Recent Trends in the French Restructuring Market: The Autodis Example

March/April 2010

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Historically, France has always been perceived as a pro-debtor jurisdiction. However, the 2009 wave of restructurings of leveraged transactions seems to suggest a shift in favor of creditors. There have been a significant number of high-profile transactions, including Autodis, Monier, SGD, CPI, and Retif, in which existing shareholders had to give the keys of their portfolio companies to the creditors and/or the investment funds that agreed to put new money into the distressed businesses.

The restructuring of Autodis, a French car parts company, is probably the most interesting of these cases, because the debtor, its equity sponsor, and its creditors signed the first pre-packaged restructuring agreement ever in France. As discussed below, there are good reasons to argue that the Autodis restructuring paved the way for the Thomson restructuring, the second-largest French restructuring after Eurotunnel, even if there is a major difference between the two cases. In Autodis, more than 66⅔ percent of the creditors—the relevant majority threshold under French law—signed the restructuring agreement that was subsequently implemented in the course of the "safeguard" proceedings. By contrast, in Thomson, fewer than 66⅔ percent of the creditors approved the July 2009 restructuring agreement, making the success of the Thomson safeguard proceedings fully dependent on the vote of the creditors' committees, which remained uncertain for a long period of time.

In addition, the restructuring of Autodis is a perfect illustration of the positive consequences of reforms of the French bankruptcy code in effect since February 15, 2009. These reforms measurably simplified the "conciliation" and "safeguard" proceedings used in French restructurings. The Autodis restructuring used the conciliation proceeding for the operating company and the safeguard proceeding for the holding companies. These two proceedings are now considered to be very efficient tools for achieving a successful restructuring in France.

Background

In February 2006, Investcorp, an international investment bank, acquired the Autodistribution Group ("Autodistribution"), the French and European leader in the independent distribution of car and heavy vehicle parts. This investment was structured as a typical French leveraged-buyout transaction, with senior and second-lien loans at the level of Autodis, a special-purpose vehicle created to purchase the shares of Autodistribution, the operating company. Autodis also had mezzanine debt in the form of ordinary bonds, which is standard for mezzanine investments in France. Parts Holdings France, the immediate parent company of Autodis, also issued vendor loan (*i.e.,* earn-out) notes to the pre-2006 shareholders of Autodistribution.

In 2008, Autodis had revenues of more than €1 billion and approximately 6,700 employees, including 5,200 in France. In light of the collapse of the automotive markets and tense economic difficulties, Autodis entered into negotiations with its shareholder and its various classes of creditors in order to implement a financial restructuring.

Pursuant to the 2006 LBO documentation, significant restructuring steps, including the write-off of claims or the conversion of claims into equity, were subject to the unanimous consent of Autodis's lenders. Given this veto right, it rapidly became apparent that a successful

restructuring would require the use of the new French "safeguard" procedures (*sauvegarde*), which would allow a restructuring plan to be approved by a qualified majority (66⅔ percent) of each of the credit institutions' committee, the supplier's committee, and the general group of bondholders.

However, a safeguard procedure typically lasts six months, which was perceived as too protracted a period for the business to endure. During an insolvency procedure, customers and suppliers are generally concerned about the debtor's long-term prospects. Customers tend to reduce orders, and suppliers no longer grant credit to the debtor, which must pay for supplies in advance of delivery. In addition, Towerbrook, the new investor, was reluctant to commit the funds necessary to restructure the business during the pendency of the proceedings.

It was therefore essential that the restructuring plan be approved among the various stakeholders contemporaneously with the commencement of the safeguard procedure, which was subject to a pre-packaged agreement signed by all Autodis constituents. The safeguard procedures of Parts Holdings and Autodis commenced on February 18, 2009, and ended on April 6, 2009, a period of less than seven weeks, which qualifies the Autodis process as a surgical restructuring.

The Restructuring Plan of Autodis

The French safeguard procedure allows a debtor to negotiate a restructuring plan with its creditors, failing which the French bankruptcy court can approve a nonconsensual repayment plan over a maximum period of 10 years. The court has no power to force creditors to write off debts or to accept a debt-equity swap, nor can it order debts to be generally discharged without creditor consent. If the debtor reaches an agreement with its creditors, the restructuring plan can

include many different restructuring measures, including rescheduling of the maturity of debts for a period exceeding 10 years, creditor write-offs, and debt-equity swaps. The 2009 reforms of the French bankruptcy code also made it clear that a restructuring plan need not treat all creditors equally, provided the circumstances justify disparate treatment.

However, not all companies are eligible for this restructuring regime. For example, companies with less than €20 million in revenue or fewer than 150 employees, such as holding companies in an LBO transaction, must obtain prior authorization from the magistrate in charge of the case (*juge-commissaire*). Accordingly, before the commencement of a safeguard procedure, discussions with the president of the commercial court having jurisdiction over a debtor are well advised. These discussions typically occur during the course of pre-insolvency proceedings, such as the "*ad hoc* mediation" (*mandat ad hoc*) and "conciliation" procedures, two out-of-court confidential pre-insolvency proceedings involving court-appointed mediators that are widely used to restructure distressed businesses in France.

The Autodis restructuring plan was accepted by Parts Holdings, Autodistribution, Autodis, the senior lenders, the second-lien lenders, the hedging bank, the mezzanine lenders, holders of vendor notes, Investcorp, and Towerbrook pursuant to a pre-packaged agreement dated February 27, 2009. The plan was approved by court order dated April 6, 2009.

Under the plan, Towerbrook established a Dutch cooperative association ("HoldCo") as the special-purpose vehicle that became the ultimate shareholder of Parts Holdings. The new investments of Towerbrook and Investcorp amounted in the aggregate to €109.9 million. Indebtedness was reduced from €733 million to €146.3 million, including senior debt of €107.4 million. Lenders that opted for the debt-equity swap received 19.1 percent of the outstanding

capital of HoldCo, and lenders that did not (or could not, for regulatory reasons) opt for the debt-equity swap received €2.6 million in notes issued by Parts Holdings.

The restructuring plan provided for different treatment of each category of creditors:

Senior Lenders:

- Conversion of 70 percent of their claims into either 9 percent of the outstanding shares of HoldCo or €9.5 million in equity participation notes ("EP Notes") issued by Parts Holdings, with the right to receive €25.5 million in "anti-embarrassment" notes.

- The balance of their claims structured as a senior loan substantially similar to the 2006 senior loan with a revised security package and a revised subordination agreement.

Second-Lien Lenders:

- Conversion of 100 percent of their claims into either 3.6 percent of the outstanding shares of HoldCo or €1.8 million in principal amount of EP Notes.

Hedging Bank:

- Write-off of approximately 50 percent of its claim, in the amount of €14 million.

- Payment of €2 million under the terms and conditions of the senior loan.

- Payment of €5 million in a single installment on the eighth anniversary of the debt-equity swap.

Mezzanine Lenders:

- Conversion of 100 percent of their claims into either 5.4 percent of the outstanding shares of HoldCo or €2.7 million in principal amount of EP Notes.

Vendor Noteholders:

- Conversion of 100 percent of their claims into either 2 percent of the outstanding shares of HoldCo or €1 million in principal amount of EP Notes.

Shareholder Lender:

- Conversion of 100 percent of its claim to HoldCo shares valued at €100,000.

Other Creditors, including Suppliers:

- Payment in full before June 6, 2009.

In addition to the HoldCo shares received as a result of the debt-equity swap, the lenders received additional (*de minimis*) equity from Investcorp.

The Conciliation Procedure of Autodistribution

Under French law, the conciliation procedure is an out-of-court proceeding available to solvent companies and to companies that have been insolvent for less than 45 days. The procedure is a brief, four-month process (subject to renewal for an additional one-month period) during which a court-appointed mediator supervises the negotiation of a voluntary arrangement between the debtor and its creditors. The procedure is confidential, unless the parties request that the conciliation agreement be approved by the court. If the court becomes involved, claims based upon new credit extended by creditors or new third-party investment benefit from a super-priority in the event of a subsequent insolvency proceeding.

Autodistribution benefited from the conciliation procedure because it was able to secure additional financing, including bridge financing, for the period between the date the pre-packaged agreement was executed and the closing date of the transaction with Towerbrook. The super-priority status demanded by the banks as a condition to providing the financing was available only in a conciliation procedure.

Five New Features of the French Restructuring Market

Concessions can be imposed upon dissenting creditors. Since January 1, 2006, creditors have had a say in French restructurings, because a restructuring plan proposed by a debtor with the assistance of a court-appointed administrator must be voted upon by creditors. Creditors are divided into four categories: (i) a credit institutions' committee; (ii) vendors and suppliers; (iii) bondholders; and (iv) other creditors. Any holder of bank debt, such as a hedge fund that acquired the debt from an original lender, will be a member of the credit institutions' committee.

The French pre-packaged agreement is an "entity rescue" instrument. In a safeguard procedure, the pre-packaged agreement is an "entity rescue" instrument entered into by the debtor, the various classes of lenders, existing shareholders, and any new investors that will essentially include the steps necessary to restructure the liabilities of the debtor, which will continue to operate after the restructuring. By contrast, a pre-packaged agreement under U.K. law is a "business rescue" instrument that typically includes the sale of the assets of the debtor to a new investor with the consent of the debtor's senior lenders (but not the junior lenders). In France, it is necessary to structure an asset sale transaction as part of a conciliation procedure in order to achieve a similar outcome. A sale of assets under the conciliation procedure is advantageous in many ways to both the buyer and the seller, but the creditors of the target company must voluntarily approve the transaction—the court cannot authorize a sale transaction as part of a conciliation agreement without creditor consent.

Due to the recent bankruptcy reforms, a restructuring plan approved by a French bankruptcy court can be highly sophisticated. Previously, a restructuring plan consisted of a cash payout option for creditors willing to accept immediate discounted payment in consideration for a large

write-off of their claims, and a deferred payment option for creditors that restructured the maturity of their debts over a period of 10 years (except in agricultural cases, where the payout period was 15 years). Creditors had minimal protection, as any original loan agreements were no longer in effect after the restructuring. Creditors had recourse to the courts only in the event that the debtor defaulted on its obligation to make the payments set forth in the insolvency plan. With the reforms, a restructuring plan can now include many options, including write-offs, issuance of new debt instruments, or debt-equity swaps.

Junior lenders must negotiate to cancel clawback obligations contained in subordination agreements. Typically, subordination agreements, including those based on the standards of the Loan Market Association, include provisions obligating junior lenders that receive payments from the debtor in violation of the priority provisions contained therein to surrender these payments to senior lenders. In a consensual restructuring, the junior lenders typically receive certain forms of consideration, while the senior lenders are not paid in full. It is therefore incumbent upon the junior lenders to negotiate a restructuring plan that allows them to retain these forms of consideration.

A restructuring plan can now be approved in a very short time frame. Prior to the reforms of February 2009, the French bankruptcy code contained detailed and stringent rules regarding the creation of creditors' committees, presentation of a restructuring plan by the administrator to the committees for approval, and voting on the restructuring plan by the committees. The recent amendments have dramatically simplified these rules. Committees are obligated to vote on the restructuring plan within six months of commencement of a safeguard procedure. A deliberation period of 20 to 30 days between submission of the plan to the committees and the vote is

required, unless the *juge-commissaire* authorizes a period of 15 days. Committee members have 10 days following the final vote of the committee to challenge the vote. The court hearing to approve or reject the restructuring plan may be convened five days after expiration of the committee members' right to challenge the court's ruling on any objections to the vote.

In the Autodis restructuring, less than 45 days elapsed between commencement of the safeguard procedure and the hearing approving the restructuring plan. The court acknowledged that the creditors that were not party to the restructuring agreement still had the right to file claims against Autodis and Autodistribution. The timeline of the Thomson restructuring is also expected to be extremely short. Thomson filed its insolvency proceeding on November 30, 2009; the restructuring plan was made public by Thomson on December 9, 2009; and the plan was approved by all creditors' committees (credit institutions, suppliers, and bondholders) by December 22, 2009. The shareholders accepted the restructuring plan on January 27, 2010, and approval of the plan by the bankruptcy court was scheduled to occur before March 30, 2010, less than four months after commencement of the safeguard proceedings.