

Coeur Défense Judgment Broadens Scope of French Safeguard Procedures



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Safeguard Procedures

To prevent the expected insolvency of HOLD and Dame, Gibson Dunn applied on behalf of the two entities to the Paris Tribunal of Commerce to open Safeguard Procedures. The Tribunal ruled, on November 3, 2008, that HOLD and Dame were entitled to the protection of Safeguard Procedures which entailed (among other things) a stay of any procedures against HOLD or Dame by their creditors.

On September 9, 2009, the Paris Tribunal of Commerce then adopted Safeguard Plans for HOLD and Dame enabling a *de facto* restructuring of the term loan.

On February 25, 2010, the Paris Court of Appeals decided to nullify the opening of the Safeguard Procedures, mainly on the grounds that the two entities did not face difficulties of an operational nature. The Paris Court of Appeals issued a similar ruling on the same day in the so-called “Mansford” case, another real estate acquisition structured financing.

The nullifications on these grounds suggested that most acquisition structures would be unable to avail themselves of Court protection under *sauvegarde*.

On March 8, 2011, the *Cour de Cassation* overturned the Paris Court of Appeals and confirmed that the French *procédure de sauvegarde* is open to any debtor confronted with difficulties it cannot overcome, regardless of their nature and regardless of whether the debtor is an operational or a holding company or a special purpose vehicle (SPV). By doing so, it neatly settled the long-standing debate - raised by both scholars and practitioners - over the scope and extent of the application of the Safeguard Procedures. The *Cour de Cassation* referred the matter to the Versailles Court of Appeals for factual issues that it did not examine, in accordance with French procedural law.

The Decision of the Versailles Court of Appeals

It took almost another year for the Versailles Court of Appeals to release its decision, confirming the Safeguard Procedures. The confirmation is based on three grounds, namely:

1. Regarding Dame’s right to ask for protection in a French court: On the grounds of Article 3.1 of EC Regulation no. 1346/2000 of May 2000 regarding insolvency procedures, the Court - after a careful review of material factors ascertainable by third parties submitted to its appreciation - held that the centre of main interests (COMI) of Dame was situated in Paris (and not in Luxembourg where its registered office was located). It did so on the grounds that Dame was a holding company, without any employee

On January 19, 2012, the Versailles’ Court of Appeals confirmed that CMBS borrower, Heart of la Défense SAS (“HOLD”), and its Luxembourg parent company, Dame Luxembourg SàRL (“Dame”), were entitled to Court protection in France under Safeguard Procedures (*procédures de sauvegarde*). Safeguard is a French pre-bankruptcy process that resembles the U.S. Chapter 11 debtor-in-possession procedure.

The decision of the Versailles Court of Appeals is the culmination of more than four years of litigation in French courts between HOLD and Dame and their creditor, Windermere XII FCT, over the availability of Safeguard Procedures.

Background

In July 2007, HOLD, which was established as a property holding company by a group of investors including Lehman Brothers, purchased the largest office tower in Europe, the Coeur Défense property, for €2.1 billion, partly financed via a €1.6 billion term loan, initially due July 2012. The term loan was then transferred to a securitization vehicle, Windermere XII FCT. The securitization vehicle issued notes to institutional investors and banks to raise the funds necessary to acquire the term loan. Interest rate hedging for the term loan was provided by Lehman Brothers International Europe (“LBIE”), a subsidiary of Lehman Brothers.

The collapse of Lehman Brothers on September 15, 2008 caused LBIE to lose its credit rating. This triggered a default under the term loan, which required the hedging counterparty to maintain a minimum credit rating. As a result of the worldwide financial turmoil occurring at that time, HOLD and Dame were unable to substitute alternative hedge providers satisfactory to the securitization vehicle within the short time frame imposed. The securitization vehicle then called meetings of its noteholders to consider the option of accelerating the term loan and taking enforcement measures. These steps, if taken, would have led to the insolvency of HOLD and Dame, and the likely sale of the Coeur Défense property, at a time when commercial property values were plummeting across the globe.

or business in Luxembourg where it did not realize any turnover. Dame had also acted and executed legally binding documents for the sole purposes of incorporating HOLD (a French company), participating in the acquisition of a property located in France and granting security interests subject to French law. This decision is consistent with the most recent EU case law on COMI issues (Eurofood IFSC of May 2, 2006, C-341/04; Interedil of October 20, 2011, C-369/09).

2. Regarding HOLD's Safeguard Procedure: The Court confirmed that HOLD faced a "serious and tangible threat" that the loan would be accelerated in circumstances where HOLD would have been unable to repay that loan. In particular at a time where HOLD had "no real possibility to [obtain] by itself (...) a new hedge within the imposed timeline and for a cost that would match its available funds". HOLD was, thus,

facing difficulties which it could not overcome and which could lead it to insolvency.

3. Regarding Dame's Safeguard Procedure: The Court confirmed that the loss of Dame's only asset (by way of enforcement of the pledge granted over the HOLD shares) would have led to Dame's insolvency. This was because Dame would have lacked the resources to repay the shareholder loan extended to Dame.

Together with the March 8, 2011 *Cour de cassation* decision issued in the same matter, the Versailles Court of Appeals decision will have far reaching effects within the French business, financial and legal community, as it illustrates that a broad range of debtors may be entitled to avail themselves of Safeguard Procedures. Any debtor in distress, "...if their difficulties are of a magnitude such that they cannot face them alone..." will now be entitled to invoke the French *procédure de sauvegarde*. 🌐

INSOL ACADEMICS' STEERING COMMITTEE

INSOL Academics Meet in Miami

The INSOL International Academics' colloquium in Miami will bring together academics from both hemispheres for a packed program of sessions on a diverse range of topics. The heart of this meeting is the research projects and proposals shared by our members and in support of this, one aspect of the meeting will be an open invitation for submissions to INSOL International for future research projects that require funding.

This colloquium showcases just how wide-ranging the interests of the group are, with presentations on subjects from creditor liability to the fascinating sounding "Conflicts and avoidance in international Insolvency". The meeting will also consider the most appropriate way to mark the 21st year of publication of the International Insolvency Review.

A review of proceedings at the Miami meeting will appear in the next issue of INSOL World.

INSOL Academics' Steering Committee is seeking nominations

The Committee, established in 2008, has continued its work of planning and expanding the activities of the Group in collaboration with our INSOL parent body. The geographical dispersal of the members of the ASC necessitates that it operates mainly by means of conference calls and email. Members of the Committee contribute a regular item to INSOL World promoting or reporting on the work of the Academics' Group.

Nominations are invited from persons to be considered for appointment to the ASC by the INSOL Board from 2012 onwards. What is needed is a willingness to contribute to the activities of the Academics' Group in both the planning and the execution, by participating in the regular ASC conference calls and by taking an active part in the proceedings at our colloquiums whenever possible. Appointment is for a 2-year term, and existing members of the ASC are eligible to seek re-appointment. For this purpose, please contact Tina McGorman, INSOL Office at tina@insol.ision.co.uk