**Transcription – Expert Interview**

**Court Administrative Perspective**

**Questions**

*Hypothesis 1: Keeping a company as going concern is the main aim of any restructuring*

1. **From a banks/lenders perspective what is the most important in a restructuring of distressed debt?**

Under French law we are always starting from the company’s point of view. The company is considered as the common security of all the stakeholders. In France there are not a lot of lenders at the level of the operating company. We can find some factoring, leasing and rarely long-term asset based loans, but mainly we are discussing with senior debt holders at the level of the holding company, owning the operational company. Of course the holding company depends on its subsidiary, but it is not possible to grant securities on assets of the operating company to senior lenders of the holding company. With distressed debt we are always discussing at the level of the Holdco, with senior debt, mezzanine debt and a shareholding loan. All the stakeholders at holding level can be considered shareholders of the operating company under French law. Senior lenders do not consider themselves as such, as they have a pledge on the company and should be able to take the keys from the shareholders. Except under French law it is not possible, so we have to negotiate.

The distressed debt market is wildly dependent on the legal restrictions you have. During the last five years and the financial crisis, we have seen that the rules have changed in favour of the lenders. Lenders were coming from a situation under which they realised that they ultimately never decided. Today they have the possibility - under certain conditions - to take the keys without the shareholders approval. The conditions are so numerous that I am not sure it is very efficient, but that it is supposed to be fair.

*Hypothesis 2: Amend and Extend solutions take place if lenders/shareholders expect a market rebound*

1. **In which situation does a bank choose to amend and extend a loan i.e. transforming interest payments in PIK, extending maturity and resetting covenants?**

With Terreal they spent more than one year in negotiation on the first restructuring, at the end only 5 or 6 lenders out of 50 or 60 were still refusing the deal. They had to be convinced without changing the deal. They finally accepted after the appointment of a mandataire ad hoc and after they were explained what would happen without a deal. This was mainly an Amend and Extend solution. And five years later, no surprise, we had to do another restructuring.

1. **What was the reasoning behind the amend and extend solutions post-financial crisis? Did the bank/lenders deem these as successful solutions even if they led to a second restructuring in some cases?**

There were two phases after the crisis, one from 2007 to 2012 and one from 2012 to 2014. 2015 is a bit different, less amicable proceedings and more judicial proceedings. When you are under amicable proceedings you need unanimity. We have seen in the first phase that lenders did not really want to take the losses on their balance sheet. Most of the time, they provided additional time. The first phase was the time of Amend and Extend.

Regarding the banks, 10 or 20 years ago, the most important thing was to be repaid. They could accept to decrease the interest or to postpone some terms, but the most important was to be paid back, even if it would take time. Today the most important thing for them is the amount of losses they will have to take this year on their balance sheet. In a way, they do not care if they will be paid back. They prefer to have an instrument to justify not registering their losses, postponing or diminishing them.

CPI and SGD were very rare cases. CPI was the first lenders-led and SGD was also lenders-led, but driven by an investor. But both cases gave the market a new option to restructure. SGD with a lender taking control by buying the debt and CPI with debt converted to equity to run the business.

*Hypothesis 3: Out of court restructuring provide the best solution for lenders*

1. **How often does a bank/lender conduct a consensual restructuring vs. a bank led one?**

Very rarely we have to go through a judiciary proceeding for LBO cases, less than one in 20 cases. The rate of success for amicable proceedings is probably 90% for LBO groups.

1. **Does the bank/lenders experience higher recovery rates in an out of court restructuring and if so why?**

At this stage under French law, I think it is true. It is true that their recovery would be lower under judiciary procedure. Why? It depends on a lot of parameters and especially what time you have. If you need to find a solution in one month or two months, because you have a financial crisis, under judiciary procedures it means you will sell the activities to a new investor. In such a situation it is generally true that the price reflects how many employees you keep; the more employees you keep, the less you pay. The other reason is that the securities can be challenged under judiciary proceedings. It has changed; the pledge on the shares for example is very efficient. Their recovery should improve in the future, but it is still true that they recover more under amicable proceedings; also because the value of the company is not as affected as if the company undergoes a public procedure. Their recovery rate should be better, especially if you are subordinated lenders. Under amicable proceedings all have to sign the agreements. Even if they are subordinated, you need to give part of the value to them. It is sometimes symbolic, but it can be 5-8%. Under judiciary proceedings they would never have received anything. And do not forget that under LBO structure all lenders are at the holding level. If the subsidiary has difficulties and is sold through an asset deal, the value of the equity on the holding company will be zero. The only way for them not to lose everything is probably to convert into equity, take over control and try to sell the company later themselves. And French banks for example also have different teams taking care of the situation if it is under judiciary proceedings or amicable. The team for amicable proceedings is more business-orientated. Based on business, the hope of recovery has to be better.

1. **Do you think a consensual restructuring facilitates the best outcome for lenders and for creditors? Why?**

From a company’s point of view the outcome is also better, but it is not so obvious. Yes, because you do not have to waste time to explain to all economic stakeholders that you have difficulties. Frankly it depends on the field of activities. For instance some time ago I dealt with a restaurant. In this case the clients do not care about the financial difficulties. The most difficult part was to negotiate with the suppliers and it is not so easy to explain but in the end the clients stayed. However if you are in the construction business and the clients are public institutions, you are not authorized to submit your proposal if you are under judiciary proceedings so your clients are leaving immediately. It really depends on the sector, but in general it is better to find a solution under an amicable proceeding. But not at all costs. If you only have a compromise between shareholders and lenders, without any considerations of the needs of the company, it is better to go through the judiciary procedure.

You now see the big trend of the lenders-led, which were created with CPI. As a conclusion from this case, I now pay more attention to governance. With CPI, which ultimately failed, you had every lender represented on the board with an opinion on everything, but they did not take any decision. CPI was really in difficulties, because of the frozen behaviour of their board, always asking for information, but never deciding. It was not compatible with a company that needed to restore its performance. You had two phenomena: They were overleveraged, but at the same time with the crisis and with some areas of enhanced competition, their performance was decreasing. It is very important to have a flexible governance and to have smart lenders. In another case we requested to have instead of a supervisory board, a real Conseil d’Administration, like a manager with their own liabilities (eg VIVARTE). It is a good way to make them aware of their liabilities and to have them take decisions. It is better to decide and make mistakes than to do nothing. This is the danger with a lender-led.

*Hypothesis 4: Incentive disparities are the main issue of consensual restructurings*

1. **What are the main issues of a consensual restructuring?**

With Terreal we had 3 or 4 hold-outs, but we also had problems with the shareholder LBO France and Oaktree that did not want to participate in the lenders-led. This situation is a bit frustrating for the company, to restructure debt is a way to start a new life with a new shareholder with new investment, choose new management etc. It is often the best solution for the company. And at the same time you have some senior lenders, who want to stick to their solution. If they decide not to write down their debt, the company cannot decide for them. In Terreal we were lucky, because the main lenders were business orientated. We had foreign lenders, very few French lenders, and they are used to take over the governance.

1. **Does the set up of the syndicate or the number of lenders play a role in the decision process?**

Yes of course. It is easier to reach a solution with two lenders than with a hundred. But the most difficult is when some lenders appear at the end of the process of your negotiation. Sometimes due to the trading level of the debt, some lenders consider during the process that they have an advantage when they sell. And you have to consider that if you have a new creditor, with no knowledge of the company and who did not attend any of the last meetings, you will have to deal with other difficulties. Also when you have a lot of small lenders, they do not have enough to lose. If you want to find a good solution for the lenders and for the company, they need to have something to lose. If they do not have anything to lose, they will be the remaining reluctant ones that will blackmail the others.

1. **Within the syndicate are the interests always aligned and if not what are the impacts of that?**

In a pool of lenders you have at minimum three or four kind of lenders: you have the traditional lenders, banks, who granted the loan to the company initially and whose main incentive is to receive interest, have securities and be reimbursed at the end of maturity. You have also a new kind of lender, the trader of debt. They are just there to sell debt and they can be an invisible lender who just keeps the loan on their books until they sell it. Their main interest is their commission. The third type of lenders is the investors. They have understood that the best way to take control of the company is to be a senior lender. Even if the French law does not recognise that the lenders come before the shareholders, they have all signed inter-creditor agreements as well as agreements with the equity owner. This gives them the possibility to take control in the event of covenant breaches, which grants them the right to accelerate the debt. Oaktree is a very good example. They bought debt of SGD to become the owner of the company. It is a very new phenomenon that we observed after 2007.

The market has become more consistent, thanks to new actors and players in the market. Investors want to take control. In your pool of lenders you have banks that are accepting a situation and French banks that are refusing, Investors with Loan-to-own strategy, Traders, CLOs and hedge funds, they will not have the same objectives. Take for example a CLO: As long as you keep the loan under debt tranches, even if the maturity is in 10 years and even if all the interest is in PIK, you can say that it is debt and not equity and you can keep the same provisions. They do not care if the company will actually pay in 10 years, but they care that this year they do not have to register any losses on their balance sheet. It has really changed the negotiations, because the most important thing for them is ultimately the rate of interest, even if it is not paid in cash, but capitalised i.e. PIK interest. They can register it as debt paying higher interest, representing a part of a diversified instrument, which can be traded. It makes it hard for us to understand their objectives in the negotiation.

It can be the case that banks with different capital requirements will want to keep more debt on the balance sheet, depending on their own constraints to register losses. This is typically French. You have fewer difficulties with Anglo-Saxon lenders, with whom it is very easy to find the level of sustainable debt for a company, the amount of new money and the remuneration of the debt. The most difficult with them is securities, right to control, covenants, flexibility in terms of trading, right to information etc. For them a breach of covenant is good news, because it generates new revenues.

1. **Does a long term relationship with the client impact your negotiation power? Would that lead you to chose another restructuring option than you would do otherwise?**

[not available]

*Hypothesis 5: In a permanent market downturn debt write-offs are necessary*

1. **In what scenario does a debt write-off become an option?**

With CPI nobody could imagine initially that the market would decrease at the level we observed five years later. CPI was the first lenders-led restructuring and the banks wanted to show the funds that they had the capacity to run the business as well as them. We have seen three years after that, even with debt divided by three, it was still too much. We were very close to financial failure. Two weeks before insolvency, a new investor injected 15 million and asked the banks to reduce the debt to 10 or 15 million. Remember we started with 700 million of debt five years before. This was done in two procedures, because obviously you cannot go down from 700 to 15 in one procedure.

1. **How do you determine the extent of a debt write-off?**

I was involved in one restructuring where it was difficult to convince the banks of the right level of debt. And I requested an independent audit for a valuation with which we could determine the right level of debt that was sustainable for the company. The lenders were against this and I noticed with surprise that depending on the banks, you did not have the same policies and rules for capital provisions on the same risk. The risk of the company will be the same. But for example BNP Paribas will not have to register the same amount of risk as for example Natixis and Credit Agricole, depending on their equity and sustainable funds. If you have different assets on your balance sheet, you will not have the same limitations to grant a loan. It is not only the quality of the loan that will drive the provisions by the lenders.

*Hypothesis 6: Banks/Lenders sold on the secondary market due to the financial constraints in the financial crisis*

1. **What was the rational of banks/lenders who sold distressed debt on the secondary market?**

It depends on their own accountancy of their losses. It depends on their balance sheet mainly. But it is not true for all of them. Some of them have an advantage to sell this year rather than next year.

Another parameter can be that they prefer liquidity now rather than in the future or that they do not believe in the business plan. Or they decided internally that they did not want to invest in this sector and they preferred to take their losses immediately. We have seen a lot of lenders that wanted to leave the real estate sector. The reasons to sell can be multiple: General policy, focus on their liquidity for their own interest, doubt in the business plan, bad experience with the management or a good proposal to sell. Some lenders in Vivarte sold one month before the opening of the mandate ad hoc at 90%. And finally the deal divided the debt by three. One month before at 90%; they were right to sell.

*Hypothesis 7: A company will be restructured in court if it is not only financially but also economically distressed*

1. **In your respective case, how much of the distress would you consider purely financial distress and how much economic distress?**

[not available]

1. **Under which scenario would you have restructured in a formal bankruptcy procedure?**

When we had to organise and restructure LBO debt it was easier under amicable proceedings than judiciary proceedings. Judiciary proceedings have just been preferred to deal with the reluctant lenders and the minority lenders, to benefit from the organisation of the committees and to have decisions taken with a majority of two thirds.

However, with judiciary proceedings and even accelerated safeguard, is not as easy as you might think because under French law we have a lot of issues with the constitution of committees. It is not the same as the classes of creditors you can find under American law. Under American law you organise your creditors by securities and you have as many groups of creditors as there are specifics. Under French law it has been decided that there are three committees. One of them you can go through quickly in the discussions, because everybody agrees that the suppliers should be paid immediately without any terms. If you do not affect their rights, they do not have the right to vote. And you have two other committees: the bond holder assembly and the financial creditors committee. If the form of the credit is a bond you are in the bond holder assembly. And if it is a traditional loan - even if it is a CLO - it will be in the financial creditors committee. Most of the time, you will find the mezzanine lenders in the bond holder assembly and all of the senior lenders in the other committee. But if the value of the company is just in the senior and the mezzanine is out of the money, it is not acceptable that the mezzanine decides on the action. This is one of the complications of the legislation system.

I will give you an example that explains why we need an efficient judiciary proceeding, even if amicable and pre-insolvency proceedings are always better for the company because they are confidential and you do not waste time explaining to suppliers and clients why you are in difficulties. In certain situations you cannot avoid that. I was involved in one case, which was before the sauvegarde financière accélérée
(“SFA”) law and which was why I contributed to the law. The case was particularly complicated. Initially lenders had found an amicable solution without any mandataire ad hoc. But in this case Credit Default Swaps were covering some lenders and you cannot negotiate with lenders covered by CDS. If they contributed to change the loan or debt the CDS would not cover them anymore and if they contributed to the safeguard or insolvency proceeding, they would also lose the cover. So we could not discuss with them. And additionally they did not know who was going to pay them in case of default, because a CDS has become a title that you can buy and sell without limitations. In our case there were 60 millions of movement with 500 institutions. But you could not negotiate without knowing who would be the final owner of the debt. So we organised an auction to settle the CDS claims and one day after the auction a new CDS issuer appeared. It was then that we decided to do a safeguard proceeding, to be able to go through to the committees, where you only have to take into account attending lenders. In case of the safeguard proceeding, best case scenario you can arrange your meeting of lenders within two weeks. And two weeks is too short to organise a new auction to settle the CDS. Therefore, the new lenders did not attend the meeting and accordingly were not considered in the decision. This story is to explain that these instruments were outside of our scope. But this situation has inspired the creation of the SFA. The company we restructured had a large infrastructure and we had to freeze all claims, even though lenders agreed that the suppliers should be paid, because we did not yet have the SFA. That is why we convinced the court afterwards that we should have a proceeding that just impacts the financial creditors. This is why it is called a hybrid proceeding, because it is not such a collective and broad approach as it is for other proceedings. That is why it is very important to have a judiciary proceeding, especially because some proceedings are directly connected with pre-insolvency proceedings. You try to find an agreement under pre-insolvency proceedings and if you do not find it, you can have it ordered by a court under a sauvegarde accélérée or SFA. For the financial lenders their power of negotiation is probably better under amicable proceedings, but they can have an advantage, because even a prepared and pre-packed can create a bad environment for the company and destroy value.

***Thank you!***