ReedSmith

The business of relationships.℠

The Macron Bill about to introduce a right to remove shareholders of distressed companies: a new threat for investors or new opportunities for creditors of French companies in need of turnaround?

Brice Mathieu, counsel, Reed Smith LLP, Paris
bmathieu@reedsmith.com

In its 2014 insolvency reforms,[1] the French Government contemplated allowing a French Commercial Court (*Tribunal de commerce*), faced with a company under judicial reorganisation (*redressement judiciaire*)[2], to remove that company's shareholders[3]. In the end, the Government did not include such proposal in the 2014 legislation for fear that the French Constitutional Court (*Conseil Constitutionnel*) would rule that such a mechanism is unconstitutional due to the fact that it would be viewed as an unjustified attack on property rights[4]. However, subject to necessary amendments, the proposal has now been put back on the agenda for 2015.

After multiple twists and turns, long hours of debate over four weeks, strong resistance from the conservative opposition and criticism from the far left, the "*Projet de Loi Macron*"[5] (the "Macron Bill") for growth, activity and equal opportunities for the economy, was finally passed on February 17, 2015 without being put to a vote of the members of the French National Assembly by virtue of Article 49-3 of the French Constitution.[6]

[1] *Ordonnance* (ministerial order) n°2014-326 of March 12, 2014 on prevention and insolvency proceedings.
[2] But not a company under safeguard proceedings (*sauvegarde judiciaire*).
[3] Article 33 of the draft ministerial order.
[4] In such a case, if a law is declared as unconstitutional, it may not be enacted. If only a part of the law is declared unconstitutional, the law may be partially enacted if the provisions which do not comply with the Constitution are capable of being separated from the rest of the law. The relevant provision that is against the Constitution may not be enacted if it can be separated from the entire law. Conversely, the entire law may not be enacted.
[5] Emmanuel Macron is the French Minister of Finance.
[6] Where parliamentary support may not be enough to pass a bill, Article 49-3 allows the French Government to override Parliament and pass a bill without vote. In this situation, the passing of a bill puts in issue Government responsibility to the National Assembly. The bill is considered adopted unless a motion of no confidence (*motion de censure*) is introduced within 24 hours following the bill and adopted by the National Assembly.

1. Introducing a new regime for removal of shareholders by a Court

Beyond the newsworthy provisions on Sunday trading laws and deregulation of some sectors (bailiffs and notaries in particular), the Macron Bill (Article 70) introduces wider powers for the removal of shareholders where a judicial reorganisation plan is under consideration by a French Commercial Court. A new Article L. 631-19-2 would feature in the French Code of Commerce, providing for the removal of majority shareholders subject to certain conditions.

Pursuant to this Article, if the majority shareholders refuse to support or to collaborate on the proposed judicial reorganisation plan, they may be forced to sell their interests in the debtor.

Mr Macron considers that these new provisions will allow for continuation of the activities of companies facing difficulties by allowing the Court to force a sale of the shares owned by controlling shareholders to third parties who present a credible reorganisation plan. Another reason stated by Mr Macron is to ensure that employment be safeguarded, where possible.

2. Strict conditions

Article L. 631-19-2 in the French Code of Commerce would provide for certain strict conditions that must be met before the measure of forcing a shareholder to sell its shares can be imposed by the French Commercial Court.

The first condition is that the measure is limited to companies with more than 150 employees or companies which control one or more companies having more than 150 employees.

Moreover, the measure will only be available where the two following cumulative conditions are met:

(i) the disappearance of the company, as a debtor, would cause serious disturbance to the economy and to the local employment area (*bassin d'emploi*)[7]; and
(ii) a share capital reorganisation of the debtor is the only solution to avoid such disturbance and to allow the continuation of its activity, after examination of the possibilities to totally or partially sell the debtor.

3. Removal procedure

Where the conditions of Article L. 631-19-2 of the French Code of Commerce are met, if a judicial reorganisation plan has been prepared to preserve the company and its majority shareholders refuse to approve a modification of the share capital to accommodate those who have undertaken to execute the plan (*i.e.*, the transferees), then, at the request of the Court appointed administrator or the Public Prosecutor, the French Commercial Court may:

[7] This condition is subjective and is obviously vulnerable to differing interpretation.

- appoint a judicial representative (*mandataire*) who will (a) convene a shareholders' meeting and (b) vote in favour of a share capital increase in lieu of the dissenting shareholders; or
- order, in favour of the person(s) who have undertaken to execute the plan, transfer of all or part of the shares owned by the dissenting shareholders.

In the latter case, the approval of the plan by the French Commercial Court will be subject to the transferee(s) of the shares committing to hold such shares for a duration which may not exceed the term of the plan. In the event of a breach of this commitment, the French Commercial Court may decide to terminate the judicial reorganisation plan and the purchase price paid by the transferee(s) will not be refunded.

The Macron Bill also provides that minority shareholders benefit from this procedure as, in certain cases, they may have the right to withdraw from the company and sell their shares to the person(s) who has(ve) undertaken to execute the judicial reorganisation plan.

4. Valuation of the shares: involvement of a designated expert

When the sale of shares of the majority shareholders is ordered by the French Commercial Court or when the minority shareholders decide to exercise their right of withdrawal, and should the parties not agree on the value of these shares, an expert is designated by the President of the French Commercial Court at the request of the most diligent party, the Court appointed administrator or the Public Prosecutor.

The role of the expert is to determine the value of the shares to be sold. This mechanism raises an interesting question: how will the shares be valued if the purchaser's commitment to purchase is subject to the essential condition to pay a symbolic euro? An alternative mechanism of share capital reduction by way of cancellation of the shares might have been more appropriate and less subject to discussion on the valuation issue.

5. Creditors' interests: overriding shareholders and converting debt to equity

Since the entry into force of Order n°2014-326 of 12 March 2014, creditors of a company under judicial reorganisation are allowed to submit a continuation plan (Article L. 626-30-2 of the French Code of Commerce). The Macron Bill now offers such creditors the possibility to "cram down" majority shareholders and benefit from a plan that may better favour creditors' interests.

With the looming prospective threat of removal from the share capital of the debtor company, shareholders may take proposals from creditors or third parties more seriously and look to initiate constructive discussions taking into account all the parties' interests.

Where creditors are able to invoke the new provisions in their favour, and as newly anointed shareholders of their debtor, they would have the legal means to participate in the reorganisation of the debtor.

6. <u>Next steps</u>

The Macron Bill is now on the Senate's agenda for April. The Senate is controlled by the opposition which has indicated that it intends to seek in-depth amendments to the bill (as adopted by the National Assembly). A specific commission gathering members of both legislative assemblies will attempt to settle on a compromise law. This is likely to prove a challenging process, considering the opposed majorities in the lower and the upper assemblies.

Upon return from the Senate, the Government will request that the National Assembly take a final decision. In this case, either the Government succeeds in convincing a sufficient majority at the National Assembly to vote for the Macron Bill in whatever form it may finally take, or by invoking Article 49-3 of the Constitution once more.

The road is long and multiple twists are possible before the Macron Bill may see the light of legislative day.

To be continued…

About Reed Smith

Reed Smith is a global relationship law firm, with more than 1,900 lawyers in 25 offices throughout Europe, the Middle East, Asia and the United States.

Founded in 1877, the firm represents leading international businesses from FTSE 100 corporations to mid-market and emerging enterprises. Its lawyers provide litigation and other dispute resolution services in multi-jurisdictional and high-stake matters, deliver regulatory counsel, and execute the full range of strategic domestic and cross-border transactions. Reed Smith is a preeminent advisor to industries including financial services, life sciences, health care, energy and natural resources, advertising, technology and media, shipping, real estate, manufacturing, and education. For more information, visit reedsmith.com.