



# **Session 503 – Corporate Counsel and the Insolvency of Corporate Groups**

**Kathryn Chapman - Consulting Counsel,  
formerly International Legal Director of Comdisco, Inc**

**CASE STUDY OF COMDISCO, INC.,  
A GLOBAL TECHNOLOGY COMPANY**

## **POINTS TO COVER**

- **GENERAL BACKGROUND ON INSOLVENCY ISSUES ESPECIALLY FOR A MULTINATIONAL COMPANY.**
- **ATTEMPTS BY DIFFERENT INTERNATIONAL GROUPS TO COME UP WITH FORMAL PROCEDURES FOR DEALING WITH CROSS-BORDER INSOLVENCIES.**
- **EXAMPLES OF SUBSTANTIVE LEGAL DIFFERENCES AMONG DIFFERENT LEGAL SYSTEMS WITH RESPECT TO INSOLVENCY FROM MY OWN EXPERIENCE.**
- **SUMMARY OF THE FACTS SURROUNDING THE CHAPTER 11 FILING BY MY COMPANY, AND, FINALLY**
- **ANALYSIS WE MADE OF THE MAJOR JURISDICTIONS WHERE WE HAD LARGE SUBSIDIARIES, WHICH GIVES SOME POINTS THAT SHOULD BE REVIEWED IF EVER YOU FIND YOURSELF IN THE SITUATION OF PENDING INSOLVENCY OF YOUR MULTINATIONAL COMPANY.**

## **GENERAL BACKGROUND ON INSOLVENCY (AND HOW IT RELATES TO CROSS-BORDER INSOLVENCY OF A MULTINATIONAL)**

### **What law governs an insolvency and what difference does it make?**

Approaches adopted by countries to insolvency vary

- with respect to divergent legal traditions
- with respect to different public policy concerns
- with respect to different societal values

Unless the financial difficulties of a multinational are resolved in a central forum, the risk exists that results of insolvency proceedings can be unpredictable and unfair. The principal place of business of the multinational may be in the US, it may have a contract to provide services to a German company in Germany and it may have assets in France – each of those countries might handle the issues of insolvency differently, whether as to the time at which a filing of bankruptcy may be made, who can make it or what the rules for voidable preferences might be. Delays and conflicts due to these differences may prevent the successful restructuring of a multinational.

## The specific issues that arise with cross-border insolvency are:

- Applicable law and competent forum
  1. Lex loci contractus (law of the country where transaction occurred)
  2. Lex situs (law of the country with subject matter jurisdiction)
  3. Lex domicili (law of the country where either the creditor or the debtor is located)
  4. Lex concursus (law of the country where the insolvency proceedings occur)
- Whether one jurisdiction will recognize and enforce the decisions of another jurisdiction

## Different Frameworks for Handling Cross-Border Insolvencies

Schemes for Cross-Border Insolvencies tend to address these issues in two general ways

*Territoriality Principle* –

local court takes the assets located in its geographic jurisdiction

distributes them only to those creditors who come to the court to present their claims

*Universality Principle* –

single forum administers all the debtor's assets

makes distributions to creditors, wherever they are located and in accordance with the forum state's substantive bankruptcy law

all other jurisdictions are obligated to assist the court with principal jurisdiction and to recognize and enforce its orders

## Problems with the different frameworks:

### *TERRITORIALITY –*

1. separate proceedings may be undertaken in each jurisdiction where debtor's assets are located, with the cost of such proceedings diminishing the amounts available to the creditors
2. will be inefficiencies and duplication, due to the multiple proceedings
3. debtors and creditors can take advantage of differing laws regarding voidable preferences.

### *UNIVERSALITY –*

1. different countries must agree to recognize foreign judgments
2. must cooperate with the primary jurisdiction.

## **Efforts have been made to come up with laws or conventions which address problems raised by cross-border insolvencies**

**BILATERAL AGREEMENTS AND REGIONAL AGREEMENTS  
BETWEEN NEIGHBORING STATES HAVE BEEN EFFECTIVE TO THE  
EXTENT THE COUNTRIES SHARE THE SAME INTERNAL MARKET AND  
SOCIETAL VALUES, SUCH AS THE**

Havana Convention of 1928 (Bolivia, Brazil, Costa Rica, Cuba, Chile Ecuador, El Salvador, Guatemala, Haiti, Honduras Nicaragua, Panama, Peru, Dominican Republic and Venezuela)

Nordic Bankruptcy Convention of 1933 (Iceland, Norway, Sweden, Finland and Denmark).

## **Modern attempts to give framework to multinational insolvencies focus on dealing with judicial cooperation, in particular with recognition of foreign judgments and orders**

### **UNCITRAL MODEL LAW**

United Nations Commission for International Trade Law Model Law on Cross Border Insolvency

Intergovernmental working group prepared draft in 1995, adopted in 1999

Model laws are implemented into national legislation of each country, not binding per se

US adopted into Chapter 15 of Bankruptcy code in 2005

Does not provide guidelines pertaining to conflicts of laws, deals only with judicial cooperation during ancillary proceedings once primary proceeding has started

### **EUROPEAN COUNCIL REGULATION 1346 ON INSOLVENCY PROCEEDINGS**

Directly applicable to all Member States of EU except Denmark, effective 2002

Adopts universality principle

Complex set of conflict-of-law rules, which resolve which country has jurisdiction over primary and secondary proceedings

Uniform procedure for recognition of foreign judgments



## Objectives of most insolvency laws



1. allocation of risk among participants
2. in a predictable, equitable and transparent manner
3. to protect and maximize value for the benefit of all stakeholders and the economy in general

## DIFFERENCES IN SUBSTANTIVE INSOLVENCY LAW

Jurisdiction over the matter

Liquidation versus rehabilitation (management and control of the enterprise – can the debtor remain in control?)

Illiquidity versus insolvency (timing of when insolvency proceeding may/must be commenced)

Corporate governance and insolvency – what are the personal liabilities of management for failing to commence proceedings?

Who initiates the proceeding?

## Jurisdiction over the matter

Different countries might assert jurisdiction over the insolvency proceedings under different theories:

- Law of the creditor's country of residence
- Law of the debtor's country of residence
- Law of the country where the transaction occurred
- Law of the country with subject matter jurisdiction over the assets

## Liquidation versus Rehabilitation

- in the U.S. a legal entity can access Chapter 11 bankruptcy proceedings without being insolvent
- Chapter 11 proceedings often leave debtors in possession – same management
- in most European jurisdictions a company has to be either insolvent or close to insolvency to be eligible to enter insolvency proceedings
- insolvency regimes in Europe usually displace existing management upon the beginning of insolvency proceedings with an administrator or trustee

## **Illiquidity versus insolvency (timing of when insolvency proceeding may/must be commenced)**

- France –  
Company must file for bankruptcy upon the inability to meet its debts as they fall due, that is, the value of liquid assets is less than outstanding current liabilities (“cessation des paiements”).  
  
May be technically solvent while in a state of “cessation of paiements”, if it has valuable fixed assets on its balance sheet.
- Germany –  
Either the liabilities exceed the assets of the company (if there is not prospect of continuing the company as a going concern the assets are valued at liquidation value, otherwise they may be valued at going concern value) “balance sheet insolvency”, or  
  
the company is unable to pay its debts as they become due. “cash flow insolvency”
- Netherlands –  
Balance sheet insolvency is irrelevant, a debtor can be declared bankrupt if he “has ceased to pay his debts”.

## **Illiquidity versus insolvency (timing of when insolvency proceeding may/must be commenced, cont.**

- Mexico –  
mixed standard –  
company is insolvent if it incurs a generalized default of its payment obligations to two or more creditors and
  - (i) of these obligations, those that are at least 30 days past due represent at least 35% of the debtors obligations as of the bankruptcy petition date, and
  - (ii) the debtor lacks sufficient assets to satisfy at least 80% of the obligations that came due on the petition date.
  
- England –  
either cash flow or  
balance sheet insolvency.  
In the case of a US corporation, with a subsidiary in the UK, the UK company's cash flow and balance sheet positions have to be considered from a UK (as opposed to a US) point of view. For example, an insolvent company cannot continue trading on the basis that its parent is solvent unless it is getting the requisite financial support from its parent.

## **Corporate governance and insolvency – what are the personal liabilities of management for failing to commence proceedings?**

### **Germany** –

Management of company is obliged to review the over-indebtedness situation continuously.

Personal risks for the managing directors are considerable if the filing for insolvency is delayed.

They face criminal penalties as well as the liability for any damages of creditors resulting from the delay.

### **France** –

Failure to file for bankruptcy can cause the personal bankruptcy of the managers, notwithstanding other sanctions.

As a result, management in France has a strong incentive to prevent insolvent trading and may initiate an insolvency filing without the consent of the corporate parent.

### **England** –

Under English law, directors (which may include as “shadow directors” persons other than those registered as directors at Companies House who have effective control of the company) are treated as responsible for the company’s conduct and activities.

Directors can be held personally liable for allowing the company to continue trading when they knew or ought to have known that there was “no reasonable prospect” of the UK Company avoiding insolvency.

Any director who knowingly allows a company to continue trading with the intent to defraud its creditors can be held personally liable to pay compensation, director can also be guilty of a criminal offense.

## Who initiates the proceeding?

Debtor or creditor?

- England – either
- France – debtor
- Germany – debtor



## Pro-Debtor or pro-creditor bias?

- Not always clear what this means
- Secured creditors could benefit from liquidation versus a reorganization or rehabilitation procedure, but unsecured creditors might benefit more from a reorganization.
- Does Pro-debtor really favor the management of a debtor company, by allowing it to retain control of the company?
- Or does insolvency law allow the enterprise to survive and the employees to keep their jobs while the managers are replaced by a trustee or receiver and eventually a new owner.

## **CASE STUDY – Comdisco Strategy re: Global Insolvency**

1. Efforts were focused on keeping the foreign subsidiaries viable so as not to expose the assets of the multinational to the vagaries of foreign insolvency regimes
2. Did not want to fall into involuntary insolvency proceedings in those jurisdictions because parent company which is the main shareholder will invariably lose control over a subsidiary in such proceedings
3. Administrator or trustee will usually not align the interests of the insolvent corporation with those of a corporate group but will focus on achieving the aims set forth in the local insolvency regime, such as preservation of employment, repayment of creditors, etc.

## BACKGROUND

- Comdisco, founded in 1969 and incorporated in Delaware in 1971
- Originally focused on the procurement and placement of new and used computer equipment, principally mainframe and related peripherals
- Comdisco's leasing business soon became a formidable competitor in the marketplace
- Comdisco gradually broadened its market breadth and began offering various technology services to its customers worldwide to help maximize their technology functionality, predictability and availability
- In an effort to synergize Comdisco's familiarity with the high-technology market and the highly lucrative capital markets, Comdisco elected to pursue venture investing
- In February of 1999, Comdisco purchased a DSL company to leverage its internet and telecommunications experience
- Due to certain transactions and Company's and its affiliates' liquidity problems, Company was forced to file for Chapter 11 bankruptcy protection on July 16, 2001

## GLOBAL PROFILE

- At the time of the filing, Company had approximately **24 active subsidiaries outside of the United States** (there were more entities, but those were the result of various transactions and tax driven restructuring in the past).
- Of these, we had employees and offices located in:  
Austria, Germany, France, UK, Spain, Switzerland, The Netherlands, Canada, Australia, Japan, Singapore, Taiwan
- We had companies, with no employees or offices in the following countries:  
Czech Republic, Brazil, Belgium, Hong Kong, Ireland, Italy, Mexico, New Zealand Poland, Sweden

## Some of the events leading to our problems:

- Purchase of DSL company - for cash price of \$53 million, expansion by providing cash in excess of \$500 million from 2/99-10/00. Due to difficulties such as lack of provisioning and significant valuation changes in the telecommunications, DSL company was not able to reach profitability.
- Ventures – venture leases, venture debt and direct equity financing to privately held venture capital backed companies, diversified across many sectors, including networking , optical networking, software, communications, internet-based another industries but, by their nature, high risk. Invested \$1.8 billion from October '98 through September, 2000. Market downturn of '01 in the technology sector resulted in substantial decrease in revenue. As a result, the group had a pretax loss of \$49 million for the nine months ended June 20, 2001, compared to the pretax earnings of \$178 million for the nine month period ended June 30, 2000.

## PROBLEMS, CONT.

- Liquidity problems – as a result of the foregoing losses, the cash reserves, overall financial performance and financial condition were negatively impacted. The Debt rating of the company was downgraded below investment grade and Comdisco lost access to the commercial paper market. In order to retire commercial paper obligations and other scheduled debt maturities and to finance operations, Company borrowed the remaining availability under the pre-petition credit agreements, approximately \$880 million in April, 2001.
- Capital Structure – another fundamental challenge faced by Comdisco was the tenor of its debt structure, involving relatively short-term debt maturities over several years and longer term lease and financing obligations associated with its principal business products. So, while operations generally generated sufficient cash to meet working capital needs, without access to commercial paper market, Comdisco could not generate sufficient cash to retire all of the debt maturities scheduled to be repaid during 2001 and 2002.

## Pre-petition Restructuring Efforts

- CEO resigned in December, 2000. New CEO appointed in March 2001. New Chief Legal Counsel appointed in June of 2001.
- Began strategic review of each of the company's operations. Used an investment bank, and a management consulting company to evaluate business initiatives, capital restructuring and/or the sale of all or a portion of the company's businesses.
- Comdisco, as a result of this process, decided to explore opportunities to sell the company's businesses as a whole. Investment bank recommended several parties that would have an interest and the financial wherewithal to consummate a transaction of this magnitude. After conducting due diligence, company only received expression of interest for portions of company's businesses. Therefore, Comdisco determined to maximize the value through the separate sale of various business segments.
- Those sales, however, were not capable of being consummated quickly enough to provide Comdisco with sufficient liquidity to fulfill their immediate financial obligations and finance operations. Having already drawn down on pre-petition credit agreement, the ensuing combination of events and factors set forth above placed certain debt obligations of Comdisco at risk of default and placed Comdisco and its properties at risk of remedial action by creditors.

## Chapter 11 Filing

- As a result of these events, Comdisco concluded that the commencement of the Chapter 11 cases was in the best interest of all stakeholders to protect the Estates from the risk of remedial action by certain creditors and because it would be difficult, outside of reorganization proceedings, for Comdisco and its affiliated Debtors to withstand the downturn in the economic environment then occurring.
- On July 16, 2001 parent Comdisco and 50 domestic affiliates filed a voluntary petition in the Bankruptcy Court for reorganization relief under chapter 11 of the Bankruptcy Code of the US.
- No foreign entities filed for local protection in their respective jurisdictions, but careful review of local insolvency requirements, director obligations and employee rights was required at several junctures, in order to maintain the foreign businesses which were viable in a position to be sold. Given the nature of our business, which included long term contracts to supply equipment or services, foreign customers had to be assured that the companies would survive to provide the goods and services under the terms of their contracts.



## Subsidiaries sold or wound down

- In April of 2002 a sale of approximately \$794 million of assets, including the assumption of \$258 million of secured debt, was paid for the sale of certain assets including some owned by larger foreign subsidiaries. Throughout the rest of 2002 and 2003 leasing subsidiaries in Australia, Switzerland, Austria, France and Germany were sold (for roughly \$500mn). Parts of portfolio located in the Netherlands, UK, Belgium and elsewhere were sold as well. Remaining subsidiaries were wound down and employees let go.
- Company is still “monetizing its assets” – October, 2006.

## Issues to consider in Global Insolvency

- While the foreign entities might be owned by the parent company, it is likely that they had either been acquired as “independent” companies, or had been built by foreign management teams, so that while the local management people felt they had strong businesses, those businesses had benefited from the financial strength of the parent.
- Resentment can occur, where the foreign managers feel the US is at fault for their problems, and the US management feel that the foreign assets belonged to the parent company in the US.
- **LOCAL DIRECTORS HAVE PERSONAL LIABILITY IN MANY JURISDICTIONS AND CAN NOT ALWAYS AGREE TO REPAYMENT OF INTERCOMPANY DEBT OR TO ALLOCATIONS OF PURCHASE PRICES TO SUBS IN SALE OF GLOBAL BUSINESS**
- Once the support from the parent is in jeopardy, (such as in the form of parent guaranties) a fine line has to be walked to maximize the benefit to stakeholders while maintaining the foreign subs in business so as to sell them when the opportunities arose.
- If one is to try to sell on-going businesses, how can one maintain existing customers and acquire new customers in foreign countries after the difficult financial situation of the Company becomes public notice in the foreign countries?

## Alternatives were considered for the major foreign subsidiaries

- 
- formal wind-down or liquidation
- informal wind-down and dissolution
- insolvency proceeding
- sale of ongoing business

Under each alternative, disadvantages and advantages of options were considered, with respect to these issues:

- Equipment/lease contracts with key customers
- Real Estate
- Employees
- Inter-company debt
- Taxation
- Administrative costs
- Director liability
- Bank relations

**In a separate attachment, I have included some of the answers we received as we researched different jurisdictions where we had the largest operations. In the interest of space, I have only included the particular issue of employee rights under each of the options ( sale of company, informal or formal wind-down, or insolvency)**

## SOURCES

- Current Topics of International Insolvency, Wessels, B. Kluwer BV. Deventer 2004
- The Law of International Insolvencies & Debt Restructuring, J. Silkenat, C.D. Schmerler, Oceana Publications, 2006
- Resolutions of Financial Distress, An international Perspective on the Design of Bankruptcy Laws, World Bank Institute, ed. Stijn Claessens, Simeon Djankov, Ashoka Mody, 2001
- “Waking from the Jurisdictional Nightmare of Multinational Default: The European Counsel Regulations on Insolvency Proceedings” Roland Lechner, The Arizona Journal of International and Comparative Law, Vol. 19, No. 3

	<i>FORMAL WIND DOWN OR LIQUIDATION</i>		<i>INFORMAL WIND DOWN AND DISSOLUTION</i>	<i>FILING FOR INSOLVENCY</i>	<i>SALE OF BUSINESS</i>
ENGLAND	can be "members' voluntary"	or "creditors voluntary"			
Who initiates?	Members (shareholders) supervision	Members, with Creditors'	no action required other than decision to stop new business and to proceed with the orderly winding down of the business and the dissolution of the Company.	A compulsory liquidation is commenced by a Creditor. Court makes an order for the compulsory liquidation of the Company and the Official Receiver will become the Liquidator. He remains in that position until the creditors of the Company decide to appoint an insolvency practitioner of their choice. Liquidator is empowered to manage the Company.	
Who is in control?	Liquidator appointed, in both cases		Shareholders remain in control, with employees who remain left with function of collecting the assets and negotiating and paying all outstanding liabilities		
What is financial status?	solvent (able to pay debts when due)	insolvent (unable)	Company must have sufficient assets to pay its liabilities, with cash to pay them as they fall due. Once business is wound-down, Directors pass a resolution to dissolve the Company and make an application to the Registrar of Companies for the dissolution which is served on creditors, shareholders, employees and the managers or any trustee of any employee pension fund. Registrar is then to advertise the proposed striking off in the London Gazette and invite objections. Several months later, the Company will actually be struck off the register and confirmation will be received from the Registrar. Another notice of dissolution will be published in the London Gazette.	Company is unable to pay its debts as they fall due.	
Procedure?	MEMBERS' - resolution passed by 75% majority. CREDITORS' - same, but meeting of Creditors must be held within 14 days of passing the resolution. Liquidator is appointed to take control of Company, to act in best interests of Company, creditors and members, to collect and realize the assets of the Company to ensure that all liabilities are settled, and after that is done, to distribute the excess to shareholders.			Compulsory liquidation is imposed on the Company by a court order, after a creditor of the Company presents a petition to the High Court listing one of seven grounds, the most common of which is inability of the Company to pay debts as they fall due.	

	<i>FORMAL WIND DOWN OR LIQUIDATION</i>	<i>INFORMAL WIND DOWN AND DISSOLUTION</i>	<i>FILING FOR INSOLVENCY</i>	<i>SALE OF BUSINESS</i>
Distributions?	Assets are distributed in accordance with detailed rules and procedures which give different degrees of control to shareholders and creditors, depending on the type of liquidation. Once the process has been completed the Company is dissolved	As there must be cash available to pay debts as they fall due in order to informally wind down and dissolve the Company, there must be money available, whether from existing business, from existing reserves or receipt of intra-group indebtedness	Similar to a members' voluntary liquidation or a creditors' voluntary liquidation, the purpose of a compulsory liquidation is to realize the companies' assets for the benefit of creditors and shareholders	Protection is afforded to employees by the Transfer of Undertakings (Protection of Employment) Regulations 1981, also known as TUPE. The Regulations were enacted to give effect to the EC Required Rights Directive 77/187 and are intended to protect the employees' employment in the event that the undertaking where they work is transferred by the employer to a new owner. Where TUPE applies the transfer of the undertaking will not terminate the employee's contract although an employee has the right to elect not to transfer. In these circumstances the employee's employment ends by operation of law and a claim can not be made. There will not be a dismissal simply because there is a transfer. (continued below) In a TUPE situation, the employee will transfer with the undertaking and will be employed by the new owner and is entitled to have is employment and the terms protected as that with his original employer. If there are any dismissals, whether actual or constructive and, whether before or after the transfer, and, if those dismissals are connected with the transfer, and they may be automatically unfair unless, there is an economic, technical or
Employees?	AS PART OF A MEMBERS VOLUNTARY LIQUIDATION, EMPLOYEES WILL BE MADE REDUNDANT AT SOME POINT. DEPENDING ON THE COMPANY'S POLICY, REDUNDANCY PAYMENTS IN THE EVENT OF TERMINATION MAY BE ONE WEEK PAY (CALCULATED BY REFERENCE TO SALARY PLUS THE VALUE OF ALLOWANCES AND BENEFITS) FOR EACH COMPLETE OR PART PERIOD OF 6 MONTHS EMPLOYMENT, RISING TO 1.5 WEEK'S PAY FOR EACH PERIOD OF 6 MONTHS CONTINUOUS EMPLOYMENT WHERE THE EMPLOYEE IS AGED 41 TO 49, RISING TO 2.5 WEEK'S PAY FOR EACH PERIOD OF 6 MONTHS CONTINUOUS EMPLOYMENT WHERE THE EMPLOYEE IS AGED 50-60: SUBJECT TO A MINIMUM PAYMENT OF 4 WEEK'S PAY AND A MAXIMUM PAYMENT OF 78 WEEK'S PAY, PLUS PAYMENT IN LIEU OF CONTRACTUAL OR STATUTORY (WHICHEVER IS GREATER) NOTICE	EMPLOYEES – AS PART OF AN INFORMAL WINDING DOWN, EMPLOYEES WILL AGAIN, AT SOME STAGE, BE MADE REDUNDANT, HOWEVER THERE IS GREATER FLEXIBILITY IN THE TIMING OF THESE REDUNDANCIES THAN IN A MVL	EMPLOYEES – REDUNDANCY PAYMENTS WILL BE MADE AS PER MVL or CVL	

*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND DISSOLUTION*

*FILING FOR INSOLVENCY*

*SALE OF BUSINESS*  
 organisational ("eto") reason.  
 Liabilities for employment claims generally pass from the transferor to the transferee.

Advantage? MVL - complete shareholder control over process, since creditors are paid in full

Disadvantage? cost of liquidator and advisers

ability to control timing and amounts of payments to creditors any creditors not previously provided for would have to be paid or Company may be forced into liquidation

If the Company has sufficient assets to pay its liabilities and has immediate access to the cash to pay these liabilities as they fall due, another option is the orderly wind-down of the business followed by liquidation

expenses greater, triggers insolvency clauses, shareholders lose control of liquidation  
 Managing directors are required to file immediately once a Company is over-indebted or illiquid, although the law provides for a grace period of three weeks during which the crisis can be cured (can only be used if a solution to the Company's financial problems is likely)  
 first, preliminary insolvency administrator to assess whether insolvency proceedings should be instituted, then appointment of insolvency receiver

**GERMANY**

Who initiates? Shareholders

Who is in control? Liquidator is appointed (can be managing director)

management



*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND DISSOLUTION*

*FILING FOR INSOLVENCY*

*SALE OF BUSINESS*

What is financial status?

Company must be solvent

Company must be solvent

Company is forced to file for insolvency if it is either over-indebted or illiquid. German law also provides the opportunity to file if illiquidity is merely imminent.

Indebtedness exists if liabilities exceed assets. Illiquidity exists if Company is no longer able to pay its debts as they fall due.

Requirements for the application of the insolvency test are very stringent

Management of a German Company is obliged to review the over-indebtedness situation continuously, as the personal risks for the managing directors are considerable if the filing insolvency is delayed.

Managing directors face criminal penalties as well as the liability for any damages of creditors resulting from the delay

*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND DISSOLUTION*

*FILING FOR INSOLVENCY*

*SALE OF BUSINESS*

Shareholders adopt resolution. All contractual parties notified that the Company will no longer perform any of its contractual obligations. Liquidator collects and realizes assets of the Company and uses proceeds to satisfy liabilities of the Company as far as possible. If assets not enough to satisfy liabilities, shareholders would have to provide further funding - if no funding is forthcoming, Liquidator would have to file for insolvency proceedings. Once process is completed, Company is deregistered from the commercial registry. (Administratively, publication of the liquidation commencement and minimum time requirement until registration is about 2 years)

Procedure?

Distributions? Any surplus is distributed to the shareholders.

Company performs contractual obligations for minimum terms but ceases to solicit new contracts and would gradually terminate all business operations with the objective of minimizing damage claims and ongoing costs.

Opening of insolvency proceedings and appointment of receiver four to eight weeks after filing. Court determines a time period for the registration of creditors' claims two weeks to three months after filing. Creditors' meeting to ascertain the claims registered between three weeks and five months after filing. Wind-down of operations and sale of the estate by the receiver and distribution of remaining cash to creditors. Final creditors' meeting, termination of insolvency proceedings: deregistration of the Company usually 6 months and 18 months after the proceedings are opened. distribution of remaining cash to creditors

*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND DISSOLUTION*

*FILING FOR INSOLVENCY*

*SALE OF BUSINESS*

EMPLOYEES: COMPANY MUST TAKE INTO ACCOUNT THE FOLLOWING COST FACTORS i) SALARIES MUST BE PAID CONTINUOUSLY EVEN DURING THE NOTICE PERIOD WHICH IS BETWEEN ONE AND SIX MONTHS, AND ii) ALTHOUGH NOT STATUTORILY REQUIRED, SEVERANCE PAYMENTS (CALCULATED WITH ONE MONTHLY SALARY PER YEAR OF EMPLOYMENT) MIGHT HAVE TO BE MADE (COSTS COULD SUBSTANTIALLY INCREASE IF EMPLOYEES ELECTED A WORKS COUNCIL, WHICH MAY HAPPEN AT ANY TIME.)

Employees?

EMPLOYEES – IN A RUN-OFF, THE TOTAL NUMBER OF PERSONNEL WOULD BE GRADUALLY REDUCED. THIS WILL NOT LEGALLY AFFECT THE COSTS FOR THE LAYOFFS PER EMPLOYEE, HOWEVER, THE GRADUAL TERMINATION OF CERTAIN EMPLOYEES INCREASES THE RISK OF LITIGATION IN WHICH EMPLOYEES CHALLENGE THE SOCIAL QUALIFICATION OF THEIR TERMINATIONS. THUS, INCREASED SEVERANCE AMOUNTS MAY BE REQUIRED TO LAY OFF EMPLOYEES THROUGH SETTLEMENT AGREEMENTS

EMPLOYEES - RECEIVER MAY TERMINATE EMPLOYEES UPON THE SHORTER NOTICE OF (A) APPLICABLE CONTRACTUAL OR STATUTORY NOTICE PERIOD, OR (B) THREE MONTHS PER THE END OF A CALENDAR MONTH. CLAIMS BY EMPLOYEES ARE TREATED AS CLAIMS AGAINST THE BANKRUPT'S ESTATE. EMPLOYEES HAVE NO FURTHER CLAIMS AGAINST THE SHAREHOLDERS.

Are employees protected in the event of a sale or purchase of a business? Yes. In general, transfer of business does not constitute a ground for dismissal. Nevertheless, pursuant to the jurisprudence of the Federal Labor Court ("Bundesarbeitsgericht") a so-called dismissal in accordance with the buyer's plan is permitted. Hence, the seller of a business is entitled to give notice if the business plan of the potential buyer provides for a smaller number of employees currently working in the business. Given that the potential buyer wants to reduce the staff for urgent operational reasons in the sense of Art. 1 § 2 (S.1) Act on the Protection against unfair Dismissal in the moment he takes the business over such dismissal is justified. However, to do so there has to be a concept or a reorganization plan. It does not suffice if the buyer only asks for a reduction of staff. (continued below)

*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND DISSOLUTION*

*FILING FOR INSOLVENCY*

*SALE OF BUSINESS*

If so, what rights do employees have and what can they do about it? Pursuant to Art. 613a Civil Code the new employer assumes any right and obligation of his predecessor. Any provision resulting from a collective or operational work agreement becomes part of the employment contract and may not be amended to the detriment of the employee until after one year of the transfer of business. What does the employer have to do in the event of a sale or purchase of a business, which includes employees? Given that all employment relationships are transferred to the buyer by law the employer does not have to do anything to that end.

Advantage?

as this option would lead inevitably to the insolvency of the Company, this option would lead to favorable settlements with major contractual parties

higher flexibility than in insolvency, Company still in control of operations, damage claims could be prevented/mitigated

no further costs for shareholders except for outstanding guarantees and comfort letters that can be enforced in the Bankruptcy proceedings operations controlled by receiver, group inter-Company receivables are lost, no value through a prospective sale can be created for creditors of parent/shareholder as all proceeds will be distributed to creditors of German Company, first

Disadvantage?

Costs would include administrative costs for the liquidation period

long time line, given the nature of Company's business

*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND  
DISSOLUTION*

*FILING FOR  
INSOLVENCY*

*SALE OF BUSINESS*

Pursuant to Art. 613a Civil Code the new employer assumes any right and obligation of his predecessor. Any provision resulting from a collective or operational work agreement becomes part of the employment contract and may not be amended to the detriment of the employee until after one year of the transfer of business.

## FRANCE

Who initiates?    shareholders decision

Company attempts to reduce exposure arising from liquidation by postponing the wind down of the Company until terms of ongoing contracts expire, thereby gradually phasing out its activity.

Company must file upon the inability to meet its debts as they fall due, i.e. the Company is unable to satisfy outstanding liabilities with available assets (cessation des paiements).

	<i>FORMAL WIND DOWN OR LIQUIDATION</i>	<i>INFORMAL WIND DOWN AND DISSOLUTION</i>	<i>FILING FOR INSOLVENCY</i>	<i>SALE OF BUSINESS</i>
Who is in control?	Liquidator appointed by shareholders, does not need to have any pre-existing relationship with Company		If Court was to decide that the filing Company has a chance to survive upon reorganization, it would appoint a receiver responsible for identifying the origin and magnitude of its difficulties for a period of up to one year, following which the court could either elect to (i) liquidate the Company if continuation in business proves impossible or (ii) reorganize the Company pursuant to a plan (plan de redressement). Shareholders surrender control to the Court.	What does the employer have to do in the event of a sale or purchase of a business, which includes employees?
What is financial status?	must be solvent		Available assets means assets which are liquid and can be quickly applied. A Company may be technically solvent while in a state of "cessation des paiements" if it has valuable fixed assets on its balance sheet.	
Procedure?	decision of an extraordinary general meeting of shareholders, appointment of one or several liquidators, specific publicity for notifying third parties of the wind-up, decision fixing the scope of Liquidator's duties during his term, and certain closure formalities (including the passing of liquidation accounts.) Under French Law, Company is first dissolved and subsequently liquidated. Dissolution is effective as of the shareholders' decision to wind-up, but the liquidation could be settled only to the extent all outstanding assets have been realized to satisfy outstanding liabilities. Liquidator not authorized to pursue on-going business or engage in new business failing the express consent of the shareholders.	Company ceases to solicit new contracts and would gradually terminate all business operations,	Company files, within 15 days from the cessation of paiements, Court sets date on which Company effectively became unable to meet its obligations as they became due, which date shall not be more than 18 months prior to the Court decision commencing insolvency proceedings. Certain payments made during that period are subject to cancellation by the Court.	Given that all employment relationships are transferred to the buyer by law the employer does not have to do anything to that end.

	<i>FORMAL WIND DOWN OR LIQUIDATION</i>	<i>INFORMAL WIND DOWN AND DISSOLUTION</i>	<i>FILING FOR INSOLVENCY</i>	<i>SALE OF BUSINESS</i>
Distributions?	Liquidator collects, realizes assets and distributes proceeds of sale to satisfy, to the fullest extent possible, the liabilities of the Company. Any possible surplus is distributed among the shareholders.	objective being to avoid claims and reduce costs and maximize recovery for creditors	Assets are distributed for the benefit of the stakeholders of the entity. French bankruptcy courts are less concerned with protecting the bankrupt entity's shareholders than they are with preserving employment whenever possible.	
Employees?	To terminate employment contracts, Liquidator must follow a number of strict legal rules. Employer has the obligation to attempt to relocate the concerned personnel within the group. If that is not possible, employer who is severing more than 50 employees has to put in place a "social plan". Plan and economic brief must be brought to the attention of the statutory auditors and the members of the workers' council. Employer is required to facilitate the obtaining of new employment positions for the employees dismissed. Dept of Labor must first be given notice of the proposed dismissal and allowed to comment. Plan must be discussed with the workers' council. After initial meeting, workers' council reps are expected to give workers' opinion. Can ask for more information and call a second meeting, give an opinion, or refuse to give an opinion after the first or the second meeting. After first two meetings, new meeting is set up to appoint an expert who must deliver a report on the social plan within 22 days, then a new meeting with the reps can take place to discuss the report and the social plan and a final meeting is convened.	must still respect French law obligations with regard to employees' severance, however it is likely that employees would quit over a wind down period which would reduce the severance costs. Potential liabilities arising from liquidation can be mitigated by postponing the winding down of the Company until the term of on-going contracts. As a result, Company would face no or little claims from clients, suppliers and real estate lessors. This option would extract the greatest value from the business.	Generally, French bankruptcy courts attempt to ensure that the bankrupt entity continues in business so as among other things, to preserve employment whenever possible. Otherwise, same procedure as in "Formal Wind-down"	In the event of a sale of a business, the purchaser has the obligation to take over the employment contracts in course of execution. A dismissal made on the occasion of a sale of business is deprived of effects. In the event of a violation of that rule, the dismissed employee can claim to the author of the dismissal the payment of the dismissal allowances and compensation. The new employer has nothing particular to do but must refrain from making dismissals that would not be grounded upon a personal or economic cause.
Advantage?	Fastest procedure which would involve savings on wages and interest payments due over the liquidation period			

*FORMAL WIND DOWN OR LIQUIDATION*

*INFORMAL WIND DOWN AND DISSOLUTION*

*FILING FOR INSOLVENCY*

*SALE OF BUSINESS*

Disadvantage?

Value of assets must be sufficient to meet creditors' claims, if not judicial insolvency proceedings will ensue

May take longer and additional capital funding may be necessary to pursue activity until the term of the agreements

As an exception to the general rule, there are circumstances where shareholders can be held directly responsible for liabilities of the bankrupt entity, for example, when they become involved in the management.