United Nations A/CN.9/WG.V/WP.182/Add.2

General Assembly

Distr.: Limited
13 August 2024

Original: English/French

United Nations Commission on International Trade Law
Working Group V (Insolvency Law)
Sixty-first session
Vienna, 12–16 December 2022

Inventory of civil asset tracing and recovery tools used in insolvency proceedings

Note by the Secretariat

Addendum

Contents

I. Introduction

1. This document reproduces submissions received by the Secretariat following its request of 29 December 2021 through a note verbale to States to provide information about ATR tools used by insolvency practitioners in insolvency proceedings in their jurisdictions in addition to those mentioned in the report of the Colloquium (A/CN.9/1008) and working paper A/CN.9/WG.V/WP.175. Submissions are reproduced in the order in which they were received.

2. This compilation supplements the submissions by States reproduced in A/CN.9/WG.V/WP.182/Add.1.

II. Submissions by States

A. Italy

[Original: English]
[23 November 2022]

As a contribution to the ongoing analysis, this delegation wishes to point out some tools allowing for the telematic search of assets of the debtor under the Italian system.

1. First, it is worth reporting that – under the Crisis and Insolvency Code (legislative decree no. 14/2019), which came into force in the summer of 2022 – in the context of voluntary restructuring procedures, an expert is appointed by the court at the debtor's request in order to assist the latter in the restructuring process. Since their appointment, experts may access, among other things, all the information concerning the debtor available in public databases without the need for specific authorization requirements.

Such a generalized access to debtor information has been made possible by the creation (under Article 13 of said Code) of a national telematic platform managed by the chambers of commerce under the supervision of the Ministry of Justice and the Ministry of Economic Development, which can be accessed by entrepreneurs and experts registered in the commercial register via the website of each chamber of commerce.

2. More generally, both in the context of voluntary restructuring and insolvency procedures, following the application for the opening of judicial liquidation or arrangement with creditors, the court registry acquires – by means of a direct telematic connection to the databases of the Internal Revenue Agency, of the National Social Security Institute and the Register of Enterprises – all the relevant data and documents relating to the debtor.

3. In turn, Article 155-sexies of the implementing provisions of the Italian code of civil procedure – in the context of bankruptcy proceedings – waives the legal requirement of an enforceable title for the authorization of the telematic search by the receiver, commissioner and judicial liquidator of assets of the debtor to be included in the bankruptcy estate.

Said Article 155-sexies links back to Article 492-bis of the Italian code of civil procedure, concerning the individual enforcement of claims: such provision generally allows for the search of assets of the debtor – by individual creditors – through consultation of online databases held by public administrations, including the tax agency and social security agencies. Under said Article 492-bis, upon application by the creditor, the presiding judge of the court of the place where the debtor has his residence, domicile, abode or place of business, upon verification of the right of the

petitioning party to proceed to compulsory execution, shall authorize the search by telematic means of the property to be included in the bankruptcy estate. In other words, according to this general provision, the judicial authorization of the individual creditor to access public databases is conditional upon the existence of a valid enforceable title.

Article 155-sexies of the implementing provisions of the Italian code of civil procedure simplifies such activity for the case of bankruptcy proceedings. And indeed, not only does such provision establish that the possibility of the telematic search of assets to be attached also apply – among others – to the execution of attachment and reconstruction of assets and liabilities in the context of bankruptcy proceedings. The same provision also adds that for the purpose of recovering or assigning claims, the receiver, commissioner and judicial liquidator may also make use of the same provisions to access data on persons against whom the proceedings have grounds for claims, even in the absence of a valid enforceable title against them.

B. Poland

[Original: English]
[17 April 2023]

1. ICT systems, such as the Electronic Land and Mortgage Registers, the Register of Pledges, as well as the electronic version of the National Court Register (to the extent that it specifies ownership structure), may be used as instruments of civil asset tracing and recovery in insolvency proceedings.

2. In insolvency proceedings, in order to establish the estate, administrators [*syndyk*] file inquiries with the Central Information Office for Register Pledges, the National Court Register and Land and Mortgage Registers which operates as a division of the Department of Information Technology and Court Registers at the Ministry of Justice. The duties of the Central Information Office for Register Pledges, the National Court Register and Land and Mortgage Registers are set out in three statutes, i.e., the Act of 20 August 1997 on the National Court Register (Polish Journal of Laws of 2022, item 1683, as amended), the Act of 6 July 1982 on Land and Mortgage Registers and Mortgage (Polish Journal of Laws of 2022, item 1728, as amended), and the Act of 6 December 1996 on the Register Pledge and the Register of Pledges (Polish Journal of Laws of 2018, item 2017).

3. Matters related to tracing the insolvent's assets are regulated in Article 178(1) of the Act of 28 February 2003 – the Insolvency Law (Polish Journal of Laws of 2022, item 1520, hereinafter: the "Law"). The aforementioned provision serves as basis for actions taken by administrators. In accordance with Article 178(1) of the Insolvency Law, an administrator may demand that central and local government authorities provide necessary information concerning the insolvent's assets.

4. In the course of insolvency proceedings, administrators request information from, among other bodies, the Social Insurance Institution, the Central Register of Vehicles and Drivers, municipalities (with respect to real property tax), and tax offices.

5. Administrators are also obliged to file requests that an enforcement officer trace the insolvent's assets, restricted to searches in databases available to the officer (Article 178(2) of the Law). The provisions of Article 801 and 801^1 of the Code of Civil Procedure do not apply. It is a *lex specialis* in relation to Article 178(1) of the Law, meaning that the lawmakers have stipulated for exceptions from the principle laid down in Article 178(1) of the Law, thereby restricting the administrators' rights (as well as *mutatis mutandis* those of the temporary judicial supervisors [*tymczasowy nadzorca sądowy*], since in line with Article 38 of the Law *in fine*, the provision of Article 178 of the Law apply respectively to temporary judicial supervisors). Because of this, administrators have to file requests for enforcement officers to trace the insolvent's assets, restricted to searches in databases available to the officers. The

provision is formulated in a highly general manner; however, there are no doubts that the lawmakers' objective was to allow the administrator (and, *mutatis mutandis*, also the temporary judicial supervisor) to use such databases as allow them to verify the personal data of the insolvent and obtain information concerning their bank accounts, vehicles, real properties and sources of income. The insolvent does not provide a list of assets to the enforcement officer, as the provisions of Article 801 and 801^1 of the Code of Civil Procedure do not apply. Court enforcement officers have access to the OGNIVO database.

6. Furthermore, with the declaration of insolvency declared, banks at which the insolvent has accounts, safes or deposit boxes shall inform the administrator of that fact (Article 178(5) of the Law on Insolvency).

7. Furthermore, Article 491^8(1) of the Law places an obligation on the administrator to refer to the head of the tax office competent for the insolvent after insolvency is declared with a request to provide information on the insolvent affecting the assessment of their assets, especially on circumstances which gave rise to a tax obligation on the part of the insolvent up to five years before filing the petition for insolvency, and to refer to the National Court Register with a request for information whether the insolvent is a partner or shareholder at a commercial partnership or company, and whether up to ten years before filing the petition for insolvency they served as a member of a body within a commercial partnership or company, and whether any of those partnerships or companies were declared insolvent.

8. Apart from that, within the inquiries filed, the administrator may also establish whether the debtor features in the pledge register as pledger, which is one way to establish their ownership of movable property and property rights.

9. As specified hereinabove, establishing the assets of an estate also involves referring to the Central Information Office of Land and Mortgage Registers. Within the inquiries filed, the administrator may establish whether the debtor is or has been entered into the land and mortgage registers as owner, co-owner or perpetual usufructuary of real property. The number of the land and mortgage register is information of an objective and subjective nature which falls under the definition of personal data and is subject to protection as provided for in the Act of 10 May 2018 on the Protection of Personal Data (uniform text: Polish Journal of Laws of 2019, item 1781). Both the numbers of land and mortgage registers maintained for real properties owned by natural persons and any data within the land and mortgage registers concerning identified or identifiable natural persons constitute personal data. Because of this, the right to search through land and mortgage registers is one attributable solely to entities enumerated in Article 36^4(8) of the Act of 6 July 1982 on Land and Mortgage Registers and Mortgage (Polish Journal of Laws of 2022, item 1728, hereinafter referred to as "the Act") which receive the consent of the Minister of Justice for such kind of access to the central database of land and mortgage registers. The list of entities entitled to search through land and mortgage registers is closed, and therefore no individual legal interest may substantiate giving consent to searches through land and mortgage registers to entities other than those directly listed in Article 36^4(8) of the Act.

10. Restructuring advisors [*doradca restrukturyzacyjny*] are not on the list of entities referred to in Article 36^4 of the Act as entitled to ask for the consent of the Minister for Justice for multiple searches of land and mortgage registers, unlimited to time, in the central database of land and mortgage registers, or to refer to the Central Information Office of the National Court Register.

11. In accordance with Article 178(1) of the Law, the administrator (and, *mutatis mutandis*, temporary judicial supervisor) may demand that central or local government authorities provide necessary information concerning the insolvent's assets. This is a general provision which allows the administrator (and, *mutatis mutandis*, temporary judicial supervisor) to refer to central and local government authorities for necessary information concerning the insolvent's assets. It is worth noting that source literature is dominated by the view that this provision imposes no

sanctions if the authorities refuse or fail to provide information at the inquiry of the administrator (and, *mutatis mutandis*, temporary judicial supervisor). Should this be the case, however, the administrator may ask the insolvency judge to carry out evidentiary proceedings per Article 218 of the Law, and obtain relevant information within the said proceedings.

12. These efforts allow the administrators not only to establish the estate, but make findings which will help them to assess whether there is any basis to pursue the restoration of a certain asset to the estate as a result of determining the ineffective or invalid nature of an act-in-law.

13. What is significant for establishing assets is also the fact that the administrator may determine the ineffective nature, by virtue of law, of acts taken by the insolvent towards the estate *ex officio* (Article 127 and 128a of the Insolvency Law). As stated in the doctrine, "*once insolvency is declared, the administrator, in establishing the estate, shall among other things make a list of assets which are not covered due to ineffective acts. This list allows to have a picture of the intended scope of assets in the estate, the said estate being subject to liquidation in the course of insolvency proceedings.*" (P. Zimmerman, *Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz.* 7th Edition, Warszawa 2022). In cases stipulated for in Article 128, 129, 130 and 130a of the Insolvency Law, the administrator may in turn ask the insolvency judge to determine the ineffective nature of an act towards the estate.

14. The administrator also has an exclusive statutory right to file an action to determine the ineffective nature of an act, i.e., to file a Paulian action (Article 132 of the Insolvency Law).

C. France (jointly with the *Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires* (CNAJMJ))

[Original: French]
[2 May 2024]

Based on document A/CN.9/WG.V/WP.189 of the secretariat, prepared for the sixty-third session, and report A/CN.9/1163 of the secretariat on the work of that session

I. Introduction

A. Origin, scope and purpose of the text (paragraphs 1 to 6)

French insolvency law focuses on business reorganization and the protection of employees, and provides for preventive, reorganization and liquidation procedures that are based on the involvement of court-appointed administrators and creditors' representatives, regulated legal professions that support or represent entrepreneurs and managers in difficulty. The prerequisite for commencement of reorganization or liquidation proceedings is cessation of payments, which is defined as a situation in which the debtor is unable to meet its current liabilities with its available assets.

French insolvency law incorporates European insolvency law, which to date includes Regulation 2015/848 on the law applicable to insolvency proceedings and Directive 2019/1023 on preventive restructuring, discharge of debt and disqualifications.

While France has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, the content of relevant French laws is largely reflected in UNCITRAL texts.

Collective proceedings under French law are initiated pursuant to a commencement decision taken by the court, which directs the proceedings, supervises the management bodies and decides on the fate of the company. The proceedings are

closed by the court. As a matter of principle, court rulings are automatically enforceable on a provisional basis.

At the beginning of the collective proceedings, the court appoints a supervising judge, who has extensive powers to manage the proceedings. The supervising judge oversees, monitors and ensures the efficient conduct of all transactions. The supervising judge rules on challenges to practitioners' decisions, authorizes the sale of assets during the proceedings, rules on the admission of claims and claims to moveable assets, and has the right to request information from practitioners and the prosecution service. The judge may also obtain any information on the debtor's economic and financial situation and the state of affairs with regard to protection of its employees, and on the debtor's assets, from external auditors, certified accountants, notaries, banking institutions, public authorities or social security authorities, without being bound by professional secrecy.

The role of the creditors' representative is to defend the interests of creditors in the proceedings. Judicial administrators are appointed to participate in the management of the enterprise and prepare the draft plan when reorganization is possible. They can request information on the debtor's assets from public authorities and bodies and banking entities. The administrator and the creditors' representative may bring avoidance actions in respect of transactions made during the suspect period for the purpose of recovery of assets disposed of to the detriment of the enterprise before the commencement of the collective proceedings.

French insolvency law provides for three types of collective proceedings:

- Judicial safeguarding: a preventive procedure aimed at protecting the enterprise and jobs and at satisfying creditors, under the aegis of the court, through the preparation of a plan. The enterprise must not be in a situation in which it has ceased making payments. There is also an "expedited" version of the safeguarding procedure, which can be initiated when the company is insolvent. The aim of the expedited procedure is to enable affected parties and the court, within a short time, to adopt a plan that has been negotiated amicably in advance but has not received the support of all creditors on whose part some form of action is required.

- Judicial reorganization: a court-supervised procedure aimed at enabling an insolvent debtor, through the preparation of a plan, to continue operating, maintain employment and pay off its debts.

- Judicial liquidation: a procedure aimed at realization of the assets of an insolvent debtor, where reorganization is manifestly impossible, in order to pay the creditors.

French law also provides for preventive procedures such as ad hoc mediation and conciliation. These procedures are confidential and are initiated voluntarily by the debtor, and it is possible for the debtor to have been insolvent for less than 45 days. Both the ad hoc mediator and the conciliator are appointed by the court, which defines their functions. In practice, insolvency practitioners (court-appointed administrators) are generally entrusted with these roles.

Under French law, the dissolution of an enterprise convicted of certain offences (including fraud, breach of trust and abuse of vulnerability) gives rise to the commencement of conventional judicial liquidation proceedings. This raises the question of whether such a scenario should be excluded from the document prepared by the secretariat.

B. Asset tracing and recovery generally (paragraphs 7 to 11)

No comments

C. Specifics of ATR (paragraphs 12 to 23)

1. The meaning and scope of ATR (paragraphs 13 to 18)

Under French law, where the debtor is a legal person, the insolvency estate comprises all of the debtor's assets.

Where the debtor is a natural person, the composition of the insolvency estate depends on how the debtor operates.

If the debtor runs its business as an individual entrepreneur, without a company as intermediary, the insolvency estate in principle comprises only the assets included among the debtor's business assets.

If the debtor's business assets are not clearly identified, the insolvency estate comprises all the assets included in the debtor's estate, whether or not they are allocated to or used for the business. This principle of inclusion of all assets comprising the debtor's assets is a principle common to all collective proceedings (safeguarding, judicial reorganization and judicial liquidation). Thus, if the debtor is married under a community property regime, the joint assets of the spouses are included in the insolvency estate.

These principles apply to all debtors, regardless of their size, including in the context of simplified judicial liquidation.

2. Specific challenges of ATR and possible solutions to them (paragraphs 19 to 23)

In France, the risk that there may be insufficient assets to finance collective proceedings is mitigated by the Fund for the Financing of Impecunious Cases, which compensates court-appointed creditors' representatives for impecunious cases on the basis of a fixed amount. This fund is financed by a portion of the interest earned on compulsory deposits of funds from insolvency proceedings into accounts held with the Deposits and Consignments Fund, a public institution for the financing of public policies.

In order to ensure the debtor's cooperation, French law requires the debtor to cooperate with the designated bodies in the event of commencement of collective proceedings. The court in charge of the collective proceedings may declare the personal bankruptcy of any company director who has obstructed the efficient conduct of the proceedings by voluntarily failing to cooperate with the bodies in charge of the proceedings.

In addition, French law requires, for each proceeding, the appointment of a supervising judge responsible for ensuring that the proceeding is conducted expeditiously.

II. ATR in the broader context

A. ATR and the key objectives of insolvency law (paragraphs 26 to 28)

No comments

B. Enabling environment for ATR: insolvency law framework (paragraphs 29 to 42)

In the area of asset tracing and recovery, French law establishes a number of dissuasive measures in respect of debtors.

In the event of judicial liquidation, the winding-up of the business as a result of insufficient assets means that creditors are in principle prohibited from taking legal action against the debtor. In practice, this principle allows the debtor to be granted a discharge of its debts. However, in addition to the fact that certain creditors will exceptionally retain the right to take legal action against the debtor, the judicial

liquidation may be resumed if it appears that assets have not been realized or that actions in the interests of creditors have not been taken during the course of the proceedings. Lastly, if the debtor is sanctioned (for fraudulent bankruptcy or fraudulent personal bankruptcy), creditors recover their individual right to take legal action.

Professional recovery proceedings enable debtors who are natural persons to have certain debts written off following the issuance of the closing judgment at the conclusion of the insolvency proceedings. This procedure is less common than judicial liquidation. However, the court may review the discharge of debts and initiate judicial liquidation proceedings if it appears that the debtor has obtained the benefit of professional recovery through an incomplete description of its assets or liabilities.

In addition to the debtor and creditors, the prosecution service may request the initiation of judicial liquidation or reorganization proceedings in respect of an insolvent debtor if no conciliation proceedings are in progress.

C. Enabling environment for ATR: other areas of law and institutional framework (paragraphs 43 to 50)

French insolvency law is aimed at preventing dishonest entrepreneurs from continuing to do business and helping honest entrepreneurs in financial distress to recover. Accordingly, French law provides for civil and criminal sanctions against uncooperative or dishonest debtors in order to facilitate asset tracing and recovery.

Bad faith on the part of the debtor may result in loss of the benefit of professional recovery, the aim of which is the discharge of debts.

In the event of judicial liquidation, French law provides for several exceptions to the rule of discharge of liabilities where the debtor has committed fraud or has been declared personally bankrupt or found guilty of fraudulent bankruptcy.

Personal bankruptcy is the most severe professional sanction, as it entails a ban on directing, managing, administering or controlling, directly or indirectly, any individual enterprise or legal person.

Fraudulent bankruptcy is an offence punishable by imprisonment for a term of five years and a fine of 75,000 euros.

A company director who has embezzled or concealed all or part of the company’s assets may be sanctioned for personal bankruptcy and fraudulent bankruptcy.

Furthermore, for many years, French practitioners, whether administrators or creditors’ representatives, have been subject to legal obligations relating to the fight against money-laundering and the financing of terrorism, in partnership with the relevant authorities. They are obliged to report suspicious transactions, such as lack of accounting records, unusual movement of capital or failure to justify the origin of funds. The profession’s regulatory body, the National Council of Court-Appointed Administrators and Creditors’ Representatives, provides related training.

III. Survey of ATR tools

A. Tools specifically designed for insolvency proceedings: domestic context

1. Preventive measures (paragraphs 51 to 54)

French insolvency law provides for a range of procedures that take into account the different types of difficulties likely to be encountered by an economic entity and the varying degrees of severity of those difficulties.

The instruments available as part of that “toolbox” can be divided into two categories: court proceedings, which are compulsory, and amicable proceedings, which are optional and voluntary, since they can be initiated only at the debtor’s request.

In the case of amicable proceedings, the involvement of a professional makes it possible to verify the composition of the assets and minimize the risk of deterioration of those assets in advance of any collective proceedings, or of preferential treatment of a creditor, since directors are bound by a duty of transparency.

In order to provide for situations in which debtors have contributed, through their own fault, to an increase in their liabilities and/or they are unable to satisfy all their creditors, the law has been modified to include two measures that make it possible to penalize company directors in the event of mismanagement.

In the context of judicial reorganization, proceedings may be brought against the director on the grounds of misconduct contributing to the debtor’s cessation of payments.

In the context of judicial liquidation, a director responsible for managerial misconduct contributing to a shortfall in assets may be ordered to pay all or part of the shortfall.

2. Provisional measures in the context of collective proceedings (paragraphs 55 to 64)

Between the time of application and the commencement of the collective proceedings, the court may decide to conduct an investigation. To that end, it appoints a judge to gather all information on the company’s financial and economic situation and the state of affairs with regard to protection of its employees. In order to carry out that task, the judge may obtain from the following entities information that will give him or her an accurate understanding of the economic, financial, employee protection and asset situation of the debtor: external auditors; certified accountants; notaries; members and representatives of the company’s staff; government departments and public bodies; social security and welfare organizations; credit institutions; finance companies; electronic money companies; payment institutions; and specialized bodies responsible for centralizing banking risks and payment incidents. The judge may seek the assistance of any expert of his or her choice.

Prior to the commencement of the collective proceedings, the court may decide to hear any person as it deems useful, in particular, the representative of the State at the latter’s request.

Once collective proceedings have been commenced, the administrator or the creditors’ representative draws up a statement of the enterprise’s assets. In order to do so, they may consult a range of files and registers (national register of bank and similar accounts; register of security rights; register of mortgages) and request information from the tax and social security authorities.

3. Measures upon commencement (paragraphs 65 to 81), including stay of proceedings, treatment of current contracts, identification of assets, and control over the disposal of assets and over the business

Under French law, the commencement of collective proceedings suspends any ongoing legal actions and prohibits any new action to order the debtor to pay a previous claim or to terminate an ongoing contract upon commencement of the proceedings because of a previous default in payment. Enforcement proceedings are likewise stayed. Proceedings may be resumed once the creditor filing the action has submitted its claim and the insolvency professional has been appointed. The decision establishes the claim and sets the amount.

In some countries, a stay of proceedings is a matter of international public policy. In France, the Court of Cassation has repeatedly stated that a stay of individual actions is a matter of both domestic and international public policy.

In order to facilitate asset tracing and recovery, French insolvency law requires that court decisions to commence collective proceedings be widely publicized.

The law provides for three types of publication, which the court clerk must arrange to be done within fifteen days of the date of the decision. Accordingly, the decision on the commencement of proceedings is referred to in the professional registers and the Official Bulletin of Civil and Commercial Announcements and is published in a legal announcement publication in the place where the debtor has its registered office or business address and, where applicable, its secondary establishments.

In addition to these publication formalities, the clerk of the court must send a copy of the decision without delay to the designated legal representatives, the public prosecutor and the departmental or, where applicable, regional director of public finance of the department in which the debtor's registered office is located and that of the department in which the debtor's principal place of business is located.

4. Obligations of the debtor and third parties, including government agencies (paragraphs 82 to 88)

French law allows the court, for the purposes of reorganizing a company, to declare the shares, equity securities or securities giving access to the capital, held by one or more directors, non-transferable, and to have the voting rights attached thereto exercised by a court-appointed representative.

In addition, the preservation of business secrecy is made possible by the fact that court hearings are held in chambers, i.e. without an audience, and the fact that notices published in gazettes include only parts of the decisions rendered, together with the information needed to identify the company and the professionals appointed.

5. Duties and powers of the insolvency representative (paragraphs 89 to 96) and verification of claims (paragraphs 120 and 121)

In France, the practitioners appointed to conduct insolvency proceedings are:

- Court-appointed creditors' representatives, who represent creditors in all proceedings and are known as liquidators in judicial liquidation.

- Court-appointed administrators, who are responsible for supervising or assisting the debtor in the management of the enterprise in safeguarding and judicial reorganization proceedings, and for helping the debtor to draw up a safeguarding or reorganization plan.

Court-appointed creditors' representatives and administrators are regulated legal professions governed by professional rules drawn up by the National Council of Court-Appointed Administrators and Creditors' Representatives and approved by decree of the Minister of Justice.

These professional rules establish such general principles as dignity, independence, probity, humanity, loyalty and collegiality, quality of services rendered and diligence in the exercise of duties.

Every three years, the National Council of Court-Appointed Administrators and Creditors' Representatives conducts a review of the activities of each professional.

Professional rules prohibit professionals from engaging in any activity likely to undermine their independence, dignity or the liberal nature of their professional

practice. The professions of court-appointed administrator and court-appointed creditors' representative are incompatible with the exercise of any profession other than that of lawyer for administrators.

The role of the court-appointed administrator, as soon as he or she is appointed to act in judicial safeguarding or reorganization proceedings, is to protect the rights of the enterprise and take action against its debtors in order to restructure its assets, for example by issuing notices of default or suspending the limitation period for a claim. The administrator may register mortgages, securities, pledges or liens that the company director has not registered.

6. Avoidance and similar actions (paragraphs 97 to 114)

Under French law, the suspect period runs from the date of cessation of payments, which is set by the court, to when the decision to commence collective proceedings is made. The date of cessation of payments may be set in the decision to commence proceedings, but in that case may subsequently be modified if there is evidence that the debtor ceased making payments earlier than the court initially believed. The date may not be more than 18 months before the date of the decision to commence proceedings.

During that period, acts detrimental to the insolvency estate may be nullified. Both acts performed by the debtor and acts performed by a creditor may be declared void.

French law distinguishes between automatic annulment, i.e. 13 categories of acts that are automatically annulled when they arise during the suspect period, and optional annulment, i.e. three types of acts in respect of which the court must determine whether the authors of the act were aware that the debtor had ceased making payments. Among those acts in the latter category, certain acts may be annulled up to six months before the date of cessation of payments (that is, potentially up to 24 months before the date of commencement of the proceedings).

The action for annulment is brought by the insolvency professional. It entails the retroactive annulment of the act, which is assumed never to have existed, not only between the parties (creditor and debtor) but also vis-à-vis third parties (*erga omnes* effect). The annulment of the irregular act leads to the restoration of things to their original state, with reciprocal restitution in kind or, when that is not possible, restitution by means of an equivalent sum of money. If the debtor's co-contractor becomes a claimant following annulment, the co-contractor must declare that state of affairs in the collective proceedings, and is thus treated in the same way as any previous creditor throughout the remainder of the proceedings.

7. Actions against directors, equity holders and other persons (paragraphs 115 to 128)

In the event of commencement of collective proceedings (safeguarding, judicial reorganization or judicial liquidation), the court may decide to extend the proceedings to one or more other persons if their assets are intermingled with those of the debtor, or if the legal entity is fictitious.

The intermingling of assets is characterized by the existence of unusual financial flows or by the lack of clear identification of assets and liabilities.

The fictitious nature of a legal entity is characterized by abuse of the entity's legal personality.

Proceedings may be thus extended at the request of the administrator, the creditors' representative, the debtor or the prosecution service.

In order to ensure the effectiveness of that action, the presiding judge may, at the request of the administrator, the creditors' representative or the prosecution service,

or ex officio, order any useful provisional measure with regard to the assets of the respondent to whom the proceeding has been extended.

B. Tools specifically designed for insolvency proceedings: cross-border context (paragraphs 129 to 166)

No comments

C. Tools of general application (paragraphs 167 to 177)

No comments

D. Civil litigation tools (paragraphs 178 to 215)

In French civil law, the burden of proof lies with the parties. The parties may, however, request investigative measures to facilitate administration, subject to the limitation that the court is prohibited from making up for the parties' failure to provide sufficient evidence. Thus, the parties may request an investigative measure before proceedings commence "if there is a legitimate reason to preserve or establish, before any proceeding, evidence of facts on which the resolution of a dispute may depend". Such requests are considered in the context of expeditious proceedings that are not aimed at the issuance of a ruling on the merits of a possible dispute or on substantive claims.

In order to request an investigative measure before the proceedings commence, it is necessary to demonstrate the link between the request and the possible dispute between the parties; that the measure is not manifestly bound to fail; and that the requested measure is likely to enlighten the judge. There are two types of investigative measures that may be ordered prior to the proceedings: measures to preserve evidence and measures to gather evidence. Such measures may include the appointment of an expert or a court enforcement officer, or discovery at the request of another party or a third party, but not broad, general measures. In the event of difficulty in implementing the measure, the court subsequently hearing the dispute will draw all the necessary conclusions.

E. Ancillary measures (paragraphs 216 to 235)

No comments

IV. Assets raising specific issues for ATR (paragraphs 236 to 241)

We have not identified any specific regulations in French insolvency law on this subject and are therefore unable to provide any useful input.