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France: "Confusion des patrimoines" —The Commingling of Assets, Another Way of Piercing the Corporate Veil

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Addition of parties; Foreign companies; Foreign nationals; France; Insolvency proceedings; Third parties

French insolvency law is well known for its various sanctions against statutory and de facto management. The latter may include shareholder(s) or other group companies—where they have regularly acted as statutory directors. A little under 50 articles of the French Code of Commerce (the Code), including primary and secondary legislation, are dedicated to these sanctions. They are regularly, if not massively applied.[1] In 2010, slightly below 300 claims were filed against directors of insolvent companies on various grounds such as mismanagement and personal bankruptcy.[2]

French insolvency law also provides that insolvency proceedings (*sauvegarde*, *redressement* and *liquidation judiciaire*)[3] commenced against a debtor can be extended to third-party legal person(s) in two circumstances:

1) where there is *confusion des patrimoines*: this occurs where there exists either: (a) commingling of the third party's assets with the debtor's assets; or (b) abnormal financial relations between the legal persons in question; or
2) if the debtor's legal personality is fictitious.

In the US, a comparable legal tool named "substantive consolidation" is available. US courts, like French courts, seem to consider it as an extraordinary remedy to be used only under specific and limited circumstances. It is available whether or not all the entities are debtors in bankruptcy.

In France, a ruling extending the debtor's insolvency to another company or person is by its nature immediately applicable. The result is that the legal entity identified in the ruling will become subject to the same insolvency proceedings as the debtor, even if it is not insolvent. For this reason, the extension of insolvency proceedings may constitute a much worse sanction or exposure for other group companies than a ruling of mismanagement. In the latter case, a court orders a de facto director (possibly another group company) to pay a certain amount, which can in principle never exceed the shortfall of the debtor's assets.

The concept of confusion des patrimoines

Created by case law and recently codified

The concept of *confusion des patrimoines* dates back to the beginning of the 20th century and is a product of case law. Confusion exists when the assets of an insolvent company and those of another person or legal entity (solvent or not), are commingled to the extent that it is not possible to individually separate the *patrimoines* (i.e. assets and liabilities). In this scenario, insolvency proceedings commenced against the insolvent company may be extended by the court to the other entity, without it being necessary to demonstrate that the latter is insolvent.

In 2006,[4] *confusion des patrimoines* was codified as a ground for extension of insolvency proceedings and in 2008[5] it received more precise treatment. Under the Code,[6]

> "the commenced proceedings may be extended to one or more other persons where their assets are commingled with those of the debtor ... The court that has commenced the initial proceedings shall remain competent for this purpose".

When the codified provision was introduced, argument was made that it contravened the French Constitution. It was argued that it infringed fundamental property rights and the freedom to private enterprise as it could cause an otherwise solvent entity to become insolvent. However, the Cour de Cassation refused to refer the constitutional question to the Conseil Constitutionnel, holding that the provision served the general interest of all creditors. The notion of *confusion des patrimoines* therefore continues to hold good.

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[1] Among the articles of the Code of Commerce, 10 articles are dedicated to an action against the manager in the case of a shortfall of assets (*responsabilité pour faute de gestion*); 15 are dedicated to actions for personal bankruptcy and other prohibition measures; seven are dedicated to criminal bankruptcy and other measures; and finally, several articles are dedicated to procedural aspects of these measures.

[2] See *Justice civile: Détails des saisines* (2010), available at: *http://www.google.com/url?url=http://www.justice.gouv.fr/art_pix/stat_annuaire_p45-69_2012.ods&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjc47nsp6bJAhXEPRoKHTvNAIEQFgghMAI&usg=AFQjCNEULncV7QePWSFM3aW19ySns6o8Mw* [Accessed 24 June 2016].

[3] Code of Commerce arts L.621-2, L.631-7 and L.641-1.

[4] Act of 26 July 2005 No.2005/845, *Loi de Sauvegarde des entreprises*.

[5] Order of 18 December 2008.

[6] Code of Commerce (the Code) art.L.621-2 s.2.

Evolution of the concept and examples

Origins of the criteria

The Code refers to *confusion des patrimoines* but does not define it. The relevant criteria have been established by case law. Two criteria coexist today and characterise *confusion des patrimoines*. They are: (1) when the assets and/or debts of persons or entities are inextricably commingled, making it impossible to draw distinction between the separate entities; and (2) the existence of serious abnormal financial relations between various persons or legal entities. The first criterion was developed in the early part of the 20th century while the second has been developed over the last 15 years.

In both cases, the facts characterising either a commingling of assets and debts or the existence of abnormal financial relations must have occurred prior to commencement of insolvency proceedings.[7]

Evolution of the criteria

The assets and/or debts of persons or entities are inextricably commingled While frequently invoked, this first criterion is not often upheld by the courts. To apply this criterion, it must be impossible to distinguish the *patrimoines* (assets and liabilities) of the legal entities in question.

In one decision, handed down in early 2001, the Cour de Cassation[8] considered that a *confusion des patrimoines* was characterised where:

- the cash of two separate companies was managed in common by the same person who was the statutory manager of both companies[9];
- payments were made by one or other entity on behalf of the other entity depending on each entity's financial situation;
- documents and invoices were sent to the statutory manager without specification as to which company was intended to be the recipient;
- moneys were made available by one entity to the other without any consideration;
- the statutory manager was unable to determine what was owed or due by the two legal entities to each other ("*s'est montré incapable de faire la ventilation des opérations entre les deux entreprises*"); and
- the staff of one company was working exclusively for the other.

The Cour de Cassation in the same decision added that judges of the lower courts need not take account of whether the entity to which the insolvency is extended is insolvent or not (*en cessation des paiements*).

The Cour de Cassation in an earlier decision dated 22 October 1996[10] also found there was *confusion des patrimoines* between two entities because one funded the other entity's losses without any apparent consideration, and the one entity cashed rents owed to the other entity. Moreover, without any consideration, mortgages and pledges had been granted over assets and goods of one entity to the benefit of the other entity's banks and credit institutions.

In these examples of rather extreme situations, the different companies in question were found to have functioned as a sole legal entity[11] which led to the lower courts extending the insolvency from one entity to the other and thereby, in effect, piercing the latter's corporate veil.

From "abnormal financial flows" to "abnormal financial relations" In addition to commingling of assets, French courts have developed the criterion of "abnormal financial flows" to characterise a situation of *confusion des patrimoines*.

This new criterion of abnormal financial flows has not been clearly defined by case law. It was developed as a flexible concept to be determined on a case-by-case basis. French courts referred to a "range of indicia method"[12] ("*méthode du faisceau d'indices*") to determine what abnormal financial flows might characterise a *confusion des patrimoines*. This criterion has also compelled courts to appreciate the balance or disproportionate balance of financial flows between the relevant legal entities.[13]

However, it was later considered by French courts that abnormality could also apply to situations where there is no flow.[14] This is why today, a larger concept is preferred and the test to characterise *confusion des patrimoines* is no longer the evidence of "abnormal financial flows" but of "abnormal financial relations".

Abnormal financial relations include unjustified flows from one entity to another, but they may also consist in the absence of flows in circumstances where there should normally have been flows between the entities concerned.[15]

Abnormal financial relations have at times been referred to as a lack of consideration for an impoverishing flow ("*absence de contrepartie à un flux appauvrissant*").

[7] Cour de Cassation, Cass. Com., 28 November 2000, No.98-10.083.
[8] Cour de Cassation, Cass. Com., 3 April 2001, No.98-16.070.
[9] The decision of the Cour de Cassation does not specify whether a cash pooling agreement had been entered into.
[10] Cour de Cassation, Cass. Com., 22 October 1996, No.94-18.285.
[11] Court of Appeal, Caen, Ch.1, 8 June 1989.
[12] Fasc. 2165: Sauvegarde, redressement et liquidation judiciaires: Exploitation en commun et confusion des patrimoines (2006), s.6, *Lexis360*.
[13] Répertoire de droit commercial: Confusion des patrimoines (2011) s.91, *Dalloz*.
[14] F. Reille, "Entreprises en difficulté", *Gazette du Palais*, 21 January 2012, No.21, p.11.
[15] F. Reille, "Les conditions de l'extension de procédure collective", *Gazette du Palais*, 19 January 2016, No.3, p.80.

Also where one entity consents to do something for another entity,[16] which is not in its interest and which may potentially endanger it.[17]

However, not every potentially debilitating financial act leads to a finding of *confusion des patrimoines*. For example, it has been judged that the fact that a lessor occasionally and temporarily waives collection of rent does not per se characterise abnormal financial relations.[18]

Moreover, the Cour de Cassation considers that financial support among entities is not necessarily abnormal, even when made through non-common or irregular processes.[19] While the criterion of abnormality requires lack of consideration, it needs to be analysed within the context of the nature of the relationship between the entities concerned, particularly among groups of companies (see below), and should not be viewed as a stand-alone financial operation.

2015 case law regarding abnormal financial relations

Recently, the Paris Court of Appeal gave a more precise definition of this criterion in a decision dated 14 April 2015,[20] where it refused to extend insolvency proceedings on grounds of *confusion des patrimoines*.

The case involved a real estate company (*société civile immobilière*—SCI), which had granted a lease to an operating company and their subsequent interactions. At first instance, the Paris Commercial Court judged that there was *confusion des patrimoines* between the operating company and the SCI because:

- both companies had common managers;
- the rent owed by the operating company was lower than the market rent as evaluated by an auditor;
- other premises were provided to the operating company by the SCI for a nominal rent (€1)[21]; and
- the lessor took no serious action to recover the unpaid rent, while it was in financial distress and struggling to pay its own creditors.

The Court of Appeal overturned this decision.

First, the Court of Appeal held that two companies having common managers is not per se sufficient to characterise *confusion des patrimoines*.

Secondly, concerning the low rent agreed between the tenant and the lessor, the Court of Appeal considered that if the agreed rent was lower than market rent, this was justified by the fact that the tenant had agreed to bear various costs, including for major repair works.

The Court of Appeal further considered that the fact that premises were rented for €1 did not suffice to show lack of consideration. The SCI was able to evidence that the €1 lease was ancillary to the primary lease, and that the rent for the premises[22] of the ancillary lease was already included in the amount of the rent provided under the primary lease.

Finally, concerning the unpaid rent, the court stated that for abnormal financial relations to be shown, repeated voluntary waiver was required. In this case, invoices for rent were sent to the tenant, there was a follow-up on unpaid rent and payment reminders had been sent to the tenant. The fact that rent remained unpaid was linked to the tenant's financial difficulties and subsequent insolvency, making recovery measures useless.

In a later case,[23] involving again an operating company and an SCI, the Cour de Cassation refined the definition of abnormal financial relations.

In this later case, the appellant SCI, to which liquidation proceedings had been extended, argued before the Cour de Cassation that financial relations among separate entities can only be characterised as abnormal when the relations between the entities increased the debtor company's liabilities and prejudiced its creditors.

The Cour de Cassation dismissed this argument, pointing out that it would have added a further (and in the Court's view undesirable) condition to the criterion of "abnormal financial relations".

Supervision by the Cour de Cassation to strictly preserve the principle of corporate personality ("le principe d'autonomie des personnes morales")

Because an extension of insolvency proceedings can affect the principle of corporate personality by, in effect, piercing the corporate veil, the Cour de Cassation exercises strict control over the reasoning and characterisation by the lower courts to extend insolvency proceedings from an insolvent company to another entity. Under French law, a group of companies does not have legal personality as a whole. Each company within the group is legally independent. This has been affirmed by the Cour de Cassation in several decisions.[24] In the context

[16] I. Parachkévova in "Défaut de perception des loyers et confusion des patrimoines: une équation incertaine", *Leden*, 2 May 2013, No.5, p.5.
[17] Reille, "Les conditions de l'extension de procédure collective", *Gazette du Palais*, 19 January 2016, No.3, p.80.
[18] Cour de Cassation, Cass. Com., 10 May 2012, No.11-17.413 and 11-30.370.
[19] Cour de Cassation, Cass. Com., 31 May 1994, No.1223D.
[20] Court of Appeal, Paris, 14 April 2015, No.14/22333.
[21] The decision does not specify whether this consideration was for a monthly or quarterly rent.
[22] "[I]l est inopérant de soutenir que le loyer d'un euro traduit une mise à disposition sans réelle contrepartie financière, la SCI établissant que les lots 34 et 84 objet de ce bail, précédemment mis à disposition par la commune ... avaient en pratique déjà été intégrés dans le loyer global de sorte qu'il n'y avait pas lieu de prévoir une redevance autre que symbolique à l'occasion de la formalisation de ce bail complémentaire."
[23] Cour de Cassation, Cass. Com., 16 June 2015, No.14-10.187.
[24] Cour de Cassation, Cass. Com., 13 June 1995, No.94-21.003; No.94-21.436; and Cass. 1re civ., 18 July 1995, No.93-18.796.

of groups of companies, this means that the parent company does not have to bear the costs and liabilities of its subsidiaries.

The Metaleurop related case law is an example of this strict control by the Cour de Cassation. The matter involved Metaleurop SAS, a 99% subsidiary of Metaleurop SA.

The subsidiary, Metaleurop SAS, was placed in liquidation in March 2003. Its two court appointed liquidators requested an extension of the liquidation to Metaleurop SA based on an alleged *confusion des patrimoines* between the subsidiary and its parent company.

At first instance, the High Court of Béthune rejected the liquidators' request to extend the liquidation to Metaleurop SA. The Douai Court of Appeal overturned this decision and ordered extension of the liquidation to Metaleurop SA on the grounds that:

- the management of foreign currency hedging ("*gestion de la couverture du risque de change*") by the treasurer of Metaleurop SA on behalf of its subsidiary had led to a significant loss of income and was only covered by adequate agreement much later;
- whereas the Metaleurop corporate organisation was based on product/business lines operating together, no intercompany agreements with a view to invoicing the different companies for their mutual services had been implemented[25];
- Metaleurop SAS was bearing the costs of two employees: one employed as a technical adviser (*conseiller technique*) and the other as a management controller who provided services to all the group companies, and there was no agreement regulating the provision of services by these two employees among the group companies;
- Metaleurop SAS's lead business was managed by an employee of another group company,[26] paid by that other company, thereby substantially limiting Metaleurop SAS's management of this business line; and
- the Metaleurop SA funded its loss-making subsidiary as follows: (1) the repayment of a long-term loan by the subsidiary had been postponed for two years; (2) failure to meet the first deadline for reimbursement of the loan triggered no particular reaction; and (3) despite the depreciation of its claims against its subsidiary, Metaleurop SA continued to provide important cash advances to the latter.

The Cour de Cassation[27] overturned the decision made by the Court of Appeal and held that the grounds relied upon by the Court of Appeal were improper to characterise abnormal financial relations establishing a *confusion des patrimoines* within a group.

The Cour de Cassation added that the Douai Court of Appeal was not seised to rule on the grounds of the parent company's liability for mismanagement which is another course of action provided for by the Code, thereby implying that some of the grounds upheld by the Douai Court of Appeal were irrelevant to characterise *confusion des patrimoines*.

The notion of abnormal financial relations between companies within a group is approached by French courts on a case-by-case basis, and the case law may yet evolve. For now, and broadly speaking, one thing appears certain: abnormal financial relations do not result from the assistance itself but from the conditions under which the assistance is given.

Thus, the definition of abnormal financial relations remains relatively open and is assessed differently depending on:

- whether or not the company filing for insolvency is a member of a group of companies;
- the existence of repeated voluntary waivers made without or against disproportionate consideration over a period of time; and
- the significance of the financial relations in question.

Requirement to order extension when the criteria for confusion des patrimoines are present

The Code[28] provides that the court may extend insolvency proceedings, leaving French judges to decide in which case an extension should apply:

> "[T]he commenced proceedings *may* be extended to one or more other persons where their assets are intermingled with those of the debtor ... The court that has commenced the initial proceedings shall remain competent for this purpose."

However, case law has affirmed that a court, when asked to rule on an application to extend insolvency proceedings, has the duty and not an option, once *confusion des patrimoines* is characterised, to order an

[25] We understand here from the Cour de Cassation judgment that this meant that services were provided with no or inadequate consideration among the parent company and subsidiary.
[26] Apparently the parent company, according to J.-P. Legros in "Critères", Droit des sociétés (July 2005), No.7, comm.133.
[27] Cour de Cassation, Cass. Com., 19 April 2005, No.05-10.094.
[28] Code art.L621-2.

extension.[29] This duty to extend the proceedings has been clearly affirmed by case law in several decisions[30] and has never been challenged by authors.

Procedure for requesting extension based on confusion des patrimoines

Who can request extension?

According to the Code,[31] each of the following parties is entitled to request extension of insolvency proceedings:

- the *administrateur* (the court appointed administrator);
- the *mandataire judiciaire* (the court appointed body who represents the creditors);
- the public prosecutor; or
- the debtor.

Previously, the court was entitled to request extension of insolvency proceedings on its own motion. However, this is no longer the case since an order dated 12 March 2014[32] came into force on 1 July 2014.

Creditors acting individually are also not in the list and so are not entitled to request extension of the insolvency proceedings.[33]

However, the Code[34] grants creditors, who have been appointed as monitors (*contrôleurs*), the right to request extension where there is a *confusion des patrimoines*, if the *mandataire judiciaire* does not request such extension.

How to request an extension

The same court where the insolvency proceedings were commenced must be seised by summons by the party requesting extension.[35] When it is the public prosecutor who requests an extension, he can simply file a motion in order to seise the court.[36]

The extension order is served by the clerk on the debtor subject of the insolvency proceedings and on the second debtor subject to the extension within eight days after the extension order (*jugement d'extension*) is rendered.[37]

The requesting party bears the burden of proof and must prove that there is *confusion des patrimoines*, which is a legal fact (*fait juridique*) that can be proved by any means.

Appeal against an extension order

Since 2008, the right of appeal against an extension order is clearly set out for every insolvency proceeding (*sauvegarde*, *redressement judiciaire* or *liquidation judiciaire*).

The extension order can be appealed by:

- the debtor subject of the insolvency proceedings;
- the debtor subject to the extension;
- the *mandataire judiciaire* or liquidator;
- the *administrateur*; or
- the public prosecutor.[38]

According to the Code,[39] in principle judgments and orders rendered in insolvency proceedings are provisionally enforceable with immediate effect.

However, if the public prosecutor appeals the extension order, provisional enforcement is automatically stayed from the date of the appeal.[40]

As per the general provisions of French insolvency law,[41] the time limit within which the appeal against the extension order must be filed is 10 days from notification of the decision. The extension order is also subject to third-party opposition (*tierce opposition*).[42]

Ordering extension against companies headquartered in another country

Whether it is possible to order extension to a company headquartered in another country was made clear in a case[43] where the liquidator of a company named Médiasucre, placed into liquidation by the Commercial Court of Marseille, requested extension against an Italian company Rastelli on the ground of *confusion des patrimoines* between these two entities.

The Aix-en-Provence Court of Appeal, setting aside the first instance judgment, held that the Commercial court of Marseille had jurisdiction to order extension. In that regard, the Court of Appeal held that the liquidator's application was not intended to commence insolvency proceedings against Rastelli but to join it to the ongoing liquidation proceedings already commenced against Médiasucre. Under the Code,[44] the court which has jurisdiction to rule on the application for extension is the court before which the proceedings were initially brought.

[29] Cour de Cassation, Cass. Com., 26 March 1985: Bull. Civ. 1985, IV, No.108.
[30] Cour de Cassation, Cass. Com., 26 March 1985: Bull. Civ. 1985, IV, No.108; CA Paris, 3rd ch.B, 12 July 1990: Bull. Joly Sociétés 1990, No.11, p.960.
[31] Code arts L.621-2 and L.641-4 s.1.
[32] Order No.2014/326, 12 March 2014, art.16.
[33] Coure de Cassation, Cass. Com., 16 March 1999, No.96-19.537 and Cass. Com., 15 May 2001, No.98-14.560.
[34] Code art.L.622-20.
[35] Code arts R.621-8-1, R.631-7 and R.641-1.
[36] Code art.R.631-4.
[37] Code art.R621-8-1.
[38] Code art.L.661-1 Pt I No.3.
[39] Code art.R.661-1 s.1.
[40] Code art.R.661-1 No.4.
[41] Code art.R.661-3.
[42] Code art.L.661-2.
[43] Cour de Cassation, Cass. Com., 13 April 2010, No.09-12.642.
[44] Code art.L.621-2.

Ruling on the appeal brought against the judgment of the Aix-en-Provence Court of Appeal, the Cour de Cassation applied to the European Court of Justice (ECJ) for a preliminary ruling on the following two questions:

1) the first question was, in essence, whether a French court is competent to order extension under Regulation 1346/2000[45]; and
2) the second question, which was a subsidiary question was: "If the action for joinder falls to be categorized as the commencement of new insolvency proceedings in respect of which the jurisdiction of the court of the Member State first seized is conditional on proof that the company to be joined has the center of its main interests in that Member State, can such proof be inferred solely from the finding that the property of the two companies has been intermixed?"

The ECJ answered negatively to both questions.[46] First, the ECJ considered that a national court cannot extend, on the grounds of a national law, proceedings commenced against a company which has its centre of main interests (COMI) in the state of that jurisdiction to another company which has its registered office in another Member State, unless it can be demonstrated that the COMI of the company subject to the extension claim is also situated in the state of the jurisdiction in which the original insolvency proceedings were commenced.

Secondly, the ECJ answered that "the mere finding of a *confusion des patrimoines* of these companies is not sufficient to demonstrate that the COMI of the company" subject to the extension is also situated in the state that commenced the original insolvency proceedings.

Therefore, to extend a French insolvency procedure to an overseas company, it has to be proven that the company subject to the extension has its COMI, as defined by the criteria provided in the *Interedil* case,[47] in the state where the original insolvency proceedings were commenced.

In light of the decision made by the ECJ, the Cour de Cassation[48] overturned the decision of the Aix-en-Provence Court of Appeal because it had not determined whether Rastelli's COMI was situated in France. The Cour de Cassation added that this could not be inferred from the mere fact that Médiasucre and Rastelli's assets and liabilities were intermingled, but only from a global analysis of the relevant facts, resulting in confirmation that Rastelli's effective centre of management and control, verifiable by third parties, was situated in France.

The matter was thus referred back to another section of the Aix-en-Provence Court of Appeal, but Médiasucre's liquidator eventually decided not to pursue this matter.

Recommendations for when an insolvency filing is being considered and conclusion

When the management of a group of companies is considering the different scenarios as to how best to dispose of a loss-making subsidiary headquartered in France, one of the options usually consists in letting the latter file for insolvency. Prior to deciding on any of these options, it is essential for the group management team to assess each of the risks associated with the different options. Specific due diligence to determine these risks is advisable.

This due diligence to identify risks associated with an insolvency filing in France and subsequent proceedings will need to be carried out with specific care for a number of reasons:

- first, it is important not to spread unnecessary concern among the employees of the subsidiary. Only a very limited number of reliable members of the senior management of the subsidiary, with an indepth knowledge of its activities over the last few years, would need to be approached and interviewed. The latter will be likely to speak openly and provide precise answers, if they are covered by specific D&O insurance; and
- another reason for a tactful, if not a confidential, approach lies in the fact that French labour law requires that the works council (*comité d'entreprise*) be informed and consulted in relation to an insolvency filing prior to the filing.[49] Even though the fact of asking questions and investigating

[45] Regulation 1346/2000 on insolvency proceedings [2000] OJ L160/18.
[46] *Rastelli Davide e C Snc v Hidoux* (C-191/10) EU:C:2011:838; [2013] 1 B.C.L.C. 329.
[47] *Interedil Srl (In Liquidation) v Fallimento Interedil Srl* (C-396/09) EU:C:2011:671; [2012] Bus. L.R. 1582 ; [2011] E.C.R. I-9915 ; [2012] B.C.C. 851 at [65]: "The term 'centre of a debtor's main interests' in Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted by reference to European Union law.
For the purposes of determining a debtor company's main centre of interests, the second sentence of Article 3(1) of Regulation No 1346/2000 must be interpreted as follows:
- a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State;
- where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office."
[48] Cour de Cassation, Cass. Com., 10 May 2012, No.09-12.642.
[49] French Labour Code art.L.2323-48.

issues linked to an insolvency scenario does mean that a decision to pursue that route has been made and that a filing will take place, it could be used against the management team and create unnecessary issues in addition to those related to the project consisting in disposing of the subsidiary.

If the insolvency route is eventually implemented, it is clearly advisable that all significant files concerning the subsidiary be copied and kept by the group in order to be in a position to prepare an efficient and well-documented defence in the event that the liquidator—who is usually the party initiating extension proceedings or other claims, including for mismanagement or co-employment—were to take legal action against the other group companies.