

## THE FORTHCOMING MIXED-BENCH SPECIALIZED INSOLVENCY DIVISION OF THE FRENCH COMMERCIAL COURTS

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*Résumé: This paper's objective is to present the current French options in the area of institutional insolvency reform. Starting with a reinforced option for a judicial treatment of insolvencies, the reform is geared to establish a mixed-bench insolvency division composed both of professional and lay judges, who will be supported by a body of specialized practitioners and by a series of administrative reforms, amongst which an important training programme comes foremost.*

### Introduction:

#### a. The French commercial court, a historical exception.

The first French commercial court was established in Lyons in 1419, ten years before Joan of Arc rode into Orléans. It was the institutionalization of a practice of self-administered justice between traders which hails back to the medieval fairs in Champagne. A Royal edict of 1563 allowed every town in France to set up its own "consular" court, their procedures were unified in 1673, and the commercial courts were the only ones to sail virtually unscathed through the French Revolution. The law of 16-24 August 1790 was the milestone for the creation of the contemporary *tribunal de commerce*. Originally designed to rule upon disputes between merchants for the delivery and sale of goods, the *tribunaux de commerce* have seen their jurisdiction extended to bankruptcies since 1715 and confirmed in 1838.

The roots of this form of commercial justice explain to a great degree its fundamental aspect, that of a privately administered form of justice. The judges are traders and business executives elected by their peers through the local chambers of commerce, and who elect in turn their own presiding judge. They are a part-time, non-professionalized and unpaid judiciary. The commercial court registrar is an independent judicial officer who purchases his office<sup>1</sup>, very much as was the case under the *Ancien Régime*, and who manages the court and its non-judicial staff very much like a private enterprise. The insolvency practitioners, administrators and liquidators<sup>2</sup> are private operators, although subject to the statutory position of court officers.

There are 227 such non-professional commercial courts<sup>3</sup> throughout France, the geographical distribution and size of which vary greatly, essentially because of historical reasons. This structure changes at the appellate level, where all appeals are examined by the commercial division of one of the 37 appellate courts. These commercial divisions are exclusively staffed by professional judges.

Although the *tribunaux de commerce* enjoy a broad commercial jurisdiction, the bulk of their activity, approximately 80 %, is linked to insolvency<sup>4</sup> procedures, to the tune of 50.000 new cases a year on average.

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<sup>1</sup> This officer's academic qualification and status is however supervised by the Ministry of justice.

<sup>2</sup> Respectively called "*administrateurs judiciaires*" and "*mandataires judiciaires à la liquidation des entreprises*" in their statute fixed by law n° 85-99 of 25 January 1985, and its implementation decree n 85-1389, as amended.

<sup>3</sup> The situation is in fact more complicated, through historical fluke essentially, because one also numbers 26 commercial court exclusively staffed with professional judges, essentially in small jurisdictions, as well 14 mixed composition courts, half of which are a legacy of the German occupation of Alsace and Moselle between 1870 and 1918.

Because of their structure and scope of activity the current French commercial courts are a historical and world-wide exception.

**b. The French first instance commercial courts: an institution under fire.**

From the point of view of substantive law, the French law of insolvency bears many resemblances with similar legislative patterns abroad, and was enacted roughly in the same period of time. It is essentially based on three laws, law n° 84-148 of March 1st, 1984, on the prevention and amicable settlement of difficulties encountered by businesses, law n° 85-98 of January 25, 1985 governing the judicial consolidation and liquidation of businesses, and law n° 85-99 of the same day, enacting the statutory rules governing the professions of administrators, liquidators and business diagnosis experts<sup>5</sup>.

The key operational concept is the notion of interruption of the business' payments, defined as the moment when a business cannot pay its debts with its available liquidities. Before such a stage, the prevention rules apply. After this stage, the insolvency proceedings proper kick in, which see first an observation period implemented before a decision is taken as to the reorganization or liquidation of the business, unless a liquidation is obviously the only solution from the outset. These rules and their implementation provisions have been amended, but are not intended to be drastically modified in the near future.

Quite to the contrary, the current *institutional* arrangement of a specialized commercial court dispensing justice through non-professional judges and private operators exclusively has attracted of late a great deal of criticism<sup>6</sup>. This criticism was expressed in scathing form by a Parliamentary report filed in July 1998<sup>7</sup>. This was followed in 1999 by a joint report of the general inspectorates of the Ministries of Justice and Finance<sup>8</sup>. The two reports agreed to a great extent both on the substance of the criticism and on the solutions advocated.

The charges filed against the existing first-instance commercial courts by these reports are serious and generated a great deal of controversy. The courts were accused of partiality, delay, of being costly, inefficient in saving businesses, and even occasionally of being suspect of corruption. As to their personnel, lay judges were said to be frequently incompetent, whilst the private practitioners were charged with recurrent financial misconduct. The controversy peaked in July 2000 when the Government presented its draft legislation, and saw some 600 judges out of 3.400 resign their commissions in a collective movement of protest.

Three draft laws are currently being examined by the French Parliament. They respectively address the reform of first-instance commercial courts, the amendments to appellate divisions, and the redrawing of the statutes governing the private practitioners. The process is very much advanced to date<sup>9</sup>, as the Government has obtained emergency status for it. More importantly, a very great measure of consensus is apparent from the pre-

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<sup>4</sup> I will henceforth use in English the word "insolvency" to translate the French concept of "*droit des procédures collectives*", which is meant to include all the various stages of the French unitary procedure, starting from the prevention stage right to up the final reorganization or liquidation stage. One has to note that the strict French equivalent to the word insolvency, "*insolvabilité*" is to be understood in the strictest sense, meaning that the debtor is hopelessly strapped of assets, and can therefore only lead to the solution of a total liquidation of the business.

<sup>5</sup> Such legislation, as amended to date, is to be found on the official legal Internet site at <http://www.legifrance.fr>.

<sup>6</sup> The criticisms are not really new, but, before the resistance of the lay commercial court judges, a proposed revision failed to be voted by Parliament in 1985, whilst it had been presented together with the changes in the substantive insolvency legislation.

<sup>7</sup> *Rapport de la commission d'enquête sur l'activité et le fonctionnement des tribunaux de commerce*, n° 1038, F. Colcombet and A. Montebourg, available at <http://www.assemblée-nat.fr>

<sup>8</sup> To be found on the Ministry of Justice's website, under [www.justice.gouv.fr/arbo/publicat/tc3.htm](http://www.justice.gouv.fr/arbo/publicat/tc3.htm)

<sup>9</sup> This article was written in view of the February 7-8, 2001, Forum on Asian Insolvency Reform.

vote declarations of members of Parliament, so that the new structure has a good chance of being passed into legislation. The following exposé is therefore based on the draft legislation only, but a draft legislation which has every chance of becoming law within a few months.

The major change will consist in the introduction of a specialized mixed bench of lay and professional judges, both at first-instance and appellate levels, to deal with insolvency matters.

### **c. The principles governing the forthcoming insolvency divisions within French courts**

Faced with such severe criticism of the existing institutional set-up, one solution is to return the core management powers for insolvencies to the creditors, thus by-passing the courts to a certain extent. Yet again, one could draw inspiration from the British system for instance, where an administrative agency has been managing insolvency procedures for over a century. But, despite the value of such foreign models, there appears a major consensus within the ranks of French policy-makers for the entrenchment of a judicial treatment of insolvency (1).

Another radical option could have been to do away with the existing commercial courts altogether, and to return commercial jurisdiction to ordinary courts. Such an option is probably impractical at this stage for reasons which will be explained below. A consensus was found on the notion of a specialized mixed-bench division, to be assigned insolvency jurisdiction (2).

Finally, the in-depth debate about the reform of commercial courts has shed light on the necessity of reconsidering the administrative framework of insolvency proceedings, specially in respect of the distribution of courts and of the training of insolvency judges (3).

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## **1. THE ENTRENCHMENT OF A JUDICIAL TREATMENT OF INSOLVENCY**

There are four categories of reasons which can be advanced for the French policymaker's choice of maintaining a judicial treatment of insolvency. Next to policy reasons (11), there are legal constraints which impose the intervention of judges (12). But there is also the emergence of the notion of a judicial task-force for insolvency proceedings (13), whilst the emphasis put on prevention techniques reinforces the necessity of resorting to judges (14).

### **11. General policy reasons for the confirmation of the judicial treatment of insolvencies**

A series of policy reasons can be identified which will lead the new legislation to remain essentially within the ambit of judicial activities. They can be brought under two headings, the limits of an administrative treatment of insolvency (111), and the legitimacy of courts in dealing with conflicting interests (112).

#### **111. The limits of an administrative treatment of insolvency**

When confronted with courts which are considered either incapable of dealing efficiently with a given caseload of insolvency cases, or which have shown outright corruption, such as was the case in Britain before 1883, the solution of an administrative agency can be and was implemented. A skilled and corruption-free civil service can indeed be an interesting solution. But several limitations can be opposed to this solution.

If the problem is that of a malfunctioning judiciary, the more obvious solution would be to address directly the cause of the malfunction, be it delay, incompetence, or corruption. One could thus tackle the question in a wider sense than insolvency reform strictly speaking, by improving general caseload management techniques, ensuring better training or a stringent disciplinary framework, to quote but a few areas of possible intervention. This has the added advantage of benefiting the entire judicial institution, and of generating far-reaching effects beyond the boundaries of insolvency cases. Alternately, rather than a broad-spectrum approach, one could envision a small-case one, by setting up a select group of competent judges to address with the appropriate means a very precise and limited area of jurisdiction. When this has been proven efficient, the scope of intervention may progressively be extended.

A second limitation derives from the fact that, even where an administrative agency is set up - such as in the case of the United States Trustee -, a reference to a judge always remains necessary. This is the case for all major decisions in the insolvency proceedings, but also because administrative authorities are generally not allowed to exercise *ex officio* powers when coercive steps have to be taken. A court application is then unavoidable, because enforcement is a reserved province of the judiciary.

This in turn is a source of complexity as different public institutions are involved, both judicial and administrative, which may or may not have the same outlook on insolvency issues. Such a set-up is difficult to organize and operate where means are limited, such as in a number of developing economies. There is also a serious risk of extra delays and rising costs.

Another element has to be factored into the equation. In many insolvency cases, there are strong executive interests at stake. For instance, a great part of the liabilities of a business may consist of tax dues, or of outlying social security contribution. The administration globally considered is frequently a major creditor and the risk is that it will be favoured over private creditors. This is often apparent in the hierarchy of secured claims, where public dues may hold priority over private secured claims. In other words, the independence of an administrative agency in respect of the executive is much less credible than that of a court. Either the agency is not fully independent of the administration's possible pressures, and there is a risk of confusion between State and public interests, or pains are taken to make it independent, in which case it resembles a court and the efforts would probably have been better directed at improving the court's operations.

Generally speaking, the accountability of an administration, whether legal or seen under a practical angle, is perceived as rather minimal. This is an important factor for foreign financial institutions or investors. They may be afraid of considering the implication of a State bureaucracy in the settling of their unpaid claims, when they are used in their own country to the flexibility and openness of judicial proceedings.

In the area of insolvency procedures, speed and attention to every case, however "minor", is of the essence. In this respect there is a tendency of administrations to focus on "major" insolvency problems, on or the cases which may be politically sensitive to the executive. On the other hand, the decision-making culture of courts can be contrasted with the trend encountered in certain administrative services of dealing by priority only with "easy" cases, and of letting the more difficult ones by the side of the road. One thinks here for instance of situations where the immediate liquidation of a big firm is in order, for fear of a domino effect against a variety of smaller suppliers. An administrative agency may be very sensitive to political pressures exercised for fear of the social consequences of a massive redundancy plan. Courts seem a better organ for making difficult "euthanasia" decisions.

112. Courts are the institution tailored to deal with conflicting interests:

1121. Should the solution of an administrative agency be set aside, the policymakers may thus envision the possibility of letting creditors take up the management of insolvency proceedings. There is a case for this approach, based essentially on the idea that after all it is the creditors' money which is at stake, and nobody else's, and that, being economic agents by profession, they are *ipso facto* better qualified for making an efficient and speedy economic appraisal of the situation.

In other words, the institutional framework for dealing with insolvencies would essentially revolve around a creditors' committee, whilst judges would be phased out of the insolvency process as much as possible.

This solution is far from revolutionary. On the contrary it is the traditional one, where the defaulting debtor is thrust into the hands of his creditors, even to the point of enslavement as was the practice in Antiquity. Of course, modern solutions are based on the premise of a negotiated settlement between the debtor and his creditors. But it seems quite evident that such a situation is hardly a level playing field for the single defaulter versus a group of disappointed creditors<sup>10</sup>.

Such a trend runs counter to the general evolution of insolvency law observed in France since the 19th century, where public perception has changed considerably since the days when the bankrupt debtor was seen as

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<sup>10</sup> For a literary illustration dating back to 1837, see Balzac's *César Birotteau*, a novel based on Balzac's first-hand experience of insolvency proceedings - and of their detrimental outcome.

a quasi-criminal offender. Today, the emphasis is put on the economic difficulties of a business within the complex framework of causes and consequences generated in an industrialized society.

An insolvency procedure is nowadays far more complex than a simple confrontation between a debtor and a group of presumably equal creditors. Within the ranks of creditors, there are many varying situations: secured creditors have little regard for non-secured creditors, the State may decide to safeguard its interests first and foremost. In certain systems, specific advantages may be granted to employees over every other category. Company interests may conflict with shareholders' interests. There will be a tendency for all creditors to file behind the leading secured creditor, generally a financial institution, with the hope that the latter will not help itself first under the pretext of a sound management of the proceedings.

Because they are usually better protected, banks will most frequently be in the lead. In other words, insolvency proceedings will as a rule be managed in accordance with financial criteria rather than, for instance, on the basis of an economic, marketing or commercial analysis of a company's activities. Banks may tend to have bureaucratic and prudent reactions, whilst a manufacturer will be more attuned to the element of risk or innovation in a business proposal.

Another illustration of the risks entailed by creditor top-heavy procedures, is that they will ignore the other players in the field, such as employees, administrations, consumers or foreign investors. Creditors will quite naturally pay scant attention to general-interest issues, such as environment policy, the protection of intellectual property, or the maintenance of public utilities. French procedures strive to take this variety of interests into account. Such a preoccupation is apparent when one examines the list of persons entitled to file an insolvency suit, or in the concept of "rehabilitation plan" which replaced that of concordate.

Finally, a privately operated insolvency suit brings about the permanent risk of insider dealing and abuse, absent the watchful eye of a pro-active judge.

1122. The second major argument that proponents of a return to a creditor-led management of insolvencies also put forward is the fact that judges have little competence or calling for the making of purely economic decisions. Because they are not economic agents, they are said to be radically incapable of making an informed decision.

Without entering into the details of the answers to this apparently strong position<sup>11</sup>, one can simply state that it is nothing but a particular illustration of a classic argument: judges should steer wide away from technical issues. This approach is excessive inasmuch as it presupposes an ideal situation where economic facts can be clearly separated from legal issues and that the resulting distribution of roles can be made between economic agents and judges. It omits to take into account that economic and legal issues are generally irretrievably emmeshed into each other. Such a proposition could be developed *ad absurdum*. For instance, judges should leave medical liability disputes to doctors, or construction litigation to architects, because they are obviously neither physicians nor builders. It is on the contrary generally accepted that judges are entitled to rule on medical negligence or on construction errors.

In the end, one cannot stress too much that when the intervention of the judge is considered, it is not in order to exercise a quasi-dictatorial anti-economic power over creditors. It is assumed that negotiated settlements are of course to be encouraged as a priority, and, if possible, that they should be the rule. Where an agreement has been achieved, there is no need for judicial intervention, assuming that all the parties have been fairly included in the process and have given their enlightened consent. The judge's role only resurfaces where a dispute arises, and on this point there can be little discussion as to his legitimacy.

To sum up on this aspect of the policy issue, it could be said that it is precisely of the essence of judicial work to arbitrate fairly and consistently between the variety of competing interests arising out of a situation of insolvency. Any attempt to factor the judge out of the treatment of insolvencies runs the risk of seeing a given group of interests take the upper hand.

12. The legal reasons imposing a judicial treatment of insolvency:

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<sup>11</sup> The major answer is precisely the proposed mixed bench considered in part 2 below.

The issue of the institutional framework for the solution of insolvency disputes is heavily conditioned in France by legal constraints, be they constitutional (121) or derived from European law (122). One also has to mention the implication of resorting to elected judges (123).

121. The constitutional framework imposes a judicial treatment of insolvencies

1211. French constitutional law enacts at the national level a certain number of universal guidelines. Such is the case for instance for the principles of equality and right of access to courts<sup>12</sup>. The first principle spells out the necessity to open a level playing field to conflicting interests, where such interests can be expressed in full and ruled upon equitably. The right of access to the courts is the corollary guideline: the level playing field is that of an open courtroom and is implemented through the procedural rules enforced by the courts.

Should an administrative agency be set up, it will have to follow the substance of such constitutional guidelines, and, in effect, turn out to be a quasi-judicial body. Even in the systems advocating a management of insolvency issues by an assembly of creditors, there are a number of decisions which necessarily have to be referred to a court. Finally, it is a general requirement that wherever a coercive decision is taken against a person or legal entity, the right to legal review has to be open. In short, courts are quite simply unavoidable, and this is a major constraint for the proponents of a purely economic, rather than judicial treatment of insolvency.

1212. Another universal human rights rule is that of the independence of the judiciary<sup>13</sup>, which has to be construed beyond the boundaries of the personal status of judges strictly speaking. Therefore, it is not admissible that a given organ or authority dealing with insolvencies is granted final authority to take decisions if, at the same time, it is not guaranteed independence. One finds an illustration of this obligation in the definition of what a “court” is, according to the European Court on Human Rights caselaw<sup>14</sup>.

The need for an independent reviewing body is all the more necessary in insolvency procedures where the executive may have a high level of legitimate interests at stake. This is the case where the outstanding debts are largely of a fiscal nature, or where the possible number of redundancies decided in the wake of a sale or liquidation of the business might generate considerable social unrest. But although legitimate, such interests cannot be such as to infringe on the independence of the body with jurisdiction to rule on the insolvency case.

One may consider curtailing judicial discretion in insolvency matters, for fear of seeing judges abuse their jurisdiction by making decisions in areas where they have no obvious technical expertise. Conversely, one could decide to enhance their accountability in insolvency disputes, in order to ensure that they do not overstep their duties. But whilst the approach may be perfectly defensible in principle, it remains extremely difficult to tailor the adequate rules without incurring the criticism that in so doing, the policymakers are in fact curtailing the judges’ decision-making powers and *de facto* restricting their independence.

1213. Next to the principle of independence one has to mention the requirement of impartiality. In fact, the existing French commercial first-instance courts are a text-book example of the risks linked to an absence of accountability. Such courts are extremely independent of the executive, as they are staffed by lay, unpaid and elected judges. Their judges are therefore objectively immune of the risk of being pressured by the Government as they are not dependent on it either for their appointment, their tenure or their promotion. But precisely of their radical independence, the main criticism levelled against the existing institutional set-up is that of their partiality. There is no real means of ensuring that a lay commercial judge does not let himself be influenced by feelings of friendship or enmity in respect of the parties involved. The danger is all the greater where insolvency disputes involve economic stakeholders who know each other well within a relatively small area jurisdiction. It was shown by the reports mentioned in the introduction that the smaller the business community served, the

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<sup>12</sup> See for instance articles 7 and 8 of the Universal Declaration of Human Rights of December 10, 1948, article 14 of the Internal Covenant on Civil and Political Rights, article II and XVIII of the American Declaration of the Rights and Duties of man, amongst others. Article 64 of the French 1958 Constitution.

<sup>13</sup> See for instance articles 10 of the Universal Declaration of Human Rights or 14 of of the Internal Covenant on Civil and Political Rights.

<sup>14</sup> As defined for instance in *Campbell and Fell v/ United Kingdom*, a decision made on June 28, 1984, where the court decided that prison visitor’s committee could be termed to be a “court” in the sense that it ensured an independent and impartial review of prisoners’ complaints.

greater the frequency of protracted proceedings, where locally elected judges find it difficult to order the liquidation of a business managed by a long-standing relation of theirs. Conversely, examples were given where the executive of a banking group holding a claim against the insolvent debtor was a member of the trial panel.

Impartiality can be viewed as a principle correlative to independence, or alternatively as an element of independence<sup>15</sup>. Whatever the approach, there is a consensus as to this necessity of an impartial allocation of insolvency cases. In fact, impartiality tends to be seen as a modern, dynamic, material and enforceable criterion, where independence in the strictest sense of the word is a more formal, organic one.

122. The supra-national obligation for judicial review deriving from European law.

Over the past years, European Union countries<sup>16</sup>, as well as more generally all the countries governed by the European Convention on Human Rights, see the issue of courts proceedings ruled by supra-national guidelines. The most well-known and developed of such guidelines is stated in article 6, paragraph 1, of the European Convention on Human Rights.

The core obligation set out by this provision is the existence of an independent and impartial court to deal with civil matters. This is of course applicable to insolvency suits. The issue of independence and impartiality was considered above, and need not be developed further at this stage. What must be underlined is the strong requirement enforced by the European court of an objective assessment of independence and impartiality. It is not sufficient that the judge is subjectively free from any reproach of dependency or partiality. He has to be above any suspicion of even *appearing* dependent or partial. It is therefore an objective assessment of independence and impartiality which is used as a yardstick to evaluate the admissibility of civil procedures<sup>17</sup>. Such an objective requirement is better satisfied by a court than by an administrative agency. It is *a fortiori* even more so the case where insolvency proceedings are managed by a body of creditors who by definition have a direct interest at stake.

Article 6 of the European Convention has also spurred an extensive caselaw in respect of the procedural requirements of a fair trial. Proceedings should be governed by the principle of “equality of arms”, that is to say that all parties should be put in a position where no single one of them enjoys undue advantage over the others. There is an obvious risk where proceedings are in the hands of creditors. In the same sense, the rights of the defendant to a full exposé of his position and arguments are to be enforced. This criterion stresses the necessity of an adversarial debate, even if the insolvency is managed by an administrative agency<sup>18</sup>. Decisions have of course to be fully reasoned and grounded in law, a task for which judges are specifically trained. Judicial ethics have to be observed strictly. And even the presumption of innocence principle has to be enforced, which, translated into the area of civil disputes, amounts to the rules on burden of proof.

123. The option for a judicial treatment is reinforced by the resorting to elected judges

In the French context of a very ancient judicial institution composed of elected judges, it was thought difficult to do away with this mode of recruitment altogether, as will be seen below. On the contrary, the draft

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<sup>15</sup> But one could have a preference for the first interpretation, which is in line with the international Human Rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or the European Convention on Human Rights.

<sup>16</sup> See for instance the very recent European Charter adopted at the Nice summit, in December 2000.

<sup>17</sup> The test case in this respect is the October 1, 1982, *Piersack v/ Belgium* decision, when the court ruled that a case where the president of the trial court had played a role at the pre-trial investigation stage in his former capacity as prosecutor. The subjective impartiality of the judge was not challenged, but an objective appreciation of the situation could have led a neutral observer to consider that the judge did not present the *appearance* of impartiality.

<sup>18</sup> In this respect, one again is confronted to the dilemma of administrative agencies: if they are to be afforded the means to observe such procedural guidelines, they amount *de facto* to fully-fledged courts. It therefore seems to make more sense to address the problem of the quality of the judiciary head-on, rather than to try to circumvent ordinary courts through the creation of a *de facto* autonomous set of courts for insolvency cases, thus creating the additional risks of jurisdiction conflicts, extended delays and additional costs.

provisions enlarge the scope of the electorate and eligibility rules. A high degree of “popular” legitimacy will derive from such an election. The practical consequence is that such judges cannot be left to rule on side issues from the wings of the theatre where the insolvency dispute unfolds.

Next to this historical and political consideration, there is also a specific public attitude to judicial work in France, and probably in civil law countries at large. The culture is one where parties expect as of course the intervention of a judge, rather than one based on a majority of settlements achieved outside judicial intervention. A high degree of expectation is put into the legitimacy and credibility of courts, as opposed to the suspicion that State-monitored agencies elicit, whilst a justice managed through private interests is viewed as liable to profit essentially the “big” creditors over the “small” ones. Judicial redress is considered a right, specifically where it appears substantially less costly than the resorting to a number of private lawyers. Finally, French courts have a tradition of high judicial output, a reality to which public perception is attuned to. Such a cultural context in judicial matters is probably not unique across the world.

### 13. A judicial option buttressed by the notion of a judicial task-force for insolvency proceedings

Recent evolutions show that the French perception of how to deal with insolvency suits tends to develop along the lines of a judicial task-force based on three types of actors: the delegated judge (131), the holders of a “judicial mandate” (132), and the public prosecutor (133).

#### 131. The role of the delegated judge<sup>19</sup>: maintaining a “hands-on” judicial presence in insolvency proceedings.

In line with the fundamental options governing the new English civil procedure rules enacted in the wake of the famous Woolf report<sup>20</sup>, French procedural options call for the presence of a judge to monitor the daily implementation process of an insolvency by the practitioners. It is considered that there is room for such an office between the relative solemnity - and discontinuity - of the full panel hearing, and the complete delegation of every decision to the practitioner appointed, whether administrator or liquidator.

The importance of the matters at hand as well as the speed they have to be dispatched with, call for a judge to be on duty to ensure real-time reaction for urgent decisions within the framework of adversarial proceedings. It is not to say that the judge will do the work of the insolvency practitioners, and indeed he should not be involved in ordinary, day-to-day management issues. Nevertheless, judicial safeguards are needed where important decisions have to be made. This will be the case when the sale of an asset during the reorganization proceedings has to be allowed, to check whether the legal conditions are met for the dismissal of employed staff, to rule on the admissibility of disputed claims, to decide of litigation pertaining to the operation of a clause of reservation of ownership, but to name a few of the issues at hand.

Very often, it would be difficult to have a full bench meet in emergency; on the other hand, it seems impractical to abandon such important decisions to unsupervised insolvency practitioners. And of course, the very fact that the delegated judge is indeed a judge enables to offer all parties the benefit of an independent and impartial treatment of any disputed issue. Proceedings are generally held in chambers and in an informal way, appeal procedures are open but adapted for an accelerated treatment.

The delegated judge is also considered as the memory of the court, as he ensures a continuum of judicial presence in the progress of an insolvency case. He is a source of reports, information and suggestions for the court. But he is not to be a member of the trial bench, which has to reserve its impartiality to rule on the major issues. Such characteristics have led the forthcoming legislation to assign the position of delegated judge to lay judges exclusively, as a great deal of decisions will call more for business experience than for legal expertise.

The delegated judge is finally the supervisor of the enforcement of judicial decisions, specially where a liquidation was imposed. A trained judiciary will afford consistency, speed and predictability to the liquidation

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<sup>19</sup> The “*juge commissaire*”, literally the “commissioned judge”, that is to say a judge delegated by the court to supervise the daily running of an insolvency proceeding.

<sup>20</sup> *Access to Justice, a final report on the civil justice system in England and Wales*, by the Honourable the Lord Woolf, Master of the Rolls, HMSO, July 1996.

process, which in turn means that more time and energy can be devoted to the minority of viable reorganization cases.

132. The concept of “judicial mandate” and its interest

The second category of participants in the judicial insolvency task-force are of course the private insolvency practitioners. In France, these will include the commercial court registrar, the administrators and liquidators, as well as specialized expert professions such as business diagnosis experts.

The recruitment, operations and supervision of such professions will be addressed more in detail below. The point they have in common is that they are officers of the court in the French system, and that they operate on the basis of a “judicial mandate” or commission. Pains are taken to ensure the professional capacity of such officers, but the “judicial mandate” is seen as the solemn basis to require both independence and neutrality in the discharge of their office, as well as the ground on which is founded the overall supervision right of the court. The consequence is that such insolvency practitioners are private operators, but who operate within the framework of a body of public regulations, be it only for their fees.

133. The role of the public prosecutor in insolvency suits:

The last member of the judicial “task-force” is the local public prosecutor. Without going into the ancient historical roots for this original French practice, which was established as early as the 13th century<sup>21</sup>, it is sufficient to underline that the public prosecutor is already present in the present institutional set-up of commercial first-instance courts, and that the draft legislation confirms this option.

This may seem surprising, but should be seen from the standpoint that French prosecutors are members of the judiciary, and that, to all intents and purposes, they are judges in charge of prosecution duties. This underlines their duty of objectivity and impartiality, whatever the process they might be involved in. Where it comes to insolvencies, the prosecutor is seen as the embodiment of the distinction between the public interest, which he represents, and the interests of the State, represented by an agent of the public Treasury. In this capacity the public prosecutor essentially performs a consultative role for the court, as he suggests an objective legal analysis of the situation and represents society at large. He is also the official and legitimate link between the court and the various administrations which may be concerned by the insolvency process<sup>22</sup>.

The public prosecutor is a source of information and of cross-reference for the court. He ensures a measure of adversariality in respect of the economic data which may be adduced by the parties or by the insolvency practitioners. He affords therefore a greater measure of independence to the court, inasmuch as it is not *de facto* solely dependent on what the parties decide to tell it.

There is finally the obvious penal backdrop to insolvency cases, in the form of fraudulent bankruptcy offences for instance. In this latter role, the presence of the public prosecutor is a salutary incentive for the business managers to follow insolvency procedures as they should.

14. The emphasis on insolvency prevention techniques

The practical scope of insolvency law is very often restricted because the ailing business’ economic situation is so degraded that liquidation appears as the only issue, whether seen from the outset of the procedure or after a reorganization has been attempted. The court is more often than not the “last nail in the coffin”, and its statistical activity little more than the supervision of liquidation proceedings, with the ensuing waste of economic assets and social consequences. Current thinking tends to favour pre-judicial measures, rather than peri-judicial or even a-judicial ones.

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<sup>21</sup> In line with the royal ordinance of 1302, according to which the King’s prosecutors and advocates swore an oath to “*render justice to the great as well as to the meek, to the foreigner as well as to the citizen, without excepting any person nor any nation; to safeguard and uphold the King’s rights, without prejudice however to anyone else’s rights*”.

<sup>22</sup> Various administrative structures exist at national and local decentralized levels, the CIRI, CODEFI and CORRI, which bring together representatives of various administrations in order to support ailing business through tax exemptions or rebates for instance.

The French lawmaker has thus set up prevention techniques. It is considered preferable to assist out-of-court, voluntary proceedings designed to anticipate difficulties, rather than to impose upon the court to wait for a creditor to initiate a suit, based on the debtor's default. In practice, the business is often so locked into a maelstrom of difficulties of every nature that its manager has little time or energy to take the initiative of a global settlement. An earlier assistance might create better chances for his undertaking to bridge over such difficulties.

A free market economy precludes administrations from interfering into the management of private businesses. Furthermore, informality, discretion and business acumen are to be required of the agent entrusted with bringing public assistance to a business in difficulty, should such assistance be solicited. Finally, any prevention procedure is based on the assumption that no default has as yet taken place - even if it is in the offing -. Preventive steps can necessarily only be suggested as they rest solely on a voluntary and private settlement between the parties. Prevention is an incentive-based form of intervention. French legislation entrusts prevention to the presiding judge of the commercial court<sup>23</sup>, who is a lay elected businessman. The three modes of prevention are the management of sensitive information (141), the setting up of alert procedures (142), and the judicial intervention in amicable settlements (143).

#### 141. The management of sensitive information

The key to an early detection of a business' difficulties lies in the access to the relevant information. This is a sensitive issue, as of course such information concerns the operation of a purely private undertaking, and public bodies have no *ipso facto* justification in having access to it. This being said, the public interest in supporting ailing businesses has led to make such information available to the commercial court judiciary.

The principal source of this information is to be found in the commercial registry. It is intended first of all as a source of information for would-be partners and for standing creditors. This registry records the "civil status" of a business and all the major events affecting a business. Modifications in the articles of association, in the registered capital, the filing of annual accounts for the most important firms, the registration of securities disproportionate to the registered capital, the recording of protests or of public securities in respect of outstanding dues are typical of the information available. The commercial court judge supervising the commercial registry is at the cross-roads of a flow of information which might reveal the difficulties of a business. One has to add that the judge is aware of any ordinary commercial dispute currently filed before his court, or that he may be informed by the prosecutor of certain offences which might show up a tendency to "cut corners" because of cashflow problems<sup>24</sup>.

It is thus relatively easy to identify a business heading for seriously troubled waters, way before the manager reports it under outside pressure. So sensitive is the information in fact, that legal provisions bar administrations from pooling their resources in these matters, and that the judiciary is the only public authority with a general overview of the situation.

#### 142. Alert procedures

French law has set up alert procedures in order to open early warning tools to businesses. One such instrument is to join an insolvency prevention grouping, specially when the business is too small to afford the constant monitoring of an auditor. Such institutions are specialized in economic analysis and will report impending problems directly to the manager, and they will also bring him a measure of discrete counselling.

Alert proceedings also rest on the presence of auditors, on the role of general assemblies of shareholders, or on the prerogatives of the representatives of employees. But the most innovative form where the commercial court presiding judge, on the basis of the information he has access to, may of his own accord contact the managers and offer his assistance.

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<sup>23</sup> And not to the presiding judge of the insolvency division.

<sup>24</sup> Such will be the case for instance where a business is charged with breaching consumer protection legislation in the management of perishable goods, or where employee safety rules are violated, or again where pollution prevention measures are omitted for lack of funds.

Such proceedings all have in common the fact that they are discreet, informal, and solely designed to bring difficulties to the attention of managers. In no way do they allow to interfere with the management of a business.

#### 143. Judicial intervention in amicable settlement process

Granted that difficulties exist, but that the undertaking has not as yet ceased to pay its creditors, it may find it advantageous to enter into a pre-emptive amicable settlement process. This it can do, and often does, without any court intervention.

But French law allows the commercial court presiding judge to lend a hand in the settlement process. He may appoint an expert to assist the debtor in re-scheduling negotiations. He may appoint a conciliator for a short-term process, he may assist also by ordering a stay of enforcement of claims. Generally, his presence in the process, although informal and discreet, is perceived as a positive contribution by creditors who are guaranteed a speedy reaction should things turn for the worse. The entire process is designed to buttress a private settlement, which may in turn lead to a consolidation plan. If the terms of the settlement are not observed, one may then see insolvency proceedings start with a greater chance of success for the reorganization of the business, as they will be based on a prior analysis and will intervene at an earlier stage.

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Because of the four categories of reasons stated above, the forthcoming French insolvency legislation is based on a large consensus that the role of the judge should be central. But as the last paragraphs demonstrate, this role is somewhat different to what is usually the task assigned to judges. Insolvency judges are asked to be not only pro-active, but even to anticipate difficulties. They are to tackle a wide variety of interests, to marry economic and legal considerations, sometimes to be legislative policy implementers, to practice real-time decision-making rather than reserve their judgement, to work as the focal point of a galaxy of a variety of practitioners, to oversee as public officers the protection of sometimes considerable private interests, and for all this, to observe confidentiality where a judge usually works in public.

It is of course out of the question to set up a “big-brother” type of judiciary, which is doomed to fail and to generate more damage than good. Nor can it be claimed that training is the life-saving solution. Judges obviously do not have business experience, nor can they be highly skilled in the economic aspects of an insolvency suit. In many countries, the resources open to the judiciary would not allow anyway a direct administration of insolvency cases by professional judges. Last but far from least, market economies are based on the fundamental freedom of economic agents, and are not to be managed by public officials or judges, however dedicated.

The dilemma seems therefore intractable: judges are not competent economic agents, but on the other hand judicial treatment of insolvency should be judge-led. The future institutional structure of French commercial courts is designed to overcome such a dilemma: it is based on a specialized, mixed bench of professional and lay judges.

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## 2. THE SPECIALIZATION OF INSOLVENCY JURISDICTION

Breaking away from some 700 years of institutional stability, the forthcoming legislation specializes the jurisdiction of insolvency proceedings. Its core lies in the creation of mixed-bench divisions (21). But the specialization is also that of the private court officers called upon to implement such proceedings (22).

#### 21. Mixed-bench divisions: the principle of co-management of insolvency proceedings.

The major institutional innovation of the new laws will be to introduce a mixed lay-professional division within the courts dealing with insolvency matters (211), as is the case already in Belgium or Denmark for instance. This choice is justified by the combination of skills, as well as by the reciprocity of support that the two categories of judges afford each other (212). One must not omit that it also offers a money-saving solution (213).

#### 211. The major innovation: a mixed lay-professional insolvency division

Despite a certain number of residual reactions, one can consider that a political consensus has been achieved in France for the creation of a mixed insolvency division, which will bring together the competences of both lay, elected judges and those of the professional judiciary. The idea is that a co-management of the insolvency process is the best way to deal with such issues.

At the trial level, the co-management will take the form of a three-judge panel, composed of a professional judge as president, and of two lay assessors. To extend the formula to the appellate level, it was decided to create a lay assessor at the appeal court level. The professional judge at trial level will be a member of the local district court on a full-time but temporary<sup>25</sup> secondment to the insolvency division of the commercial court. The appeal court division assessor will be a lay judge on temporary and part-time assignment. The flexibility of the formula opens a mixed composition both at trial and appellate levels, and thus ensures a consistency of approach rather than a succession of an economic approach followed by a legal approach, as is today the case.

There is a classic interest in the creation of a collective bench, for the simple reason that three minds are best than one. The law wants to generate a lively debate between judges, and to avoid the unilateralism of a single judge. But on the other hand, nothing prevents the court from resorting to the technique of the reporting judge, where it feels that an in-depth pre-trial examination is necessary. It will also be able to base its appreciation of the facts of the case on the information given by the delegated judge. Finally, it is to be remembered that the adversariality of proceedings will involve many parties: the debtor, the creditors, the administrator or liquidator, the public prosecutor, and a representative of employees. The complexity of the information given, the variety of the conflicting interests at stake, and the sometimes contradictory goals of insolvency legislation will better be accounted for through a collective panel.

The option chosen is to restrict the principle of co-management to insolvency cases, competition law, and incorporation issues. The rest of the commercial litigation, such as ordinary disputes between traders will remain within the jurisdiction of their peers. The criterion used here is the existence of a public interest in the type of case dealt with: insolvency suits answer this criterion because of the multiplicity of interests involved, as was developed earlier.

The technique selected is that of a specialized division at every tier. But one must stress that, contrary to the usual understanding of the word, the specialization is to be understood here as the possibility to widen the scope of the knowledge available to deal with insolvencies, within a unitary procedure which may extend chronologically from the prevention to the liquidation stages, passing through an eventual attempt at reorganization.

In other words, the specialization considered is not designed as a break-away from ordinary courts, but quite to the contrary, to draw a type of dispute which up to now evaded ordinary jurisdiction towards the ambit of the professional judiciary. Because of the specific historical context of the French courts, the mixed-bench is a half-way house in a movement in the direction of ordinary courts. But other countries with a different institutional history might consider this half-way house as a movement away from a purely judicial treatment towards the involvement of economic circles in the dispensation of commercial justice. It therefore could be a formula to consider if one wished to go beyond the simple inclusion of *ad hoc* judges into the ordinary courts.

#### 212. The combination of skills within the mixed insolvency division

The major interest of this new type of mixed division is to answer the dilemma mentioned above by combining the skills necessary to deal with insolvency suits. The variety of professional experience is reflected

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<sup>25</sup> Three years, according to the draft

in the composition of the trial bench itself. It is tailored to address the implication of economic realities and of statutory law which makes insolvencies so complex.

2121. The professional judge is to be the president of the first-tier insolvency division. Within the framework of the French career judiciary, this position will automatically ensure that the professional judge is not a junior one, but rather a judge with some 10 to 15 years of seniority and judicial experience. In effect, he will be one of the most senior judges of the local first-instance district court. This background guarantees that the insolvency division will be presided over by a specialist mastering both legal and procedural skills.

Because of his training and experience of ordinary litigation, the professional judge will afford a better level of legal interpretation and analysis, together with an enhanced coherence of insolvency caselaw. It was one of the major criticisms levelled at lay judges, that their uneven level of legal background led to wide discrepancies in the way the law was implemented. This in turn affected the constitutional principle of equality of treatment for all. The defect was all the more critical as practice shows that appeal processes in the area of insolvency procedures are of limited scope. Immediate enforcement of first-tier decisions is the rule, and a suspension of proceedings pending the outcome of an appeal the exception. A first-instance liquidation decision amounts to an unappealable death penalty for the undertaking concerned, as its creditors or clients will immediately cease to do business with it<sup>26</sup>. The contribution of an experienced judge is vital.

The professional judge will also contribute the modern case-management techniques which are currently implemented in ordinary courts. A performing statistical tool, applied information technology, real-time decision and dispatch techniques, single-entry registration norms, “instrument panels” monitoring caseflows, pre-trial interlocutory decision-making, the systematic implementation of judgement templates, are a few of the improvements expected. Ordinary French courts have indeed made much progress in the efficient expedition of court caseloads, which commercial courts did not develop to the same extent. Positive results should derive from this passing over of professional, state-of-the-art “*judicial technology*”.

The presence of the professional judge will furthermore stamp a judicial hallmark upon the entire insolvency process. A central value is that of impartiality, precisely because lay commercial judges are currently criticized for their alleged partiality. The introduction of a judge who cannot be suspected of collusion with local economic interests, and who works in line with the ordinary rules governing recusation and abstention should at a stroke enhance the credibility of the new insolvency division. As the criterion of objective independence and impartiality has become the pan-European norm, the presence of the professional judge should answer best the test of appearances mentioned above.

Generally speaking, the strong ethical requirements imposed on professionals should become the norm for the division’s members, as one cannot imagine that different standards would apply according to the origin of the judge. One can envision a sort of positive “ethical contamination” extending from the professional to the elected judges, as the dominant opinion is that ethical failings are frequently due to absence of awareness rather than to actual misconduct.

The senior position of the future presiding judge within the ordinary judiciary is also clearly designed to enhance the authority of the bench over the judicial officers it commissions. Up to now, the part-time activity and relative ignorance of things judicial has sometimes led lay judges to be manipulated by the professionals, who are both highly qualified and of course permanently on the ball. Henceforth, such professionals will be confronted by an equally competent and permanent judge, and it is reckoned that a certain number of *laisser-aller* attitudes will be kept in check. Specifically, the professional judge will enforce a high level of adversarial debate in order to test whatever allegation or suggestion is made by the administrator or liquidator. The debtor, creditors and third parties interested should have a wider scope to make themselves heard. And one should be aware that the full bench hearing will from now on include two full-time members of the judiciary with the presence of the public prosecutor.

The draft legislation is careful to set out the rule that the professional judge, although assigned full-time to the insolvency division, will only hold a temporary appointment. This is intended to prevent certain judges from holding entrenched positions which would expose them to the risk of becoming too close to their elected colleagues. In fact, the division president will remain subject to the rules governing the accountability of

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<sup>26</sup> This argument can in fact also be directed against creditor-managed insolvency proceedings: it is a single shot process with little practical appeal remedies.

professional judges, and under the disciplinary jurisdiction of the High Council for the Judiciary, the independent supervision body for the judiciary. On a day-to-day basis, the professional judge will ensure in his person that a permanent link to the ordinary court stays open, thus creating a bridge between the commercial and ordinary courts at first-instance level. Any misbehaviour should therefore be reported and acted upon much earlier than is the case today.

2122. The lay judges' presence is obviously endorsed because of the positive technical contribution they are to bring to the insolvency division. In their capacity as business-tested personnel, they will contribute their first-hand experience of economy and business life, their in-depth knowledge of commercial custom, their intensive links to the local and sectorized economy.

The lay judges can claim a double source of legitimacy. First of all, the fact that they are elected by a wide electoral body gives them a strong personal standing, which balances the professional legitimacy of the presiding judge. Second, their economic expertise is the counterweight to the latter's legal and procedural skill. This legitimacy is acknowledged by the fact that the elected judges will outnumber the division president two to one. Theirs is not simply a consultative role, but quite to the contrary that of equals. It is foreseen that they will be in a position to overrule the professional judge, thus avoiding that legalistic excess takes precedence over economic good sense. To all intents and purposes, the lay judges are the official representatives of the business community, and specifically those of the creditors.

The draft legislation reacts to the criticism of defective ethical accountability directed against the non-professional judges. Reinforced requirements are to be imposed, in the form of a compulsory statement of assets and financial interests upon the assumption of judicial office, and in the form of a clear list of incompatibilities directly tailored to the position of the elected judges. Such rules are to be enforced through strict disciplinary provisions, and will buttress the indirect disciplinary control realized through the professional judge's simple presence.

The lay judges' specific expertise in the area of business activities finds its consecration in the fact that they will be the only ones to exercise the duties of delegated judge and president of the commercial court, specially in respect of urgent applications. Far from being restricted to the role of silent assessors, they will see one of their number<sup>27</sup> exercising the vital responsibility of overseeing the day-to-day progress of insolvency cases.

Finally, the recent re-direction of insolvency proceedings towards alternative dispute resolution (ADR) procedures will obviously entail that such techniques are as a priority discharged or supervised by lay judges.

2123. The mixed composition of the new insolvency division will also ensure the reciprocity of support and control which each category of judge will afford the other.

It is indeed a two-way process. The legitimacy of the elected judges, and the credibility of a mixed bench will allow them to be in a position to control any misconduct of the professional judge. Countries fearing the existence of corruption within the ranks of the professional judiciary may therefore see in the creation of a mixed bench a useful form of control of such judicial misbehaviour by ensuring the permanent presence of two non-professional judges. In effect, the latter will be the representatives of the public at large in insolvency proceedings, as is already the case in numerous other areas of the law<sup>28</sup>.

On the other hand, the judicial proficiency, the independence and impartiality which one can reasonably expect of a professional judiciary should quite naturally be extended to cover lay judges. The latter will see their standing enhanced in the eyes of the public, and the decisions of the mixed bench will appear all the more trustworthy.

Thus, all in all, the principle of co-management of insolvency disputes as it is projected strives to achieve a careful combination of mutual skills and support, within the framework of a system of checks and balance.

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<sup>27</sup> Because of the rule prohibiting the delegated judge from being a member of the trial bench.

<sup>28</sup> Such is the case in many countries who resort to mixed benches in penal proceedings, in Germany or Italy for instance. The same goes for juvenile courts in France.

213. A money-saving solution

One of the great advantages of the current institutional organization of French commercial courts is that it dispenses justice virtually cost-free for the State. Unpaid judges and private practitioners offer a money-saving solution, a dimension which the policymaker has taken into account. This cost-efficient system of justice is probably of interest for countries with restricted means for the establishment of the judiciary.

The cost of the option of introducing a professional judge into the first-instance insolvency divisions is offset by the fact that lay assessors are to become part of the appellate court specialized division. Such assessors will only be appointed to the appeal court when they can show a certain number of years of judicial experience. They will furthermore work on a part-time basis by rota, and thus not cost the taxpayer as much as a senior appellate judge. It is envisioned that they will keep up their own professional activity. The reorganization of the judicial map and the restriction in the number of commercial courts will help reduce the number of professional judges required to occupy the presidency of the new insolvency divisions. This in turn guarantees that no major manpower shortage happens when the new legislation is passed.

Maintaining a body of unpaid lay judges to dispense commercial justice obviously alleviates considerably the expense of commercial justice for tax-payers. It avoids the risk of recruits attracted solely by the perspective of a fixed civil-service income. In practice, this requirement of accepting to work free for the community should encourage public-minded candidates.

Another advantage of the mixed bench formula is visible when it is compared to the solution of *ad hoc* judges, in the sense of judges integrated into the professional judiciary on the basis of their past experience as business executives or traders. For such judges to be encouraged to abandon a presumably lucrative private activity would entail that the State is prepared to offer a significant level of income, which might not be in line with the civil service salary grid. It would appear difficult to introduce a discrepancy of salaries between long-term professional judges and their newly appointed *ad hoc* colleagues. If being offered a judicial posting amounts to a serious loss of income, the chances are that the number of potential candidates will be quite small.

Finally, the decision is to maintain insolvency practitioners as private, although regulated, operators. Their fees will be closely monitored, but as the option of an administrative agency was not selected, the cost of the intervention of such practitioners will not be borne by the State.

22. The specialization of court officers

221. The commercial court chief registrars

The traditional solution of an independent profession to discharge the duties of chief registrar of the first-instance commercial court is endorsed by the forthcoming legislation. The profession is however to see its status seriously overhauled.

Its major role is to ensure a professional and highly-skilled support for the court's activities. The technical qualifications required of the candidates will be tested to the full before they are allowed to compete for the purchase of an office. The number of courts will be reduced, and therefore the number of registrars will fall accordingly, introducing increased competition.

A special emphasis will be put on the quality and operation of the commercial registry. The chief registrars will be accountable for nationwide standards in this area. The confidentiality of the information available through the commercial registry will be reinforced. Good management standards will have to be observed throughout the country, for instance in respect of single entry-techniques<sup>29</sup>.

The chief registrars have developed a certain number of computerized accesses to the information they manage. Such access is of course offered against a consideration, and may indeed be quite costly, restricting *de facto* its availability. In other words the registrars derive personal benefits from making accessible sources of information of which they are only the keepers, not the owners. This situation will be remedied by clarifying the current confusion of private and public interests.

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<sup>29</sup> See below point 31, the criteria for the remodelling of the judicial map.

The tariff and official schedule set out for the remuneration of commercial court registrars will be modernized. Special attention will be given to ensuring a reasonable cost for the access to information via such media as the Internet. The law will therefore restrict the private business nature of the registrar's activities, and entrench its specialized public service characteristics.

The special position of this private operator will be further outlined in the reinforcement of the supervision of his activities. A two-tier system will be implemented with a systematization of local supervision through the ordinary judiciary, amongst others, and through a national pluri-technical inspectorate. Quite naturally, a reinforced supervision spells out a reinforcement of the disciplinary liability of commercial court registrars.

## 222. Administrators and liquidators

Despite a suggestion to the contrary in the 1998 parliamentary report, the division of roles between administrators for the reorganization process and liquidators for the liquidation stage, as introduced into law in 1985, will remain under the cover of the judicial mandate.

These two professions will however see their statutory position comprehensively reviewed. They are to be regulated independent professions, in the sense of private operators discharging their activities within a framework of precise regulations. Their academic standing, recruitment process, training - both initial and in-service training -, their modes of appointment for a given case as well as the rules governing their daily activities are all to be closely scrutinized and overhauled. The professions holding a judicial mandate are supposed to work in an open and accountable fashion: special attention is given to their duty of information, both in respect of their activities and in respect of the parties they are to inform. Professional bodies and public authorities will supervise the proficiency, discipline and ethics of private insolvency practitioners.

The double requirements of competence and cost-effectiveness have led the draft legislation to suggest doing away with the current area monopoly of these practitioners. The court will not be obliged to select a person established within its area jurisdiction, but on the contrary may appoint any qualified person nationwide. It is hoped that the abrogation of the monopoly will enhance competition and ethical behaviour between practitioners. Certainly, the courts will be offered the chance to sanction incompetent and/or dubious insolvency officers as it will be able to choose from a wider selection of professionals. One will probably see more specialized practitioners emerge, with better targeted skills for given economic sectors. This internal competition will further be enhanced by the new provision which will enable the court to appoint any qualified European Union insolvency practitioner. French officers will therefore be put under the pressure of a highly competitive market. The combination of these various steps is believed to improve the cost and speed of insolvency proceedings.

Financial safeguards will be built up, as insolvency administrators and liquidators are called upon to manage vast amounts of money. The obligation to immediately deposit the funds managed is to be reinforced and better supervised. Their public-regulated tariff will be revised and its implementation closely supervised through the authority of the delegated judge. A collective professional joint liability system, as well as a compulsory insurance scheme, will ensure that any financial misdemeanour is paid for by the profession collectively and will not affect the interests of the parties to the insolvency. Such a joint liability will of course encourage practitioners to closely monitor their peers through the action of professional bodies.

Ethical requirements are also to be strongly developed in respect of insolvency practitioners. They will for instance be asked to file compulsory statements of personal assets and economic interests, in order to avoid conflicts of interest from arising. Their discipline is to be tightened both at the local and national levels, through the intervention of their respective professional bodies and that of public authorities, specially the pluri-disciplinary technical inspectorate mentioned above.

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The forthcoming mixed bench structure for the treatment of insolvencies in France is supported by the specialization of non-judicial personnel. To the combination of skills at the decision-making level corresponds

the drawing of the best advantages possible from the specific position of judicial officers, who are private operators working under a public-law statute.

Thus the complexity of the issues and interests at stake in contemporary insolvency litigation is addressed by making room for the variety of skills available, under the overall guarantee offered by a judicial treatment. Resources are concentrated and predictability enhanced.

But an institutional revision cannot be simply restricted to the statutory position and powers of the actors in the process. It calls for a “judiciaryfication” of the supporting institutions.

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### 3. THE “JUDICIARYFICATION” OF INSTITUTIONAL SUPPORT FOR INSOLVENCY PROCEEDINGS

By using the neologism of “judiciaryfication”, I mean to stress that a comprehensive review of insolvency proceedings based on a clear option for a judicial treatment would not be complete without the correlative review of supporting institutions. Two such institutions can be selected to illustrate this proposition<sup>30</sup>: the distribution of commercial courts through the remodelling of the judicial map (31), and the training of insolvency judges (32).

#### 31. Remodelling the judicial map

France has inherited a very complex geographical distribution of its commercial courts, which means that insolvency proceedings are also conditioned by an ancient and sometimes cumbersome historical context. Although this situation is unique and probably of little practical interest abroad, it has led authorities to reflect in depth on the issue of which criteria should be used for the rationalization of a judicial map, if only because the reformers have encountered strong opposition from the local authorities concerned. Such a reflection is all the more vital in insolvency cases because of the economic and social interests at stake. Therefore a commentary introducing the criteria identified in contemporary French thinking could be of use elsewhere.

The first obvious guideline is that of a simplification of the overall distribution of courts. In a situation like the French one where different orders of courts co-exist, it seems appropriate to rationalize their area jurisdiction by agreeing on common boundaries. A simultaneous revision of the map of ordinary first-instance courts has every chance of being implemented together with that of the commercial courts so that a single type of area jurisdiction is implemented. Although the process is still far from complete, one can surmise that the elementary geographical unit will be that of the *département* or district. This option will be reinforced by the choice of a district court judge to preside over the insolvency division. Thus, the number of first-instance commercial courts will probably be reduced in the near future from 227 to a maximum of approximately 100.

The option of resorting to elected judges has two further consequences. The distribution of courts should best be tailored to the size of the electoral constituencies. Furthermore, the necessity of implementing geographical incompatibilities<sup>31</sup>, specially at the appellate level, calls for a relatively big number of first-instance and appeal courts rather than for a drastic reduction in numbers down to just a few or even to a single specialized court.

Barring the historical and political obstacles which bedevil the process of redrawing the judicial map in France, the priority criteria should be linked to economic and demographic realities as well as to the existing means of communication. The activity of a court addressing insolvency issues will naturally be conditioned by the concentration of businesses in a given area, whilst a predominantly rural one will probably generate fewer such cases. A densely populated zone will of course entail a higher density of commercial activity tailored to its

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<sup>30</sup> Another linked issue is that of the revision of accountancy legislation and of professional auditors.

<sup>31</sup> The draft legislation wishes to avoid having elected judges rule over insolvency issues which would be too closely linked to their economic zone of origin.

needs, and in turn a greater potential number of business failures. The speed required of judicial institutions in the specific matters of insolvencies, combined with a “hands-on” approach of judges’ decision-making, mean that the distribution of courts is also affected by the simple availability of means of communication. This in turn seems incompatible with an excessive degree of centralization.

Next to the identification of the needs to address, another criterion lies in the realistic assessment of the means open to the judiciary, in terms of funding resources, of material means open to the courts and of course in terms of the competent personnel available. For instance, the number of skilled senior professional judges cannot be increased *ad infinitum*. The elected judges are also heavily dependent on the presence of chambers of commerce. But the use of private insolvency practitioners rather than civil servants also means that such operators should be afforded a “constituency” of sufficient economic potential. The French ministry of justice has designed nationwide standards for the construction of courts and for the adequate number of the different categories of judicial personnel. This type of standard will probably be extended to the means needed for an efficient operation of first-instance commercial courts.

The emphasis on the constitutional principles of equal and best court accessibility for the public will entail a unitary model, instead of the current variety of historically-conditioned types of courts. But a further consequence is that a single-entry technique has every chance of becoming the standard mode of operation for registry offices. Parties are often forced to identify in advance the competent court, with the correlative procedural and time-wasting bickering associated to area and material jurisdiction disputes. A new option could be to accept every petition filed with any court, and of letting the issue of jurisdiction be settled internally by the relevant registry offices. After all, jurisdiction issues are essentially a question of internal court management and should not lead to extra complexity in an area where speed is of the essence. Computer technology will be used for the speedy transmission and exchange of files and documents.

The reduction in the numbers of insolvency divisions does not necessarily spell a reduction in the numbers of judicial sites where insolvency proceedings are implemented. For instance, provisions exist to enable courts to be mobile within a given circuit, whilst densely populated areas may best be served by the division of a same court into different boroughs.

The insolvency law reforms introduced in 1985 already provided for the specialization of certain insolvency courts in accordance with the size of the businesses concerned. The criteria used for resorting either to a full-fledged process or to a simplified process are based on the business’ cashflow or number of employees (20 million Francs and 50 employees, respectively).

Finally, one should take into account the fact that a skilled judiciary will only be achieved if it dealing with a certain volume of activity. The situation of a court should be calculated in order to have a sufficiently important number of cases for its personnel to be confronted with a wide selection of issues. This has the added advantage of automatically creating a salutary distance from local economic interests and the ensuing risk of pressure over the elected judiciary.

### 32. Training insolvency judges

An efficient dispatch of insolvency cases necessarily rests on a competent judiciary. The discussion above identified the dilemma of resorting to professional judges who are not business-tested, or of lay judges who may be deficient in the area of legal and procedural skills. The option of a mixed bench is a first way to answer this dilemma. It should logically be supported by the training of professional judges in respect of economic issues (321), and by the correlative training of elected judges in judicial techniques (322). The process is to be completed by training sessions followed in common by both categories of judges (323).

#### 321. Training of professional judges in respect of economic issues

The French professional judges are trained by the *Ecole Nationale de la Magistrature*, the judicial training college. Its role is to turn its graduates from academically qualified lawyers into a fully professionalized judicial personnel. In the area of insolvency disputes, the *Ecole Nationale de la Magistrature* has already set up a variety of initial and in-service training programmes<sup>32</sup>.

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<sup>32</sup> A detailed description of these programmes is available on the Internet site of the *Ecole Nationale de la Magistrature* at <http://www.enm.justice.fr>

Trainee judges are given a variety of occasions to develop their general knowledge of economic issues. They are given courses on the practical court-oriented aspects of economic legislation, tax law or company law. They are asked to develop a business culture, specifically through a practical externship of several months with businesses, and to address issues from the global angle of commercial activities, labour relations or the interaction of public policies. They are given a grounding in accountancy rules and are supposed to be able to read the major elements of a balance-sheet. Further externships are offered with the private insolvency practitioners and other judicial officers, as well as a long-term internship within a firm of lawyers. The setting up of the new insolvency divisions will lead to the development of specially tailored curricula.

Judges have a duty to follow in-service training programmes of at least a week per year. Amongst the training offer of the *Ecole Nationale de la Magistrature*, one can for instance quote sessions on the situation of ailing businesses, the rules governing the judicial role in the protection of credit and savings, the comparative approach of financial cases in European Union member States, and of course an analysis of the relations with the elected commercial court judiciary. An economic and financial cycle of studies extending over several training sessions is organized for the speedy mastering of economic and financial skills. A specific training programme strives to make professional judges more familiar with such issues as the management of a business and its marketing strategies, the relations with its financial partners, its professional environment, its exchanges with debtors and creditors, the management of outstanding debts.

A special mention should also be made of the training programmes opened to foreign judges by the French training college, as well as of its participation in judicial training abroad, for instance within the framework of the ERSUMA, the professional judicial training college for the judiciary of the member States party to the regional OHADA treaty.<sup>33</sup>

### 322. Training of lay judges in judicial techniques

Lay judges composing the insolvency division are of course extremely qualified in the practical business issues of relevance to this type of litigation. But they need training in the area of legal and procedural rules.

This is the province for the Centre for Commercial Justice, an institution dedicated to the training of elected commercial court judges. This college is due to develop its activities with the support of the *Ecole Nationale de la Magistrature*, as the new legislation is to impose upon the newly elected judiciary a compulsory training, prior to assuming judicial office. In other words, the lay judiciary will henceforth have a right and a duty to train before exercising judicial powers.

The contents of the training offered will tackle such areas as decision-making techniques, procedural and substantive insolvency law, the drafting of decisions. A special emphasis will be put on observing the principle of adversariality in judicial proceedings, whilst specific court and caseload management techniques will also be presented. Prevention procedures will be favoured.

The lay judges will be given courses on ethics and their practical implementation. They will be made aware of the necessity to identify possible conflicts of interest, and of the consequences deriving from their duties of independence and impartiality.

### 323. Common training of insolvency judges

A last form of training which will be provided will take the form of joint sessions where professional and lay judges are trained in common. This is the logical consequence of the choice of a mixed-bench for dealing with insolvency suits. Such training will mainly be offered at a local, decentralized level. It may also be coordinated with the specific training programmes open to insolvency practitioners.

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<sup>33</sup> The *Organisation pour l'Harmonisation du Droit des Affaires* (OHADA) is a treaty open to all the States belonging to the Organization for African Unity, which purports to implement a trans-national set of legislation in the area of business law.

A major objective of this common form of training is to establish common standards for decisions in insolvency cases, through a greater degree of uniformity in outlook, just as uniformity is created for the relevant institutions.

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**Conclusion:**

The key decision in the projected reform was to overcome the dilemma posed by the treatment of insolvency cases. Rather than choosing between an economic or a judicial approach of such issues, the French option is designed to combine both approaches by marrying the skills of the various personnel available. It is also a special form of specialization which, starting from an existing “privatized” form of justice, develops a dynamic movement. This movement can be analyzed as returning insolvency litigation back towards the ordinary courts, through what has been termed a “judiciaryfication” of insolvency disputes.

The future will tell whether this fundamental option is appropriate to the French situation and does indeed improve the operations of an institution which has incurred a great measure of criticism in its present state. Further developments can be envisioned, which could lead to a greater measure of professionalization of the judicial institutions involved. For instance, a major economic jurisdiction division could be imagined, which would also deal with such topics as intellectual property, patents or commercial leases. At any rate, the fast-moving European Union integration process will probably also have major consequences on this area, as pan-European solutions will have to be devised to support a unifying economy. Such solutions will directly depend of the measure of success which the varying European institutional models will be able to offer.