LATHAM&WATKINS

Number 1433 22 November 2012

Client Alert

Latham & Watkins Finance Department

Time for conciliation: French accelerated financial safeguard now also available for holding companies

New insolvency proceedings called "accelerated financial safeguard" (*sauvegarde financière accélérée*) were introduced into French law two years ago[1]. The introduction of these new proceedings not only drew from the experience of the so-called "pre-pack" restructuring practice, implemented for the restructuring of certain French distressed companies, but also innovated by being applicable only to so-called "financial debt".

The objective of accelerated financial safeguard proceedings is to quickly (*i.e.* within a maximum time period of two months) overcome the dissent of minority financial creditors holding up the restructuring of a French company's financial debts that has otherwise obtained — or is likely to quickly obtain — the approval of two-thirds of its financial creditors (credit institutions and bondholders). It is quicker and simpler than ordinary safeguard proceedings because the proceedings do not affect the rights of creditors that are not financial creditors (*e.g.* suppliers, tax or social security administrations) who, in particular, will continue to be paid in the ordinary course of business notwithstanding these proceedings.

"The combination of conciliation proceedings and larger availability of accelerated financial safeguard proceedings should change the dynamics of French restructurings going forward."

Until now, accelerated financial safeguard proceedings were only available for companies which had more than 150 employees or with revenues for the previous financial year exceeding €20 million, conditions which are not met by holding companies, particularly in LBO deals.

This restriction, which explains the disuse of accelerated financial safeguard proceedings up to now, was relaxed by a decree dated 20 September 2012[2] pursuant to which accelerated financial safeguard proceedings are now available for **companies with total net assets[3] exceeding €25 million**. Such threshold is furthermore reduced to €10 million when the debtor is a company controlling[4] another (i) which has more than 150 employees or (ii) with revenues for the previous financial year exceeding €20 million or (iii) with total net assets exceeding €25 million.

The accelerated financial safeguard applicant must also meet additional criteria:

- it must pass the "ordinary safeguard" test, *i.e.* it must face difficulties that it cannot overcome, but it must not be insolvent (*cessation des paiements*);
- it must already be subject to conciliation proceedings (see below) and have prepared a restructuring plan ensuring the continuation of its business as a going concern; and

Latham & Watkins operates worldwide as a limited liability partnership organized under the laws of the State of Delaware (USA) with affiliated limited liability partnerships conducting the practice in the United Kingdom, France, Italy and Singapore and as affiliated partnerships conducting the practice in Hong Kong and Japan. Latham & Watkins practices in Saudi Arabia in association with the Law Office of Salman M. Al-Sudairi. In Qatar, Latham & Watkins LLP is licensed by the Qatar Financial Centre Authority. Under New York's Code of Professional Responsibility, portions of this communication contain attorney advertising. Prior results do not guarantee a similar outcome. Results depend upon a variety of factors unique to each representation. Please direct all inquiries regarding our conduct under New York's Disciplinary Rules to Latham & Watkins LLP, 885 Third Avenue, New York, NY 10022-4834, Phone: +1.212.906.1200.
© Copyright 2012 Latham & Watkins. All Rights Reserved.

- it must demonstrate that its proposed restructuring plan is capable of receiving enough support from its financial creditors in order for it to be likely to be adopted by two-thirds[5] of its credit institutions and two-thirds of its bondholders within one or a maximum of two months as from the opening of the proceedings — if no plan has been adopted within this deadline, the commercial court must end the accelerated financial safeguard proceedings.

Conciliation proceedings, which are a mandatory prerequisite to applying for accelerated financial safeguard, are one of the two French contractual court-supervised restructuring proceedings (the other one being the "*mandat ad hoc*"). With the exception of certain grace periods that can be imposed, creditors' rights may not be compromised without their consent and management retains all of its powers notwithstanding the conciliation. Conciliation proceedings are only binding on creditors that agree to participate in them and to be bound by the agreement that is ultimately reached.

Conciliation proceedings may be initiated by the company only, which petitions the president of the commercial court to appoint a conciliator proposed by the company (in practice, a licensed French insolvency practitioner), in order to help the company reach an agreement with its creditors. The company must show that it experiences, or expects to experience, legal, economic or financial difficulties.

The proceedings are limited to a maximum time period of five months and are confidential for their duration. After they are concluded, their existence and the agreement reached by the company and its creditors may become public if the company requests that the agreement be approved by the commercial court (the agreement with the creditors will typically provide whether or not the company should seek such an approval).

In order to obtain court approval, the company must declare that the terms of the agreement reached with its creditors allow the company to continue to operate as a going-concern. Formal approval (*homologation*) will have the following consequences:

- providers of new money or goods or services required to ensure the continuation of the business (other than shareholders providing new equity) will enjoy priority of payment over all pre-petition and post-petition claims (other than certain employment claims[6] and procedural costs), in the event of subsequent safeguard proceedings, judicial reorganization proceedings or judicial liquidation proceedings; and
- should insolvency proceedings subsequently be opened against the company, the insolvency court may not back-date the date of its insolvency to a date prior to the one on which the conciliation agreement was approved by the court. This is very useful, since it eliminates lender liability for supporting an insolvent company and the risk of insolvency-based avoidance actions.

The combination of conciliation proceedings and larger availability of accelerated financial safeguard proceedings should change the dynamics of French restructurings going forward, by minimising the leverage previously exercised by minority hold-out financial creditors (without involving other creditors).

Endnotes

[1] Accelerated financial safeguard was introduced by law n° 2010-1249 dated 22 October 2010, the so-called "law for banking and financial regulation" (*loi de régulation bancaire et financière*) and is now incorporated into the French Commercial Code at article L.628-1 *et seq*.

[2] Decree n° 2012-1071 dated 20 September 2012. This decree implements Law n° 2012-387 dated 22 March 2012 (*loi relative à la simplification du droit et à l'allégement des démarches administratives*) which replaced the previous eligibility criteria to accelerated financial safeguard proceedings.

[3] *I.e.* the sum total of the net value of its assets in accordance with article R.123-200 of the French Commercial Code.

[4] The term "control" is defined by reference to article L.233-3-I-1° of the French Commercial Code, whereby a company controls another when it directly or indirectly holds a portion of its share capital granting it the majority of the voting rights at its general shareholders meetings.

[5] In each case, two-thirds of the creditors belonging to the relevant constituency having expressed a vote.

[6] The discussion of which is beyond the scope of this *Client Alert* but which, in practice, are not necessarily a deterrent to providing new money.

If you have any questions about this *Client Alert*, please contact one of the authors listed below or the Latham attorney with whom you normally consult:

Hervé Diogo Amengual
+33.1.40.62.20.93
herve.diogoamengual@lw.com
Paris

Xavier Farde
+33.1.40.62.23.12
xavier.farde@lw.com
Paris

Etienne Gentil
+33.1.40.62.21.25
etienne.gentil@lw.com
Paris

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult. A complete list of our *Client Alerts* can be found on our website at www.lw.com.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, visit http://events.lw.com/reaction/subscriptionpage.html to subscribe to our global client mailings program.

Abu Dhabi
Barcelona
Beijing
Boston
Brussels
Chicago
Doha
Dubai
Frankfurt
Hamburg
Hong Kong
Houston
London
Los Angeles
Madrid
Milan
Moscow
Munich
New Jersey
New York
Orange County
Paris
Riyadh*
Rome
San Diego
San Francisco
Shanghai
Silicon Valley
Singapore
Tokyo
Washington, D.C.

* In association with the Law Office of Salman M. Al-Sudairi