La restructuration de dette et la procédure collective

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Opening Remarks

François Villeroy de Galhau
Governor of the Banque de France

Je voudrais d'abord vous dire mon grand plaisir de vous accueillir ici dans une institution historique. Nous fêtons cette année notre deux cent seizième anniversaire, mais vous voyez que c'est compatible avec la modernité. Vous vous trouvez ici dans l'ancienne salle des guichets de la Banque de France, vous l'avez peut-être traversée en entrant. La Banque de France n'a plus de comptes de particuliers, elle ne fait plus d'escompte de commerce. Nous avons des tas d'autres missions et l'une de nos missions est de nourrir le débat et d'accueillir de toute l'Europe, et même du monde entier, les acteurs que vous êtes. Nous sommes très heureux de le faire ce matin pour cette conférence de Droit & Croissance – et je salue Sophie Vermeille qui en est l'animatrice infatigable – sur un sujet qui peut apparaitre austère : la restructuration de dette et la procédure collective.

C'est un sujet effectivement difficile, techniquement et politiquement. Mais c'est un sujet absolument essentiel. C'est un sujet essentiel pour les régulateurs bancaires que nous sommes, et je vais en parler, mais je crois que c'est un sujet plus largement économique, notamment dans le cadre de l'Union des Marchés de Capitaux et de ce que j'appelle de mes vœux, c'est-à-dire, une union de financement et d'investissements en Europe. Utiliser mieux cette ressource clef qu'est l'épargne, pour promouvoir l'investissement productif et l'innovation des entreprises en Europe.

So I will limit myself to five opening remarks which could be of some help for your debate today.

First, what is the photography, about NPLs in the banking sector in Europe. We all know it's quite a topical issue.

The average of NPLs in the European Union, according to the EBA, the European Banking Association is 5,7 %. It's more than in the US, but I will come back to that, because the comparison is a bit biased. If I look among the various European countries, we have a first group of the three main European countries: France, Germany, and the UK – still the UK – which is significantly below the average, 4 % in France, 3 % in Germany, 2 % in the UK, approximately. If I focus on the French and German comparison, apparently, France is slightly higher, but if I look by segments, the NPLs for corporates, especially domestic corporates, are lower in France than in Germany and the global figure is higher in France due to one explanation, which is the higher share of consumer finance in French banks. You know they are very active in this area, and traditionally NPLs are higher in consumer finance.

On the other side, the NPL ratio is 6 % in Spain, 17 % in Italy, not to mention some smaller countries where the banking crisis has been very severe, Cyprus 49 %, Greece 47 %, Portugal 19 %, Ireland 15 %.

We are all conscious that this is a very important topic for the health of banks in Europe. A higher share of NPLs reduces the revenues and the solvency of banks. It increases their funding costs and it limits their capacity to fund the economy. So it affects, somewhat, the efficiency of monetary policy. So it has to be addressed. Progress has been made in the framework of the Banking Union but the issue is not yet completely solved, obviously.

My second remark.

There are significant differences – and you are well aware of that – between jurisdictions about the framework of NPLs. Let me mention three of these differences.

First, is obviously the tax regime and the accounting regime. If I compare, for instance, the US and Europe. In the US, in order to be tax deductible, NPLs have to be taken away from the accounting, from the balance sheet. So they have to be sold. In France, on the other hand, the tax regime is quite favorable for "provisioning" NPLs. And to keep these NPLs in the balance sheet is a prerequisite for a judiciary action.

The second difference is obviously the judiciary system. There are differences about the protection of banks and about the protection of the asset holders, and we all know that in some southern countries, Italy for instance, the efficiency, the time framework of the judiciary system is – let me say it this way – "improvable". The Italian government – and this has not been very noticed – took serious measures, some months ago, to improve the efficiency of collection. It has to be seen what practical effect it will have, but obviously, it goes in the right direction.

The third difference is about supervision. Here we have quite different practices. In the US, NPLs have to be depreciated, it's a general rule, after a predefined time framework. In Europe, with some exceptions, like Spain, we consider, as supervisors, that it is up to the banks themselves, to define the rules, to define, the time framework, under the control of the supervisor.

Finally, we all know the last difference. You mentioned it. It's the secondary market of NPLs. It is less developed in Europe than in the US. Obviously, a growth of this market would help a smoother and quicker solution of the NPL challenge.

To finish with this second remark about the differences let me note that, at present, the European harmonization, the European law on this question, is, limited, to say the least. It has rules, in case of cross border collection, of conflict of laws and jurisdictions. There was one significant progress, in May of 2015, about cross-border insolvency procedures, with the centralization of information about national procedures in a single register.

My third remark.

The new element, obviously, in Europe, is the birth, and growth, of the banking union. Here you are all conscious that we made two very significant steps. First in 2014, with the so called BRRD which is a European law for resolution. And second with a practical implementation of the single resolution mechanism, in Brussels, since January first of this year.

But we still have to harmonize two different levels. We have a common European resolution scheme. And we have national procedures for collection, as I just mentioned. We will have, specially, to clarify the regime of assets, of liabilities for banks, in the new framework of the BRRD. And you are conscious of the debate about the senior debt becoming senior/junior or, in the French case, for the new flows, the creation of a new category of banking debt, which we could call senior/junior, created by the so-called "Sapin 2" law, Sapin being the name of the French Finance Minister. This law is not yet completely passed by Parliament. But it should come in the coming weeks. The main difference, at present, between the new German regime and the new French regime, is that the new German regime also applies to stocks, while in our case, we apply to the new flows and we think it's more consistent. The European Commission will have, in the coming weeks and months, – you will perhaps comment on that – to say how to take into account these various regimes and, if possible, and it is desirable, to try to harmonize them.

My fourth remark

Let me go beyond the banking sector and beyond the Banking Union. What I just mentioned about NPLs, about the collection of banking assets, has a deeper reach within the Capital Market Union. If we look at the Eurozone as a whole, it has a very strong asset, which is its volume of savings. We have a volume of savings which exceeds investment in Europe by about 3 % of GDP or 300 billion euros. This should be an engine for productive investment in Europe. There is a part of it which is public investment, that is the Junker plan. But there is another very important part of it, less often mentioned, which is private investment and corporate equity. Again, let me make a transatlantic comparison. If you look at the share of corporate equity to GDP, it's 120 % in the US, it's about 50 % in the Eurozone. Less than half. And this is an economic challenge. This is why I mentioned in the beginning that it's not only about banking, it's also about the economy. If we want to have a more innovative economy, we need more corporate equity. We all know that an innovative economy is financed more from equity and a bit less through debt. I am going beyond your topic of the day here. But if we want to have more investors in equity, more investors in risk capital, we need to have a clearer rule of law for insolvency. And, if possible, harmonized. It's a difficult task. You mentioned it. We are all conscious about that. Also, it is due to the fact that, in each country, it is the responsibility of the Justice Ministries, the "chancellery" as we say in France. And they are not very accustomed to harmonizing laws. So, if you can contribute to this, it will be most welcome. There is an idea which is quite often mentioned or floated. If we don't succeed in harmonizing national regimes, or parts of them, could we study the idea of what we called, until the Brexit, a "29th regime", which will probably be a "28th regime" today. The idea is that, just as there is a concept of a European Company, could there be a concept of European Insolvency. I don't have the answer. But if we can make progress on harmonization, at least on the corporate principles of insolvency laws and perhaps on a common regime, it will be a great incentive for having more investment in equity and in risk capital. And this is an engine to European growth.

My last remark, a very short one, is a comparison with the US. I did it in some of my opening remarks. I would like to conclude with a caveat. The figures are different in the US. But the situation is different too. We all know that the American practice is quite often to take NPLs away from bank balance sheets and to sell them to other actors, including the so-called shadow banking sector. And the subprime crisis, clearly, was a very intense episode of this difference. And we saw, first, NPLs, being outside of the banking sector, which, clearly, has its dangers – and we must think about it when we think about financial regulation after the crisis. So, after the crisis, a very quick evolution, increase and then decrease of the NPL volumes. This an important caveat or nuance in the comparison between the two systems. Having said that, we have to learn some experience from the US case. Obviously, they have a single insolvency law, probably a quicker regime, and a stronger incentive for private investors to take risks and to invest in an innovative economy.

I will stop here with my five remarks. I hope they can be of some use to your debates today. Again, I welcome you, very warmly, and I wish you a very useful and fruitful colloquium during this fall Friday in Paris. If you can enjoy Paris after the colloquium, I wish you, also, an excellent week end. Au revoir.

The risks of high yield markets: Are we ready?

Keynote Speech

Mihaela Carpus Carcea

European Commission
Directorate General for Justice and Consumers

I have to be very careful today. Everything I will be saying today does not represent the Commission's position. This will be officially known probably around the 22nd of November. Therefore, there will be a lot of question marks in my presentation, you will see. This is because before the college formally makes the decision, we do not know what will be in this forthcoming proposal. Yet I think that you can already have a flavor of what is on the table, what is considered as the potential content of this minimum harmonization directive. This much I can tell you already. We don't aim at doing more than that.

The main objectives of the Commission's work on insolvency, but more specifically on preventive restructuring and second chance, are very much linked to a few points that the Governor made previously. Namely to reduce borders to cross border investments in Europe, namely to increase investment opportunities and job opportunities, to reduce the number of unnecessary liquidations and save as many companies as possible, of course those which are viable, and not the other ones. And finally, to reduce the costs and increase the opportunities for a second chance, for honest entrepreneurs. This is crucial if we really want an innovative economy because entrepreneurs are those who are usually testing new ideas.

Let me give you a few quick facts about insolvencies in Europe. According to our estimates there are about 600 insolvencies taking place daily in the EU. At least 25 % of these have a cross border dimension. There are 1.7 million jobs which are lost due to liquidations in the member States. It is currently impossible to restructure a group of companies which have a presence in more than two member States. This is due to differences in national laws.

Recovery rates, according to a World Bank study, which is very well known, are higher in restructurings than in liquidations. Differences in national laws translate in differences in efficiency as well as recovery rates.

The context to the forthcoming proposal is the Commission recommendation of 2014 with which you may already be familiar. We are working on that basis and we are trying to see whether we can improve it, we can provide further efficiency elements which would strengthen the restructuring framework and the second chance framework. We have also been looking at formal insolvency proceedings or liquidation proceedings and tried to see if there is any possibility of harmonizing a few elements to make this more efficient. I will come back to all the aspects.

I will start with the first part of the recommendation and of the future proposal which is the preventive restructuring procedures. It is not a secret anymore that the reason why we focus on preventive restructurings is to address the problem of NPLs as well, which was raised earlier by the governor. When designing this procedure, while you will see that we have stopped at high level principles and only targeted rules where absolutely necessary, we have tried to make some very ambitious advances in EU restructuring procedures.

We will see how far we went in the proposal itself and then further in the negotiation with legislators.

A few efficiency elements, most of them have already been announced in the Commission recommendation of 2014.

The first one is the possibility to have an early access to the procedure, before the debtor is insolvent.

We have maintained the principle that there should be a likelihood of insolvency in order to have access to restructuring procedures, the reason is that we wanted such procedures to be notifiable under the Insolvency Regulation and to have circulation in the EU.

The debtor should be in possession normally and have the control of the day to day operations of the business.

A court appointed practitioner should not be necessary in every case, it should be appointed on a case by case basis, depending on the complexity of the case and of the restructuring measures which are necessary in respect of a particular debtor.

There should be a stay, a possibility for the debtor to obtain a temporary stay of individual enforcement actions of creditors in order to address the holdout problem. Of course, the stay comes with important consequences for creditors, which we have tried to limit, in several ways. You will see there are several safeguards related to the stay and the first, probably most important one, is the limited duration of the stay.

Based on the experience of the most recent reforms in the EU, we believe that a maximum period of four months is necessary – of course members States can decide to have a period of two months or three months – but the initial period of the stay at least, should not be more than four month. Obviously, there should be possibilities to extend it but it should be left to the decision of the member States. Whether to have such extension possibilities and how many. The only condition we would make is to put a maximum cap. We are still considering what that should be. In the recommendation, it was twelve months.

There should also be a possibility for the stay to be lifted in several circumstances, most importantly when a majority of creditors no longer support the negotiations and it is clear that a restructuring plan has no chances of being adopted. There are some other circumstances where the stay could be lifted at the request of creditors.

There are new elements which are being considered in the forthcoming proposal and which were not in the recommendation and these are provisions on executory contracts and on the inapplicability of *ipso facto* clauses. I cannot tell you more about this. You will see the proposal very shortly and I am sure we will have plenty of opportunities to discuss the details of the proposal.

On the adoption of restructuring plans there is also an element that we are considering adding to the proposal. Here I have to stop to make a brief parenthesis. We have worked on the future proposal with a group of experts and several of these new efficiency elements were actually recommended by this group of experts, even the drafting has been fine tuned in collaboration with them. So, this is only to acknowledge that input and to thank again the people who have contributed to this. It is not an effort of the Commission only. So, on the adoption of restructuring plans you may see new possibilities for a Court to conform a plan despite the dissent of one or several classes of credi-

tors. There will be, obviously, safeguards, to ensure that nobody loses out and we will see exactly when the proposal comes out whether we caught the balance right and we can discuss afterwards how things can be improved.

Encouraging new financing was already in the Commission recommendation. We are now thinking about extending that protection to interim finance. That is, finance which is necessary to keep the debtor going during restructuring negotiations. We know that in several member States, new financing is granted priority ranking in subsequent insolvency proceedings. This may be a good idea but there are, well, serious doubts on our side that this should be a minimal standard. I have to make a little parenthesis here again to say that what we are aiming at is really minimum standards. So, member States will be able to go beyond this and provide, for example, more protection for new financing and more incentives for creditors or investors who take the risk of putting money in a company which is already in financial difficulties.

Next, Court involvement is important. Even more so, where restructuring plans involve an impact on creditors rights. For example, where there is a stay of enforcement or where there is a cram down on certain dissenting creditors. The Court supervision is crucial and we believe in that. However, we do not believe that the Court is necessary at every step of the procedure and where it is not necessary, we believe that steps should be taken out of Court, in order to speed up the procedure and reduce the costs.

There are several other efficiency elements which we have considered since the adoption of the recommendation and one is the introduction of early warning tools. We know that about half of the member States have very efficient public-backed or public-sponsored, early warning mechanisms. I think France is one of them. We will not be able to impose that in all member states as there are serious concerns about spending public money in such cases. But we will try to find a way of encouraging early warning without requesting member States to spend money if they don't have it, basically. So, we will see if we can successfully make advances in that regard.

We also considered another efficiency element, which reminds me about a case which was forwarded to us by one of our experts about a French restructuring which went wrong because of shareholder opposition. I don't know how things will evolve in the future but perhaps this could help. We will, perhaps – we are considering – introduce a principle that shareholders should not be able to oppose a restructuring plan which can bring the debtor back to viability. There will be safeguards for shareholders obviously and member States will have flexibility to decide how exactly this principle is implemented.

As I told you at the beginning, we are concerned about the length of procedures in some member States. In about 14 member States, procedures take two or more years, up to four years, basically. Our aim is to reduce the length in all member States to less than two years. That would be great but we cannot do much in a first step and this is the first step we are taking in harmonizing substantive insolvency. The main efficiency element, considering what our experts have told us, is the need to have Judges who are better prepared to take quick and competent decisions on insolvency cases and the need to have higher standards of professionalism of insolvency practitioners in all member States. We have tried to think about a few principled rules which would guide member States towards taking measures to make such procedures more efficient and therefore, we hope, less lengthy.

One important element also, is a provision which we are considering, on the digitization of restructuring and insolvency procedures, which is also expected to reduce proceedings as well as to increase the level of participation of creditors, especially those who have small amounts of debts or are located in another member State than the member State with jurisdiction over the debtor.

Finally, I will say a few words about providing a second chance for entrepreneurs. It is a concern of the Commission to help entrepreneurs obtain a second chance, to have the possibility of starting a new business venture, where they are likely to be more successful because of their past experience. This measure is also linked to the aim of reducing NPLs.

We will not be covering consumers, with this second chance procedure, I can say that. But, of course, member States are encouraged to extend the same principles, the same rules that they apply to entrepreneurs, to consumers as well. We will be fairly consistent with the recommendation on the second chance aspect. There will also be limitations which member states can make use of, in cases of fraud, dishonesty or where there are abusive or repeated actions. Certain categories of debt could be excluded from this, and, again, member States will be able to decide which debt should be excluded.

There are also new ideas and one of them is to consolidate procedures, where this is not already the case, in one member State. I think it is already the case in several member States, when entrepreneurs have both a professional debt and personal debt. There are other, smaller ideas on how to ensure an effective second chance.

What has, until recently, made London so unique in Europe? Potential consequences of Brexit on financial restructuring practices

Round table 1

Julie Miecamp
Reorg Research

Justice Snowden
High Court of Justice of England and Wales

David Chijner
Lawyer / Barrister
DLA Piper

Julie Miecamp

We will obviously touch on the fact that the UK voted to leave the EU and what impact might Brexit have on the future insolvency for Europe and the UK as well. To discuss these topics with me today are two distinguished panelists. Justice Richard Snowden of the High Court of Justice of England and Wales and David Chijner a lawyer in Paris and barrister in England, who is a partner at DLA Piper in Paris.

I will start with a general question to you Justice Snowden about what you think has made the UK so successful and attractive in the past years.

Justice Snowden

Good morning. What I am about to say echoes a great deal of what you have just heard from the Commission. In 1986, we changed our insolvency laws fundamentally in the UK. We moved from the idea that insolvency was about liquidation and the selling of assets and repaying secured debt and we introduced for the first time what we call the "rescue" culture. We introduced an administration process which was designed to save viable businesses and preserve jobs. We did that with the assistance of a new group of people that had never existed in England before. We called them "insolvency practitioners". We gave them special powers. And largely they were accountants. They weren't lawyers. They weren't Judges. They were appointed by the Courts, but they were accountants. This had a huge benefit because accountancy firms had already been well established across national borders and we gave the opportunity to rescue businesses and save jobs to people who understood business and finance. We also did something which, again, echoes what the Commission is planning to do. We took a group of commercially experienced Judges and gave them increased powers in relation to insolvency. I have been a Judge in England now for eighteen months. Before that, for twenty-nine years, I specialized in corporate and incorporate insolvency cases. I cut my teeth on BCCI, Maxwell, Federal-Mogul, from the United States, Lehman Brothers, the Icelandic collapse. Those were my bread and butter cases as a practitioner. So, I brought to the bench twenty-nine years of experience of commercial insolvency. The same goes for my colleagues. So, when in 2000, the European Insolvency Regulation, the first European Insolvency Regulation, came into force, the UK was already very experienced as to how to best utilize that European Insolvency Regulation because it had had fourteen years of saving companies and operating through insolvency practitioners. So, the English insolvency profession was able to overcome one of the difficulties of the European Insolvency Regulation which is that it – at the moment – doesn't allow the coordination of insolvency across national borders. It focuses simply on single corporate entities, not groups. But of course, if you have a group of insolvency practitioners who are fundamentally in the big accounting firms, they have offices in other jurisdictions, you have a ready network of coordinated insolvency practitioners. Again, that allowed the English insolvency profession to take the lead very quickly in relation to the implementation of the European Insolvency Regulation. Then, finally, I suppose, again, picking up on what was said by Mihaela, because we have experienced judges, we also have the ability of having people who take rapid commercial decisions. And that, again, coupled with the ability of the insolvency practitioners to coordinate across national borders, meant that we had a very responsive system. And if I can just briefly touch on one case study to illustrate the points I have made. You'll notice that I have spoken for the moment at all about schemes of arrangements, which I know is a very topical subject, but I will now talk about a scheme of arrangement. Because in a case called Rodenstock, the first case in which the English Courts had really looked carefully at restructuring a European company with no base, no COMI, no establishment in the UK, all the factors that I have just spoken about came together. Now, we've had a scheme of arrangement in the UK for well over a hundred years. It has nothing to do with insolvency as such. It is used for takeovers as well. But about five years ago, a German company was unable to restructure in Germany because it had no pre-insolvency mechanism to do it. It would have had to enter into formal insolvency in Germany with a loss of jobs and a loss of value. It had a holdout creditor in its bank facilities which was preventing a consensual restructuring. And it was facing German insolvency in six weeks. It had one possible connecting factor to the UK and that was that the bank facilities were governed by English law. I was the barrister that presented the Rodenstock case. I did so, in front of a very commercially minded English Judge who saw that here was a German company destined for failure with loss of jobs and loss of value to creditors. He had been in the rescue culture for twenty-five years. I had been in the rescue culture for twenty-five years. Of course, he would therefore be receptive to the argument that the UK should, help, if it could. And we used the connection to the UK, the English law connection, as a peg upon which to hang a restructuring. And we did it, from beginning to end, in five weeks. Five weeks. And that included three weeks for the notice to be given to the creditors. The decision to convene the Court meeting was taken in two hours of argument. The actual decision to sanction the scheme, we did very thoroughly, and we did it in two days. The result was that that German company was saved. So, all those factors that I had just rehearsed over twenty-five-years of experience, is what has driven the English restructuring profession to offer a restructuring tool, where we can. To save jobs, to save viable businesses and return value to creditors and that's what basically we think insolvency is about.

Julie Miecamp

So, would you argue actually that the popularity of schemes of arrangements provides the companies with an alternative? I mean, companies in Spain, I'm thinking of

companies like Cortefiel, the Spanish retailer or APCOA, a German company, has come to the UK, Metinvest in the Ukraine, has also come to the UK. All of those companies seem to come when they don't seem to have any other options. When they are in a deadlock in their own jurisdictions. So, do you think that perhaps the UK scheme of arrangement provides them with this alternative and gives them a bit more flexibility and predictability with the outcome that they are after?

Justice Snowden

I mean, yes. We have no great plans to conquer the world. We haven't gone out and recruited these insolvent companies to come to the UK as such. The drive is from abroad. It is, that companies are unable to restructure in their own jurisdiction or, again, the problem with the current European Insolvency Regulation, if you have a pan-European group, consisting of companies in a number of European jurisdictions, at the moment there is no structure, apart from a scheme of arrangement that will enable you to restructure that group successfully, or it is very difficult across national borders. That is the point Mihaela made. But a common factor that connects those companies and their debts, is English law. We have said, fine, if we have got a sufficient connection and what we do will be recognized in Europe, then we are very willing to help. That's the driver for schemes of arrangement. The cases you have mentioned are all examples of companies who have found it more convenient to come to England to restructure and where the English Court has a reasonable degree of assurance that what it does will be accepted and recognized in other European member States. Now, sitting as a Judge, I have absolutely no desire to make an order that is in vain or would be regarded as an insult in other European countries. I want to do something which assists European companies to restructure and will be recognized in their home member State. If they come to me and ask me to save the company to save jobs and to save value for creditors and I can do it, in a way that will be respected by other European member States, why would I not do it? I mean, that, that, is the driver.

Julie Miecamp

David, you may have a different perspective being a French lawyer? So, when we are talking about a need or maybe something that the law of whichever country we are talking about, was lacking. I think very few French companies have come for schemes of arrangements. I have two in mind. One was Zodiac Marine whose assets were mainly in the US. And the other was Longrex which was part French part Polish. So apart from that, would you say that in France, as well as in Europe, you agree that there is a need for proceedings like schemes of arrangements?

David Chijner

Well, first of all, I think that one of the reasons that not many French companies go elsewhere is that we have got a highly-developed insolvency law that includes almost a dozen different proceedings to choose from and that we have a system of commercial Courts that are more specialized now, following recent legislative changes, which were already in the past pretty specialized, where French debtors, as a general rule, have not felt the need to go forum shopping. The other thing is, that we have a series of Courts of Appeal that are very reluctant to recognize forum shopping. I don't know if there is anyone from Alsace-Moselle in the audience. But, under their laws we have something that resembles what the Commission has proposed which is the discharge for individual bankruptcy after a relatively short period. So, we have had a lot of German individual traders trying to cross the border to Strasbourg or Colmar or Mulhouse, establish themselves there, and get a French agreed-upon discharge for their debts. Now, the Courts of Appeals that have had to deal with that have been extremely reluctant to accept movement across the border, unless it has been a real substantive movement. I think that is one of the big differences. We have a culture in which it is not up to the debtor to choose his or its jurisdiction. There are specific rules that are intended to ensure that the proper Court deals with the proper case. There is a very strong tendency to assume that where people manipulate these rules, it is in some way inappropriate. Couple that with a very debtor friendly regime, which has quite an effective stay on individual proceedings, and you get a situation in which, at least from France, there is no great appetite for a debtor to start forum shopping. I had to handle a couple of cases where people have tried to market shifts of COMI to England. And one of the reasons the directors elected not to do that is because they took advice from Criminal law counsel on the issue of whether a totally artificial COMI might amount to fraud under French criminal law. The mere likelihood of a prosecution or at least a criminal complaint was a major element in the directors electing not to do that. But I think that is a minor thing because over the last ten years I have only seen two cases where people have seriously thought of shifting COMI to England. I think the real answer is that our laws and our Courts are perceived by debtors as rather adequate.

Lord Snowden

If I can just comment on that. I mean, I entirely agree with the point about the debtor-friendly nature of French jurisdiction. That's a perfectly legitimate reason why French companies should decide not to seek to restructure in England. They have their own domestic restructuring tools which are perfectly good for the job and in fact are desirable, from their point of view. But what I do disagree with, is the implicit suggestion that there is something improper about what the English Courts have been doing in relation to COMI shifts, forum shopping or bankruptcy tourism. I indicated that there are two reasons that the English Courts might accept jurisdiction, to do a scheme of arrangement, for example. One is, that English law has been chosen by the parties as their governing law. That's got nothing to do with forum shopping. That was a conscious choice by the parties, at the time when they took their financial obligations. To choose a system of laws, which had, a scheme of arrangement, as a restructuring tool, built into it. As it happens, in APCOA, they changed the governing law, just to go and get the English scheme of arrangement. Let me just tell you, I was the counsel that opposed that. Having done Rodenstock to get the English Court to try and do the scheme. I was employed by the German government, effectively, to oppose the scheme in APCOA. And one of the reasons we did want to oppose it, was that, there had been a recent change of governing law, which we said was an insufficient connection. The judge rejected that argument but we got permission to appeal from the Court of Appeals so that question is still out there, to be decided. But the COMI shift, the bankruptcy tourism, I would find that equally offensive. I have no desire to approve a scheme of arrangement for a company which has artificially pretended to move its COMI or a bankrupt who artificially changes his domicile. And I am strengthened in that, by a recognition that the European Union, in the new, recast, Insolvency Regulation, has included provisions precisely designed to deter artificial COMI shifts and bankruptcy tourism, in the presumptions that apply in relation to COMI. So, I don't think you'll find the English Courts

actually, any longer, if they ever did, accepting artificial, bad forum shopping if I can use that expression.

Julie Miecamp

Maybe David you want to comment on possible recognition or difficulties of recognition of international, and particularly British, rulings in France. Do you have examples where you felt that maybe the Judge wasn't that keen to acknowledge what was ruled in the UK? Before Brexit.

David Chijner

Before Brexit, we are all familiar with the case of Daisytech which was one of the first cases where an English Court sought to exercise its jurisdiction over a French Company, and we are all familiar with the rather strong language used by the Judge to refuse to recognize that a Court, somewhere in Birmingham – wherever that is – might have something to say, over a company within its jurisdiction. The strong language was overruled on appeal and the Court of Appeals actually applied the relevant EU Regulation. So, I don't think it's a major issue these days, per se, about recognizing these things but I think Brexit will become a really major thing because many, many, years ago, I had the privilege of acting for Enron when they became insolvent and Enron did not have any French subsidiaries and we had all sorts of creditors who wanted to file an "action paulienne", in other words sought to seize the assets of various Enron subsidiaries that were within the French jurisdiction, based on the fact that the Court in the Southern District of Manhattan – wherever that is – did not benefit from any recognition in France and the initial position was quite a few creditors did manage to jump the queue and go around the stay of action in the US and we eventually went for exequatur in front of the Tribunal de Grande Instance de Paris and we actually tried to treat the decision to open bankruptcy proceedings as an ordinary civil decision, to be recognized under ordinary civil proceedings, in the absence of any treaty, or at least any treaty recognizing bankruptcy or insolvency as such. And we were successful. But it did take six months. And in that case, one of the reasons that we were successful is that both the Tribunal de Grande Instance and the Procureur de la République were very eager to acknowledge that it is a pretty banal and pretty legitimate thing for an obviously insolvent US Company to go to a US Court. I would be a lot more reluctant tomorrow, in front of a group of companies, with an English High Court that would hypothetically no longer be European, and subsidiaries in France, for instance, whether exequatur might or might not be quite that easy to obtain, as a public policy matter.

Lord Snowden

I understand the sentiment, or at least I acknowledge the sentiment. I would be disappointed if that was the outcome. I'll say nothing about Brexit. I will make no comment about it, as a decision. I am not really entitled to, in my current job. But I can say this. There is a world beyond Europe. And beyond Europe, there are insolvencies. The one think that I think binds everybody together, in the insolvency field, perhaps more than in many other areas of law, is that we all have certain common goals. If I am judging just a contract dispute between A and B, I interpret the contract, and A wins, and B loses, and they disappear, and I never see them again. That's a very straightforward thing. But in insolvency, there is a different game to play. Everybody is interested in rescuing viable businesses. Saving jobs. Returning value to creditors. Those are the three main pillars of insolvency law. And wherever you go in the world, that's what people tell you. So, there has to be, I think, some people have got to stop treating insolvency as some sort of cross country inter judge contact sport. Insolvency is about more than national borders. I think that we have to go into a mindset, both within Europe and in the wider world, that, actually, there will be benefits in cooperation across national borders and in saving companies. The idea that some Court or some Judge has some sort of particular possession of a company and should therefore be entitled to restructure, is, actually, I think, quite economically counterproductive. From my perspective, sitting as an English judge, for example, I will be looking to make sure that, If I am asked to make an order in a cross border insolvency case, I am going to be very interested in understanding how that order will be viewed in other jurisdictions where the company has assets, where other creditors are based, I don't actually mind whether it's in the EU or whether it's in America or the Far East. Wherever the company has assets, wherever creditor action may take place, I want to know, if I am being asked to make an order, what effect that order will have. Will a Judge, in that other jurisdiction, think it is a sensible order, will he recognize it, will he give effect to it. And I would like to think, that other judges in other jurisdictions would look at me in the same way. Because I think we have all got a much bigger game to play, a bigger part to play, than the usual sort of national politics of asking: whose company is it anyway?

Julie Miecamp

David, would you like to come back on this? There are now professional commercial Courts in France, as well.

David Chijner

We had experiences in France, it was probably over twenty years ago, of lots of companies changing internally their registered office, just so that they could effectively select their judge. Normally, under the French internal rules, it is the commercial Court of your place of registered office that is competent. What we found, is that when companies were playing games in order to select their judge, there was usually a good public policy reason why that should not be happening. There was a decree passed and the decree said something very simple. It said, if you've changed your registered office in the last six months, then the old Court remains competent for that period. And it did stop a large number of games that were not necessarily to the credit of the judicial system. As a result of that simple rule, there was a lot of clarity and a lot of quality improvement. It's been around for twenty years and it's largely uncontested. There is something about a Judge not being selected, but a Judge being a totally impartial individual or a group of individuals that is imposed on the debtor rather than chosen by the debtor. Now that's as a general statement. Beyond that, you were referring very recently, Sir Richard to APCOA and the change of law. There is something that, at least to a French mind, appears uncomfortable with that.

Justice Snowden

It appears uncomfortable to an English mind actually, but unfortunately, not the Judge I was arguing in front of.

David Chijner

You know, for those who are not familiar with the case. Here is a debtor who, for the sake of argument, has no real establishment in the jurisdiction. All there is, is – let's call it a multilateral credit facility – amongst a variety of lenders and a variety of borrowers within the corporate group. And that credit facility happens to be subject to a law and there is a provision that enables one to choose a change of law. And simply in order to achieve, effectively, the ability to restructure under what is seen, rightly perhaps, as an attractive tool, the scheme of arrangement, in a purely artificial

way, in a sense, one changes the rules governing the multilateral credit facility and says, well, let's speak English law, and, on that basis, let's go convince a Judge, now, Gilbert and Sullivan used to say, let's hoodwink a Judge, who is not all the wise – I think that does not apply to the specific case in instance – but, be that as it may, let's just use that little change of law and bring it into a jurisdiction that suits us, because there is a legal instrument, a scheme of arrangement, that happens to be what we think is the easiest or the most efficient way to achieve a restructuring. Now, contracts and insolvencies are part of a legal system in which legal certainty, we heard from the European Commission a short while ago and the Governor of the Bank of France, as well, legal certainty has a lot of value. This is the total opposite of legal certainty. You are lending to a company or a group of companies in country X, under law Y, and from the day to the morrow, it's going to be restructured in a totally different way, simply because a commercial or a finance contract is changed. Whilst the results may be desirable in the specific instance, I suspect that there are many, who would feel that, what it does, runs counter to legal certainty and may achieve a negative result in the long term.

Justice Snowden

David, I should have had you as my junior arguing the case with me. I mean, those were exactly the arguments which we were running. To provide some balance, don't forget that the choice of the change of law had been undertaken by a majority which was permitted by the financing documents.

Julie Miecamp

It was only a fifty percent majority which is relatively weak.

Justice Snowden

The point is, the good thing about ALCOA, as a case. It does illustrate one point which is that the English Court looked very hard, long and hard, at the question of whether to accept jurisdiction and approve that scheme. We had five days, I think, five days of arguments in Court. I cross examined the German expert witness who was attesting to the way that the scheme would be recognized in Germany. There was evidence in front of the English Court as to what attitude the German Court would take. We said, they will be offended. The German Courts won't like this, they won't give effect to it. The other side, the proponents of the scheme said, oh yes, they will, they will be perfectly content with it and we had expert witnesses, Dr. Paulus, from Germany, a well-known expert, from DLA Piper in Germany. And they were cross examined, for a day, in front of the English Judge. It was a very thorough examination. So, the one thing I will say, is that, rightly or wrongly, and we will never know, because the appeal got settled, the case got settled before the Appeals Court. But rightly or wrongly, at least the English Court looked very long and hard, before making a decision. One thing I will say, is that the English Court is not a rubberstamp in these cases. Most definitely not a rubberstamp. It doesn't just approve whatever the debtor wants. I have given a number of judgements, where, recently, where I have made it very, very, clear, that I regard my role as a Judge, as going around this vehicle and kick the tires and look underneath the hood, look under the bonnet and see what's there. And test whether this is an appropriate exercise of jurisdiction. And if I may go back to one thing I was saying earlier, which I forgot to mention. When I was saying it's very important to have a more international outlook in these sort of restructuring cases. It goes back to something that Mihaela said again, that the Commission made clear, and needs to happen. There needs to be judicial education and judicial training in these very specialist fields. And if you can't appoint your judges from some people who have had twenty-nine or thirty years of practical experience as practitioners, there are various ways in which you can assist these Judges to get a more international outlook. There are conferences like this. There are organizations, like INSOL, like III, the International Insolvency Institute, where, judges regularly meet, from many jurisdictions, in order to get a better understanding of what's going on in their respective countries. To have a better level of trust and confidence in other judges in other jurisdictions. So, I think that whole area has to be strengthened. That soft training, it's meeting people and understanding that German judges are normal human beings, English judges, I like to think, we are normal human beings, and that will, again, assist in the restructuring process.

Julie Miecamp

Did you want to say something?

David Chijner

Yes. I'd like to come back to Brexit. I have the great privilege of being allowed to be controversial which makes me, I guess, only one of us, on this panel. I think that when we are speaking of Brexit, just because a majority of Neanderthals voted one way, is not a foregone conclusion. We have all recently seen that Wallonia, with three and a half million inhabitants, stopped a half a billion Europeans, from signing a jolly sensible treaty with Canada, a roughly civilized place, I am told, that was negotiated by the EU Commission for six or seven years. That may yet work out fine, but the reality is that the commercial treaty with Canada is comparatively simple, indeed almost simplistic when contemplating the type of treaty that would be necessary to unravel the relationships between the United Kingdom or whatever is left of it after Scottish independence, from the rest of the EU. Now, take a few examples that are relevant to people like us, who have an interest in the insolvency world. One of the issues is the recognition of civil judgements. I just mentioned it in Enron. Well, today, an English or British judgement is, effectively, with very minor exceptions, automatically recognized throughout the EU. If we had a hard Brexit, and I will come back to it, such automatic recognition would no longer exist. There are literally hundreds of examples of things like that, that would impact an insolvency case, that will have to find their way into some sort of treaty, that would, in some way, formalize the British exit from Europe. Now, let's step back for a second. Let's look at Article 50. We have already established that if you want to leave the EU, that's a treaty. Based on the Canadian experience, it's almost certainly a mixed treaty. Therefore, the remaining 27 member States have a veto. Approximately ten of them, I believe, require, not just a lower House, but also the upper House, to vote. That's 37. I believe there are at least six regions in Europe, of which I am aware of, that also need to vote, under their internal constitutional arrangements. So, effectively, a treaty sanctioning a UK exit, would have to occur within two years and would be subject to approximately 45 separate independent vetoes. Now, we have all conducted a large number of commercial negotiations where people are roughly rational, which is not necessarily an adjective that one would be prepared to extend to politicians. Imagine running forty-five such negotiations with states, involving literally hundreds of individual decisions where you have conflicting interests. So, we are back to, it's not going to happen within two years. Ah, but the decision to extend an Article 50 proceeding, beyond the two-year limit? That's also a treaty. With, again, we can have that debate, proba-

bly, 45 vetoes. So, the reality is, if the UK ever does in fact invoke Article 50, then there is, from a mechanical perspective, irrespective of the merits, a very material likelihood that Brexit, at least in an initial stage, will be a hard Brexit. Therefore, when we come back to our world of: what's going to happen in insolvencies? There is some likelihood, potentially a strong likelihood, that tomorrow, a British Judge, whose judgements are automatically recognized today in France, because of the UK's membership in the EU, will become a Judge from a third-party country that is not bound to France and presumably to other member states by any treaty whatsoever involving recognition of Judgements, be they insolvencies, be they civil judgements, be they commercial judgements. That is likely to be one big unholy mess and one can only hope that when they finally realize what is involved from a technical perspective, a variety of politicians will make the decision to start negotiating, assuming they do want to negotiate, outside of the framework of Article 50, rather than within the framework of Article 50.

Justice Snowden

I don't think anybody doubts the technical challenges that Brexit will cause. But perhaps I can go neutrally back to one of the points that I made in relation to international insolvency. There is a world outside of the European Union. We've had schemes of arrangements long before the European Union existed. We have cross border insolvencies involving the US, involving Hong Kong, Singapore, Cayman and the Far East, in the UK. Because of the huge uptake of English law as a governing law for financing documents and instruments for all manner of worldwide companies. It makes much more sense for all parties involved in insolvency to recognize cooperative judicial assistance across international borders rather than adopting a very narrow "we're in the club you're out of the club" type of approach. There is the UNCITRAL model law.

David Chijner

With all due respect, Sir Richard, we're dealing with a worse system than that. It's not "We're in the club, you are not". It's "You chose to leave our club and slam the door on the way out".

Justice Snowden

But in insolvency matters, I think everybody probably has to recognize that there is a bigger game to play. It's the one I was talking about earlier. So, for example, the UNCITRAL model law, operates in many jurisdictions these days. It operates in the US, it operates in the UK, it operates in Canada, it operates in Japan. And that law doesn't care whether the country from whom the insolvency comes is a model law country or not. It recognizes that it is much better in terms of coordinating international insolvency, to grant recognition, to a collective proceeding, in a foreign jurisdiction, irrespective of whether you have any reciprocity with them, in order to achieve a better result for creditors. So, yes, I don't doubt the sentiment that exists about, or would exist about, Brexit. But in insolvency matters, I think the people in this room and the people in many rooms like it, around the world, probably will have to take a broader view, about what insolvency actually means.

Julie Miecamp

Another point I wanted to raise actually is that some of the decisions that might come from the European Union in terms of insolvency, seem to emulate some things that can already be done, in a very efficient way, in the UK. So, moving away from the politics. Isn't there an argument, for some jurisdictions in Europe, to, perhaps look at how it's done, efficiently, either in the UK or in the US, and try to emulate that. I know in Spain, they have set up a form of insolvency proceedings called "homologation", which almost mimics what's going on in the UK, under a scheme of arrangement. So, moving away, again, from, just the politics, and Brexit. Isn't there a common interest, across Europe, to make all the systems more efficient? I mean, twelve tools in France, that's a lot of tools. I'm sure they are very efficient, but, in terms of duration of restructurings, I mean, France doesn't rank very well. So, isn't there an argument perhaps to, instead of just saying, well you're out of the club and I don't like you anymore, to try and learn, from what's done elsewhere, and maybe not from the UK, perhaps the US as well?

David Chijner

Julie, it's not "you're out of the club and I don't like you anymore", it's, "and you said that you don't like me anymore", that's far worse. More seriously, what you are raising is just a general argument for comparative law. As Sir Richard points out, there is a world out there, outside of the EU, there has always been a world out there at least for as long as the planet has been existing. It has always made sense to look around and find out what other people do and see whether you can learn better things from those other jurisdictions. Frankly, French law, to take that example, is clearly an example to be learned from, because I gather Brazil has adopted a system that is remarkably similar to ours. And it's, so far, I think, the only country that seemed to like it but there may be others out there, one day. More seriously, the differences are not that substantial. At the end of the day, we all have some sort of system involving a stay. At the end of the day, we all have some sort of system involving proofs of claims that enable one to determine with certainty what is owed out there, and what the balance sheet actually looks like. At the end of the day, I think Judges and legal systems, pretty much around the world, have recognized that if value is to be achieved and jobs are to be preserved, it is often better to sell whole businesses, rather than to sell them piecemeal in individual pieces. Now, at the end of the day, the question then becomes, and those are almost secondary questions, but they are important: who handles the process? To what extent do creditors get to control that process? To what extent, and that's the duration you are referring to, do I give companies, and, from that perspective, French law is very generous, a period to stabilize their business under Court protection, to carve to out certain elements of it, to restructure the business, before it is marketed, in some way, either back to the shareholders, to the debtors, to third parties, and that is the "*période d'observation*" (observation period), which we have. Those are all legitimate arguments and you can have them in several ways. But at the end of the day, I don't think – speaking seriously, for a change – we will ever stop learning from one another and I don't think a perfect system exists.

Justice Snowden

I agree. I think we all have a lot to learn. I have been very privileged over the last year to be invited to speak about schemes of arrangements, for example, in a number of other jurisdictions, as far afield as, Singapore, Japan, to Dutch insolvency lawyers, particularly recently, the Dutch, as you know, in the Netherlands, are thinking very seriously about introducing something which looks very like a scheme of arrangement. And in fact, in many eyes, I think, might be thought to be a considerable improvement on a scheme of arrangement in terms of the legislative structure. I was asked to go and participate in a day-long seminar with Dutch lawyers, in relation to that, which, I found very

valuable. Because their understanding of what I did, and their perception of what I did, is actually extremely valuable to me, in questioning how I approach my own cases and how I am perceived elsewhere. It may be that there are a lot of structural problems that a lot of jurisdictions face because, going back to what I said a little earlier, one beauty of the scheme of arrangement, is that it is a very, very flexible tool. I mean, the actual statutory provision is one sentence long. It is one sentence of English. It is in very general terms. It has been in exactly the same terms since 1872, I think. The beauty of the scheme of arrangement as a flexible restructuring tool, is that it is administered by lawyers and judges who understand what's going on because of their commercial experience. And that is a very difficult thing to learn from another jurisdiction in a very short space of time. But I think there is great opportunity for international lawyers and jurists to talk to each other. I think it's a great benefit. So, I benefit from hearing – and I emphasize what I said earlier – I recognize that I can only restructure a company insofar as other people recognize and respect what I'm doing. And if I hear that what I am doing is meeting unremitting hostility in other jurisdictions, then, of course, I would question very hard whether I am right to do it. So, I think that an interplay between jurisdictions is terribly important.

Which Insolvency Law should apply to corporations in the European Union?

Keynote Speech

Vincent Aussilloux

Head of the Economic Department
France Stratégie
Office of the Prime Minister

First of all, let me just say, that the views that I am going to express here are not the official view of the French Government. Even though France Stratégie is part of the administration of the Prime Minister. We are independent and responsible for what we say and we do not represent the views of the government.

I will take here a slightly broader view in comparison to the first session that we have just heard. It was really interesting by the way and touching upon some of the key challenges. I would just like to remind you of the context that we are in. We are in the midst of a large crisis in Europe, at least on four different fronts. First of all, the Eurozone crisis is still not over. Of course, we have the migration crisis, which is with us, and will stay with us, for some years. Of course, we are in Paris. We all remember what happened this year and the year before. And the security crisis, is also there. And, all of that, in the context of a rise in populism. And, I must say, a legitimacy crisis, of the European project, with a decreasing public support. This is not specific of the European project, as we have seen, with the US presidential election, for example, but also the vote on Brexit. It's a general rise of populism across all democracies. Why am I saying this today? We need to remember that the European project is based on the promise of delivering prosperity. Peace and prosperity to its people. So, we need to have in mind that we need to restore the credibility of our European project based on output legitimacy. What is the current performance of the EU? It's not that good, of course. The decline in productivity growth, is not, of course, only to be found in the EU itself. It is a global context of secular stagnation with a global decline in productivity growth everywhere in the advanced world. But the EU has stagnated relatively to the US, for over a decade. We are staying at 70 % of GDP per capita, in comparison with the US. We are not catching up any more, as was the case in the seventies, for instance. And, of course, within the EU, the widening gap, in terms of income per capita, between the north and the south is pretty much worrying. As can be seen on this graph, since the crisis, the southern European countries are relatively losing grounds with respect to the northern part of the EU. And this is a major threat to our project. To our common goal of shared prosperity.

What are the key factors behind that? What I want to stress is the widening imbalance building in terms of savings and investments within the EU. Capital is not flowing from excess savings countries to countries in need of productive investment. This is the key challenge, economically speaking. To rebalance growth, we need to restore capital flows going from the north to the southern countries. But, of course, we need to avoid the pre-crisis imbalances that we saw where, basically, investments and capital flows going to Spain, for example, and other countries, have fueled housing bubbles. So, we need to allow for investment flows to be directed to productive investments to prop up economic

growth in the countries where there is a catching up to foster. The private and public investment needs to be encouraged much more. We will see this in the Juncker plan with the EFSI (European Fund for Strategic Investments) project which is one key initiative from the EU. But we need to do much more to restore growth in Europe by fueling and helping capital to go and get invested in the areas where productive investment is much needed. We need some truly pan-European venture capital. There are some initiatives on this front to be announced soon on the European side, but it will take much more than just some European plans to do that. We need to count much more on private initiative on this front. Pan-European investment funds will have to develop from private initiative. This is all the more important that we do not see that many European start-ups developing on a pan-European, on a continent-wide, scale. We see some of these European start-ups being very successful. But hardly any being leaders on all European markets. Europe, as a basis, as well, to develop on a global scale. So that is why, as was said by the governor earlier this morning, we need a capital markets union. We need to have a framework where private investments will be secured in going cross-border much more than is the case now. As you all now, insolvency procedure is key in that respect. The framework for insolvency, currently, does not allow the capital flows to happen cross-border in the type of investments that we want, basically equity.

Just a reminder that we tend to forget that the single market still has a huge potential to deliver. We tend to think, often, that the single market is a thing of the past and that we have done what was needed to have the right framework for companies to thrive on the European scale. This is only partially true. What we have done, over the past thirty years is to double the intensity of trade among member States. Which is already a great achievement. And economic studies say that this doubling of trading intensity has delivered, more or less, around ten percent GDP growth for Europeans. This is already quite something, of course. But, what is more important, is what is ahead of us. We are all still trading four times less among member states in the EU than between US States. This is taking into account, of course, structural factors such as languages, distance and population density. This is what we call, in economics, gravitational analysis. So, taking into account structural factors, we are still four times below the potential of trade that is taking place within the US states. This doubling of trade intensity, that I think is achievable over the next thirty years, mirroring what happened over the last three decades, would deliver around fourteen per cent GDP growth over that period. This is around half a GDP point growth, every year, in addition to what we know, already. So, this is the potential which is waiting for us to take the right decision for that growth to be able to take place.

But we need new approaches for the single market. We have tried, in the recent past to take actions in some areas of the single market where we know there is still a great potential, just to mention the digital single market, of course, but in energy, in all the major services sectors which are heavily regulated. For those sectors, we need new approaches to foster the single market. We need more active use of norms and standards. We have the biggest market in the world in terms of finance consumption. We need to leverage this size to steer innovation by defining ambitious norms and standards. Let's say, for example, banning all the sales of petrol fuel cars by 2040, would drive and steer a lot of innovation. This is the type of lever that we need to use in a more active way. The second way where we can make progress is by defining single rulebooks and single regulators at the EU level, to regulate service sectors where there is still great potential for more integration. Namely, telecoms, energy, pharmaceuticals and many others. And in certain areas, and this is why I am speaking about this, the only possibility for us to make progress in terms of integration would be to have the same set of laws. I think, in particular, for the insolvency framework. There, I would argue, that convergence will not be enough to build confidence and for capital flows to happen, for equity investment to happen cross-border, investors need to have full certainty on the way they will be treated, if problems arise with their investment. As I said, this is key for investments in productive activities. And that's exactly why, as I said at the beginning of my presentation, we need this type of similar laws to be enacted in Europe as cross-border investment is at the heart of the resolution of the unbalances that we see inside the Eurozone and, more broadly, inside the EU. We all know that we need to develop equity financing over loans to move away from the full financing of companies by banks and rebalance the way they finance themselves. It is indispensable to develop pan-European private investment funds. And for that to happen, we all know that the insolvency framework is absolutely key. And we need more than just standards and convergence of regulations. In summary, I would argue, in the insolvency framework, we need absolutely similar laws. In terms of insolvency and I will go very fast on this, we know that there are wide differences in Europe, especially in terms of efficiency. You all know, probably, the "doing business" study, from the World Bank, and the study by the European Union, the Commission. There is ample room for progress in the insolvency framework in Europe.

Let's take the example of France. Over the last decade, sixty seven percent of all insolvency procedures ended up in bankruptcy. Why is that? Because the asset-to-debt ratio is simply not good enough for the company to be saved. Simply because companies are entering the insolvency procedure at a stage that is too late. They wait too long before entering a collective procedure that would help them and resolve the situation. Even the new safeguard procedure, which has a better track record in that respect, still, we have 40 % of cases ending in liquidation, which is a better track record, but, still, there is probably a selection bias in this case. If we think that the best companies, those that are more aware of their problems at an early stage, go through that procedure, then the track record is not that good, in this respect.

Why am I advocating for similar laws and not just convergence? Simply because, again, in terms of trust, in terms of cross-border investments, which are absolutely key to resolve the problems which we are facing, this will happen only if the foreign investor has full confidence in the system and how he is going to be treated in case of difficulties. Under which time horizon will it be possible to think of a single EU law? I think we see the very welcome initiative of the European Commission, to be announced soon, as we have heard this morning, but, still, this is only one step, and a very important one, but I believe we all need to think very hard on defining a single framework. Maybe the next panel will, I hope, help us discuss how that could be achieved. We heard this morning, from the Governor, maybe the idea of a 29th judicial regime, or 28th, after Brexit, would be an option. I would very much like to hear about this. I would very much like the panel to discuss that.

Thank you very much.

The risks of high yield markets: Are we ready?

Round table 2

Sophie Vermeille

Président,
Droit & Croissance/Rules for Growth

Adrian Thery

Partner, Garrigues
Madrid, Spain

Vincent Catherine

Managing Director
European Principal Group
Oaktree Capital Management France

Yves Lelièvre

President of the General Conference of Consular Judges of France

Claire Favre

Honorary Chair of the Commercial Division of France's highest Court of Appeals (Cour de Cassation)

Donald S Bernstein

Partner
Davis Polk & Wardwell

Sophie Vermeille

Before going further down and talking about what can be done in Europe, we're just going to take a step back and look at the current issues with respect to formal bankruptcy proceedings. May I ask Adrian what are your views with respect to formal bankruptcy proceedings. What do you think are the main flaws, not only in Spain but also about what you may know about other countries?

Adrian Thery

Thank you, Sophie. In my personal view, the financial crisis of 2007 has implied also a crisis of the traditional insolvency proceedings. And this is shown by how the different states have tackled complex restructurings after 2007. Until 2007, insolvency proceedings were liquidation proceedings. After 2007 the situation changed and you had banks and you had large corporations failing and the different states did not resort to traditional insolvency proceedings. They created new proceedings for both cases, for complex restructurings. In the case of the banks, you had new regulations passed. The scope of further restructuring and the resolution of banks was withdrawn from the ordinary bankruptcy Courts. With large corporations, the states could not do the same. The competence was maintained within the scope of the bankruptcy Courts but pre-insolvency was regulated. Pre-insolvency was a sort of new regulation that has changed.

Sophie Vermeille

This is a solution that we use. So, basically, in short, the various procedures in Europe were, mainly, and France was an exception, focused on liquidation, so, not enough ability to preserve the value, too many distressed sales, not preserving the value of the assets, maybe job losses and so on. That is what you are saying. Maybe one of the issues you should know is also the high rate of failure, what we call in the US, Chapter 22, there is no specific word in France. But just to give you an idea, in France, 85 % of companies which emerge from *redressement judiciaire* file into liquidation within five years. With respect to the *procedure de sauvegarde*, the safeguard procedure which was enacted decades ago, there is still 50 % of the proceedings which fall into liquidation. So, the high rate of failure, that was the situation in France, created this incentive to use pre-insolvency tools. We will discuss this after this first topic, what has been the approach in France and other countries in Europe but also in the US. But, high rate of failure, Vincent, as an investor, just focusing for the time being only on formal bankruptcy proceedings. Have you ever been in a situation to buy assets in an auction for example? Have you seen that in France or elsewhere? What can you say? Would you do that? Or would you, on the contrary, focus on a pre-insolvency proceedings?

Vincent Catherine

Your question is whether we would participate in an auction of distressed types of assets?

Sophie Vermeille

Yes, exactly

Vincent Catherine

I think we have seen that working on large size opportunities, in France, so far, at least from our perspective and our track record in that respect is quite low. We haven't seen many opportunities like that really working and functioning well. I think, to us, one of the big issues that we have seen so far in Continental Europe is the lack of velocity and the pace that is much reduced compared to what is effectively the case from a more Anglo-Saxon type of hat, which, in our mind, has many consequences. I know that there are many legal difficulties in trying to harmonize and unify that type of regime. And despite being more on the business side and less on the technical and legal side, I do recognize that there are plenty of obstacles. But I think the lack of velocity in this never-ending type of restructuring process that goes on and on for months and months because effectively it is sometimes difficult to go from amicable proceedings to effectively enforce a judicial type of proceedings is creating a lot of harm and damage. One of our wishes, at least from an investor point of view, is to try and find a solution, you know the regimes have progressed positively, especially in France since 2014, clearly, we see an improvement, but, we want more speed.

Sophie Vermeille

What you are saying is that there are difficulties for a company in an informal bankruptcy proceeding to properly deleverage their balance sheet. We see them quite a lot. That's why we see those figures. The fact that there are so many companies who file for liquidation after having initially gone through an informal bankruptcy proceeding. So there is no real market for the investor at this stage. This is quite consistent with what Vincent said earlier during his presentation. The fact that when the companies actually file for formal bankruptcy proceedings, the quality of the assets is really bad. That's why there is no market for investors.

Yves, do you want to add anything to this? Just, first, to start, to focus on what is the situation about formal bankruptcy proceedings, based on your experience.

Yves Lelièvre

Thank you. First, let me add one thing beforehand, which I would like to say. We heard earlier about the English Judge. Let me just say that the French Consular institution is five hundred years old. It has survived all manners of revolutions and republics. Today, as in the past, it is based on a few basic principles. First, all Judges are business managers. Second, they are unpaid volunteers. Third, they must meet two criteria, competence, based on their experience and independence, based on their participation and their incorporation in the Judicial system and authority. So, our job is, of course, to enforce the law, and, on some occasions, I will come back to that later, to bring evolution to the law as well. But I wanted to say, that, in France, on this matter, we're not completely ignorant or in need of an education from our English friends.

Sophie Vermeille

Yves, thank you for this introduction. I don't think Justice Snowden was aiming directly at French judges. Perhaps you should have mentioned this during his speech.

Yves Lelièvre

No, this is just a preliminary remark. You said this was an open debate and I thought it would be useful to start it this way.

Sophie Vermeille

Well, at least the debate is now open and I thank you for that.

Yves Lelièvre

So, let me get back to the numbers that were mentioned. In France, we have to deal with, roughly, every year, some sixty thousand liquidations. Yet it is important to keep in mind that more than ninety percent of these liquidations are sole traders or companies with less than two employees. So, I think it is necessary to shed some light on this. We don't have numbers, and this is, of course, regrettable, and there is a good reason for that, which I may touch upon later. So, when we talk about the number of liquidations and percentages of liquidations, I think we need to keep this in mind. The second notion that we must keep in mind is that, contrary to many other countries, large French companies, companies with sometimes very complex balance sheets, are heavily dependent on the French State. It is important to keep in mind that, in France, the French State is a shareholder in no less than 81 large corporations, public and private. Their total assets reach more than 87 billion euros. The French State is the main shareholder forcing these companies to launch emergency capital increases. So-called "last resort" recapitalizations. Therefore, I believe it's important to understand the context in which French companies are operating because, obviously, it's always a bit awkward to compare average numbers and to draw conclusions from such numbers.

Sophie Vermeille

Thank you very much. This is very true and this is a point that is not sufficiently described. The French State's intervention when the company is on the brink of bankruptcy but before the opening of formal insolvency proceedings means that there is a French way of dealing with insolvency which it is important to recall.

Now that we have made this first step. I think it is important to ask the question to the various members of the panel. How to address this issue? What we can hear from Mihaela, the representative of the EU, is that the EU Commission has taken the approach that, I think, it is quite complicated to solve all the issues raised by formal bankruptcy procedures in Europe, so they have encouraged the various member States to adopt what we call pre-insolvency tools. That is the approach that France has taken for quite a long time. So, I think it is important, in our debate, to discuss this approach. Whether or not it has some benefits, some flaws. And after that, perhaps Donald will give us his views, after we have discussed the various costs and benefits of this approach. So, maybe, Madame Favre, would you explain to us, very briefly, how it works in France, with respect to these pre-insolvency tools and what are the recommendations that the High Legal Committee of the Paris Financial Market (*Haut Comité Juridique de la Place de Paris*), has made on this issue.

Claire Favre

Thank you very much and thank you for your invitation to the High Legal Committee to express its first recommendations here today. This High Committee was created almost two years ago under the impetus of the French Market Regulator (*Autorité des Marchés Financiers*) and the Bank of France. The Committee includes lawyers, academics and qualified persons. It is tasked with providing independent legal advice which is made public. It is also tasked with the mission, and it is the only one which I will mention today, to assist and be available to public authorities in the negotiation of European and International legislation in this area of the law. It was mentioned earlier that, in 2015, the European Commission invited member States to make proposals to harmonize the various national laws governing insolvency. This question was important for the decision making body of the Committee in the context of what the Governor of the Bank of France explained this morning, that is because of the risk of non-performing loans on banks. It is in this context that the Committee decided to appoint, in March of 2015, a special task force on corporate insolvency (excluding banks). This was to make proposals to the EU Commission in the context of the work it was initiating at the time.

The task force auditioned experts to hear their opinion and their analysis on the state of the French system of insolvency and on the possible proposals which could be made in anticipation of a common system or a harmonized system for the resolution of the financial difficulties of companies. The hearings showed that preventive procedures experienced high success rates. Therefore, to anticipate on a harmonization which should, in my opinion, occur in a moderate and progressive way, it appeared advisable to the Committee to encourage such procedures which, based on the initiative of the debtor and on negotiation had the best chances of being adopted by the various member States. These procedures, seemed to us to have, as they exist in France today, a number of advantages. There are two such procedures, they are called, for specialists, the "ad hoc" mandate ("mandat ad hoc') and the "conciliation". They have since been improved and this is perhaps the reason why the French system appears complex, by the addition of two very important procedures, the accelerated safeguard procedure and the prepack sale. Their benefits are the following. First, they rely on the appointment, at the request of the debtor, a distressed debtor who is not necessarily insolvent, of an independent professional, to lead the negotiations with creditors. This independent professional, in the French system, has the great advantage of being free from any conflict of interest. This a specialized and regulated profession called judicial administrators and practitioners. These are highly skilled professionals who are appointed after many years of training and experience.

They fees are regulated and controlled by the Court, even for preventive procedures. The second benefit is that these procedures are based on the free choice of the debtor and on confidentiality. I know that to some, this confidentiality is not a benefit. But in my view, to keep the value of a company and to keep the client base and the trust of banks, confidentiality is a real benefit. The debtor remains free to enter into these preventive measures, it cannot be forced to do so by a creditor. Third benefit, the procedure is controlled by the Court. The Judge will be kept informed throughout the procedure by the insolvency professional appointed by the Court. Finally, another benefit, these are procedures, especially the conciliation, which are governed by short deadlines, which may be renewed once, but must lead to a solution within a relatively short timeframe.

What outcomes? The best scenario in any negotiation is to reach a consensual agreement among all creditors. Thankfully, this happens sometimes. This agreement is then acknowledged by the Judge, either through a simple agreement or through a Court approval (homologation) which will make the agreement binding to third parties. This Court approval can also consolidate the claims of a number of creditors, especially new money creditors. It is an agreement, which, once it is approved by the Court, cannot be terminated later on, especially if formal insolvency proceedings are opened, especially during what we call the "suspect period", this agreement may not be terminated.

Now, the French system has evolved. It was inspired by foreign procedures. It has evolved in two directions. To allow negotiations to take place even without the unanimous consent of all creditors. This is what we call accelerated safeguard procedures. There are two such procedures. I won't go into details. One is called an "accelerated financial procedure" which seeks to reach an agreement with financial creditors only. This agreement can happen even without a consensus among creditors because it can be approved by a 2/3 majority of the amount of all claims.

Sophie Vermeille

It may be necessary here, to clarify what this 2/3 majority represents. Because there is a big difference between France and the EU Commission on this point. Would you like to clarify this Madame Favre?

Claire Favre

So, today, the French system creates two creditor committees. The committee of bank creditors and, where applicable, a committee of bond holders. The restructuring is negotiated within this framework. Today, the French system does not acknowledge what you may call creditor "classes".

Sophie Vermeille

So, the two committees here give no credit to either the subordination rank of creditors or the fact that some creditors are secured or unsecured.

Claire Favre

I think it is very complicated because there are creditor classes, one must classify them, and on the other hand the law of *in rem* security, which is, in principle, is outside of the scope of EU law, so, from a legal standpoint, it is a very complicated matter.

Sophie Vermeille

So, Ms. Favre, let's stick to the description. To summarize, and correct me if I am wrong, but, France, having realized that there are many problems at the level of insolvency procedures, has chosen to develop a number, which kept rising over time, of preventive, so-called pre-insolvency tools. That there are four such procedures today, including two recent ones. And that, in this context, having recognized that it is ever more difficult to reach an agreement between creditors, there were even new proposals made by the High Committee.

Claire Favre

The High Committee is still working and is very open to the need to reach a harmonization. But a harmonization doesn't necessarily need a single law. In every Directive, we have heard of a "de minimis" Directive, I think there are some great principles that are necessary and we all know that in a number of areas the member States can keep specific rights.

Sophie Vermeille

If I may, on the question of preventive measures, I think there are some specific measures that are contemplated.

Claire Favre

I think we can be open to a discussion on classes of creditors, there is no problem with that.

Sophie Vermeille

So that would be classes. Just so that I understand you correctly. These classes would take into account the order of subordination? the collaterals?

Claire Favre

I cannot answer, at this stage, and tell you precisely what the High Committee may propose regarding creditor classes. I am saying that this is an open subject today.

Sophie Vermeille

Thank you for this presentation. This was a description of the various procedures that we find under French law. We see that it is quite a complex framework because there are four various types of procedures and, as Madame Favre just mentioned, maybe we should consider recognizing the concept of classes of creditors but, at this stage, there is no definitive answer on how do you define what is a class of creditor. So maybe now I am going to ask Donald to explain to us how it works in the US because, frankly, when I look at US law I find it quite simple, in the sense that you have a chapter 11, you have a chapter 7, which is the equivalent of the liquidation proceedings, but you don't have any specific pre-insolvency tools. You have, what you call, the prepack but please explain to us how it works.

Donald S Bernstein

Thank you, Sophie. I am glad to be here so I can escape the US Presidential election. I think it is worth outlining briefly how Chapter 11 works and I am not going to advocate it as the best system. There are a lot of insolvency systems. And then, explain how we got there. Because we were actually very slow learners. It took us from 1880 to 1978 to get to the system that we have now. It evolved over time. Almost a hundred years. So, chapter 11 has some very simple fundamental principles. There is creditor representation. Due process in terms of creditors rights to be heard. But importantly, a restructuring can be accomplished by a requisite majority vote, which is at least two thirds of the

amount and one half in number. As to dissenting creditors where a class of creditors, you do classify creditors.

Sophie Vermeille

How do you define a class of creditors?

Donald Bernstein

You actually look at the legal priorities that creditors have. If creditors have secured claims you value the collateral, and to that extent they have a priority, the balance of their claim is a deficiency claim and that is considered a non-secured claim. In a non-subordinated claim for example a trade class, that would be considered a separate class for purposes of a classification. So, you have classification. And you have the requisite majorities, voting in each class. With disclosure. As to the minority that votes against the plan, you have a best interest of creditors test, namely that they have to receive at least what they would have received in a liquidation, so that's the fairness standard as to the dissenting members of an assenting class. But you also have cram down, which means that if a class of creditors vote against the plan, they can block the plan, if they are not being paid in full and any class junior to them is receiving a recovery. Conversely, if a junior class votes against the plan, the junior class can block the plan, if the senior class is being paid in full and the junior class feel that they are not getting adequately compensated. So, you can actually block the plan or cram down the plan on the senior class depending on how the values work. One problem with cram down is that it requires an enterprise valuation because you have to decide which classes are in the money and which classes are out of the money. And that is the only way you can apply an absolute priority rule, which is the rule which determines the fairness of a cram down. So how did we get to this system? It has very few basic rules but it also evolved over time and the first big thing that evolved was the idea that reorganization was better than liquidation. And the reason we ended up with that system is that, in the 1860s and 1870s, transcontinental railroads were built in the United States and by the 1880s many of them were failing. I have seen various statistics and one of them is that 70 % of the railroads in the United States failed in the late 19th century. At that time, we didn't have a national insolvency law to address that. The remedy was that the creditors, the bondholders who had financed various parts of the railroads and were secured by various parts of the railroad could seize their collateral. Well, that's not very helpful when you've got a railroad. Because if you financed a portion of the track and you lifted that railroad, the railroad is no longer a railroad. And it was quickly decided by these creditor groups that they preferred to act collectively and reorganize the railroad rather than having it liquidated, but there was no vehicle for doing that. So, they devised a vehicle called the Federal Equity Receivership where you go to a Federal Court, a receiver is appointed for the Company and sells the Company and the Creditors can bid their claims. The secured creditors can actually bid for the railroad with their claims and then buy the railroad and that's how they reorganized. So that was the first principle and that was embodied in a Bankruptcy Act in 1898. And then, over time, the question became, how do you deal with the tension between shareholders and creditors? Shareholders would prefer to threaten to liquidate the company and destroy the going concern value if they are not rewarded with enough compensation. And that came in front if the US Supreme Court in 1913, in a case called Northern Pacific vs. Boyd. The Supreme Court decided that, to be fair, a reorganization had to satisfy the absolute priority rule and maintain the rule that we discussed a moment ago for cram down. And that was again reaffirmed in 1939 and was actually embodied in a statute just before that in 1938. Now the interesting thing about the 1938 statute, was that it had two separate provisions. A chapter 10 and a chapter 11. Chapter 10 was for large companies with secured debt. And chapter 11 was for smaller companies, primarily with unsecured debt. In Chapter 10, for large companies, a Trustee was mandatory, and you also had a mandatory application of the absolute priority rule. There was no idea that you could waive the absolute priority rule by vote. In Chapter 11, the debtor remained in possession and you had a voting procedure and you had the best interest test. You didn't have the absolute priority rule. And what that led to, was a real problem, because for the larger companies that needed to be restructured, you had to do an enterprise valuation in every case and litigation over the value of the company lasted a very long time. So that was not a workable solution and we suffered under that until well after the war. And then finally in 1978, they combined the two chapters into a single chapter 11 with the voting procedure I described, but the ability to cram down. Now, the importance, of all of those rules, is that they affect the inter creditor negotiations. The actual design of Chapter 11 was deliberately to try to encourage consensual plans. To reduce the power of shareholders to hold the case hostage and insist on value that they are not entitled to in terms of their priority. But also, to allow the debtor to remain in possession and to be given value, to the extent that they were providing value to the plan. And that system, in fact, does encourage consensual resolutions. Because you negotiate your plan in the shadow of the absolute priority rule. And the creditors know that if they don't reach agreement, what the outcome will be. And that has created the possibility of pre-packaged bankruptcies which is our sort of pre-insolvency procedure where the creditors actually vote on the plan before bankruptcy and then go into bankruptcy Court and in four to six weeks the plan is evaluated by the Court and it's determined whether you have satisfied the best interest test, or the absolute priority rule if necessary, and you emerge from bankruptcy. So that's a summary of how we ended up where we are, Sophie

Sophie Vermeille

So, we can see that there are two different approaches. The French approach with some issues around the formal bankruptcy proceedings; let's find a solution with pre-insolvency tools, with have their own specific rules. And that is the kind of solution that the EU Commission is about to choose. And we have the US approach, which is to make sure that the rights of the formal bankruptcy procedure are like the one we would like to have and make sure that those rules encourage out of Court negotiations. When you say "negotiating in the shadow of the absolute priority rule" you mean negotiating in the shadow of the formal bankruptcy rules. So that is two different approaches. Let me turn to Adrian now, our Spanish lawyer. Perhaps you can briefly explain how it works in Spain and with respect to these two approaches, where you stand, which one would you advocate, as an expert, to the EU Commission.

Adrian Thery

I am not going to explain the Spanish scheme because it is very similar to the French *Sauvegarde* so I will refer to the French *Sauvegarde* but, in my view, after what Donald just explained, there are two aspects which I personally think are fundamental flaws in the French *Sauvegarde*. The first one is the so-called "*imposed plan*", which means that the fallback position of the debtor, if he doesn't reach an agreement with its creditors is not that he will be crammed down, as he would, in the US, and end up disenfranchised of his interest, but the fallback position of the debtor or

shareholder in France is completely the opposite. He can cram up, over his creditors, if he does not accept a restructuring.

Sophie Vermeille

So, just to make sure that everybody understands. If there is no agreement between the debtor and its creditors, during a formal bankruptcy procedure in France, it is true that a judge has the ability to force the consent of all the creditors, whether secured or non-secured, and, for instance, to reschedule the debt, for a period of up to ten years.

Adrian Thery

Exactly. So that fallback position doesn't incentivize the debtor to reach a settlement. Because if he doesn't reach a settlement with his creditors, his fallback position is ten years of almost free riding. I think that this is the opposite incentive that you want to impose on your typically out-of-the-money stakeholder, which is the equity. The second flaw I perceive is the fact that pre-insolvency instruments, all over Europe, have statutory classes of creditors. As opposed to flexible classes of creditors to be created by a Court. We have to recall that insolvency is, fundamentally, addressing the issue of solving financial problems. That is, balance sheet restructurings and financial restructurings. Financial creditors are contractual creditors. They have all had the opportunity to negotiate their priority rank in the capital structure. So, it makes all the sense in the world, not to divide them artificially between bondholders and bank debtors, and to give them veto powers in each other's committees, but rather to respect their pre-existing entitlements, previous to the insolvency situation. And to achieve that, you need to give the power to the Judge to create the classes of creditors that reflect preexisting, contractual entitlements. This is not respected if what you are doing is obliging bond holders, who are typically subordinated to bank debt, and you put them in a separate class with a veto power over the plan. Donald was doing a very significant gesture when he spoke. He was doing this gesture (moving his raised forearm from a high to a low point). Because, in his mind, the classes of creditors rank from senior (high) to junior (low). In Europe, we wouldn't do that. In Europe, you would have the classes of creditors divided between the bank debt and the bondholders. And each of the classes of creditors would have a veto power. While in the US, your classes are ranked vertically, from top to bottom, not horizontally, from left to right. And what vertebrates the system, what supports the system, is the enterprise valuation. When you compare the classes of creditors and their value, against the valuation of the enterprise, you are able to see where the value breaks. In which class the value breaks. And this, through cross class cram down, is how you disenfranchise out-of-the-money stakeholders. But you can do that only through cross class cram downs. That is why the initiative of the Commission, if the directive reflects cross class cram down, will be so welcome. Because with intra class cram down, which is what we have currently in Europe right now, even in the UK, you do not achieve a cram down of different classes of creditors but only the creditors within a single class. So different classes of creditors would have a veto power on the plan and at the end of the day, pre-insolvency is all about trying to manage holdouts. The need for pre-insolvency after 2007 when large corporations and banks started to fail, the need was to manage holdouts and allow rescue plans to be approved against holdouts, typically through cram downs but ideally with cross class cram downs as in the Chapter 11.

Sophie Vermeille

If I summarize what you are saying, but please correct me if I am wrong. If I try to reconcile what you say with what Madame Favre just said. I think everybody recognizes that there are a lot of holdout issues these days in the various recent cases, especially the big ones. We have seen, in France, but also in Spain and elsewhere in Europe, that because of the crisis, there have been many cases. But there are two different approaches. I just want to make sure that the audience understands. The approach taken by France which is to say, we recognize this issue and we are going to work on this issue during the pre-insolvency phase by changing, adjusting the pre-insolvency tools that we have. That is the *procédure de conciliation*, *mandat ad hoc*, and we already had new tools, the *sauvegarde accélérée*, the *sauvegarde financière accélérée*. That has been the French approach.

What you are saying, and that we can also infer from Donald's remarks, is that you want this issue to be addressed during formal bankruptcy proceedings because you think that by having clear rules in terms of classes of creditors with full bankruptcy proceedings, it will give the right incentives for the parties to negotiate properly out of court and you would not necessarily need specific pre-insolvency tools. Am I correct?

Adrian Thery

Yes. Absolutely. I will give you a typical example. Bondholders are typically junior to bank debt. During pre-insolvency, both stakeholders know that, bondholders know that they are junior, because that is what the financing documentation says. With the current French system of *Sauvegarde* today, they would find themselves *pari pasu* with the banks. It doesn't make any sense. Why should we improve their position after the pre-insolvency proceedings when they were junior creditors before that? That is simply a gift. It does not respect the pre-existing agreements.

Sophie Vermeille

So now I will turn to Vincent. Since you have some experience working in France. What are the dynamics of negotiations out of Court, in France, from your perspective, and what are your views.

Vincent Catherine

To come back on what has been said on negotiating out of Court, versus the judicial proceedings, there seems to be, in France, and this was rightly pointed out in the previous discussion, a very strong focus even an obsession on getting an out of Court restructuring agreed amicably. So, there is a lot of focus on *mandat ad hoc* and *conciliation*. A few years ago, you would start a totally out of Court process and the appearance of the *mandataire* would trigger some form of surprise among the creditors, because that was effectively the message that things were getting slightly more difficult than what was anticipated. Right now, you start any process and boom, you get a *mandataire* appointed immediately. Of course, the Court validates the appointment of the *mandataire*. So, there is a lot focus on the *mandataire* or the *conciliateur*, depending on which proceedings you have, to make sure there is an agreement. And I think that the very simple negotiation tactics that was being used was, there is a carrot of getting this out of court restructuring agreed in, let's say, a relatively short time, but don't worry because now we got a stick, which is the SFA, (*Sauvegarde Financière Accélérée*) so that we can avoid the risk of holdout which is typically a hedge fund taking a …

Sophie Vermeille

Why is there a stick?

Vincent Catherine

A stick because you can enforce a two third majority and take out a holdout guy that has bought maybe one or two million of debt and is just sticking around in a process to extract something that frankly he shouldn't be entitled to.

Sophie Vermeille

So, just to make sur that this is clear to everybody. You say that whereas Donald speaks about incentives to reach an agreement, you talk about a stick.

Vincent Catherine

Yes, because that is the way it is being portrayed. In the dramaturgy, the choreography that is being organized by the *mandataire* in the process there is obviously the message that, guys, if you don't reach a concerted agreement, this is all going to end up into an SFA, and it's going to be costly for the company *et caetera, et caetera.*

Sophie Vermeille

Just to make sure. I'm sorry to interrupt you. I want to make sure that we understand. Is this considered a stick because once you get into the SFA – the pre-insolvency tool which has been enacted in France – there is no class of creditors. So, you know that your rights, as you think they are, based on the fact that you have collaterals or not, or based on the fact that you have signed a senior or junior agreement, you are subordinated or not, you know that those rules are not going to be respected and this is a threat to you.

Vincent Catherine

Well, not to us, because, fundamentally, what we think, is that if the SFA or the judicial proceeding, the *sauvegarde accélérée*, is, let's say, crystal clear, from day one, on what is going to be the outcome. Whether we are creditors, whether we are shareholders, whether we are the company, we should not be in fear of the use of this procedure. But I think that too often, in France, the *mandataire* will tell you to wait an additional six months or nine months, to get to that famous unanimity, rather than effectively enforcing the second part of what you have in your legal arsenal, which is effectively to implement a two third type of cram down, or a two third type of vote, through the SFA. That, to us is, we feel a bit frustrated that the new tools, that have been put forward by the 2014 reforms are not being used as much as they do. Maybe there is a bit of inertia between the practitioner and obviously the law that has just changed. I'm sure that it will correct itself. But what we think, fundamentally, is that any tool that gives us more visibility of the outcome is good for the French market because there will be more liquidity and more capital being deployed as long as you get visibility on the outcome. From a London point of view, from a New York point of view, from a German point of view from a Norwegian point of view, the difficulty that all the creditors have is to be able to predict the outcome of a Continental European insolvency proceeding. It is very difficult from an outside-in perspective. You feel it is a world that is very difficult to understand, especially this out of court procedure. I think there was one point Mr. Lelièvre raised which is very important and that is that beyond the law itself, the specificity in France is that frankly, let's face it, you have many layers of, I would say, additional political tools that are being used, obviously and as usual in France, for very good and valid reasons, but sometimes, in practice, are slightly dysfunctional and will get in the way of a legal process that is already being set up and structured. Let me give you an example very quickly.

You are a Norwegian bank. You have a very small claim into a French company. The first thing you receive is, your advisors tell you, going to be a very amicable process and it is going to be very short. You are being called to a meeting but you receive a letter now, from the Mandataire, generally, saying that it is a Court appointed official. So suddenly you don't understand why there is a Court appointed official, so there is a sort of pedagogy to be made, to explain that it's simply normal and that's the practice in France. Two months later you are being called to a meeting for a "*mediation du credit*". But the *mandataire* is also there so you don't understand the difference, since, as a Norwegian bank, it's the first you have been through that. Then you end up with, now, the CIRI. The restructuring arm of the French Minister of the Economy. Then you think you are done. Fundamentally. At this stage. But no. You are then called to another meeting, with other officials on top of the CIRI. Again, the intentions are very valid, everyone wants to make sure that the future of this company is being preserved and all these professionals want the best for everyone but fundamentally, from an outside-in perspective, when you go through one of these processes and you are a foreign investor willing to deploy capital into the restructuring space, the reality is that, I think, investing in France, – I think the Spanish system, to be fair, has progressed, and from a continental perspective they might have at least from a practical perspective improved a bit more quickly than in France – but there is always a notion that there will be a discount to the pricing of the debt that you can buy from a French bank willing to sell its position, because of the complexity and, again, the inability to read properly the outcome, compared to an Anglo-Saxon system.

Sophie Vermeille

So my question is, and perhaps, Yves, you may want to comment on that, is there any way to make sure that the outcome of the formal bankruptcy procedure is clear, without introducing classes of creditors? and how would you do it? Donald, after Yves, I would also like to put the question to you.

Yves Lelièvre

Just to put things back in perspective. It is true, the process in France is complex. I'm not going to deny that, far from it. But there are three issues that must be distinguished. The first is the Courts, the second is the law, as it is practiced today, and then there are the "outside" parties, so to speak. On the Courts, you should know that, globally, in France, pre-insolvency works well. Last year there were roughly 1500 *mandat and hoc* and *conciliation.* That number is rising very quickly every year. We even work ahead of those procedures now since there is even a detection procedure available to the President of the Court and only last year there were more than 6000 direct interventions by the President directly to the entrepreneurs. So of course, there is a will, among Courts to work as far in advance of bankruptcy as possible. The second goal of the Court, is, when opening a *mandat ad hoc* or *conciliation*, for these procedures to be successful. The goal is not to reach a stalemate but to find an amicable exit, because it is all confidential, at the request of the entrepreneur and we find a solution in more than half of the cases. After that, we enter another territory. Procedures which are complex. The Accelerated Safeguard is something that was, in practice, used even before it became the law. We used it in the Thomson Technicolor case in Nanterre, even though the law had not been

passed yet. So, we can be creative this way. And then after that, there is government intervention, but this is something that the Courts have little control over, whether it's the *mediation du credit*, the CIRI or the Ministry of Finance. This is out of our hands.

Sophie Vermeille

On the question of predictability, if I may, the issue raised by Vincent is that, during amicable negotiations, since you must negotiate with a fallback position, the problem is that, in France, you have no visibility of what the outcome will be. Therefore, there is a negotiation dynamic going on which may look like it is working, since it will lead to an agreement, but, this agreement will, in fact, be dysfunctional for the debtor. What I see, as a practitioner, is that when you are afraid of the bankruptcy proceedings, you are led to make compromises which may not be satisfactory for the debtor. Let me be very clear. If a creditor is always afraid of the bankruptcy proceedings, he will always accept a plan even though he knows that the business plan is not credible and that the debtor will fall back into difficulties. One of the criticisms we can make of the pre-insolvency proceedings, is that; and here I will express a personal opinion and take full responsibility, even though, unfortunately, we don't have statistics, at least not publicly available, the numbers show that there are a lot of companies going through a *mandat ad hoc* which fall back into financial difficulties, because, since they are afraid of the bankruptcy proceedings, they accept, I won't say anything, because that would be unfair to the *mandataires ad hoc* who work hard to find solutions to help companies rebound. But, in my view, and I am stepping out of my role as moderator for a moment, this fear creates a real risk. So, here you have it. Donald, do you think there is a way to make sure that a formal bankruptcy procedure can be predictable enough and if you think that valuation is the only answer, can you please let us know, because one of the critics that we hear about Chapter 11 is that it is expensive and that valuation is complicated. How do you deal with this issue when the company is too small? What can you say to the critics?

Donald Bernstein

First of all, I just want to make an observation. I think we're thinking about two separate goals here of an insolvency system. The first goal is to accomplish restructuring so that you don't have liquidation. And you can have an insolvency system with mandatory rules that accomplish restructuring. It's very easy to do depending on what your rules are. But, the second issue is also important from a public policy perspective, which is the cost of capital. In the economy, predictability of the insolvency procedure actually leads to a lower cost of capital which creates value in the economy generally. The way creditors are able to evaluate what their outcomes is going to be is to look at their actual rights. I think that is the point that was being made before. If outcomes depart from what is in their contracts, the cost of capital is going to go up. So, it is extremely important to have a system that honors the contractual entitlements so that sitting today, when there is no financial distress, I can predict what my outcome will be if there is financial distress and then, based on that, price the risk. One of the problems of a system that is not based on a backstop or default position that says we honor contracts is that it creates unpredictability. And the default rule further says that the only way you get your contractual rights is, if there is a liquidation. It doesn't even say that you can have a court supervised insolvency, with honoring contractual rights and entitlements, unless you end up in a liquidation. That is a system that uses the threat of liquidation as a way to extract value from the creditors and make the outcome very predictable. So, the question you ask is, is there a way to have your cake and eat it too, in other words, have a system that honors contractual entitlements but never or very rarely have to litigate the question of what the valuation is. I think that if the system honors contractual entitlements, often the creditors can agree, within a range, as to what the values are. And very often there are some creditor groups that are clearly out of the money. And other creditor groups where valuation variance may put them in the money or out of the money depending on how you evaluate it. And the way those situations can be resolved consensually is the use of contingent value securities options and warrants. In the United States, what has happened in those situations is very often the creditors say, we don't know what the company is going to be worth but if it's worth more than the senior class expects, the junior class can participate at a certain level. If it is worth less, the senior class controls the company. There has been a number of cases, American Airlines, Conseco, a huge number of cases in the United States where those sorts of solutions have led to consensual results, where there has been disagreement between the creditors over the valuation but the creditors know that, if they litigate, the Court will do the valuation and their contractual entitlements will be honored rather than think about that unpredictable valuation, they settle the issue using these contingent rights. And it creates a lower cost of capital because it's predictable and it also creates consensual outcomes and in fact one of the articles in the packet talks about this.

Sophie Vermeille

Yes, I recommend that you read Donald's paper which we have circulated this morning. So, if I understand you correctly, the formal bankruptcy proceedings can be predictable only if you have a valuation methodology. That means that, at some point, you need a Judge, to address that question. And if I understood you correctly, because I've read your paper, what you say is that of course, raising this issue to a Judge maybe itself unpredictable sometimes because you don't know what the Judge is going to say. And to solve this issue, the parties are encouraged to be provided with instruments where this question of valuation is deferred to a later stage. This is what you obtain when you get a warrant. So, what you say, basically is, me, as a shareholder, believe the value of the company is 100. You, the creditor, think it is 80. I'm not going to be given much in the new company but if, somehow, I am right, in two years' time I am going to be able to get more than what I thought at the beginning. That is the concept. So, for you, if the judge doesn't address this issue of valuation, there is no predictable outcome which is possible during formal bankruptcy proceedings.

Donald Bernstein

What I am saying is that if here is no threat that the judge will address the valuation issue. With the threat that the Judge will address it, usually, it is settled.

Sophie Vermeille

So that, at least is the big difference between the continental approach, Adrien, because I don't think there are any Judges in continental Europe who have the power to address this issue of valuation.

Adrian Thery

As Donald said, strict cram down, absolute priority rule and the rule of valuation of the enterprise only exist actually in the United States. They are not even in Germany, where there is no cross-class cram down because it is simply a majority of classes, if my recollection is correct, but there is

no possibility for one class to cram down all the others, based on valuation. And I think that there is a confusion in Germany between the fairness test and the best interest of creditors test. I think in Europe, valuation does not reign. The creditors do not settle into a restructuring in the shadow of a Judge deciding the valuation of the enterprise and putting every class in order. If you don't have the valuation to rank the classes from top to bottom and determine which are in the money and which are out of the money because the classes are horizontally divided and valuation does not play a major role. I think that any such system is fundamentally flawed because valuation is not at the center stage where it should be.

Yves Lelièvre

I fully concur with this point of view. It is obvious that ranking the creditors is an absolute necessity, it should be homogeneous and in line with economic reality. Valuation should be replaced at the center of the debate. That is absolutely clear. This is what I believe. Now, on the cram down, I believe we're not there yet, and even at the European level, we are not. My own impression on this is that we have an important problem. We have, in France, started to reinforce creditors rights and we have tilted the balance back in their favor, through small measures which, in all, favor creditor rights. We haven't gone further than that. We will certainly need to change that one day. Yet there is another thing you need to keep in mind and that is that, in our country, for now, the fundamental goal of our laws is to save jobs. Unfortunately, it is not the development of the debtor. As long as we will have this public policy, and it is not for us, Judges, of course, to change it. As Judges, we must apply the law as it is, to the facts presented to us. Until this policy has been changed, I think we will find it very difficult to go very much further in striking a better balance between the rights of creditors and debtors. This is my opinion. And I think that at the European level, continental law, as it is today, is largely aligned with this view. I understand the debate on achieving legal and financial predictability. It is obvious to me, and we constantly strive to achieve this, that when you enter the Court, for one reason or another, you exit it with your rights secured, that is obvious. But you must understand that we have to apply the law, that the law is made by the legislator and that it is the legislator's job to decide where the cursor should be. And to date, the cursor is closer to the preservation of jobs than the turnaround of the debtor, even if that means the company must die in order to be born again, these are things that we don't have in France yet.

Sophie Vermeille

There is another point which I would like to touch upon with Madame Favre. It's a matter of concern for countries in continental Europe and that is the issue of how to treat shareholder vis-a-vis creditors. To be clear, and Donald won't contradict me on this, in the United States, at some point, the shareholder is considered to be the most subordinated of all creditors, it is a super junior creditor. Whereas in France, as a matter of constitutional law, but also, I know, more broadly, across Europe, and here I turn to Mihaela, it's not something that is widely accepted. I have my opinion on this, because everybody knows that I, as an economist, believe that, at a certain point there should not be any difference, but Madame Favre, you have a different opinion.

Claire Favre

I am not here to express my personal opinion, which is of interest to nobody, I believe. But I will gladly comment on the state of the law today. I will start with what Yves Lelièvre said. The fact is that insolvency law in France is part of a broad public policy and vision of the State and the goals that it wishes to achieve through the legal system. Originally, insolvency law focused on collectively reimbursing the creditors when the debtor became bankrupt and the rights of the creditors to be paid. Since 1985, this is no longer the primary focus of the legislator in France. As Yves said, it's really jobs and their preservation in our Nation that is the focus. Some people see this goal as an opposition and an advantage that would be granted to the debtor and to the employees against the creditors.

Vincent Catherine

There are two issues here for me. One is philosophical, which I will not comment upon, and that is which fundamental doctrine our law should follow. But the corollary is that the consequence of all this is that the current shareholder is the party which will be in the best position to defend the interests of the company and therefore the preservation of jobs. And on this point, I believe there is a real debate. This is where we have a true conflict sometimes. Between the staying power of the existing shareholders, in a continental environment, by contrast with an Anglo-Saxon environment where it is the creditors, and the existing shareholders, as a creditor among them, who will be crammed down once they are out of the money. This is where we have a difference. The first point is something that you either accept or not, and if you don't accept it, then there is no point coming to France to do business. The other issue is where we can, I believe, make progress.

Claire Favre

The other issue, I believe, is of great interest to our legislator. The shareholder is the owner of the shares, that is a matter of corporate and not insolvency law. So, this right belongs to a framework that is much broader than insolvency law. Is this a right that cannot be alienated? This is how the French legislator is considering changes today. Because, property rights are, as you mentioned Sophie, constitutionally protected. Therefore, the legislator has been very skittish to alienate this right, because some commentators have criticized these alienations as outright expropriations. So, we have a first example, a recent one, which shows that the road is not closed, with the Macron Law which allows, in certain circumstances, to cram down shareholders opposed to a restructuring plan.

Sophie Vermeille

With a caveat, if I may, which is the condition that the cram down is necessary to preserve jobs?

Claire Favre

More than the preservation of jobs…

Sophie Vermeille

Yes, the preservation of jobs "in the broader geographic area".

Claire Favre

Well, the law also offers procedural guarantees for the cram down. The public policy goal as well as the due process provisions of this law have allowed it to be ruled Constitutional by the Constitutional Court in France, because while property rights had indeed been restricted the public policy objective and due process protections had made this restriction was not disproportionate and therefore constitutional. This is a first progress. I think we can also participate in negotiations and see how we could change the law.

Sophie Vermeille

It may be striking to you but we have this issue in Europe. Should we consider that shareholders are super junior creditors or that they are a specific class of investors and should be treated that way. When did this debate end in the US? And let me go one step further. Do you think that, the reason may be found in US corporate law, let's say under Delaware law, knowing that the management has fiduciary duties owed to the shareholders, you were more prone to accept that, at some point, there is a shift, and to recognize that there is nothing to be saved in the case and knowing that the management would, in any case, take in its hearts the interests of the shareholders, they would recognize more quickly that, at some point, they need to be crammed down?

Donald Bernstein

I am not sure that's the reason for it. I think it was very important that there were just references to property law. Because I think you can think of the sole entrepreneur that owns the assets of the business and borrows and is personally liable on the debts of the corporation or the debts of the business, not debts of the corporation and then there is a separate concept, the corporate form, which protects the shareholder from liability, and I think in the US while you own the shares, that's your property, you don't have a property right to the assets of the company. And it is considered more of a contractual relationship. So, from the point of view of the shareholder, the shareholder is making a bargain with the creditors. And the bargain is, you give me money for the lowest possible cost, I will get all the upside, you will get a fixed return, but if things go badly, the company is yours.

Sophie Vermeille

Yes, but at some point, you recognize that you can file for Chapter 11 protection even if the debts did not fall due. So, the management can decide, before the expiry of the term that it can file for bankruptcy and at this stage, there is a crystallization of the value of the company, because that is what Chapter 11 can offer. And in these circumstances, you can end up in a situation where the shareholders do not have really any right in the company when the claims did not fall due. So, in those circumstances how can you make sure that there is no expropriation of the shareholders?

Donald Bernstein

This is why I say it is more of a contractual relationship. The shareholder has actually agreed to that outcome. The shareholder knows what the insolvency rules are. They know that they are not personally liable on the debts. That they are in a corporate form and it is a very efficient change of control mechanism to say, "if the shareholder is out of the money, now the creditors own the company". And, in fact, even under state laws in the United States, the fiduciary duties of Directors of an insolvent company begin to move over to the creditors. If the company is solvent, you're maximizing value for the residual stakeholder which is the shareholder. But as soon as you become insolvent, the residual stakeholder, under this contractual view, as opposed to a property right view, is the creditor group. And there is liability to creditors, potentially, for, not maximizing the value of the company and not resolving the firm in the appropriate way.

Sophie Vermeille

So, there is a clear difference between the European approach, based on property rights, and the US approach. I would tend to think that maybe the fact that you favor a contractual approach over property rights is perhaps due to the fact that you are more focused on a law and economics approach. From what you said it sounds like it makes sense to give the power to the shareholders when there is some upside but provided that they still can take the loss when there is a downside. Whereas in France, we don't think that way when it comes to voting rights and there is no economics approach to this issue.

Adrian Thery

I don't think it is different in Europe. The absolute priority rule is also embedded in the European systems. As long as in our company law, in liquidation, shareholders are only entitled to the liquidation quota. Once all the creditors have been repaid fully. The only thing is that, in Europe, we don't extract all the consequences. But that is the absolute priority rule. As long as, in lack of a restructuring, the shareholders will end up in liquidation and will see no recovery, they should be able to be disenfranchised in a restructuring, because a restructuring can only be agreed by creditors.

Sophie Vermeille

I agree with you. As you know, Adrian, the point I was making, is that it is understandable to be disenfranchised when the debts fall due, and we can think that way. The point I wanted to make is that, in the US, you can also be disenfranchised when the debts have not yet fallen due, because the management has filed for bankruptcy protection. And what Donald responded is that shareholders had agreed to that outcome, that is the contractual approach. This is where there is a small difference in the two approaches but I am sure that we can reconcile them. The last point I would like to make, because we are running out of time, is, to you, Yves, as a former judge, do you think that even though there are some flaws in the law, do you think that a Judge can sometimes circumvent the issues. How do you see the role of the Court in the future, to address this issue if the law does not change?

Yves Lelièvre

It's difficult. Circumvent is a word which I would not use. But it is true that, it is important to understand that, in France, everything is always solved by the law. That's how it is done. I don't think we can change that, that is our culture, it has its pros and cons. On the matter at hand, let me say that for us, the issue is very simple. The manager of a company has taken too many risks for the company. And we must find a way to correct this imbalance. I think that perhaps it shouldn't come from the law but perhaps from corporate governance where changes need to be made. Everything cannot hinge on the law. On this matter, there are many examples from abroad. On the issue of management pay for example. Perhaps things can be done to get out of problems which the law cannot solve today.

Sophie Vermeille

Sorry, Yves, can you be more specific, because I'm not sure to understand myself. When you talk about management pay, what do you see that you find disturbing in French corporate governance.

Yves Lelièvre

I see that the manager sometimes takes excessive risks and that for these risks we need to find a way to…

Sophie Vermeille

A way to punish him?

Yves Lelièvre

Not necessarily to punish him. But to have corporate governance rules that make it clear to him which are the risks that are off limits. It's not for me to set those rules but perhaps that rather than to wait for specific laws, it would be better to think about the evolution of corporate governance. I'm talking about French companies because I realize that when a company goes bankrupt it is because a manager, at some point, took excessive risks, for the company.

Sophie Vermeille

If I may restate what you said. You are in favor of finding contractual mechanisms, because when we are talking about management pay, these are contractual issues, which are different than the mechanisms contemplated under the US approach of insolvency law.

Yves Lelièvre

Well, when I see how difficult it has been for us, since this morning, to explain how we would like to harmonize the law but that we cannot do it, even though we would very much like to, I say to myself, we must find pragmatic ways to make progress which are in line with the realities of French companies and the way the company manages its own funds. I won't go much further than that, it is a question I'm asking here.

Sophie Vermeille

This is very interesting. You are offering a different approach. Rather than to encourage the parties, via insolvency law, to find an agreement, quickly and amicably, ahead of the formal insolvency proceedings, which would benefit the company, if we cannot reach harmonization in Europe, what you are suggesting, if I understood correctly, is to find other contractual mechanisms which would lead to the same results and could be found in corporate governance rules.

Yves Lelièvre

Absolutely, and this is the reason why, I would add, to answer your original question about the law, for a long time now and very frequently, for many years, in our jurisdictions, we have found solutions, to problems which were not contemplated by the law when we had to deal with them, I'm thinking about the "*mandat ad hoc*" for example which was created by our practice, same for the financial safeguard, which I mentioned earlier. Therefore, I believe, that in our system, there is a cohabitation between strict legal rules which follow the evolution of French culture and legislative work, together with pragmatism, which, when real problems arise, tries to solve it to the best of our abilities and knowledge of the matter, the company and its creditors which we are trying to protect. That is very clear to us.

Adrian Thery

I totally agree that there is a problem in allowing the managers appointed by the shareholders to keep running the company in a situation of distrust because they are prone to taking excessive risks and that may deepen the insolvency. What I believe is that company law regulates corporations in non-distressed situation but that insolvency law is part of corporate governance law because it contains provisions that relate to the corporate governance of companies in distress. Just as they can appoint an examiner or a supervisor to the Board of Directors, they should rule on the effects of insolvency on shareholders. In fact, in the US, the idea of wiping out the equity and giving the new equity to the fulcrum security, so to the class where the value breaks, is to give the control rights of a certain company, to the class of creditors that might be in the money or out of the money, but will have the best incentive to run the company in a non-risky manner. And that is of the essence but we cannot differentiate fully between company law and insolvency law. They are overlapping, in distressed situations. Insolvency law is also corporate governance law in distressed companies. I think we have to appreciate that because just as they regulate the incidence of Board of Directors, they should also regulate the impact of insolvency in equity.

Sophie Vermeille

I think you are making a very valid point on the difference that we have with this issue in France. We are looking at insolvency law in a separate way and we fail to look at corporate law at the same time. Maybe the answer is to look at both laws at the same time and to find a solution.