

# ARTICLE

## RESTRUCTURING NEWSFLASH

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### **Cœur Défense or how a Luxembourg financial holding company qualifies for french law on safeguard proceedings**

The now-famous case of Cœur Défense (an office complex at La Défense) has sparked a number of legal debates regarding French bankruptcy law; the most recent decision was handed down by the Versailles Court of Appeal (the "Court") on 19 January 2012.

The Court's ruling has come after the case was referred back to the lower court from the Cour de cassation, and it confirms the opening of French safeguard proceedings for both the French borrowing company and its Luxembourg parent company.

#### **BACKGROUND**

Cœur Défense was sold in 2007 to funds (including Lehman Brothers) for a price of approximately €2.1 billion. The French company Heart of la Défense ("Hold") owning the property had taken out a loan of €1.6 billion and the loan was then "securitized" with a French securitization vehicle (the "FCT").

Under the loan agreement, Hold had entered into a hedge agreement with an entity of the Lehman Brothers group to cover fluctuations in interest rates; the group's bankruptcy in 2008 resulted in a downgrading of the relevant Lehman entity's rating, which constituted an event of default under the loan agreement.

As a knock-on effect, the subsidiary's default meant that its parent company was in turn at a risk of defaulting. Dame Luxembourg having pledged its only asset (its shares in Hold) as security, Hold's default would allow the securitization vehicle to claim ownership of the shares, which might also have caused another of Dame Luxembourg's liabilities to fall payable.


As Hold was unable to set up new hedge agreements, as required under the loan agreement, Hold and its parent company, Dame Luxembourg, each obtained the opening of safeguard proceedings in November 2008.

Many legal proceedings have been initiated since then. In a ruling of February 25, 2010, the Paris Court of Appeal cancelled the safeguard proceedings; this decision was quashed by the Cour de cassation on 8 March 2011 and the case was referred back to the Versailles Court of Appeal. Now the Court has just reconfirmed the opening of the safeguard proceedings. However, as the Public Prosecution Department appealed the decision determining the plan, although the safeguard has now been confirmed, the plan is still suspended for the time being.

This aspect of the case is interesting because of the issues addressed by the Court. The other issues relating in particular to the efficiency of the Daily assignment of receivables system or the admissibility of a recourse filed by a creditor, and analysed by the various courts in this matter, will not be addressed herein.

#### **THE DECISION OF THE VERSAILLES COURT OF APPEAL**

The Court ruled on issues relating to the French courts' jurisdiction to decide on the opening of safeguard proceedings over a Luxembourg company and on the criteria for opening such proceedings.



The French courts' jurisdiction to open safeguard proceedings over the Luxembourg holding company of a French company

The concept of a centre of main interests; a condition of jurisdiction in matters of international bankruptcy

Pursuant to section 1 of Article 3 of Council Regulation no. 1346/2000 of 29 May 2000 on insolvency proceedings (the "Regulation"): "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated" have jurisdiction to open insolvency proceedings. This section provides that "the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary".

Recital (13) of the Regulation provides that: "The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties".

The parties' arguments before the Court

The FCT challenged the French courts' jurisdiction over the opening of safeguard proceedings with respect to the Luxembourg company Dame Luxembourg, on the grounds of the presumption set forth in Article 3 of the Regulation.

For their part, Hold and Dame Luxembourg claimed that Dame Luxembourg's centre of main interests was not the place of its registered office, but rather in Paris. They claimed that Dame Luxembourg's only real asset is 100% of the shares in Hold (a French company whose main asset is Cœur Défense), that it does not employ any staff and has not recorded any turnover since its incorporation.

The Court's decision on jurisdiction

With reference to the Regulation and to the CJEU's decisions in the Eurofood (2 May 2006, C-341/04) and Interedil (20 October 2011, C-396/09) cases, the Court ruled that it is possible to overturn the presumption whereby the centre of main interests is in the place of the registered office (Luxembourg). It found that Dame Luxembourg's only activity is to have entered into legal deeds to incorporate Hold, purchase Cœur Défense through its subsidiary, and secure the financing for this transaction. The decision points out, inter alia, that these facts and agreements (some of which the FCT was a party to) constitute a body of consistent evidence demonstrating that Dame Luxembourg's centre of main interests is in Paris where its main interests were administered. The Court decided that the French Courts had jurisdiction to rule on the application for safeguard proceedings.

The decision relating to jurisdiction can be explained by the fact that the application for a safeguard proceeding was made by a pure holding vehicle whose only asset is in fine a property complex located in France. It is important not to overestimate the scope of the decision. The solution will undoubtedly be different for a holding company owning various shareholdings in companies having their registered offices in different countries.

The Court confirms the opening of safeguard proceedings over Hold and Dame Luxembourg

Article L. 620-1 of the French Commercial Code, as worded in the Act of 26 July 2005 applicable to the case at hand, provides for the opening of safeguard proceedings when the debtor "can prove difficulties that it is unable to overcome, and of such a nature as to lead to a cessation of payments."



The Paris Court of Appeal's decision of February 25, 2010 had cancelled the judgment opening the safeguard proceedings and found that the difficulties invoked by Hold and Dame Luxembourg (relating mainly to the cost of setting up a new hedge agreement) did not affect the companies' activity but simply made it more costly to pursue the financing agreement.

The Cour de cassation had quashed the decision on the basis of Article L. 620-1 of the French Commercial Code and considered that the Paris Court of Appeal had added a condition (difficulties affecting the company's activity) that was not provided by law.

In upholding the safeguard proceedings with respect to Hold and Dame Luxembourg, the Court remains within the limits of the Cour de cassation's case law.

The Court confirms the Hold safeguard

The Court concluded that Hold had produced evidence that, as of the opening date of the safeguard proceedings, there was a real risk of enforcement and that it was therefore faced with difficulties of a nature to lead to a cessation of payments.

The Court also found that, due to the short timeframe for finding a new hedge agreement, the uncertainty of the relevant market and the cost of the agreements needed, Hold had justified that it was unable to overcome the difficulties related to its obligation to find new interest rate hedging.

The Court also confirms the safeguard of Dame Luxembourg

The Court's analysis was that Hold's default could lead to the enforcement of the pledge granted by Dame Luxembourg over its shares in Hold. The Court ruled that Dame Luxembourg, which could lose its only asset, had therefore demonstrated difficulties that it could not overcome and of a nature to lead to a cessation of payments.

To conclude, holding companies are not denied safeguard proceedings because of their specific purpose (holding shares or a single asset). Although the opening of safeguard proceedings is subject to the debtor proving the existence of difficulties, such difficulties do not necessarily need to be of a nature affecting its operating business. Purely financial difficulties could justify the opening of safeguard proceedings, which would confirm the possibility for financial holdings to qualify for such type of proceedings. This is especially important as current laws do not allow pure financial holding companies to qualify for the new fast-track financial safeguard system.

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