



# French safeguard proceedings

BALANCE SWINGS BACK IN FAVOUR OF CREDITORS

**On 25 February 2010, the Paris Court of Appeal handed down two much-anticipated decisions confirming that creditors are able to challenge the opening of safeguard proceedings and clarifying the basis upon which safeguard proceedings can be opened by a debtor.**

## Background

The Business Safeguard Act of 26 July 2005 (which was codified in the French Commercial Code) made significant changes to the law applicable to distressed companies in France, with the aim of promoting the recovery of ailing companies. These changes notably included the introduction of safeguard proceedings (*procédure de sauvegarde*).

In a nutshell, safeguard proceedings are available to debtor companies that have no short-term liquidity issues, but that face difficulties they cannot overcome. Safeguard proceedings are intended to facilitate the implementation of solutions in favour of the continuation of the business, the preservation of employment and debt workout. Only the debtor's management may file a petition for the commencement of safeguard proceedings and prepare and present to its creditors a restructuring plan (*plan de sauvegarde*), under the supervision or with the assistance of a court-appointed administrator (*administrateur judiciaire*).

## Standing of creditors to challenge safeguard proceedings

In the recent *Coeur Défense* case involving Heart of La Défense (HOLD) and its parent company Dame Luxembourg (Dame), the Court of Appeal confirmed<sup>1</sup> the decision of the Paris Commercial Court, which had acknowledged the ability of a creditor to challenge the

judgment opening safeguard proceedings in respect of HOLD and Dame. Previous decisions of the Paris Commercial Court (involving Eurotunnel in particular) had made it difficult for third parties to challenge the opening of safeguard proceedings. A subsequent appeal<sup>2</sup> in the Eurotunnel case had overruled that decision, and now this most recent decision indicates that a creditor will be able to show the necessary standing to launch a challenge more easily than previously thought.

## Safeguard proceedings annulled for the first time

As well as ruling that a creditor could have the necessary standing to challenge the opening of safeguard proceedings, the Court of Appeal also overruled the judgment of the Paris Commercial Court that opened the safeguard proceedings with respect to HOLD and Dame. This is the first time that safeguard proceedings have been annulled on appeal.

The Court of Appeal held that the difficulties alleged by HOLD and Dame, which included the increased cost of finding a new swap counterparty following the insolvency of a previous counterparty (a Lehman Brothers entity), did not affect the continuation of the activity of HOLD and Dame, but essentially made the performance of their obligations under their loan agreements more costly.

<sup>1</sup> CA Paris, 25 February 2010, RG 09/22756.

<sup>2</sup> Cass. com., 30 June 2009, No 08-11902: *Bull.* IV No 88.

On the same day, the Paris Court of Appeal used the same reasoning to refuse the opening of safeguard proceedings for several special purpose vehicles (SPVs) incorporated in Luxemburg, holding real property in France<sup>3</sup>. Having confirmed the jurisdiction of the French courts (on the grounds that the centre of main interests of all the SPVs were located in France), the Court of Appeal ruled that the problems suffered by the SPVs, for example breach of the loan to value covenant and the difficulty of subsequent discussions with their creditors, did not affect their activity and could not be used to impose the waiver of contractual obligations that they did not obtain in their negotiations.

## Commentary

The decision of the Paris Court of Appeal has certainly swung the balance more favourably towards creditors, with the ability to challenge the opening of safeguard proceedings.

The annulment of the safeguard proceedings in the Coeur Défense case shows that the French courts will not look favourably on debtors using safeguard as a means of escaping from situations that make the performance of contracts more difficult or onerous, as opposed to circumstances that threaten the continuation of the business and would lead to insolvency.

These decisions are an important step in the case law relating to the development of safeguard proceedings.

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<sup>3</sup> CA Paris, 25 February 2010, RG 09/22756.