

REGIONAL DEVELOPMENTS

France*

I. Insolvency and Bankruptcy

The present times of relative economic difficulty make it topical to examine the issue of corporate insolvency. The latest position of French legislation on this matter is to favor the corporation's economic recovery (*redressment*). Accordingly, when a corporation finds itself unable to pay its debts, it may request protection from the courts. This procedure, known as *dépôt de bilan* or filing of balance sheet, automatically opens a waiting period for the corporation to file a more complete financial statement and a business plan leading to the continuation or the winding up of business. Such waiting period cannot exceed eighteen months.

These main consequences take place in this period. First, the corporation is managed by a trustee appointed by the court. Second, as of midnight of the date the order is entered, payment of any previous debt is barred. Subsequent debts can be paid by the trustee. Third, the trustee may enforce the contracts that the corporation has with other enterprises. Debts generated by these contracts must be paid when due. Otherwise, these debts have priority. If the trustee elects not to enforce the contract then it is deemed rescinded. Consequently, if the non-performance causes damages to the other party, the latter may recover.

Once the waiting period ends, and the court believes that the corporation may continue doing business, one of the following two main solutions could be chosen: (1) with the consent of the creditors as to delays and partial payments, the plan for continuation of the enterprise can be approved; or (2) the enterprise can be awarded to a third party whose plan to save the enterprise and its commitment to it is found satisfactory by the court.

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II. Electronic Transmission of Documents

According to French law, parties who exchange electronic messages or documents may determine the evidentiary weight carried by the documents so transmitted.¹ French evidence rules, in this case those established by the Civil Code, do not fall under the category of public policy (*ordre public*).² It follows, therefore, that parties to a contract are free to stipulate about said evidence rules.

III. Support Letters

Support letters (*lettres de patronnage*) are those issued by controlling companies stating, in many different ways, that they support and approve the loans requested by their subsidiaries. These letters bind companies that issue them if the court finds that they contain a guarantee of payment. The difficulty resides in determining when such documents are binding. The answer depends entirely on how the document is construed.

Generally, liability arises when the party in question has promised or guaranteed a certain performance with enough precision to enable a court to order such party to perform or to pay damages in case of breach. Based on this principle, French courts have found that controlling companies were bound by their support letters, addressed to banks that loaned money to said companies' subsidiaries, when the following language was used: "From now on we are taking all the necessary steps";³ "[the corporation] undertakes to do all that is necessary";⁴ or "[the corporation] undertakes to take all measures";⁵ "[w]e affirm our intention of assisting our subsidiary in all its financial needs and, if necessary, of substituting for it and answering for all the commitments it may have acquired in your respect; [o]ur commitment is to protect our subsidiary's long-range solvency";⁶ "[w]e are aware of the loan that you have approved for our subsidiary."⁷

Language like the above makes the controlling company liable for the debts acquired by its subsidiary. The rationale is that the party who has promised to "take all steps necessary" to support its subsidiary, is not directly liable for payment of the latter's debts. However, the controlling company has to bail out its subsidiary to prevent it from becoming insolvent.⁸

1. Judgment of Nov. 8, 1989, Civ., 1990 J.C.P. II, No. 21576 (comment by Virassamy).

2. Judgment of Nov. 16, 1977, 1977 Bull. Civ. III, No. 300.

3. Judgment of Oct. 13, 1987, Trib. com. Paris, 1981 Revue Banque, No. 1456 (commentary by Martin).

4. Judgment of Apr. 25, 1979 (Uniputz Mosbacher v. B.N.P.), Cass. civ. 3e, ch. A., Paris, 1980 D.S. Jur., No. I.R.55.

5. Judgment of Mar. 10, 1989, Paris, 1989 G.P., No. 292.

6. Judgment of Dec. 21, 1987, Com., 1988 Revue Sociétés, No. 398.

7. Judgment of June 16, 1989, Trib. com. Paris, 1987 Revue de Jurisprudence Commerciale, No. 53 (commentary by Gallet).

8. Judgment of June 16, 1986 (Société générale v. Soc. SOREPAR), Trib. com. Paris, 1987 D.S. Jur., No. S.297.