Comparative Analysis of the Informal, Non-Insolvency Procedures of the UK and France

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Introduction

During the last decade, the foundation of a "second-chance culture" has been evolving in Europe. The introduction of rescue orientated reforms, both in the United Kingdom and France, signifies that the two jurisdictions place great emphasis on business recovery. This paper will briefly consider the impact of the reforms within the two jurisdictions. However statutory law tells only part of the story in reorganisations and the aim of this paper is, furthermore, to consider the various informal tools that are available in the United Kingdom and France and to provide a comparative analysis of the approach taken towards corporate rescue within the two jurisdictions.

The advantages of early-stage intervention

Although various formal and informal steps may be taken in order to give effect to a successful rescue, it is submitted that a traumatised company will often benefit from intervention before it gets to the stage of insolvency. In fact, it has been noted that most rescues are achieved through informal rescue, that is, rescue without recourse to the formal reorganisation laws.[1] Informal rescue mechanisms have a variety of advantages for the ailing company. From a

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[1] See Sandra Frisby, 'Report to the Insolvency Service: Insolvency Outcomes' (Insolvency Service, London June 2006).

director's and also a shareholder's perspective, engaging in informal rescue is preferable as it prevents any adverse publicity in relation to the company's financial troubles and hence protects its goodwill and reputation.[2] It could be argued that, by pursuing informal rescue, the company can effectively avoid the stigma which is attached to corporate failure and that the realisable value of its assets can be protected.[3] Moreover, one could argue that informal rescue is not as costly as court proceedings. However, it should be noted that informal rescue is not a cheap method of rescue[4], as the turnaround professionals, who co-ordinate the process, often charge very hefty fees.[5]

Moreover, since there is no court involvement in informal rescue, one could argue that the process is more flexible.[6] Nevertheless, a disadvantage of informal reorganisation is that the process is of a contractual nature, hence there is great reliance on a consensus being achieved with the creditors. The fact that there is a need to obtain the consent of all creditors during an informal reorganisation attempt arguably negates the advantages of informal rescue, as obtaining consent from dissenting creditors could prove to be a time-consuming and expensive course of action.[7]

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[2] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles*, (2nd ed. Cambridge, 2009) 278.

[3] Ibid, 251-252.

[4] For instance see ibid at p.309, where it is stated that the implementation cost of the London Approach have been high, i.e. up to £6 million. Admittedly, the London Approach is designed to be used in the context of large entity workouts (including banks), but the issue of costs remains a live one for all types of workout.

[5] Karen Hopper Wruck, 'Financial Distress, Reorganisation and Organisational Efficiency' (1990) 27 Journal of Financial Economics 419–444, 419, See also Alice Belcher, *Corporate Rescue*, (Sweet & Maxwell, London, 1997) 121.

[6] For instance the London Approach.

[7] It could be said that a formal procedure, such as the Company Voluntary Arrangement in the United

It could be argued that intervention at an early stage is a crucial aspect of corporate rescue and it appears that, from early years, the insolvency law regimes of the two Member States included insolvency-prevention mechanisms. These mechanisms are being increasingly used before the technical moment of insolvency supervening and are "colonizing" the area formerly occupied by informal procedures, such as workouts and turnaround mechanisms. For instance, in France, procedures such as the "ad hoc mandate" and "conciliation" made their appearance in the early 1980s and were primarily designed to encourage an early stage intervention by the existing management.[8] In addition, in the United Kingdom, with the exception of one of the oldest rescue devices in the world, namely the Scheme of Arrangement, in 1986 the CVA procedure was introduced following the recommendations of the Cork Report.[9]

An overview of the French informal rescue laws

In the mid-2000s, France, in a quest for an ideal insolvency system, introduced the 2005 Law which is designed to improve the efficiency of pre-insolvency institutions, the proper supervision of rescue plans and the simplification of liquidation procedures.[10] Arguably, the

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Kingdom, could prove more effective, as far as consent is concerned, since an approval in excess of 75% in value would suffice. A Part 26, Companies Act 2006 scheme of arrangement could also be used for solvent entities, which would have the same effect.

[8] See Marie-Jeanne Campana, 'A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France' in Katarzyna Gromek Broc and Rebecca Parry*, Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europ*e, (Kluwer Law International, 2004).

[9] The Report of the Insolvency Law Review Committee, Insolvency Law and Practice, Cmnd 858 (1982, HMSO, London).

[10] Paul Omar, 'French Insolvency Law: The 2004 Project and Reform Perspectives' (2005) 2 (2) Int. Corp. Rescue 65-77, 67.

new law effectively improves the pre-existing pre-insolvency framework and, in particular, strengthens the *mandat ad hoc* procedure. In addition, the old amicable settlement procedure has gone through transformation and has been renamed as conciliation. Finally, the crucial contribution of the Law of 2005 to the French corporate rescue regime is that it creates a new debtor-in-possession procedure, namely the safeguard procedure, which is aimed at promoting the idea of intervention at an early stage, while leaving the company's incumbent management in the "driver's-seat". It should be noted that the Law of 2005 itself has been subject to reforms[11] in order to make the safeguard procedure more attractive, as this procedure in fact has enjoyed very limited use since its inception in 2005.[12]

It should be noted from the start that the issue of corporate rescue is approached in France in a rather different way, when compared to the United Kingdom.[13] A sharp distinction can be drawn between the United Kingdom system, which traditionally favours the interests of creditors, and the French system, which is primarily geared towards the preservation of an ailing company and hence serving to safeguard, wherever possible, the jobs of employees. Nevertheless, it should be noted that both France and the United Kingdom have introduced reforms, which bring the two systems closer to each other. It could be argued that the French

[11] See The French Ordonnance of December 18, 2008 on the reform of the law for businesses in difficulty, amending the law of July 26, 2005, which was published in the Journal Officiel of December 19, 2008.

[12] Nicole Stolowy, 'Transparency and Prevention for Corporate Bankruptcy: A US- France Comparison' (2009) JBL, 525-542, 527. See also Paul Omar, 'French Insolvency Law: Remodeling the Reforms of 2005' (2009) 6 ICCLR 214-219, 215.

[13] Rebecca Parry, 'Introduction' in Katarzyna Gromek Broc and Rebecca Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe,* (Kluwer Law International, 2004).

insolvency law reforms in 2005 bear a resemblance to the Anglo-American legal system,[14] whilst the United Kingdom has softened its traditionally "creditor friendly" approach and introduced more collective insolvency procedures. In France, the preservation of a company is a matter of critical importance and is a paramount objective. In essence, certain groups' interests, mainly those of creditors, may be sacrificed in order to rescue the company.[15] A significant feature of the French legislation is that it is specifically designed to urge directors to become aware of their companies' financial difficulties at an early stage and consequently to take steps so as to recover their position.[16]

The French corporate rescue system is arguably a very sophisticated system that has developed over many years. There are two types of treatment that may be adopted in order to help companies in difficulties, namely the out-of-court treatment and the judicial treatment. In particular, following the 2005 reforms, there are now three pre-insolvency institutions, the newly introduced safeguard-preservation procedure ("*sauvegarde*"), the renamed conciliation procedure ("*conciliation*")[17] and the renewed ad hoc mandate ("*mandat ad hoc"*).[18]

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[14] The US Chapter 11 was used as a model for the recent reforms in French insolvency law, in particular the Chapter 11 concepts of amicable settlement and the pro-active involvement of creditors in any ongoing settlement regime. See Cécile Dupoux & David Marks, 'Chapter 11 a la Française: French Insolvency Reforms' (2004) 1(2) Int. Corp. Rescue 74-77, 74.

[15]See Rebecca Parry, note 13 above, 13

[16] Marie-Jeanne Campana, note 8 above, 34.

[17] This was known as 'amicable resolution' (*règlement amiable*) prior to the Law of 2005.

[18] A pre- condition that needs to be satisfied in order to use this process is that the company is not in "*cessation de paiements*". Cessation of payments may be defined as the impossibility for a business to satisfy the debts which are due with the assets that are available. See Paul Omar, & Anker Sorensen, *Corporate Rescue Procedures in France* (Kluwer Law International, 1996) 11.

The “ad hoc mandate”

At a stage prior to insolvency there are two pre-existing (before the 2005 reforms) procedures designed to promote corporate rescue, namely the conciliation procedure and the ad hoc mandate. The ad hoc mandate is a procedure that has developed predominantly as a result of the practice of the Paris Commercial Court.[19] The initiation of this process usually involves the ailing business making a request to the President of the Commercial Court in order to appoint a “mandatee”.[20] The request for the Court’s assistance can be in the form of a registered letter and must be accompanied by a plan stating the measures that the company is going to take in order to repay its debts and also its plans for restructuring its business. Where the court is convinced that the company is likely to overcome its difficulties by means of a scheme of arrangement, it will order the appointment of a mandatee. Once the debtor and the creditors have agreed on a scheme of arrangement, the mandatee will establish its terms and conditions. It is noteworthy that the agreement will be binding upon the agreed parties.[21]

An advantage of the ad hoc mandate is that it is subject to fewer formalities than amicable resolution and that, importantly, it offers more flexibility for informal and private negotiations between the debtor company and its debtors. The confidential character of the procedure crucially allows negotiations between the debtor company and its creditors without raising

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[19]See Cécile Dupoux & David Marks, ‘Chapter 11 a la Française: French Insolvency Reforms’ (2004) 1(2) Int. Corp. Rescue 74-77 , 75.

[20] Paul Omar, & Anker Sorensen, ‘The French Experience Of Corporate Voluntary Arrangements’ (1996) 7(3) ICCLR 97-103 (referring to the pre-2005 regime).

[21] See Paul Omar, ‘The Future of Corporate Rescue Legislation in France: Part 1: History and Reforms’ (1997) 8 (4) ICCLR 129-134..

undue public attention. In addition, confidentiality is a significant quality of the "*mandat ad hoc*" procedure, as it averts any unnecessary rumours, which could have a catastrophic effect on a rescue attempt.[22] However, it has been argued that, beyond the incentives that the current rescue regimes provides for directors to take early steps in order to avert a crisis, it is nevertheless the mindset of those involved in rescue which defines, largely, the level of success of a procedure. Accordingly, because directors regard the court as solely a "purveyor of sanctions" and are reluctant to approach the Commercial Court in order to prevent a financial crisis at an extra judicial stage, it is often the case that, when they decide to implement an extra-judicial settlement, it is too late and the only way forward would be judicial proceedings.[23]

Moreover, a significant drawback of this process is that no specific time frame is set out within which the process must be completed. Accordingly, the length of the process is left to the discretion of the President of the Court, although generally the duration of the mandate is short (with a maximum of 3-4 months). Another noteworthy disadvantage is that the availability of the procedure differs from court to court, depending on the experience of the judges.[24] Nevertheless, where difficult cases are concerned, the lack of a specified time frame could also prove to be a great advantage as the debtor company could enter a long-lasting negotiation process in order to devise a viable reorganisation plan. In such cases it is common practice that the ad hoc mandate will be the preliminary stage to the amicable settlement procedure, because,

[22] However, it has been argued that confidentiality of extra-judicial procedures is only theoretical in small or medium sizes towns, so that directors fear that the anxiety that will be aroused in their economic and financial partners by the disclosure of their difficulties may in fact worsen the company's financial position. See Marie-Jeanne Campana, note 8 above, 32.

[23] Ibid.

[24] See Paul Omar, & Anker Sorensen, note 20 above.

as opposed to the latter, there is no time-limit within which a creditors' agreement must be reached.

It should be noted that, following the enactment of the Law of 2005, an increase in the use of pre-packaged agreements has been noted, as part of the safeguard procedure.[25] Arguably, the 2005 reforms boosted the use of the *mandat ad hoc*, as the procedure may be used in order for an agreement to be reached prior to a safeguard plan. Once a pre-packed agreement is complete, the safeguard procedure can be commenced. Effectively, this allows for quicker reconstruction of a company's affairs, as a safeguard plan can be approved shortly after the opening judgment (practice demonstrates that this may range from thirty to fifty days) in order to speed up the new financing described in the pre-established plan.[26]

The Conciliation procedure

Following the reforms, introduced by means of the Law of 2005, the preceding preventative mechanism of amicable settlement has undergone significant changes in order to improve the procedure and make it more attractive to debtors. The new conciliation procedure, similar to its predecessor, is designed to bring closer creditors and debtors, in order to negotiate possible solutions to the problems of the company, other than liquidation. The process of amicable resolution is of informal and voluntary nature. Beyond the cosmetic changes to the amicable

[25] In addition, in 2010 further reforms explicitly encouraged the use of pre-packs, by making available a new accelerated financial preservation (*sauvegarde financière accélérée*) procedure. For a detailed analysis of the accelerated financial preservation procedure, see Paul Omar, 'Preservation and Pre-packs *a la Francaise*: The Evolution of French Insolvency Law' (2011) 22 (8) I.C.C.L.R. 258-263, 262.

[26] See Isabelle Didier, 'Pre-Packs-French Style' Paper presented at the INSOL Europe Annual Congress in Stockholm on 1-4 October, 2009.

settlement procedure,[27] the changes introduced by the Law of 2005 are of a far more substantial nature.[28] The new conciliation procedure is designed to provide the troubled company with breathing space and encourage negotiations on a confidential and contractual basis with the company's creditors at an early stage. Conciliation is available to businesses experiencing legal, financial or economic difficulties, actual or forecast, which have ceased payments for no more than forty-five days.[29] This allows technically insolvent companies to use this institution, hence lessening the restricting effect of the precondition that a company should not be unable to pay its debts as they fall due.[30] Under the previous regime, it was necessary that a debtor, prior to entering an amicable resolution, was not unable to pay its debts. Additionally, a debtor must have been in a legal, economic or financial situation that presented him with difficulties, which could not be solved in the ordinary course of events by finance from a third party that would cover his indebtedness and which would at a later stage lead to insolvency.

The procedure is opened by the President of the Commercial Court, who, upon the request of the chairman of the troubled company, shall appoint a conciliator (*conciliateur*).[31] It is interesting to note that any person whose experience is likely to facilitate the course of the proceedings and who is, in the view of the President of the Court, capable of fulfilling the duties and responsibilities of conciliation can be appointed as a conciliator. The powers of the

[27] The amicable settlement procedure has been modified and renamed as 'conciliation'.

[28] See Paul Omar, 'Insolvency Law and Practice in France' in Katarzyna Grome Broc and Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2006) 140.

[29] Article L 611-4 of the Commercial Code (Inserted by Article 5, Law of 2005). It could be argued that tardy action by the directors to seek help may have the effect of going beyond this (rather limited) period.

[30] Law of 1994 L. Article 35.

[31] Article L 611-6 of the Commercial Code (Inserted by Article 5, Law of 2005).

conciliator are partly set out by statute and partly by the President of the Court. However, the conciliator is by no means impotent; rather he is able to dramatically affect both the course and the outcome of the proceedings. In fact, the mission of the conciliator is to assist the debtor company to enter into negotiations with its principal creditors and any other affected parties, such as banks, and to conclude an agreement, which would ensure the continuation of the company's business.[32] An agreement should be concluded within a period not exceeding four months and may be extended by a month only.[33]

Ratification of the agreement and the role of the court

Under the previous regime, once an agreement had been concluded, it could be simply ratified by an order of the President of the Commercial Court. This allowed for the procedure to retain its crucially confidential character. However, it did not mean that the agreement was ratified for all purposes and for all time, as, on occasion, the court, in subsequent insolvency proceedings, in reviewing the agreement, had to modify the date of insolvency prescribed in the original order.[34] That in its turn created a "suspect period" during which certain transactions

[32] Article L 611-7 provides that 'the conciliator may suggest any proposal, which is relevant to the preservation of the business, the pursuit of economic activity and the maintenance of employment. Additionally, useful information is communicated to the conciliator from the debtor or the President of the Commercial Court.

[33] Article L 611-6.

[34] Cécile Dupoux, & David Marks, 'French Bankruptcy Law: Putting the Safeguards in Place' (2006)3(4) Int. Corp. 207-214.

Rescue, at p. 209.

could be set aside and liability could potentially arise for those who delayed in filing for insolvency.[35]

The Law of 2005 importantly redresses this problem and enhances the court's involvement in the conciliation procedure by requiring it to ratify the conciliation agreement in certain circumstances.[36] Under the new regime, there is an option to have the conciliation agreement approved either by the President of the Commercial Court or by the Court itself. The crucial difference between the two being that, where an agreement has been approved by the President of the Court (*constatation*) confidentiality is retained, whereas, where enforced by the Court, the judgment becomes public (*homologation*).[37] It could be argued that making the agreement public could have an adverse effect upon the debtor company, as it could alarm its creditors.[38] However, it is important to note that homologation only takes place upon request of the debtor and where the agreement does not harm the interests of any non-signatory creditors.

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[35] When the court decides to commence insolvency proceedings, it fixes the date on which the company is deemed to become insolvent (this can be 18 months before the opening of insolvency proceedings). The period of when the company was deemed to be insolvent and the date where the filing for insolvency proceeding took place, is called the 'suspect period'.

[36] Pursuant to Article L 611-8 of the Commercial Code, at the request of the debtor, the agreement is validated by the Court and becomes public if the following conditions are present: a) The debtor is in not is cessation of payments or the agreement brings this to an end; b) the terms of the agreement are of a nature to ensure the continuity of the business' activity; c) the agreement does not prejudice and makes provision for the interests of non-signatory creditors.

[37] Pursuant to Article 611-9 of the Commercial Code, the court makes a public judgment having previously received submissions in chambers from the company, the creditors who are party to the agreement, the conciliator, the public prosecutor and representatives from any works council and any other party that appears to be relevant and useful.

[38] See Marie-Jeanne Campana, note 8 above, 32.

Additionally, as mentioned above, homologation has a stronger effect than *constatation* as the court is unable to question the date when the company's insolvency was pronounced.[39]

It could be argued that, although the publicity of an agreement could worsen the already ailing financial position of a company that the need to eliminate the stigma which is attached to corporate insolvency was emphasised in France. In particular, President Sarkozy, months before leaving office, highlighted the need to provide the right framework for enhancing the efficiency of French insolvency procedures and the need to afford a second chance to ailing companies and their managers. In particular he stated that "the law should give to the manager of a firm the means to get going again; it should help him to recover confidence when he is faced with difficulties; it should convince him that failure is not irreversible. The vision in France of a failure that is final must come to an end."[40]

Furthermore, from a creditor's perspective, it could be argued that one may prefer to have resort to a simple court ratification rather than homologation, because of the confidentiality that this process entails. On the other hand, however, a formal approval of the agreement affords extra protection to creditors and persuades them to extend more generous credit arrangements.[41] A significant innovation of the Law of 2005 is that it affords a super-priority to creditors who have injected new funds to the troubled company or continued to supply goods or services during the conciliation process. This priority entitles the abovementioned creditors to rank above all debts arising prior to the opening of conciliation.[42] Similarly, the same priority will

[39] See Cécile Dupoux, & David Marks, note 34 above, 209.

[40] See Paul Omar, 'French Insolvency Law: Remodeling the Reforms of 2005' (2009) 6 ICCLR 214-219, 219.

[41] Ibid.

[42] See Article L.611-11 of the Commercial Code.

be afforded to those creditors in the context of any formal insolvency proceedings opened, as a result of the failure to endorse the conciliation agreement.[43]

The conciliation procedure is undoubtedly a significant pre-insolvency mechanism. Nevertheless, there is a range of reasons why the process may fail. For instance, the debtor may seek help where it is too late and, consequently, where the company's difficulties have reached such a stage that recovery is impossible. Moreover, where the debtor's expectations for the salvation of the company as a going concern are too high, the creditors may not be convinced of the success of the process. Additionally, the process is likely to fail where, although an agreement has been reached, a creditor is unwilling to respect its terms.[44]

Moreover, the new law, importantly, addresses the concerns of banks and states that, except in cases where blatant fraud or inappropriate behaviour is manifested, those creditors who extend funds with a view to support the continuation of the ailing business, cannot at a later stage be held liable for improperly extending credit to the debtor.[45] This is known as the principle of "improper support" ("*soutien abusif*"), which developed in case-law in the mid-1970s by the Commercial Chamber of the *Cour de Cassation*. The doctrine imposes liability upon a lender for knowingly extending finance that is beyond the capacity of the debtor, thus contributing to the aggravation of the company's perilous situation and leading to its subsequent insolvency.[46] As stated above, the Law of 2005 restricts lender liability for improper support. This proved

[43] Article L. 611-12 of the Commercial Code.

[44] Paul Omar, 'French Insolvency Law: The 2004 Project and Reform Perspectives' (2005) 2(2) Int. Corp. Rescue 65-77.

[45] Ibid, 69.

[46] Ibid. See also Paul Omar, 'Reforms to Lender Liability in France' (2006) 3(5) Int. Corp. Rescue 277-284.

necessary in order to protect creditors who, in the context of the conciliation process or a rescue plan, offered post-commencement funds.

The safeguard procedure- Chapter 11 a la Française

The new "safeguard" procedure is the core change introduced by the Law of 2005 in order to facilitate the reorganization of companies that are faced with financial crisis but that are not yet insolvent. The safeguard procedure is inspired by the American Chapter 11 model.[47] Similarly to Chapter 11, the safeguard procedure is "a debtor in possession" procedure that allows the incumbent management to continue being in charge of the ailing business in order to help it overcome its financial difficulties. For instance, a safeguard plan could provide for a wide range of solutions, such as waivers of debt, a rescheduling of debt, a change in the company's control, or a sale of certain corporate assets.

The safeguard procedure provides a significant incentive to directors, who are encouraged to take early steps in order to save their company. However, a key pre-condition, which has to be satisfied by a debtor who wishes to enter into safeguard proceedings, is that the business is not insolvent. It is fundamental that the debtor has not actually ceased payments, as this remains the qualification for entering judicial rescue.[48] The Law of 2005 originally required that, in order for a debtor to be able to use the safeguard procedure, it should be shown that the

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[47] Richard Jadot, & Lucas D'Orgeval, 'The Reform of French Insolvency Proceedings' (2005) 2(1) Intern. Corp. Rescue 16-17, 16.

[48] For the importance of the concept of 'Cessation de Paiements' see, Paul Omar, 'Defining Insolvency: The Evolution of the Concept of 'Cessation de Paiements' in French Law' (2005) 2 E.B.L.R. 311-327, 311.

company is faced with difficulties that it is not able to surmount and the nature of which is capable of leading to cessation of payments.[49] However, it is important to note that the reforms amended the criterion for entering into the safeguard procedure.[50] In particular, it is possible for a debtor to use the safeguard procedure before actually being in default on payment, on the condition that the debtor "provides proof of difficulties he cannot overcome".[51] Subsequently, it could be argued, on the one hand, that the reforms have drastically facilitated the entry for distressed companies into the safeguard proceedings. On the other hand, it could however, be argued that the changes to the entry requirements could cause additional uncertainty for creditors as to when a debtor may request the court's protection.[52] Nevertheless, it has been argued that the amendment of the test of entry into the safeguard procedure applies, in actual fact, more in theory than in practice, as the debtor must always prove to the court the genuineness of his financial difficulties.[53]

The safeguard procedure is implemented by a court judgment at the request of the debtor.[54] The court will appoint an administrator (*administrateur judiciaire*) where proceedings are initiated in relation to businesses that are above a threshold, which is fixed by decree of the

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[49] Article 12, amending Article L 620-1 of the Commercial Code.

[50] The French Ordonnance of December 18, 2008 on the reform of the law for businesses in difficulty, amending the law of July 26, 2005, which was published in the Journal Officiel of December 19, 2008.

[51] Article 12 of the Ordonnance.

[52] See Freshfields Bruckhaus Deringer LLP, 'French Insolvency Law- Reform of Safeguard proceedings Comes Into Effect On 15 February 2009' 13 February, 2009, 2.

[53] J. Vallens, 'Flexibility in France', Eurofenix, 2009 (Summer) 22.

[54] Article 621-3 states that the judgment opens an observation period for a maximum duration of six months, which may be renewed once by a reasoned decision at the request of the debtor, the administrator or the Public Prosecutor.

Council of State.[55] It should be noted that, by means of the reforms of 2008, the role of directors has been significantly enhanced, as it is now possible for the debtor to nominate an administrator for appointment by the court.[56] The administrator is required to supervise or assist the debtor in the performance of some or all management operations.[57] The judgment also triggers an automatic moratorium ("*période d'observation*") under the protection of which the debtor is permitted to propose a recovery plan.[58]

The role of the court in the implementation of the continuation plan

It could be argued that a limited role is attributed to the court during safeguard proceedings, in order to positively encourage distressed companies to seek the protection of the court at an early stage, prior to a real threat of insolvency. The Law of 2005 contains a further incentive for debtors to use the safeguard provision, by preventing the courts for removing the company's directors, unless the Public Prosecutor makes a request to this end.[59] Prior to the reforms, the removal of directors was a sanction imposed automatically upon the initiation of rescue

[55] Article 17, amending Article L 621-4 of the Commercial Code. However the court is not bound to appoint an administrator, where proceedings benefit a debtor, whose number of employees and gross turnover are below the threshold fixed by decree. This discretionary facility to appoint, however, is likely to be exercised in situations where the court is not satisfied of the directors' suitability to remain in control, although statistics of such discretionary appointments are not available to evidence whether this facility is used and how often.

[56] Article 14 of the Ordonnance.

[57] Article 23 Law of 2005, amending Article 622-1, Commercial Code.

[58] Article 12, amending Article L 620-1 of the Commercial Code. See also 'Stay Ordered Because Of French *Sauvegarde* Proceedings – Case Comment' Insolv. Int. 2007, 20(3), 46.

[59] Article 626-4, Commercial Code.

procedures.[60] It is noteworthy that the sanctions section of the Commercial Code has been amended so as to ensure that directors who resort the safeguard procedure are not unduly exposed to the risk of sanctions.[61]

Although the directors are at the helm of safeguard proceedings, the court may exercise its discretion, where it appears that the debtor is in cessation of payments, in order to convert the proceedings into judicial administration or liquidation proceedings.[62] This could be one of the reasons why directors are reluctant to resort to safeguard proceedings,[63] as conversion of proceedings to those of judicial rescue would mean that the management could be ousted by the court. It could be argued that, during the first year of the application of the safeguard procedure, the directors, threatened by potentially being removed from the company's management, preferred to resort to conciliation proceedings, where the outcome of a case is not solely dependent upon the judge hearing the case, but rather extensive negotiations take place between the debtor and its principal creditors.[64]

The role of the creditors

[60] Paul Omar, note 28 above, 141.

[61] Ibid, 142.

[62] See Article 22 Law of 2005.

[63] A statistical analysis carried out by Euler Hermes demonstrates that the safeguard procedure has been applied to only 1% of the insolvency proceedings opened during 2006.

[64] See C Theron & Vincent Pellier 'Why Did the French Invent the Rescue Procedure?' (2007) Eurofenix, Summer, 19.

Notwithstanding the reforms, it could be argued that France remains a pro-debtor/employee jurisdiction. However, the new regime portends changing attitudes, as it affords greater protection to creditors, who are involved in pre-insolvency proceedings. Notably, the safeguard procedure is seeking to strike a balance of preserving an ailing business while satisfying the creditors.

With regards to businesses whose number of employees and gross turnover exceeds the threshold, the Law of 2005 provides for a key novelty. It is stated that a financial creditors' committee and a principal suppliers' committee will be set up.[65] The role of the two committees is to approve the rescue proposals submitted by the debtor, assisted, it being the case, by the administrator. The establishment of the two committees is designed to increase the creditors' involvement in developing a viable reorganisation rescue plan.[66] The "preservation" procedure involves an extensive negotiation process, between the debtor and the creditors, who must co-operate in order to achieve a settlement of the company's debts.

The draft rescue plan must be presented for approval before the two creditors' committees within two months of their being formed. Following discussions with the debtor and the administrator, the committees will vote on the draft plan. It is important to note that, under the Law of 2005, a decision was taken, within a further period of thirty days, by each committee, by a majority of its members representing at least two-thirds of total amount of the debts owed to all the members of the committee as indicated by the debtor and certified by the company's

[65] Article 620-1 Commercial Code.

[66] Isabelle Didier, 'Creditors' Rights in France after the Reforms of 26 July 2005- Part II' (2007) 4(5) Int. Corp. Rescue 241-244, 241.

auditors.[67] However, following the reforms of 2008, the voting rules on creditors' committees have been amended. Accordingly, approval of a plan shall require only a vote in favour by committee members representing at least two-thirds of the claims by value of that committee. This effectively prevents creditors from splitting their debt among various entities of the same group in an attempt to obtain a majority in number.[68]

The subsequent exchange of opinions and recommendations form the final draft, which is submitted to the court for validation. Once the court has finally endorsed the rescue plan, it becomes binding upon all members of the committees.[69] However, dissenting or non-participating creditors are not bound by the decisions of the committees. Creditors, who are not members of the committees, must be consulted in parallel as to the strategy of settling the debts owed to them.[70] The role of the court is rather limited, as, in validating the plan, it must do so in conformity with the suggestions of the two creditors' committees. In addition, the court must ensure that the interests of all creditors are sufficiently protected.[71]

The Law of 2005 strengthens further the rights of creditors. It is provided that the judge supervising the proceedings may appoint a technical expert[72] and up to five creditors[73] in order to assist him in his mission to supervise the management of the business. The appointed

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[67] Article 626-30 Commercial Code.

[68] See Freshfields Bruckhaus Deringer LLP, 'French Insolvency Law- Reform of Safeguard proceedings Comes Into Effect On 15 February 2009' 13 February, 2009, 2.

[69] Article 626-29 to 35, Commercial Code.

[70] Article 626-33 Commercial Code.

[71] Article 626-31 Commercial Code.

[72] Article 626-9 Commercial Code.

[73] Article 621-10 Commercial Code.

creditors, who are to act as "monitors" ("*contrôleurs*"), must not be associates of the debtor and must hold no shares in the company. The inspectors may have access to all documents transmitted to the administrator and the judicial nominee.[74] The option to appoint inspectors, who must be consulted and informed throughout the proceedings, already existed prior to the reforms. However, the Law of 2005 strengthens the position of the controllers, as it provides that, in case of default, they may bring a claim against the debtor in the collective interest of creditors as a whole.[75]

Moreover, public creditors, such as financial authorities and social security bodies, account for a very substantial part of the liabilities of distressed companies.[76] It is significant to note that the Law of 2005 introduces a "principle of forgiveness" in respect of public claims.[77] In other words, public creditors may consent, in parity with the efforts agreed by the other creditors, to waivers of all or part of the debts owed to them by the debtor company.[78] Therefore, public creditors, such as the "tax administration authority", are authorised to grant a waiver for the whole of any directly paid taxes, such as corporate income tax. In addition, indirect taxes, such as VAT, may be deferred, but only as to interest on late payments, accumulations or other penalties.[79]

[74] Article 621-11 Commercial Code.

[75] Article 622-20 Commercial Code.

[76] See Isabelle Didier, note 67 above, 242.

[77] Ibid.

[78] Article 626-6, Commercial Code. The conditions for the waiver of debts are determined by a decree of the Council of State.

[79] Article 626-6 para. ii, Commercial Code.

It could be argued that having public creditors involved in waivers of debts is a clear indication of the legislature's intention to promote a metamorphosis of the rescue culture of France. It is noteworthy that, prior to the 2005 reforms, public creditors were paid-off on a priority basis, in respect to debts owed to them.[80] Therefore, the introduction of the principle of "debt forgiveness" in relation to public claims is a step that would be welcomed by private creditors, who may now achieve a return sooner than they would have otherwise would have done.[81] In addition, "debt forgiveness" is only possible in the context of the safeguard procedure and not judicial reorganisation, hence making safeguard proceedings more attractive for private creditors.

As mentioned already, similarly to conciliation, in safeguard proceedings, creditors who, in order to support the continued operation of a distressed company, have injected new funds into it, are conferred a super-priority by the Law of 2005.[82] This could be seen as a reward for creditors who promote corporate rescue at a pre-insolvency stage.

Nevertheless, in assessing the effectiveness of the safeguard procedure, one could say that the great expectations over the effectiveness of the Law of 2005 have not been met. Although the safeguard procedure was used in high profile cases, such as Eurotunnel,[83] it should be noted

[80] A useful comparison may be drawn here to the Enterprise Act 2002 reforms and the abolition of the preferential status of the Crown.

[81] See note 77 above.

[82] Article L. 611-12 of the Commercial Code.

[83] See judgment of the Paris Commercial court: greffe number No 2006/1903. See also INSOL International Case Study Series 1, Eurotunnel Plc & Eurotunnel S.A. And Associated Companies, 2nd August 2006 and 15th January 2007, available at http://www.rovigo.ro/images/INSOLInternationalTechnicalCaseStudy1.pdf.

that its usage only represents a nominal percentage of all insolvency proceedings in France since the law came into force. It has been argued that the main reason for the significantly limited success of the safeguard process is the stigma, which is attached to insolvency proceeding in France. Arguably, debtors, scared of the stigma of insolvency, delay in filing for the commencement of safeguard proceedings and, in most instances, it is inevitable that the company becomes insolvent. Hence, the company is required to enter a judicial re-organisation procedure, if not to pay the ultimate price of entering liquidation.

Finally, it should be noted that the Eurotunnel case revealed certain flaws of the safeguard procedure, which prompted the reforms of 2008. The Ordinance of 2008 addressed the flaws in the law on the safeguard procedure and clarified the rules applicable to the approval and implementation of a safeguard plan. The reforms provided for the extension of the financial institution committee of creditors, so that it not only covers banks, but also creditors who have purchased a claim from a supplier or any other entity with which the debtor had concluded a credit transaction. Furthermore, it is now possible for creditors to convert their claims into shares. It could be argued that the 2008 reforms established the safeguard procedure as the key-reorganization tool, as the process is now more easily accessible. Nevertheless, it has been argued that the amendment of the entry criteria into the safeguard proceedings creates uncertainty for creditors and opens the road for abuse of the procedure as debtors may seek the protection of the court any time their creditors threaten to enforce their security.

In 2010 further reforms were introduced in France, which provided for a new pre-pack procedure, the *sauvegarde financière accélérée*,[84] which was a variation of the safeguard

[84] Paul Omar, 'Reform in Search of a Purpose: French Insolvency Law Changes (Again)' (2014) I. I.R. 23(3), 201–220, 225.

procedure and is available to debtors in the banking and financial sectors. This fast-track procedure was designed to be available to debtors who, although entered into conciliation procedings, could also benefit from accessing the safeguard procedure. In order to benefit from the fast track preservation regime, such debtors were required, due to their size, to form creditors' committees for the purpose of approving a restructuring plan and to also seek the court's approval of the plan. [85]

In light of the continued impact of the financial crisis, further reforms of the French Insolvency law were introduced in 2014.[86] The latest reforms focus mainly on the *sauvegarde* regime and aim to facilitate access to the ordinary safeguard procedure and also redraws from the success of the fast track safeguard procedure and extends its application to all types of creditors. The 2014 reforms provide for a 'main-stream' *sauvegarde financi*ère procedure, which is to be available to debtors who have participated unsuccessfully to conciliation proceedings but can demonstrate that they have put in place a plan which would result in the continuation of their business. Arguably, the extended application of the *sauvegarde financière accélérée* regime for the benefit of all debtors reflects the effectiveness of the procedure. It remains to be seen whether or not the *sauvegarde financière* procedure will prove to be equally successful.

The UK corporate rescue ethos

The United Kingdom's insolvency law has traditionally been regarded as "creditor friendly" because of the strong priority given to the protection of creditors' interests. Nevertheless, the

[85] Ibid.
[86] Ordinance no.2014-326 of 12 March 2014.

Enterprise Act 2002 was introduced in order to encourage a more collective approach towards corporate rescue, whereby all the interests in the company would be considered. This paper looks at the impact of the reforms introduced by the Act with special reference to the company voluntary arrangement, which is largely a "debtor in possession" procedure. Reference, will also be made to schemes of arrangement, which are largely used as re-organisation tools. However, one should be reminded that schemes are not, strictly speaking, insolvency law measures.

Company Voluntary Arrangement

The company voluntary arrangement ("CVA"), introduced by the Insolvency Act 1986, is a "debtor in possession" process and is designed to facilitate the rehabilitation of financially troubled but viable enterprises. A CVA is a "compromise" between the debtor company and its creditors, whereby, for instance, the creditors agree to receive less than the amount due to them in discharge of their claims.[87] There are two types of CVA: firstly, there are the CVAs without a moratorium, which are governed by Part I of the Insolvency Act 1986 and, second, CVAs with a moratorium, which are governed by the Insolvency Act 1986 and the Insolvency Act 2000, which introduced Schedule A1 in the Insolvency Act 1986.[88] The current judicial

[87] Michel Rutstein, 'Voluntary Arrangements: Contracts Or Not? Part1' (2000) 13 (1) Insolv. Int. 1-3, 1. See also Roy Goode, *Principles of Corporate Insolvency Law*, 3rd Ed. Sweet & Maxwell, 324.

[88] See John Tribe, 'Company Voluntary Arrangements and Rescue: A New Hope and a Tudor Orthodoxy' (2009) 5 JBL 454-487.

attitude[89] demonstrates that the CVA is a contractual arrangement and hence should be governed by contractual principles.[90]

Prior to the enactment of the Insolvency Act 2000, the CVA procedure suffered serious practical deficiencies and proved to be of limited use to small ailing companies.[91] However, it could be argued that the reforms introduced by the 2000 Act addressed this issue[92] and now the CVA constitutes an important part of the current trend in shifting the ethos of the United Kingdom's insolvency law towards effective corporate rescue. Importantly, the 2000 Act introduced a moratorium for small businesses, (which is available to a company that chooses to use it) which imposes a temporary stay on all claims against the company and allows it with a short respite, so as to design a rescue plan.[93]

[89] See for instance, *Re McKeen* [1995] BCC 412, *Johnson* v *Davies* [1997]1 All ER 921, *Raja* v *Goodman* [1999] The Times April 14, See also *Oakley Smith* v. *Greenberg* [2002] EWCA Civ 1217, [2004] BCC 81, [2005] 2 BCLC 74, [2003] BPIR 709, [2002] WL 1876359, [2002] WL 1876359 and *Welsby v Brelec Installations Ltd* [2002] 2 BCLC 576, 579.

[90]Section 5(2) (b) I.A 1986, c 45 Pt I, where it is stated that: (2) The voluntary arrangement binds every person who in accordance with the rules (i) was entitled to vote at that meeting (whether or not he was present or represented at it), or (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement. See Also Michael Rutstein, note 87 above.

[91] Katarzyna Gromek Broc, 'England and Wales: The Impact of The Revised Company Voluntary Arrangement Procedure', in Katarzyna Gromek Broc & Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries in Europe* (2nd edn. Kluwer Law International, 2006) 93.

[92] Ibid, 97.

[93] Ibid, 104.

However, it should be noted that from the outset, the CVA procedure was not warmly received by insolvency practitioners and whether their attitude is likely to change following the reforms remains questionable. Commentators expressed the fear that the long-awaited transformation of the CVA procedure may be seen as a classic instance of “too little too late”.[94]

Implementation of the CVA

The directors of a company may propose the adoption of a CVA.[95] The directors must prepare a proposal, following the advice of a nominee, who will be supervising the process.[96] The proposal must, inter alia, state the reasons why the company’s directors believe that a CVA is desirable, the company’s assets and their value, details of assets charged in favor of creditors, the nature and the amount of the company’s liabilities, the duration of the CVA, the dates of distributions to creditors and the remuneration of the nominee/supervisor.[97] The nominee must be instructed to act by means of written notice and must receive a copy of the proposal from the directors.[98] In addition, within 28 days of being endorsed to act, the nominee must submit a report to the court stating whether in his opinion meetings of the company and its creditors

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[94] Ian Fletcher, ‘UK Corporate Rescue Culture: Recent Developments- Changes To Administrative Receivership, Administration and Company Voluntary Arrangements- The Insolvency Act 2000, The White Paper and The Enterprise Act 2002’ (2004)5 EBOR 119-151, 130.

[95] Insolvency Act 1986, s 1(1).

[96] Insolvency Act 1986, s 389A, inserted by Insolvency Act 2000, s4 (4) states inter alia that a person may as a nominee if authorised to do so by a body recognised by the Secretary of the State for that purpose. Hence it is no longer required that a person acing as a nominee is a qualified insolvency practitioner.

[97] See Insolvency Rules 1986, r.1.3. (1) - (8).

[98] Insolvency Act 1986, s 2(3); Insolvency Rules 1986 r.1.4. (1), (2).

should consider the proposal.[99] The directors are required to provide the nominee with a statement of the company's affairs,[100] with any information he requires in order to prepare his report[101] and give him access to the company's accounts and records.[102]

Furthermore, the nominee may call for a creditors' meeting, where creditors may consider whether to approve (with or without modifications) and go forward with the proposed CVA or not.[103] It is significant to note that, for voting purposes, the CVA treats all creditors as one single class,[104] in contrast to the scheme of arrangement. All creditors who receive notice of a creditors' meeting can vote on a CVA draft. In order for the CVA to become effective, it needs to be approved by the requisite majority at the meeting.[105]

A significant reform of the CVA procedure was introduced by the Insolvency Act 2000. A CVA approved both by creditors and members is binding upon not only those creditors who had notice of the creditors' meeting, but also on creditors who did not have notice and creditors whose existence was unknown to those convening the meeting.[106] This is a significant development as, previously, creditors who did not receive notice of the meeting were not bound

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[99] Insolvency Act 1986, s 2 (2).

[100] Insolvency Rules 1986 r.1.5.

[101] Insolvency Rules 1986 r.1.6.

[102] Ibid, r.1.6. (3).

[103] See Insolvency Act 1986, s 4.See also Katarzyna Gromek Broc, note 88 above, 91.

[104] See Ian Fletcher, note 94 above, 127.

[105] Insolvency Rules 1986 r.1.19: more than three quarters in value of the creditors voting on the resolution must vote in favour of the arrangement.

[106] Insolvency Act 1986, s 5(2) (b), as amended by I.A 2000, Schedule 2, Part 1, para 6(c), See also Gromek Broc, note 91 above, 100.

by the arrangement and had a right to enforce their claims against the debtor company. For instance, such creditors had a right to petition for the company to be wound up, undermining therefore the effectiveness of the CVA procedure.[107] It is significant to note that, under the new regime, the only creditors who can escape from the content of a CVA are those who are not eligible to vote. Therefore, the possibility of disruptive tactics on the part of dissenting creditors may be kept to a minimum.[108] In addition, it should be noted that secured creditors, unless they have irrevocably waived their security rights,[109] retain their right to enforce their claim and are only eligible to vote in respect of any unsecured part of their claim.[110]

The Moratorium

As mentioned above, section 1A of the Insolvency Act 2000 introduced a moratorium for small businesses. The moratorium effectively provides the ailing company with some breathing space. For instance, during the moratorium, an administrative receiver cannot be appointed and no resolution aiming at the winding up of the company may be passed.[111] In addition, no steps may be taken to enforce security over the company's assets and no claims may be commenced or continued.[112]

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[107] See Rebecca Parry, *Corporate Rescue* (Sweet & Maxwell, 2008) 188.

[108] Ian Fletcher, note 94 above, 133.

[109] *Khan* v *Permayer* [2001] B.P.I.R. 95.

[110] See Rebecca Parry, note 107 above, 189.

[111] Katarzyna Gromek Broc, note 91 above, 100.

[112] John Tribe, note 88 above.

The directors of the company may apply for a moratorium, provided that they can present sufficient evidence that the CVA has a reasonable prospect of success. For instance, it must be shown that, during the moratorium, the company will have sufficient funds to allow it carry on business. It is noteworthy that, only if the nominee forms the professional judgment that the proposal has a reasonable prospect of being approved and implemented,[113] can the directors file the proposal with the court.[114] Provided that the nominee supports the directors' proposal, they have three working days to apply to the court for a moratorium. The directors must enclose with their application a statement of the company's affairs and a document stating the terms of the envisaged CVA.[115]

The moratorium applies for a 28 day period, but it is extendable for up to two more months. During the moratorium, the directors will continue to manage the company, while the nominee monitors its affairs.[116] Upon approval of the proposed CVA, the nominee becomes the supervisor of the arrangement and his task is to oversee its implementation.[117]

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[113] See however, Ian Fletcher, note 94 above, 132, where he expresses the concern that the fact that directors have the ability to preselect the person whom they approach with a view to taking the appointment of the nominee, may present a source of difficulties with regard to the quality of professional judgment exercised at the outset of the CVA process.

[114] Insolvency Act 1986, Sched. A1, paras 6 & 7.

[115] Insolvency Act 1986, Sch. 1A, para 7, as inserted by IA 2000, Schedule1, para 4.

[116] L Tilbrook, 'Corporate Rescue Reform in the UK', (2000) 2(3) J.I.F.M., 65-69.

[117] See Katarzyna Gromek Broc, note 91 above, 103. "The nominee is required to monitor the company affairs during the moratorium, among other reasons to prevent fraud".

The impact of the CVA

Although the Insolvency Act 2000 introduced some far-reaching changes to the CVA, only limited use of this procedure has been made. It could be argued that is the case predominantly because of the radical reforms brought in by the Enterprise Act.[118] The virtual abolition of administrative receivership might have led one to believe that the impact of the CVA would be greater.[119] However, it is submitted that the new streamlined administration process is now preferred over a "free-standing" CVA. It is argued that a CVA proposal, combined with an application for administration, seems to be more popular because of the benefit of the moratorium (which is offered to companies of all sizes under the administration procedure). However, a significant drawback of this is the increase in costs.[120]

Furthermore, it could be said that one of the main factors that renders the CVA as a less attractive means of corporate rescue is the fact that insolvency practitioners have never embraced the procedure. Flood argued that the possibility that CVAs could lead to a lower fee being paid to the insolvency practitioners, coupled with the lack of familiarity on their part with the CVA procedure, contributed significantly to the low uptake of CVAs.[121] Furthermore, it has been contended that insolvency practitioners failed to embrace the CVA procedure due

[118] David Milman, 'Corporate Insolvency in an Era of Increased Legal Complexity' (2004) 25(1), Comp. Law 2.

[119] Prior to the EA 2000 it was possible for creditors to interrupt the CVA by means of appointing an administrative receiver.

[120] Katarzyna Gromek Broc, note 91, 106.

[121] John Flood, 'CVAs: A Neglected Lifeline?' (1994) 86(7) C.A, 31-32. See also The Insolvency Act 1986. Company Voluntary Arrangements and Administration Orders. A Consultative Document, (DTI, London 1993), where the lack of insolvency practitioners' familiarity with the CVA procedure was identified as one of the reasons for the procedure's limited use.

to the procedure's significant weaknesses at the time when it was originally enacted.[122] It is submitted that, beyond the significant changes that reshaped the CVA procedure, a change of IP mindsets is needed, so as to convince them to have resort to the CVA at an early stage. Unfortunately, current practice demonstrates that, notwithstanding the high profile case-law developments, which effectively manifest the fact that CVAs could prove to be a valuable restructuring tool, and the statutory improvements to the procedure, insolvency practitioners continue to use tried and tested restructuring alternatives, such as administration (particularly pre-packs) and schemes of arrangement.[123]

Termination of a CVA

Finally, termination of a CVA takes place either where the conditions of the arrangement have been successfully fulfilled or where the obligations undertaken have not been met.[124] In the former scenario, the supervisor shall make the appropriate distributions in accordance with the provisions of the arrangement. In the latter scenario, the supervisor's task is to take all the necessary steps in order to achieve a suitable variation of the terms of the arrangement or, where that is not feasible, to put the company into liquidation.[125]

Schemes of Arrangement

[122] L Hiestand, & Christian Pilkington 'CVAs: A Restructuring Tool for the Future' (2006) Recovery, Winter, 38.

[123] Ibid.

[124] Rebecca Parry, note 104 above, paras 15-01 & 15-02.

[125] Ibid, 217-218.

A scheme of arrangement[126] is a useful alternative corporate rescue procedure, whose popularity has significantly risen in the last few years.[127] It should be noted, however, that a scheme of arrangement is not strictly speaking, a rescue procedure, as it is designed to be used mainly by solvent companies. A scheme of arrangement is a restructuring tool, which allows a company to reach a "compromise" or an "arrangement" with its creditors, or any class of its creditors, or with its members, or any class of them. A scheme of arrangement may also be used by a group of companies and it can prove particularly useful where the group is seeking to hive off any of its underperforming elements.[128] In addition, it should be noted that, schemes of arrangement prove to be very effective restructuring tools as they are, arguably, less stigmatic than other formal rescue procedures, since they are not insolvency proceedings.

A scheme of arrangement involves a complex voting structure under which, for voting purposes, creditors are divided into classes and it is required that a reorganization arrangement be approved by a majority vote of all classes[129] of creditors.[130] At first glance, it could be argued

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[126] Part 26 of the Companies Act 2006, which replaces Part XIII of the Companies Act 1985, makes provision for such schemes.

[127] Rebecca Parry, note 104 above, 233. See Also Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd, Cambridge, 2009) 486, where it is argued that the revived popularity of schemes of arrangement may be due to the courts 'constructive attitude, to facilitate the implementation of schemes by means of assessing junior creditors' 'real economic interests'.

[128] See Rebecca Parry, note 107 above, 234.

[129] A class includes persons whose interests are not to dissimilar as to make it impossible for them to consult together with a view to their interests. See *Sovereign Life Assurance Co* v *Dodd* [1982] 2 QB 573, 583; *Re BTR Plc* [1999] 2 BCLC 575.

[130] See Companies Act 2006, s 899, which states: If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in

that this cumbersome requirement effectively creates difficulties in having the arrangement quickly approved and therefore highlights the fact that the CVA procedure should be preferred over a scheme of arrangement, as creditors under a CVA may vote as a single class. However, on a closer look, it appears that the potential difficulties in having an arrangement approved and the simplicity that the CVA offers are outweighed by the fact that, once an arrangement becomes binding under the scheme, it binds all creditors, whereas an agreement reached under the CVA is only binding upon creditors who were eligible to vote, or who would have been eligible to vote, if they had notice of a creditors' meeting.[131] In addition, it is important to note that, under a scheme of arrangement, it is not necessary to consult any class of creditors who have no real economic interest in the company, hence their votes on the scheme may be disregarded.[132] This is a significant advantage of a scheme since, as opposed to the CVA, it is easier to re-organize the company without having to worry about identifying and giving notice to all bond-holders.

As far as the implementation of the procedure is concerned, it should be noted that this involves three stages.[133] Stage one involves an application being made to the court, which will have to

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person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement. However, see also Charles Maunder, 'Bondholder Schemes of Arrangement: Playing the Numbers Game' (2003)16(10) Insolv. Int. 73-77, 76, where it is argued that if the majority in number requirement was removed, schemes of arrangement would be more flexible and attractive restructuring tools.

[131] Rebecca Parry note 107 above, 233.

[132] See *Re Tea Corp*. [1904] 1 Ch. 12. See also *Re My Travel Group Plc* [2004] EWHC 2741; [2005] 1 WLR 2365, where the basis of valuation of entitlements caused some contention. See also Rebecca Parry, note 107 above, 246; and Vanessa Finch, note 127 above, 486.

[133] *Re BTR plc* [2000] 1 BCLC 740, at p. 742.

decide whether or not to make a "meetings order".[134] In addition, stage two involves a meeting of creditors or members who will decide whether to approve the scheme. However, it is required that, prior to the meeting, sufficient information must be circulated so as to enable the creditors to reach an informed decision.[135] Finally, stage three involves a "sanction hearing", where the court will consider whether or not to sanction the scheme.[136] Once the scheme has obtained the required level of approval, the court may sanction the scheme. However, the court is not obliged to sanction a scheme which has received the approval of creditors.[137] Rather, the court has discretion to refuse to sanction a scheme, unless it is convinced that all the procedural requirements have been complied with;[138] in addition, the court must be satisfied that the classes were fairly represented by the parties who attended the meeting,[139] and, finally, the court must be satisfied that the terms of the scheme are fair.[140]

It is argued that the requirement that a scheme of arrangement has to be approved by the court is a significant advantage of the procedure, because, once the arrangement has been court-approved, it cannot be challenged by the company's creditors or its members. It could be argued that this might be one of the primary reasons why such schemes seem to be more popular than the CVA, as a CVA may be challenged on the grounds of unfair prejudice.[141]

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[134] At the meetings hearing the court will consider whether or not the company has appropriately identified the classes, which will have to consider the scheme. See *Re Hawk Insurance Co Ltd* [2002] BCC 300.

[135] See Companies Act 2006, s 897

[136] Rebecca Parry, note 107 above, 236.

[137] *Re BTR plc* [2000] 1 B.C.L.C. 740, [747].

[138] *Alabama, New Orleans, Texas and Pacific Junction Rly Co* [1891] 1 Ch. 213, 245.

[139] Rebecca Parry, note 107 above, 238.

[140] Ibid, 239-247.

[141] Ibid, 233.

A significant advantage of the scheme of arrangement is that, although it has proved to be an effective re-organization tool, the procedure may be initiated without the requirement of an impending insolvency.[142] Accordingly, there is no need for an insolvency practitioner to be appointed and, importantly, the directors remain in control of the company.[143] It could be argued that the increasing popularity of schemes in rescue scenarios is implying a need to acknowledge its role as a corporate rescue procedure rather than purely regarding the scheme as simply a creature of company law.[144] Ultimately, one may raise the question whether there is a reason why the scheme of arrangement process should be used by insolvent companies or whether it should be restricted perhaps to solvent companies, where resort may be made to other procedures such as the CVA and administration.[145]

Conclusion

The insolvency laws of many European jurisdictions have undergone in depth reforms in advance of the recent financial meltdown which struck the corporate world. During the last few

[142] Vanessa Finch, note 127 above, 482. However, in *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10, it is arguable that one of the entities was nearly (if not already) insolvent.

[143] Rebecca Parry, note 107 above, 233.

[144] A scheme of arrangement does not benefit from a moratorium, although one could argue that the introduction of such protection would enhance the level of effectiveness of the procedure. Nevertheless, the counterargument might be that a moratorium is not necessary while a company is solvent and that it is in the creditors' interests to participate in the procedure; otherwise, there's no point for a scheme to take place.

[145] Rebecca Parry, note 107 above, 233.

years, the global economy has witnessed, arguably, the most significant decline since the early 1930s. It could be argued that the adverse effect of the financial demise emphasised the need for many jurisdictions to ensure that effective corporate rescue mechanisms are in place, so as to enable traumatised businesses to recover and to be restored to profitability. With particular regard to the restructuring regimes of France and the United Kingdom, both jurisdictions took drastic steps towards the improvement of the existing pre-insolvency tools and the further development of a rescue culture.

It could be argued that the foundations of a 'second-chance' culture have been laid both in France and the United Kingdom. The introduction of reforms to the insolvency laws in both jurisdictions demonstrates that both place great emphasis on business recovery. The reforms of the insolvency laws in both jurisdictions encourage corporate rescue by means of providing for sophisticated pre-insolvency mechanisms, as well as formal restructuring procedures.

With particular regard to informal rescue procedures, it could be argued that the insolvency laws of both jurisdictions provide a secure legal framework, which would allow debtors to swiftly negotiate their debts with the creditors without seeking the protection of the courts, but which might at the same time provide for the ability to obtain guidance from commercial judges or insolvency practitioners who have a high level of experience and expertise in the area.

In France, the 2005 reforms and, in particular, the enactment of the safeguard procedure, signify the intention of the legislator to encourage early intervention. Nevertheless, it is noteworthy that, soon after the introduction of the safeguard procedure, the need for additional reforms was expressed, as flaws of the procedure became apparent in the Eurotunnel case. Accordingly, a series of reforms were introduced in 2008. On the one hand, it could be argued

that many of the discrepancies in the Law of 2005 have been effectively addressed by the 2008 reforms. On the other hand, the need for amendment in the corporate reorganisation regime of France could be perceived as a failure of the Law of 2005. Either way, one is bound to agree that the latest reforms of 2010 and 2014 significantly improved the corporate reorganisation regime and provides a framework which fits the needs of the French economy and society.

Finally, in the United Kingdom the first step towards the establishment of a corporate rescue culture was made, following the Cork Committee's proposals, by means of reforms which led to the enactment of the Insolvency Act 1986. In addition, the Enterprise Act 2002 introduced revolutionary changes to the existing restructuring regime of the United Kingdom and importantly promoted a "second-chance culture" in a traditionally regarded "creditor-friendly" jurisdiction. Finally, it has been argued that the United Kingdom's current insolvency laws, in particular its restructuring and business rescue regime, are performing well and continue to compare favourably with their international peers.