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The Role of Directors in Corporate Rescue in France and the United Kingdom: An Overview

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Introduction

1 In the last decade, the insolvency laws of many countries in the European Union have undergone significant reforms. In particular, the United Kingdom and France introduced substantial reforms into their insolvency regimes, so as to promote a corporate rescue culture, which in turn would effectively safeguard their economic wealth and ensure the preservation of employment. However, one should note that the law reforms of key corporate rescue mechanisms in the two jurisdictions, are not free of stark differences.¹ These differences, arguably, reflect the wider cultural differences that exist amongst France and the United Kingdom.

2 It could be said that the laws of a country are the mirror of its society. According to Montesquieu, laws express the spirit of nations, hence are very closely linked to their geographical, cultural, sociological, economic and political elements.² In a similar manner the insolvency laws of the France, and the United Kingdom, have been influenced by “external” factors, such as the political, social and cultural conditions which prevailed in each jurisdiction. However, although it is important to acknowledge that economic and socio-political factors influence the approach that might be taken towards corporate rescue, it is also important to place particular importance of the “internal” factors that have shaped the design of the insolvency laws in each of the three jurisdictions. For instance, it could be argued that the elements which principally affect the process of corporate rescue range from the behaviour of the company’s directors and the conduct of the insolvency

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¹ For example it should be noted that the United Kingdom decided not to opt for a “Chapter 11” regime of re-organisation.

² C. Montesquieu, *The Spirit of Laws* (Livre I) (1749, Gallimard, Paris), reprinted: J. Mayer and A. Kerr (eds), (1970, Free Press, Glencoe IL).

professionals to the approach taken by secured lenders and the courts. This article places particular focus on directors, and is aimed at considering their role in the corporate rescue process in the two jurisdictions.

The Role of Company Directors in the Rescue Process

3 Directors have a crucial role to play in ensuring the financial health of their company. Generally speaking, running a company involves reaching key decisions, which may entail a significant degree of risk. Belcher best describes this drastic-decision routine as follows:

“if rescue is defined as the avoidance of distress and failure, all management activity can be thought of as a constant and repeated rescue attempt.”³

4 In addition, Omar argues that rescue involves:

“the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and investment.”⁴

5 Arguably, the tasks of directors become even harder to perform during challenging times, where credit is hard to obtain due to the changing market conditions. At such times, it is vital to ensure that the insolvency laws of a jurisdiction make provision for a set of rules which influence directorial behaviour. It could be argued that the foundational principles of the insolvency law of every jurisdiction should be such that not only they ensure that directors are precluded from irrational and irresponsible risk-taking, in order to afford protection to the company’s creditors and shareholders against severe financial laws, but should also punish incompetent or dishonest directors.⁵

6 Furthermore, company directors have a significant role to play in the process of corporate rescue, as they may be the first to sense a forthcoming financial crisis and hence are able to be the first to adopt drastic measures in order to safeguard the viability of their company. It is argued that incentives should be granted to directors in order for them to effectively avoid corporate failure. Such incentives could be in the form of “sticks and carrots”. In other words, on the one hand, directors should be rewarded for engaging in diligent behaviour and for dealing with a financial trauma at the earliest possible stage. On the other hand, personal liability should be

³ A. Belcher, “The Economic Implications of Attempting to Rescue Companies”, Chapter in H. Rajak (ed), *Insolvency Law: Theory And Practice* (1993, Sweet & Maxwell, London), at 236. See also A. Belcher, *Corporate Rescue* (1997, Sweet & Maxwell, London), at 121.

⁴ P. Omar, “Thoughts on the Purpose of Corporate Rescue” (1997) 4 *Journal of International Banking Law* 127.

⁵ B. Carruthers and T. Halliday, *Rescuing Business* (1998, Oxford University Press, Oxford), at 274-277.

imposed upon directors, as a direct consequence of their inability to readily adopt drastic measures against the collapse of their company.

7 It could be argued that the behaviour and ethics of the company's directors during a period of financial distress are elements of significant importance. However, it could be said that, whether the directors will take steps at an early stage to avert a financial crisis, depends highly on cultural factors, such as, for instance, the perception of the society towards the role of directors. It could be argued, that in jurisdictions such as France,⁶ where a friendly approach is taken towards the debtor, company directors are encouraged to seek help at an early stage; whereas a different approach is seen in jurisdictions such as the United Kingdom, where the debtor is in most occasions is regarded as the one to blame for the company's failure.⁷

8 If an early intervention culture has not developed within a jurisdiction,⁸ for example, then directors are not likely to seek help in fear of the loss of control and also the stigma that is attached to failure.⁹ This point is illustrated through a comparison between the approach to insolvency between the United States and the United Kingdom. This demonstrates that the United States is a pioneer country that promotes entrepreneurship as a major component of the creation of wealth and, accordingly, it places greater confidence in "debtor-in possession" management.¹⁰ In brief, Chapter 11 provides for the incumbent management to remain in control of the company's management under the auspices of the bankruptcy court, unless fraud or other misconduct has been committed by the directors.¹¹

⁶ It is noteworthy that, although France adopts a more "debtor-friendly" approach towards the debtor, the number of insolvencies is not significantly less than in the United Kingdom. It is argued that another primary factor, which contributes to the fact that directors take steps at a late stage is the stigma attached to failure.

⁷ R. Goode, *Principles of Corporate Insolvency Law* (3rd ed) (2005, Sweet & Maxwell, London), at 328, where it is stated that insolvency law in the United Kingdom is predicated on the assumption that where a company becomes insolvent it is due to the failure of the management and hence those responsible for the company's plight should not be left in control.

⁸ It could be argued that the society's expectation that directors should be able effectively to deal with the challenges is well justified, when their remuneration is taken into account. This could be seen as one of the reasons why an early-stage intervention culture has not developed and instead a stigma is attached to failure.

⁹ G. McCormack, "Control and Corporate Rescue: An Anglo-American Evaluation" (2007) 56(3) *International and Comparative Law Quarterly* 515, at 522, where the attitude towards insolvent debtors in the United Kingdom is described as "once a bankrupt, always a bankrupt". See also G. Moss, "Comparative Bankruptcy Cultures: Rescue or Liquidations? Comparison of Trends in National Law-England" (1997) 23 *Brooklyn Journal of International Law* 115, at 115, where it is noted that the bias towards creditors in the United Kingdom reflects a general social attitude, which is inclined to side with creditors, when they suffer a loss and to punish and to punish risk-takers by displacing them from the company's management.

¹⁰ McCormack, above note 9, at 524.

¹¹ A. Keay, "A Comparative Analysis of Administration Regimes in Australia and the United Kingdom" in P Omar, *International Insolvency Law: Themes and Perspectives* (2008, Ashgate Publishing, Aldershot) at 112.

9 In contrast, the United Kingdom has a long standing tradition of being apprehensive towards unfortunate debtors and accordingly “debtor in possession” insolvency procedures.¹² Arguably, this is why the United Kingdom opted for a streamlined administration procedure, where it could have, mimicking a series of other Member States including France, launched in its insolvency law system an additional debtor-in-possession procedure, which would co-exist with the CVA, a debtor-in possession regime introduced in 1985.¹³

10 On the other hand, the insolvency legal regime of France has traditionally been debtor-friendly¹⁴ and provided for “early warning mechanisms” so as to encourage directors to seek help at an early stage.¹⁵ However, it is interesting to note that notwithstanding the early stage intervention mechanisms insolvency rates skyrocketed¹⁶ in France, as directors failed to take advantage of them. It is argued that one of the reasons for this failure on the directors’ part is the stigma attached to insolvency.

Accountability and Efficiency of Directors

11 The conduct of directors may be challenged in respect of transactions, which preceded insolvency. This covers not only “suspicious” transactions prior to the outbreak of insolvency, but also any negligent or wrongful conduct of the directors. However, it should be noted that different approaches involving “sticks and

¹² However, it has been argued that the Blair Government has encouraged the creation of an ambitious business culture, whereby entrepreneurial risk taking is encouraged and where honest debtors, who become insolvent, are given a second chance staring over their business. See also V. Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed) (2009, Cambridge University Press, Cambridge), at 497.

¹³ The Insolvency Act 2000 introduced a stand-alone debtor-in-possession procedure, the Company Voluntary Arrangement (“CVA”) with a moratorium which is designed to facilitate the reorganisation of smaller companies. In addition, it is interesting to note that not so long ago (2010), the CVA became the subject of a consultation exercise, where the possibility of extending the moratorium for medium-sized and large companies is considered, in order to promote the further use of the procedure as a route of restructuring a company’s affairs. See also J. Tribe, “The Reform of UK Corporate Insolvency Laws: CVAs, the Conservatives and Chapter 11” (2009) 47 *International Accountant* 20.

¹⁴ C. Dupoux and D. Marks, “Chapter 11 à la Française: French Insolvency Reforms” (2004) 1(2) *International Corporate Rescue* 74.

¹⁵ M-J. Campana, “A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France”, Chapter 2 in K. Gromek Broc and R. Parry (eds), *Corporate Rescue in Europe: An Overview of Recent Developments from Selected Countries in Europe* (2004, Kluwer Law International, Deventer).

¹⁶ A remarkable acceleration of corporate worldwide insolvencies was reported (a 35% increase in fact): <http://www.eulerhermes.com/en/documents/pr_intl_insolvencies_4june09_en_final.pdf/pr_intl_insolvencies_4june09_en_final.pdf>. In particular, corporate insolvencies in France increased by 6% in 2009. In addition, only a moderate decrease of insolvencies was anticipated for 2015, the figure standing still far above the pre-crisis level (about 60,000 insolvencies against below 50,000 before 2008). See: <<http://www.eulerhermes.com/mediacenter/Lists/mediacenter-documents/Economic-Outlook-Insolvency-World-Cup-May14.pdf>>.

carrots” are adopted within the European Union jurisdictions. For instance the United Kingdom leans towards the adoption of sticks in order to hold incompetent directors accountable. Accordingly, directors may incur liability or be disqualified even where they have not been dishonest, but merely negligent.¹⁷ In contrast, France makes use of sticks more restrictively. In particular, incompetent directors may be treated more leniently in France, as they will only be disqualified where they have been convicted of a criminal offence.

12 Bearing in mind the liability regime of France, it could be argued that both the courts and the insolvency practitioners have a significant stake of responsibility for the malfunction of the liability regime, as they arguably fail to ensure that dishonest directors are held accountable.¹⁸ In other words, it could also be argued that the courts fall short of adequately encouraging insolvency practitioners to bring actions for a contribution or with a view to a disqualification of directors and, accordingly, the insolvency practitioners neglect this crucial function in their profession.¹⁹ In particular, the judicial trend in France appears to stem from the fact that judges in the Commercial Courts are individuals that are elected from amongst the business community, hence they consider that their role is not to police their “peers” and that such a function should be delegated to the Public Prosecutor.²⁰

13 Furthermore, it could be argued that an essential part of insolvency law is to provide for the availability of measures that range from civil claims to criminal sanctions, in order to ensure that dishonest behaviour is punished, hence ensuring the protection of the public from the costs of mismanagement, as well as deterring delinquent and negligent behaviour.²¹ For instance both the United Kingdom and France make provision for an array of criminal measures, which are designed to ensure that directors are held accountable for failing to file for insolvency within a specified time, as well as civil measures which are intended to compensate creditors. In other words, the insolvency laws of each jurisdiction make provision for the punishment of incompetent directors, where, at a time of a crisis, they continued trading, hence furthering the indebtedness of the company and, accordingly, reducing any prospects of it avoiding liquidation. However, it should be noted that the two jurisdictions take different views as to the appropriateness of sanctions that should be applied where imprudent conduct is involved.

¹⁷ See sections 212, 214, Insolvency Act 1986 (“IA 1986”). See also section 6, Company Directors’ Disqualification Act 1986 (“CDDA 1986”).

¹⁸ It is submitted that both the courts and insolvency practitioners fail to ensure the punishment of company directors, who engage in fraudulent trading.

¹⁹ P. Omar, “France: The Regime Governing Directors’ Liability in Insolvency and Reform Perspectives” (2004) 25(12) *Company Lawyer* 378, at 381.

²⁰ *Ibid.*, at 381. See also B. Soinne, *Traité des Procédures Collectives* (1999, LITEC, Paris), at 28.

²¹ P. Omar, “The European Initiative on Wrongful Trading” (2003) 6 *Insolvency Lawyer* 239, at 239.

Directors' Liability in the Two Jurisdictions

The United Kingdom Regime

14 A key principle of insolvency law is the *pari passu*²² principle, which provides for the fair and equal distribution of assets amongst creditors, where liquidation of the debtor company takes place. The *pari passu* principle effectively provides for the equal treatment of creditors in insolvency and, in effect, restricts the rights of individual creditors, so as to ensure that the body of creditors as a whole is benefited.²³ In essence, this means that certain transactions, such as transactions which affected the disposition of the company's assets, may be challenged within a time period prior to the initiation of insolvency proceedings, so as to inhibit the enrichment of the benefited party to the detriment of the body of creditors.²⁴ Nevertheless, it should be noted that the *pari passu* principle is subject to many exceptions.

15 It could be argued, however, that directors could use (or abuse) insolvency proceedings, not only to maintain their office,²⁵ but also in order to escape from potential personal liability. For instance, where directors have concerns that they may incur wrongful trading liability, they could file for administration proceedings and hence prevent their conduct from being challenged by either the company's creditors or the administrator²⁶ during such proceedings.²⁷ As far as the use of administration proceedings by directors is concerned, it has been noticed that, following the streamlined out-of-court- route of entry to administration by means of

²² For a detailed analysis see R. Mokal and L. Ho, "The *Pari Passu* Principle in English Ancillary Proceedings: *Re Home Insurance Company*" (2005) 21(6) *Insolvency Law & Practice* 207. See also R. Mokal, "Priority as Pathology: The *Pari Passu* Myth" (2001) *Cambridge Law Journal* 581.

²³ A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (2003, Pearson Education, Harlow), at 478.

²⁴ It is important to note that this time zone extends to a time prior to the commencement of administration proceedings; this arguably, prevents the misuse of this particular rescue procedure and discourages directors from using administration as a way of getting protection against liability in respect of illicit trading prior to insolvency. However, such provision could only prove useful where liquidation proceedings have been initiated, since until that point no wrongful trading action may be brought by the company's administrators. For a further discussion on the point that administration, as a course of action, could be a way for directors to avoid liability in respect of wrongful trading, see Keay, above note 11, at 128.

²⁵ With regards to the choice of proceedings, Finch points out that directors tend to file for reorganisation proceedings rather than liquidation, because if they opted for liquidation they could face an immediate replacement by the liquidator, whereas if they opted out for administration proceedings they would expect to remain in office. See Finch, above note 12, at 401. See also P. Aghion *et al.*, "The Economics of Bankruptcy Reform" (1992) 8 *Journal of Law, Economics and Organisation* 523.

²⁶ It should be noted that where the administrator suspects that the directors of the company may be liable for wrongful trading, he is only able to hold them personally liable and to contribute to the company's assets, once the rescue proceedings are converted to liquidation proceedings. Both sections 213 and 214, IA 1986 are "reserved" for the liquidator to use.

²⁷ Keay, above note 11, at 128.

the Enterprise Act 2002, the popularity of the procedure increased significantly.²⁸ In fact, Frisby notes that during 2003-2004, 65.5% of administrations involved out of court appointments,²⁹ and 70.6% of these proceedings were commenced by directors.³⁰

16 The conduct of directors of a financially distressed company may be challenged by the liquidator, who is called to collect the assets of the debtor company in order to make distributions to the creditors. The IA 1986 provides that directors may incur personal liability where they have engaged in either fraudulent³¹ or wrongful trading.³² In other words, directors may be called to personally contribute to the company's asset pool in order to maximize the returns to creditors,³³ where their company is in insolvent liquidation. However, it should be noted that, at a time of insolvency, it is only the liquidator who may make use of the two "main weapons" against incompetent directors, in order to seek compensation on behalf of the body of creditors as a whole.

17 The two provisions are, arguably, of little use, as the liquidator is faced with the dilemma as to whether or not he should pursue proceedings, which are of a time-consuming and expensive nature. Arguably, funding such claims will prove hard, hence discouraging the liquidator from relying on them,³⁴ but more importantly defeating the rationale behind their very existence. Nevertheless, it is argued that the CDDA 1986³⁵ compensates for the weaknesses of the two above-mentioned provisions, as it provides that unfit directors could be disqualified from being concerned with the management of other companies for a period not exceeding fifteen years, depending on the seriousness of their misconduct.³⁶

18 In the United Kingdom, section 213 of the IA 1986 states that fraudulent trading is committed by:

"a person who knowingly is a party to the carrying on of the affairs of the company with the intention to defraud creditors or for a fraudulent purpose."³⁷

²⁸ Finch, above note 12, at 393.

²⁹ Whereas only 29.8% involved an appointment by a court order.

³⁰ S. Frisby, "Report On Insolvency Outcomes" (2006), at 55, available at: <<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf>>.

³¹ Section 213, IA 1986.

³² *Ibid.*, section 214.

³³ For a more detailed analysis of the two provisions, see further below.

³⁴ Keay and Walton, above note 23, at 530. See also P. Godfrey and S. Nield, "The Wrongful Trading Provisions: All Bark and No Bite" (1995) 11 *Insolvency Law and Practice* 140.

³⁵ See in particular, section 6, CDDA 1986.

³⁶ See sections 2, 6 and 10, CDDA 1986; see also *Re Sevenoaks Stationers (Retail) Ltd* [1994] Ch 164.

³⁷ In particular, section 213(1), IA 1986 states: (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any *fraudulent* purpose, the following has effect. Accordingly, section 213(2) states: The court, on the application of the liquidator may declare that any

19 Accordingly, section 213 empowers the court to make an order against any such person, to personally contribute to the company's assets. It should be noted that, although relating to dishonest conduct, proceedings under section 213 are of a civil nature. However, criminal proceedings for the offence of fraudulent trading may be initiated under section 993 of the Companies Act 2006 ("CA 2006"). It is noteworthy that both the civil and the criminal proceedings require that actual dishonesty and a real moral blame is established,³⁸ so effectively the notion of "fraud" under the two provisions is identical, but the burden of proof is different.³⁹

20 It could be said that one of the main differences between the two fraudulent trading actions is procedural. In other words, the difference lies with the person that may initiate the action and with the time when the action may be taken. In particular, proceedings pursuant to section 213 may only be commenced where the company is in insolvent liquidation, by the liquidator, whereas an action under section 993 of the CA 2006 may be triggered by the Crown and it is irrelevant whether the company is insolvent or not.⁴⁰ In addition, it should be noted that there is an important difference with regard to the actual purpose of the two provisions. It should be remembered that the purpose of section 213 of the IA 1986 is to compensate the company for the loss suffered, rather than punishing those who are responsible for fraudulent trading. In contrast, the punitive element is contained in section 993 of the CA 2006, which is primarily designed to punish the fraudulent directors.⁴¹

21 It is important however, to note that the actual meaning of "fraud" is not clearly defined by means of statutory legislation, instead, for years, it has been one of the difficult issues that the courts were called to address.⁴² Accordingly, the case law provides some guidance as to what conduct may amount to fraudulent trading. Nevertheless, it could be argued that the judicial approach in defining fraudulent trading has not always been consistent. It could be said that in essence what makes section 213 differ from section 214 is the important requirement to prove that the affairs of the company have been carried on "with the intent to defraud".⁴³

persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

³⁸ *Re Patrick and Lyon Ltd* [1933] Ch 786.

³⁹ Keay and Walton, above note 23, at 532.

⁴⁰ *Ibid.*, at 532-533.

⁴¹ B. Jones, "The Difficulty of Proving Fraudulent Trading" (2007) 16(9) *Insolvency Intelligence* 69, at 70.

⁴² J. Farrar, "Fraudulent Trading" (1980) *Journal of Business Law* 336, at 339.

⁴³ See *Bernasconi v Nicholas Bennet & Co.* [2000] BCC 921; [2000] BPIR 8.

22 Consequently, one should expect that in order for a claim under section 213 to succeed, actual dishonesty should be established.⁴⁴ However, the courts have at times adopted a more vigorous approach, whereby fraudulent conduct could resemble recklessness,⁴⁵ as it was asserted that directors could not only incur liability, where the liquidator would prove an intent to defraud creditors, but even where a director was of the belief or had an expectation that ultimately the creditors would be repaid.⁴⁶

24 Another provision that the liquidator may invoke, in order to hold directors individually liable for the company's losses, is section 214 of the IA 1986. Similarly to section 213 of the IA 1986, proceedings pursuant to section 214 may only be commenced at a time of insolvent liquidation and only by the liquidator. Section 214 of the IA 1986 states that a director may incur liability, if at some time prior to the commencement of the liquidation he knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvent liquidation.⁴⁷ Therefore, this presupposes that the exact time, where the director knew or ought to have known that the company was unable to meet its liabilities, can be defined. This could, arguably, be an extremely difficult task⁴⁸ as, at a time of crisis, such as where a lender, such as a bank, withdraws its financial support to the company, effectively rendering it vulnerable to insolvency,⁴⁹ a director honestly believed that their company would survive the "storm" by getting more funding.

25 It is important to note that the liquidator bears the significant burden of correctly identifying the time that a director knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent winding-up or, in other words, the point that liability was triggered. Consequently, in the unfortunate event that the liquidator fails to convince the court that his case is made out with reference to a particular date, he may not be permitted to provide an alternative date at a hearing.⁵⁰ Therefore, it could be argued, given the fact that there is no consistency in the approach adopted by the courts, that a safe option for the wise liquidator would be to nominate a date from which the directors undoubtedly knew or ought to have concluded that insolvent liability was unavoidable.⁵¹ It is, however,

⁴⁴ See *Re Patrick and Lyon Ltd*, above note 38. See also *Re L Todd (Swanscombe) Ltd* [1990] BCC 125.

⁴⁵ Keay and Walton, above note 23, at 534.

⁴⁶ *R v Grantham* [1984] 2 WLR 815; [1984] BCLC 270.

⁴⁷ Section 214(2), IA 1986.

⁴⁸ See M. Simmons, "Wrongful Trading" (2001) 14(2) *Insolvency Intelligence* 12, at 12. See also A. Keay, "Wrongful Trading and The Point of Liability" (2006) 19(9) *Insolvency Intelligence* 132, at 133.

⁴⁹ Simmons, above note 48, at 13.

⁵⁰ See *Re Sherbourne Associates Ltd* [1995] BCC 40. In contrast, see *Continental Assurance* [2001] BPIR 733, at 899, where the judge was stated he would not: "wish his decision to be cited hereafter as authority for the proposition that in all cases under s 214 the Liquidator must always specify his starting date, and must lose the whole case if he cannot satisfy the Court that his case is made out by reference to that particular date. Cases vary in detail and complexity."

⁵¹ Keay, above note 11, at 134.

important to note that a director may avoid the bullet of personal liability,⁵² where the court is satisfied that, while trading in the “twilight zone”, he took pro-active steps in order to minimise the potential loss to the company’s creditors.⁵³ It should be noted that section 214 explicitly provides that a director must take “every step” to minimise the creditors’ loss. Hence, taking some steps would not be enough to protect him from incurring personal liability.

26 Finally, it should be noted that the wrongful trading and fraudulent trading provisions only apply in liquidation. This is arguably the “stick”, which is designed to hold directors accountable for their misconduct. Arguably, directors, whose company is in financial difficulty, are provided with the incentive (“carrot”) to take action at an early stage so avoid personal liability in the event of insolvency. However, where they fail to make correct use of such a “carrot”, they are faced with the “stick” of personal liability.

The French Regime

27 The insolvency law regime of France is sophisticated and, similarly to the United Kingdom, it makes provision for a wide range of civil and criminal measures, which are designed to hold directors accountable for the failure of their business. The civil liability regime of France seeks primarily to compensate the company for its losses and accordingly provides for the disqualification of unfortunate and incompetent directors, who may be required to make personal contributions towards the assets of the company. In addition, the criminal liability regime provides for sanctions against fraudulent and dishonest and accordingly makes provision for the imposition of penalties, which have a punitive character.⁵⁴

28 In the event of liquidation proceedings, personal liability may be incurred by the company’s directors in respect of the company’s insufficiency of assets. However, Article L. 651-2 of the Commercial Code provides that certain criteria have to be satisfied prior to any liability being imposed. Firstly, a director may suffer civil liability if he has committed a fault in the management of the company (*faute de gestion*). It is noteworthy that, although the concept of “fault in the management” is not specifically defined by statute, case law has nevertheless refined the concept so as to cover errors in the management of the company, negligence, breaches of law, regulation or the by-laws of the company.⁵⁵

29 Secondly, prior to personal liability being imposed upon a company’s director, it must be established whether there is an insufficiency of assets. In other words,

⁵² Simmons, above note 48, at 13.

⁵³ Section 214(3), IA 1986.

⁵⁴ P. Omar, “The Regime Governing Directors’ Liability In Insolvency And Reform Perspectives” (2004) 25(12) *Company Lawyer* 378, at 379.

⁵⁵ “Directors In The Twilight Zone III” (INSOL International Report, August 2009), at 268.

whether the liabilities of the company exceed the value of its assets. Finally, it must be considered whether a causal link exists between the *faute de gestion* and the insufficiency of assets.⁵⁶ However, it is noteworthy to show that the error in the management contributed to the insufficiency of the company's assets and it is not necessary to demonstrate that the *faute* is the only cause.⁵⁷ The determination of the *faute de gestion* lies with the court, which shall also consider whether the directors should bear all or part if the company's debts.⁵⁸

30 Furthermore, during the course of formal insolvency proceedings commenced against the company, a director may be subject to personal bankruptcy and may be prohibited from being involved in the management of a company.⁵⁹ For instance, such liability is involved where a director abusively carried out an unprofitable business activity that would necessarily lead to the legal entity's insolvency, misappropriated or concealed all or part of the assets of the company, or fraudulently increased the liabilities of the company or carried out a management function of a company while forbidden to do so. In addition, personal liability may be imposed on a director:

- (a) for having the intention of avoiding or delaying the opening of formal insolvency proceedings;
- (b) for having entered into, for the account of a third party and without consideration, undertakings which are considered too significant at the time of signature, given the situation of the company;
- (c) for having paid after the date of cessation of payments one creditor in preference to others;
- (d) for having failed to keep accounts, when required by applicable law; or
- (e) for having kept either fictitious, incomplete accounts or for having caused accounting books and records to disappear.⁶⁰

31 It is important to note that liability in both the cases of personal bankruptcy and prohibition on management is civil, albeit that they have characteristics of penal sanctions.⁶¹ Furthermore, under the French law, a director may, in certain circumstances, be subject to the imposition of the sanction of "criminal bankruptcy".⁶² A director may incur such criminal liability, provided that formal insolvency proceedings have been commenced in respect of the company.

⁵⁶ It should be noted that no provision is made for a specific time limit, prior to the commencement of formal insolvency proceedings, during which the *faute* must have occurred. However, since a causal link must be established between the *faute* and the company's insolvency the period is in practice limited. Arguably, the last *faute de gestion* may be committed by the directors, where a declaration of cessation of payments is not filed within the legal limitation period (see Article L. 631-4, Commercial Code).

⁵⁷ INSOL International Report, above note 55, at 269.

⁵⁸ Article L. 652-1, Commercial Code.

⁵⁹ *Ibid.*, Articles L. 653-3, L. 653-4, L. 653-5 for personal bankruptcy and Article L. 653-8 for the prohibition on management.

⁶⁰ INSOL International Report, above note 55, at 271.

⁶¹ *Idem.*

⁶² Article L. 654-2, Commercial Code.

However, it should be remembered that the court, in exercising its punitive jurisdiction, is not seeking to compensate the company.⁶³ In particular, a director may be guilty of an offence,⁶⁴ where with the intention of avoiding or delaying the opening of formal insolvency proceedings, he has made purchases with a view to resale at a lower price or used ruinous means to obtain funds. In addition, the criminal offence may be committed where a director has:

- (a) fraudulently increased the debts of the company;
- (b) misappropriated or concealed all or part of the company's assets;
- (c) kept fictitious accounts or caused accounting records to disappear; or
- (d) kept manifestly incomplete sets of accounts or kept accounts that do not comply with legal requirements.⁶⁵

32 It should be noted that, where a director is found guilty of the offence of "criminal bankruptcy", a series of severe sanctions may be imposed upon him. That is to say a director may be liable to imprisonment or a fine. It is noteworthy that the gravity of the offence will be reflected in the length of imprisonment or the fine that is ordered and in the nature and extent of any other sanctions that might be imposed. It should be noted that the court may, in addition to the imprisonment or the payment of a fine, order:

- (a) the deprivation of a director's civic, civil and family rights;
- (b) prohibition, for a maximum period of five years, on having a public function or conducting a professional activity in the same field as that in which the offence was committed;
- (c) exclusion from being permitted to bid for public tenders for a period of at least five years;
- (d) publication of the judgment; or
- (e) personal bankruptcy or prohibition on management.⁶⁶

33 Moreover, criminal liability for the offence of fraudulent organization of insolvency⁶⁷ may be imposed upon a director where he:

- (a) fraudulently misappropriates or conceals part of his own personal property to avoid paying the debts of the company in insolvency; or
- (b) fraudulently acknowledges and accepts debts that do not exist.

34 It should be noted that absence of the intent to defraud constitutes a defence against both criminal sanctions, namely criminal bankruptcy and fraudulent organization of insolvency.⁶⁸

⁶³ INSOL International Report, above note 55, at 274.

⁶⁴ A person guilty of this offence may be subject to imprisonment (maximum five years) or a fine (maximum EUR 75,000).

⁶⁵ INSOL International Report, above note 55, at 273.

⁶⁶ *Idem*.

⁶⁷ Article L. 654-14, Commercial Code.

⁶⁸ INSOL International Report, above note 55, at 273.

Conclusion

35 To conclude, it could be argued that corporate rescue is only feasible if the mind-set of all the “key actors” (including directors) is fundamentally shifted towards rescue. Where a rescue culture is embedded in the mind-set of the parties involved in corporate restructuring, the initiation of proceedings may be crucially sought at an early stage, hence averting a later possibility of failure. Therefore, directors have, undoubtedly, a very significant part to play in corporate rescue.

36 Corporate rescue has attracted increasing interest in the last decades. Both the UK and France have undergone thorough reforms and introduced drastic changes in respect of their corporate reorganisation mechanisms so as to promote the establishment of a corporate rescue culture.⁶⁹ In particular, with regard to the role of directors in the process of corporate rescue, both the United Kingdom and France have sophisticated director-liability regimes in place. In addition, it could be said that both jurisdictions adhere to the stick and carrot approach, as essentially, both legal systems provide directors with the necessary “legal tools” in order to encourage them to take early intervention stapes in order to avert liquidation.

37 Moreover, where directors fail to take advantage of the “carrot” approach, both legal systems provide for a “stick” of civil as well as criminal liability. Although the substance of the provisions relating to civil and criminal liability of directors in insolvency appears different, arguably both jurisdictions share a common aim, namely the need to enhance directors’ efficiency, so as to promote corporate rescue. Ultimately, it could be said that each jurisdiction adopted different means, in order to achieve the same ends, effective corporate rescue.

⁶⁹ A. Kastrinou, “Comparative Analysis of the Informal Pre-Insolvency Procedures of the UK and France” (2016) 25 *International Insolvency Review* 000 (forthcoming).

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