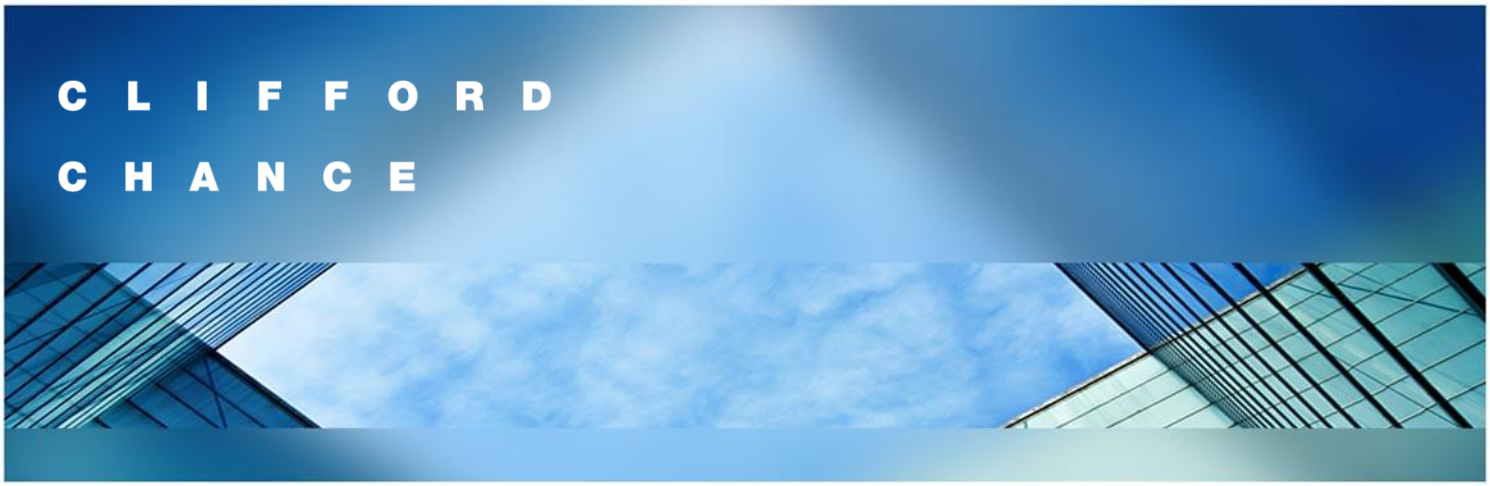


# A NEW DAWN FOR RESTRUCTURINGS IN FRANCE

From 1 October 2021 debtors needing to restructure in France will have access to a new framework. The most significant change is the availability of the new accelerated safeguard procedure which is designed to offer a streamlined rescue mechanism, allowing debtors to restructure within 4 months and without the unanimous consent of all creditors. The process is overseen by a court appointed receiver and also benefits from the court's approval. The legislation also allows for rescue finance to be provided which then receives a super priority status. The new law is derived from the EU Directive on restructuring frameworks, and promotes France as a key jurisdiction for restructurings of the future. It leverages off existing French rescue procedures, providing a more flexible rescue mechanism more suited to dealing with complex capital and debt structures, and overcoming the impasse of requiring unanimous creditor consent, while at the same time ensuring that the necessary creditor safeguards are in place.

**Key issues**

- Updated restructuring frameworks from 1 October 2021
- Accelerated safeguard is accessed via the conciliation route
- Restructuring under the new accelerated safeguard process within 4 months
- Allow creditors to be classified by court receiver within classes in order to vote on the terms of the plan
- Dissenting creditors/classes of creditors can be crammed down

***"The new measures are very much welcomed and are a significant milestone in promoting a more balanced rescue culture in France. They could not be more timely in terms of offering distressed debtors an opportunity to resolve their difficulties, while at the same time ensuring that creditors' existing rights and priorities are balanced in that process. The accelerated timescale recognises that swift action is often needed in a restructuring and the process will encourage deals to get done."***

Delphine Caramalli – Head of restructuring for France

***"France like other jurisdictions has embraced the rescue culture by implementing this new legislation. This has to be good news for debtors facing distress. They now have a number of options available to them to resolve their difficulties at an early stage, that is good news all round for creditors and debtors alike."***

Philip Hertz – Global head of restructuring

## NEW RULES APPLICABLE TO ACCELERATED SAFEGUARD

Accelerated safeguard proceedings are aimed at restructuring and reorganising capital structures of distressed companies when no unanimous agreement is possible during the course of the conciliation proceedings. The process has now a maximum duration of 4 months and can be used by all corporate entities (regardless of their size).

In the new accelerated safeguard proceedings as well as in regular safeguard and judicial rehabilitation proceedings, creditors must now be classified within classes[1]. Such classes of creditors are constituted by Court-appointed receivers (*administrateurs judiciaires*) and are required to vote on the restructuring plan (to be presented by the debtor only in safeguard proceedings). Dissenting creditors may be crammed down (see further below).

The approach to classification is as follows:

- only parties who are affected by the plan can be included in the classes;
- creditors sharing a sufficient community of interests will be in the same class and should benefit from equal treatment under the plan;
- to constitute classes, receivers take in consideration (amongst other things) existing subordination agreements and security packages (e.g., there are likely to be separate classes for secured creditors, shareholders, preferential creditors and strategic suppliers);
- certain claims such as those arising from employment contracts or those secured by a *fiducie* cannot be affected by a restructuring plan.

Following the constitution of classes of creditors (which may be challenged by creditors), the restructuring plan is presented to the vote. To be adopted, the plan must be approved by a two-third majority vote within each class (2/3 of the claims amount or 2/3 of the number of voting members).

After the plan has been adopted with a 2/3 majority vote, the plan must be approved by the Court. Before rendering its decision, the Court verifies that the overall process has been conducted in accordance with applicable rules. The Court also verifies (amongst other things) that individual dissenting creditors are no worse off than in a liquidation scenario (best interests of creditors test).

The restructuring plan can be imposed by the Court on dissenting creditors or creditor classes (cross-class cram-down) where the 2/3 majorities have not been met, provided several conditions are met namely:

- the plan has been approved by: (i) a majority of the classes of affected parties, provided that at least one of those classes is secured or senior to ordinary unsecured creditor (*créanciers chirographaires*) or (ii) at least one of the classes of affected parties is "in the money" other than a shareholders' class (upon a valuation of the company by an independent expert);
- the plan must comply with the absolute priority rule (i.e., dissenting senior creditors must be fully repaid before a junior ranking class is entitled to be paid or retains an interest).

[1] Same rule applies in safeguard and judicial rehabilitation proceedings where debtors have more than: (i) 250 employees and €20m of turnover or (ii) €40m of turnover.

In the event the cross-class cram-down is used against the shareholders' class, the Court also verifies that the following additional conditions are met (provided that the decision of the Court is deemed to constitute a modification of the share capital and the by-laws without the obligation to convene a shareholders' meeting):

- the company must have a minimum of (i) 250 employees and a turnover of €20m or (ii) a turnover of €40m;
- it could reasonably be expected that the dissenting shareholders' class would not likely be reimbursed in a liquidation scenario (upon a valuation of the company by an independent expert);
- if the plan involves a capital increase by cash contribution, the shareholders should benefit from a preferential subscription right that would be proportionate to the amount of their shares;
- the plan does not involve the transfer of the shares of the dissenting shareholders' class without their consent.

***"It's encouraging to see other jurisdictions adopting measures that promote rescue, we now have a great collection of new restructuring tools in France, together with those promoted recently in other jurisdictions such as the Netherlands, Germany and the UK. As those other jurisdictions have already shown, the availability of new techniques has in practice made a real difference to debtors facing distress."***

Ilse van Gasteren – Co Ordinating Partner, Continental Europe for restructuring and Insolvency

## Accelerated safeguard and other in-Court proceedings compared

| | Accelerated safeguard | Safeguard | Judicial rehabilitation |
|---|---|---|---|
| **Maximum duration** | 4 months | 12 months | 18 months |
| **Constitution of classes** | Mandatory | Mandatory only if certain thresholds are met | Mandatory only if certain thresholds are met |
| **Presentation of a plan** | Only the debtor | Only the debtor | The debtor or any affected party |
| **Cross-class cram-down** | Possible (with the agreement of the debtor or the receiver) | Possible (with the agreement of the debtor or the receiver) | Possible |
| **Court imposed term-out** | Not possible | Possible (max 10-year period) | Possible (max 10-year period) |

Finally, in the event of safeguard proceedings being converted into judicial rehabilitation proceedings, classes already constituted will be maintained as such.

## REINFORCEMENT OF MECHANISMS TO PREVENT BANKRUPTCY

The legislation also promotes resolution at an early stage and actions to be taken to prevent bankruptcy.

Firstly, it provides that the competent Court may request any useful document to clarify the economic and financial situation of a company. Likewise, the warning procedure (*procédures d'alerte*) is strengthened as it may be accelerated, if a company's auditors identify a need for emergency measures for instance.

Secondly, the legislation reinforces the attractiveness of conciliation proceedings.

Under the new regime effective on 1 October 2021, should a creditor refuse to grant a temporary breathing space upon request of the conciliator, the debtor can file a petition before the competent Court to require (i) the deferral or the rescheduling of accrued debt over a maximum period of 24 months (so-called grace period) or (ii) the deferral or the rescheduling of debt to be accrued (i.e. undue debt at the date of the petition) for the duration of the conciliation proceedings. The guarantor also benefits from such deferral or rescheduling consented by the competent Court in favour of the debtor.

## RESCUE FINANCE

The new legislation perpetuates the rescue finance (so-called post money lien) introduced into French law as a result of the temporary Covid-19 measures.

Rescue finance providers benefit from a priority if the contribution was made after the opening of the insolvency proceedings and duly authorised by the bankruptcy judge (*juge commissaire*).

Rescue finance providers cannot be subject to any rescheduling or write-off, unless they agree otherwise. And rescue finance shall rank senior (immediately after super senior employees-related debt, new money provided in the context of conciliation proceedings).

## ADJUSTMENTS TO EXISTING FRENCH INSOLVENCY LAW RULES TO COMPLY WITH FRENCH SECURITY LAW REFORM

The new legislation also modifies some French insolvency law rules to comply with the new security law reform adopted concomitantly.

Among others:

- claw back rules are clarified to enable *inter alia* the substitution of security of an equivalent nature;
- the enforcement of *in rem* security granted by the debtor to secure a third-party's debt (*cautionnement réel pour autrui*) is now affected and automatically frozen upon the opening of insolvency proceedings (of the pledgor)[2];

[2] The new legislation terminates a debated line of precedents that ruled conversely (French Supreme Court., 25 Nov. 2020, no. 19-11525).

- protective rules applicable to individual guarantors (as opposed to corporate guarantors) in safeguard proceedings are strengthened and extended to judicial rehabilitation proceedings;
- security may not be increased as a consequence of the opening of insolvency proceedings; thus top up clauses in security account pledges are no longer enforceable.

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