.htm>.

appointment would qualify the lay judge as part of the formal judiciary and would subject the lay judge to most of the rules governing the conduct of the judiciary, including the requirement to make a declaration of interests prior to assuming office. Some exceptions would be made, in that lay judges would not be transferable or promotable, would not be eligible for membership of judicial councils or commissions, would not be required to take up residence in their judicial district and would, finally, not be paid a salary but would instead receive expenses. In light of the last item, lay judges would remain 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.

In light of concerns expressed by the lay 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 would be preserved, the sole exception being made for powers under insolvency legislation,¹³ which would devolve 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,¹⁴ would remain, a further exception being the power to order a moratorium, which in light of other reforms to French insolvency law was to be abolished. Nevertheless, the role of the President in the day-to-day administration of the courts would be modified to take in to account the presence of professional judges. Consultation would, for example, become necessary with the President of the High Court (a professional judge) in relation to the assignment and allocation of functions affecting professional judges, with any differences being submitted to the Court of Appeal for arbitration.

By far the most interesting application of the reforms was 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 selected 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 of 65, any qualified elector would be similarly eligible for election as a lay judge. New rules would also be introduced relating to ethical standards of behaviour. There would be a requirement for all newly elected judges to make a declaration of interests specifying any economic or financial activity in which an interest is held as well as any positions held in civil or commercial companies. The declaration and any changes to its contents must be regularly updated. In addition, there would be a prohibition on lay judges hearing cases in which he personally or any company in which he has a position had an interest. This incompatibility would be extended for up to five years even after the interest may have ceased. Strong new disciplinary measures would accompany the new requirements. Even if disciplinary proceedings were not

¹³Law no 85-98 of 25 January 1985, now consolidated in Book VI of the restored Commercial Code.

¹⁴Law no. 84-148 of 1 March 1984, now consolidated in Book VI of the restored Commercial Code.

initiated, the President of the Court of Appeal would be able to issue warnings relating to behaviour. Where proceedings are taken out, 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 leave 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.

F - 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 might be to account for the fact that the original timetable, which provided for most of the reforms to take place in 1999, was ultimately severely delayed. The opposition was most keenly felt from the organisations representing business, such as the CCIP¹⁵ and MEDEF.¹⁶ 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.¹⁷ 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.¹⁸ Similarly, although at first cautious in welcoming the debate on the question of mixed benches,¹⁹ the MEDEF was reported as having supported the judges in a bid to scupper the reforms.²⁰ In a communiqué issued following the publication of the draft texts,²¹ 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

¹⁵Chambre de Commerce et d'Industrie de Paris.

¹⁶Mouvement des Entreprises de France.

¹⁷See Courtière, La réforme des tribunaux de commerce: éléments de réflexion, CCIP Report (15 May 1997), <www.ccip.fr/etudes/propos/qjurid/cou9902/cou9705.htm>.

¹⁸See Courtière, Projet de réforme relatif aux tribunaux de commerce: réactions de la CCIP, CCIP Report (15 June 2000), <www.ccip.fr/etudes/propos/qjurid/cou0006/cou0006.htm>.

¹⁹Position Paper of 17 May 1999.

²⁰See Orange, op. cit.

²¹Communiqué of 18 July 2000, a copy of which may be seen at <www.medef.fr/fr/C/Cdoc/C_07-18_communique.htm>.

800 reported in the press.²² A further number were reported at the time to be 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.²³ In fact, there was a view about the choice of release date for the draft texts that viewed the choice of the middle of the summer as being prompted by cynical considerations. This stated that serious opposition would thus be prevented from forming before the beginning of the new Parliamentary and judicial year.²⁴ 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. Although this was the case, the three draft laws were approved by the National Assembly in March 2001 and were remitted to the Senate for discussion shortly afterwards. They were duly submitted to the Senate in April 2001 but the Government held off tabling the texts for discussion until the end of that year, perhaps acknowledging the strength of opposition. After some considerable discussion, much of which was very critical of the Government's alleged attempt at portraying the Commercial courts as a corrupt institution, the Senate rejected the proposals relating to the Commercial Court but adopted the law relating to insolvency practitioners with a number of amendments that effectively diverted the text from its main purpose. In any event, events intervened and the Presidential and Parliamentary elections in 2002, which saw the prorogation of the National Assembly, resulted in all the texts being shelved, pending a decision by the incoming Government as to its priorities for its legislative programme and whether it would seek to revive the texts in their present form. This it has now done with the new Garde des Sceaux, Dominique Perben, categorically stating that the reforms to the Commercial Courts would be abandoned in their present form. Nevertheless, the Government remains open to the idea of reform should a suitable opportunity present itself.²⁵

G - The Renovation of the Commercial Legal Environment

²²The figure of 800 is attributed to Jean-Pierre Mattéi, former President of the Commercial Court in Paris. See Hénisse, *Les magistrats professionnels arrivent en force dans les tribunaux de commerce*, *Les Echos* (1 June 1999), for a quote attributed also to Judge Mattéi describing the reforms as 'simply unacceptable'.

²³See 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>.

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

²⁵Speech to the Annual Congress of the General Conference of Commercial Courts on 22 November 2002.

Despite the difficulties in reforming the structure of the commercial justice system, law reform in the commercial legal environment has proceeded apace. There have been changes to the underlying legal system, especially in the corporate sector and, in particular, an initiative that has seen the restoration of the Commercial Code. The French Government had been proceeding since 1989 to a re-examination of the body of law codes that existed, deriving from either the great Napoleonic texts of the first wave of codification in 1801-1808 or later sporadic codification of legal texts. The Commercial Code, which originally contained the rules relating to company and insolvency law, had 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 1966,²⁶ 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.²⁷ Many other areas of commercial law and practice also escaped the confines of the Commercial Code to be enacted as 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.²⁸ The draft law provided for a substantial new code, annexed to the draft, to come into force together with then current reforms to the Criminal Code. However, the draft law did not progress any further and the measure seemed destined to lie on the shelf together with other abandoned reform projects. Significant developments, however, took place in early 1999 when the National Assembly was invited to reconsider the earlier Senate text and the 1992 draft ended up being used as the basis for a revived Commercial Code. This text was subsequently referred to the Commission for Laws, one of Parliament's standing committees. The Government had also coincidentally 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 1999.²⁹ The contents of the Memorandum attached to this second 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.

²⁶Law no. 66-537 of 24 July 1966, now consolidated in Book II of the restored Commercial Code.

²⁷Law no. 67-563 of 13 July 1967, later revised and re-enacted as the Law of 1985.

²⁸Senate draft law no. 1336, adopted on 14 October 1993.

²⁹Senate draft law no. 438, adopted on 13 October 1999. A copy may be seen at <www.senat.fr/leg/pjl98-438.html>.

As an alternative, 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. Parliament subsequently approved the draft law in late 1999.³⁰ Despite a challenge being brought against it on grounds of a lack of constitutional powers to authorise a delegation of legislative powers in this way, the Constitutional Court issued a decision upholding the law.³¹ Part of its decision supporting the law was the fact that re-codification would be carried out using the principle of 'droit constant', the law in force at the moment of codification. Thus the exercise could be qualified as mere textual arrangement. The way was thus 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.³² 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 codification did not solve all the problems. The only texts that were not included in the revised Code were those articles dealing with the constitution and procedure of the Commercial Court, which would be integrated into a revised Code of Judicial Organisation.³³ In this context, an early law, passed in 1991,³⁴ repealed, apparently in error, provisions setting out the jurisdiction of the Commercial Courts previously contained in Article 631 of the previous Commercial Code. The drafting that resulted was preserved in the re-codification of the Commercial Code that occurred following the adoption of the ordinance. This Ordinance also repealed a further provision as to jurisdiction, apparently because the article was intended for inclusion in the Code of Judicial Organisation and was therefore omitted from the Commercial

³⁰Law no. 99-1071 of 16 December 1999.

³¹Decision 99-421 DC of 16 December 1999.

³²Ordinance 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.

³³See Pansier, *Présentation du Nouveau Code de Commerce*, Les Petites Affiches, 24 October 2000 at 5.

³⁴Law no. 91-1258 of 17 December 1991.

Code. In fact, the draft proposals outlining reforms to the jurisdiction of the Commercial Courts, included in the 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 in 2001.³⁵ This article 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.³⁶ 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 are now *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.

The future position of the Commercial Code is also unlikely to remain static. There also remain further outstanding proposals, including that seeking to reform insolvency law. In this context, the Parliamentary Office of the Evaluation of Legislation has issued a report on the state of insolvency law in France since the adoption of the previous main texts in insolvency law in 1984-5.³⁷ The report authored by Senator Hyst, who is also the author of reports into the draft texts seeking to reform the administration of commercial justice, provides a number of recommendations about the future of insolvency law and procedures. Part of the report also deals with the organisation of the Commercial Court and is in accord with the views outlined in a study paper, produced in October 1998,³⁸ which takes a comparative view of commercial jurisdiction in 5 other European Union member states, particularly with respect to insolvency matters. The report recommends 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 is noted in the report, which recommends 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 should 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

³⁵Law no. 2001-420 of 15 May 2001. These proposals had been outstanding at the time the consolidation of the Commercial Code was attempted.

³⁶*Ibid*, Article 127.

³⁷The Report may be viewed on the Senate website at: <www.senat.fr/rap/r01-120/r01-120_mono.html>.

³⁸The Study Paper may be viewed on the Senate website at: <www.senat.fr/lc/lc44/lc44_mono.html>.

stage. The question of costs and the complex nature of existing procedures is a feature of the report that concludes with an extensive list of specific recommendations for legislative action. The status of this reform as well as those generally to insolvency practice rules, following the Government's proposals being overtaken by the 2002 elections, remained in some doubt until the incoming Government had established its legislative priorities. This it has now done with a new law on insolvency practice being enacted in early 2003.³⁹

Summary

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. As refined by the outcomes reported in the Ministry of Justice statement in 1998, the focus of these reforms grew in measure and scope. 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 itself a reflection of the overwhelming importance of insolvency as a tool for managing the economy. 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 a strategy that had already prompted the Government to introduce reforms in other areas including constitutional law, criminal law as well as family and social law.

The renovation of the Commercial Code was intended to provide a renewed legal foundation and purpose for the Commercial Courts and represents a highly ambitious project, prompted by the need in part to overcome the scandals and systemic abuses revealed at the heart of commercial justice. This was perceived as a necessary tool in the updating of the framework for commercial justice. Whether the changes to the structure of the courts will have the same effect has yet to be seen as the disquiet attendant on these proposals shows no sign of abating. Pressure of this type is reported as having caused Robert Badinter, Minister for Justice in the mid 1980s, to have abandoned his 1985 reform project. Nevertheless, these changes are seen as very necessary in order to achieve the purpose the Government has set itself: that of updating the commercial law environment in light of the exigencies of globalisation and the need for French law and institutions to compete on a

³⁹Law no 2003-7 of 3 January 2003.

global basis. In this type of market, only efficient delivery of legal services will prompt users to continue to select French law for their transactions. It is perhaps no coincidence that the 2000 General Conference of the Commercial Courts chose as its theme: 'Anglo-Saxon (common) law and Romano-Germanic (civil) law: war or peace?' Speaking at this congress, the new Minister for Justice, Marylise Lebranchu, Elisabeth Guigou's successor, 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. Their pragmatism has allowed for the good application of complex texts... I am convinced that the [Commercial Court] judges will also do this for the present reforms."⁴⁰ As evidence of the then Government's intention and determination to proceed, this cannot be less clear. Nevertheless, it may be too ambitious to use this as the principle by which to conduct reforms.

It is a fact that the introduction of the various texts to Parliament in 2001 did not achieve an outcome, the Senate decisively rejecting the commercial court texts and altering the focus of the text on insolvency practitioners through considerable amendments. Despite the hiatus offered by the 2002 Presidential and Parliamentary 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. It was thus always possible that the original spirit of the reforms aiming to restore confidence in the system would be lost in the compromises and calculations that would be necessary to secure passage of legislation in the face of opposition. Nevertheless, it seems now that reforms of this important area have been delayed owing to political or other considerations, a situation that seems to replicate the position the Badinter proposals were at in 1985 when interests hostile to the proposals succeeded in getting the reform project derailed and indefinitely shelved. In any event, the context of the reforms has not changed with the Commercial Courts still undergoing a period of uncertainty with the consequent impact on the ability of business to regulate itself properly. This concern will remain until such time as the French Government addressed it properly and commentators await the results of this process with some anticipation and anxiety.

22 November 2002 (revised 21 January 2003)

⁴⁰Speech of 19 October 2000, a copy of which may be seen at: www.justice.gouv.fr/discours/d191000.htm.

Table 2: Actual Reform Timetable

	Early History	1996	1997	1998
Commercial Justice Structure	<p>Edict of Michel L'Hôpital 1563</p> <p>Commercial Code 1807-8</p>	<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>
	1999	2000	2001	2002-2003
Commercial Justice Structure	<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>	<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 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>