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INSOLVENCY PRACTITIONERS GROUP

INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

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FOREWORD

INSOL International's Insolvency Practitioners Group (IPG) has decided to prepare a publication that explores the roles and tasks of insolvency practitioners in various jurisdictions. The result of IPG's research is contained in this publication.

Worldwide, insolvency practitioners have similar objectives: to provide all stakeholders with the best possible outcome from the restructuring / insolvency mandate. Interestingly, however, in practice, the manner in which insolvency practitioners operate can vary significantly from jurisdiction to jurisdiction. For instance, many jurisdictions have a myriad of options available which are geared to achieving a maximum payout to creditors. The question to address is whether these procedures are used regularly and are they effective in practice?

Other distinguishing factors include, the manner in which insolvency practitioners are appointed, to whom these office holders must report and how regularly, the effect that a restructuring would have on employees, suppliers and other related parties, the extent and ability to investigate the management and directors, the manner in which claims are dealt with both locally and cross-border and many other aspects which an insolvency practitioner must deal with in the fulfillment of his / her mandate. Other important aspects include what qualifications an insolvency practitioner must have to be able to practice, the need to belong to an accredited member association and the manner in which practitioners are remunerated.

This publication strives to provide a comprehensive overview of the issues stated above and provide answers to these questions in multiple jurisdictions. We hope the readers will find the information useful in their daily work.

Through its excellent network, INSOL International has identified seasoned experts around the globe who have been willing to contribute to this publication. This publication is the product of their hard work and efforts. A big thank you goes out to all the contributors for making this publication come to fruition. Much gratitude is also owed to Dr Sonali Abeyratne, Sarah Mylott and Jelena Wenlock for their invaluable support and assistance in getting this publication completed.

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INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

FRANCE

1. Insolvency procedures

1.1 What drives the decision in your jurisdiction to use certain insolvency procedures?

When restructuring purely financial indebtedness (such as leveraged buyout transactions), so-called amicable proceedings (namely *mandat ad hoc* and *conciliation*) will often be the preferred option because of the confidentiality they offer. In this context, creditors will almost systematically grant a standstill over the debts, thus giving time to negotiate.

If the company is cash-flow solvent, amicable and safeguard proceedings (i.e. public proceedings triggering an automatic stay) are available. Commencing such proceedings is purely optional for the debtor.

If a company is cash-flow insolvent (*en état de cessation des paiements*), management has a duty, within 45 days, to make the determination to commence conciliation proceedings (i.e. an amicable proceeding which may not last more than five months) or public insolvency proceedings (judicial rehabilitation and liquidation proceedings).

French law and French courts encourage debtors to use pre-insolvency proceedings to tackle financial difficulties as early as possible, in order to maximise the chances of success. Experience shows that amicable proceedings are an efficient tool to restructure debts. If necessary, safeguard proceedings may be used, after finding an agreement in principle with key creditors, to cram down dissenting creditors.

If the commencement of insolvency proceedings proves necessary, rescuing the business as a going concern and preserving jobs will be key criteria when choosing which proceedings are appropriate. To the extent possible (i.e. provided that the company has sufficient cash to continue trading for a few months), a straightforward judicial liquidation will be avoided and, instead, judicial rehabilitation proceedings will be commenced with the objective of either the restructuring the company's affairs or the sale of the business as a going concern (in which case all or some of the employment contracts are transferred to the buyer).

It is only when it is anticipated that the business cannot be financed during the time needed to organise the restructuring or the sale (because, for instance, there will be not enough cash to pay the salaries) that a judicial liquidation would be commenced.

1.2 Are certain procedures listed but hardly ever used for a corporate insolvency? If so, what are the reasons for non use of these procedures?

All proceedings are used but safeguard proceedings (which are public and only available to cash-flow solvent companies) are statistically less used than others.

1.3 For those procedures that are used more often, what are the foremost reasons to use the procedures?

- Is it an immediate liquidity event,
- a foreseeable liquidity event (but not yet immediate) or
- do you see other drivers (e.g. incentives for directors to file for administration to avoid insolvent trading liability)?

From the date the company is cash-flow insolvent, directors must file for conciliation or insolvency proceedings within 45 days, otherwise they risk being disqualified as directors and could be held liable for all or part of the company's shortfall of assets.

So long as the company is solvent, its directors generally prefer using amicable proceedings (*mandat ad hoc* or *conciliation*) because (i) they are confidential, and (ii) the court-appointed mediator (*mandataire ad hoc* or *conciliateur*) does not interfere in management.

1.4 In practice, is the role that the IP has or can play, a factor that is of relevance when determining whether or not to apply for certain types of insolvency procedures?

The role which the IP may play in the proceedings may be a factor influencing the choice of the insolvency proceedings, but generally not the key factor.

In amicable proceedings, the IP cannot interfere in management, nor can they avail themselves of the use of coercive measures as against the creditors. Their role is akin to that of a mediator.

In safeguard proceedings, there are two IPs: a judicial administrator and a creditors' representative. The judicial administrator's role is limited to supervision so that directors remain in charge of the management of the company.

In rehabilitation proceedings, there are also two IPs. The judicial administrator is generally more involved in the management than in safeguard proceedings (for example, they are generally required to countersign all the directors' management decisions).

In judicial liquidation, the court-appointed liquidator is provided with all of the necessary powers to act in the name of the company.

2. Appointment

2.1 Aside from formal qualifications, are there any "soft" requirements in order to be able to take appointments as an IP? For instance, does an IP need to have gained prior experience in another field or under the supervision of a more seasoned IP?

In France, IPs belong to two separate professions.

Judicial administrators (*administrateurs judiciaires*) assist directors in managing the company and in preparing the rehabilitation/safeguard plan.

Creditors' representatives (*mandataires judiciaires*) are responsible for receiving and (as the case may be) challenging claims filed by creditors. In a judicial liquidation, the creditors' representative becomes the judicial liquidator. They are then in charge of selling the debtor's assets and distributing the sale proceeds to creditors.

The ability to act as either type of IP is strictly controlled. Specific diplomas rewarding mastery of both accounting and legal skills are required.

Until recently, individuals were also required to gain sufficient experience as a collaborator to a qualified IP. Recent reforms have introduced some flexibility, allowing access to the profession by individuals who have graduated from specific masters degrees. In practice, those individuals who qualify as IPs often accumulate certain experience as a collaborator to a qualified IP beforehand.

Both types of IPs are regulated, with necessary attributes precisely defined by law. IPs are appointed by the court at the commencement of the insolvency proceedings to fulfil the role assigned to them by law.

In amicable proceedings, the *mandataire ad hoc* or *conciliateur* is generally an IP (i.e. either a judicial administrator or a creditors' representative), although other persons may also be appointed.

2.2 Does the appointing body take prior experience into consideration when appointing an IP?

The court considers prior experience when appointing an IP and in more complex matters, will appoint the most experienced IPs.

However, in amicable proceedings, the company may propose its own choice, and this proposal will generally be followed by the court.

In safeguard and rehabilitation proceedings, French courts will generally agree to appoint the judicial administrator proposed by the debtor. However, French courts usually do not follow the debtor's

suggestions regarding the appointment of the creditors' representative (i.e. another IP) due to the fact that, in the event of a subsequent liquidation, part of the role of this latter is to establish legal actions against directors.

In large-scale insolvency proceedings, French courts appoint two judicial administrators and two creditors' representatives (or liquidators).

2.3 If stakeholders do not appoint the IP, can stakeholders influence who gets appointed?

If so, how does this work in practice?

See 2.2. In addition, the public prosecutor and the workers' council also may express views as to the choice of the IPs.

2.4 How does your jurisdiction safeguard that an IP is impartial? Are there any conflict rules and independence requirements, or restrictions on accepting an appointment? If so, how do they work in practice?

The law has strict criteria to ensure the independence of IPs. In particular, IPs are prohibited from carrying out any commercial activity other than that of IP. The accounting aspects of an IP's activity are closely monitored and regularly certified by chartered accountants.

Once appointed, IPs must inform the court of any facts which would give rise to a conflict of interest, such that their independence or impartiality might be impaired, and they should proactively request to be replaced if they believe that the conflict of interest does indeed exist.

3. Dismissal

3.1 Assuming that an IP can be dismissed upon the request of a creditor (or the debtor), in what circumstances can a request be made and how does this practically work?

The dismissal of an IP is very rare in practice.

In amicable proceedings, the debtor can easily terminate the proceedings at any time.

In insolvency proceedings, although a replacement procedure does exist, it is very rarely used. The IP's replacement may be requested by any creditor, the debtor, any IP appointed in the proceedings, the public prosecutor, the insolvency judge, and the court itself. Such a request typically arises when an IP has breached the law or code of conduct for IPs, and in particular when an IP is in a situation of conflict of interest.

3.2 Does dismissal occur often? If so, what are the consequences (if any) for the IP being dismissed?

If dismissed, an IP can be held liable for any prejudice caused to third parties under tort law. A fault and a prejudice must be proved.

3.3 How easy or difficult is it to hold an IP accountable in your jurisdiction and what other measures are available to do so?

An IP may be held responsible for any prejudice caused to the debtor or the creditors under tort law. IPs are insured against such risk.

IPs may also be subject to disciplinary sanctions if they breach their professional duties.

In cases of serious breaches, if a prejudice has been willfully caused to the debtor or to creditors, or if IPs used their powers in a way detrimental to the debtor or creditors, IPs may face criminal charges.

4. Role of the IP

4.1 Aside from the formal / statutory requirements, how does an IP – in practice – perform their role? Is the IP 'self-starting' with a focus on (for instance) realising assets or is the IP more prone to await and act upon instructions by creditors or the court?

IPs do not receive instructions from the court or the creditors. They must act in accordance with the law, which precisely defines what their respective role is.

During safeguard proceedings, the judicial administrator is responsible for monitoring management of the directors and assisting the directors in establishing a safeguard plan.

During rehabilitation proceedings, the judicial administrator has a role similar to the one in safeguard proceedings. In addition, where no prospect of continuation exists, the judicial administrator assumes responsibility for identifying candidates to acquire the debtor's business.

During liquidation proceedings, the liquidator is responsible for terminating contracts, selling assets and distributing proceeds to creditors.

In all proceedings, frequent exchanges between the IP, the court, the insolvency judge and the public prosecutor are provided for by the law:

- the insolvency judge is often required to authorise certain acts of the debtor or of the IP;
- the court is often required to rule on important decisions such as the authorisation to sell the debtor's business as a going concern, the conversion of rehabilitation proceedings into liquidation proceedings and the adoption of a continuation plan; and
- the public prosecutor is present at the hearings and gives its opinion on numerous important decisions.

4.2 Do IPs have much leeway to determine the manner in which they perform their tasks?

As described above, an IP's tasks are clearly and precisely defined by law.

5. Investigations

5.1 Does an IP also have an inquisitive role?

Generally speaking, IPs do not have an inquisitive role, although they must report any criminal offences they become aware of to the public prosecutor.

However, a liquidator is responsible for bringing legal actions against directors if there has been any mismanagement in respect of the company. For that purpose, the liquidator may request that the insolvency judge appoints an expert to investigate acts of mismanagement.

5.2 Does the IP have an obligation to conduct investigations, or is the IP otherwise generally prone to investigate issues surrounding the insolvency and institute claims as a matter of practice? If so, how often does this occur and is an IP often successful?

See question 5.1 above.

There is no obligation for the IP to launch in-depth investigations, but there is a responsibility to identify acts of mismanagement, at least *prima facie* on the basis of available information, and to launch legal actions against directors as the case may be.

Legal actions against directors are common. The liquidator may request a general prohibition on the directors running a business for a certain period of time and / or to hold directors personally liable for all or part of the company's debts. Criminal sanctions may also apply in specific cases (e.g. where managers diverted corporate assets).

The legal concept of mismanagement (*faute de gestion*) allowing IPs to hold directors personally liable is rather wide and often results in successful actions. However, a recent reform has narrowed the scope of this concept to exclude "mere negligence" (*la simple negligence*).

6. Supervision

6.1 How on a practical level is supervision of an IP organised?

During the proceedings, the insolvency judge, the court, the public prosecutor and (as the case may be) some creditors appointed as "controllers" monitor the IP's actions.

In addition, compliance with statutory duties is monitored by the national association of French IPs (*Conseil National des Administrateurs Judiciaire et des Mandataires Judiciaires* (CNAJMJ)). IPs are systematically audited every three years by the CNAJMJ and may be subject to occasional audits on any aspects of their practice.

Accounting and financial aspects of the IP's practice are audited twice a year by chartered auditors.

6.2 Is the supervising body sufficiently equipped to perform its role and do IPs experience that they are genuinely supervised?

As indicated above, controls are regularly performed by the national association of French IPs and by auditors.

6.3 Do stakeholders have sufficient ability to act against or correct the IP if and when this is deemed necessary? If so, how is this achieved?

Debtors and creditors may act against the IP by suing if a prejudice has been caused or (exceptionally) by requesting their replacement as described above.

7. Disclosure obligations

7.1 Assuming that an IP is obliged to make (periodic) public disclosures for the benefit of creditors / interested parties, do these public disclosures provide sufficient insight into how the insolvency matter is developing? Are they sufficiently detailed and accurate?

In a judicial liquidation, the liquidator must file an annual report on the liquidation process with the commercial registry. This report is available to the debtor or any creditor.

In practice, this obligation is frequently not complied with, and little information is available although liquidation processes may be quite lengthy.

8. Influence by creditors

8.1 Assuming that creditors' committees can be formed, do they in practice have sufficient ability to oversee and / or influence the process? If so, how?

In safeguard and rehabilitation proceedings, creditors' committees can be formed (more exactly, classes of affected parties). If so, they vote on the debt restructuring plan. In this context, a cross-class cram down may be decided and, in rehabilitation proceedings only, creditors may propose an alternative plan to the one prepared by the debtor assisted by the judicial administrator.

No creditors' committees are formed to oversee the liquidation process. However, one to five creditors can be appointed as controllers (*contrôleurs*). In such capacity, they benefit from privileged access to information (e.g. they may participate in key court hearings) and they are entitled to initiate legal actions against the directors in the event a liquidator fails to do so.

9. Remuneration

9.1 Is IP remuneration an issue in your jurisdiction? If so, are IPs insufficiently remunerated?

IP remuneration is determined by several factors fixed in great detail by law (such as the sale price of the assets etc.). The final remuneration of an IP is determined by the judge at the conclusion of the proceedings.

The payment of such remuneration receives priority in comparison to all other debts, but for certain debts relating to salaries. This ranking is the subject of much debate.

In amicable proceedings, the remuneration of the IP is determined by contract but is controlled by the judge. The judge will make a final determination based on the contract.

9.2 Are IP fees something stakeholders can object to? If so, does this occur often (and successfully)?

It is possible to challenge the decision of the judge deciding on the remuneration of the IP. However, this is rare given that the criteria are precisely defined by the law.

9.3 Are there any means for an IP to obtain state funding for remuneration and / or investigations?

State funding can be obtained in the context of a judicial liquidation however this is minimal. If the sale of the debtor's assets does not allow the liquidator's remuneration to reach a threshold of EUR 1.500, state funding ensures payment of this minimum amount.