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CEOs dealing with the economic crisis : the prospect of insolvency

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CEOs dealing with the economic crisis : the prospect of insolvency

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The current global crisis has surprised governments around the world due to its scale and its brutality. The consequences of the pandemic on the Moroccan economy are very difficult to evaluate at this time, but it is certain that a drastic drop in the GDP can already be predicted, since there has been a significant drop in turnover for many sectors of the economy.

The Moroccan government, in an attempt to mitigate the effects of the health crisis on the economic situation of companies, has enacted a certain number of measures.

Essentially, such amendments are aimed at postponing tax deadlines, reducing payroll costs by setting up a tax-exempt assistance benefit and implementing the help of financial institutions in order to support companies through the provision of State-guaranteed credit.

However those loans, although necessary, cannot benefit all companies and, in the majority of cases, cannot enable them to overcome the financial difficulties resulting from the health crisis.

In fact, despite the decisions made by the Government to support businesses, the COVID-19 crisis may leave almost no business sector unscathed, in Morocco, as in many other countries. Some sectors, such as transport, tourism, restaurants, business services, trade, industry, construction and public works, communications and event planning, risk suffering considerable losses.
According to a survey[2] conducted by the Moroccan Confederation of VSE-SMEs, 83% of companies have been totally shut down.

Companies are legitimately wondering about the legal arrangements available to them in order to save their companies, protect jobs, and account for the interest of their creditors.
The law governing companies in difficulty is indeed closely linked to the economic situation.

It is to be expected that, as soon as the courts are back in session, many companies will make use of the difficulty handling procedures.

However, it is essential to establish a diagnosis in order to analyse the appropriate measures to be implemented (I) in order to determine the most appropriate legal procedure for handling difficulties, based on the nature and severity of the difficulties (II) being specified that Moroccan lawmakers have not made specific changes to the company difficulty handling deadlines (III)

2 Lamiae Bouhamrou *« Covid-19 : les premiers résultats de l'enquête sur la situation économique des TPE et PME »*, EcoActu, 6 April 2020

I. Establishing the diagnosis and analysing the appropriate measures to respond to the crisis

A. Establishing the existence of the crisis

A financial crisis, generally results in a lack of liquidity, which is essential to the continuity of operations. It may have preceded the pandemic, because it is very rare that a crisis is sudden, or it may have been triggered by the pandemic.

Cash flow is generally defined for a company as being *« all of its payment possibilities considered with regard to all of the commitments it has undertaken. The cash position results from conditions under which cash and cash equivalents will be presented one compared to the other over time. This is expressed by the concept of solvency, defined as the ability of an economic agent to settle its debts when they fall due ».*[3]

A cash shortfall means that the company is not, or will no longer be in a position in the short term, to pay its salaries, suppliers, bank loan payments, or to obtain new funding from banks needed to restructure the company in order to ensure continuity of operations.

CEOs must take a step back to analyse the type of difficulties they must face, and be supported.

B. Relying on skills

It is essential that the CEOs surround themselves with all the internal and external skills in order to very quickly take stock of the situation and implement the most appropriate treatment.

What is difficult for CEOs is knowing when to seek outside help.. Too often, CEOs wait until it is too late to talk about the difficulties they are experiencing, sometimes compromising for good the possibilities of turning their business around.

3 Jean-Claude JUHEL, *Gestion optimale de la trésorerie,* State Doctoral Dissertation, University of Nice, September 1978

As soon as financial difficulties arise, CEOs must end their silence and call on experts to :

- Make a diagnosis of the situation and consider all solutions.
- Enable them to quickly make the right decisions and particularly to use, if necessary, the right legal remedy.
- Support them in implementing the methods for getting out of the crisis.

This analysis, with the help of experts, should enable the CEOs to have a clear view of their company's financial position, in order to understand the difficulties and grasp the current and very short-term financial position. It must also make it possible to identify the elements that will lead to choosing the resources to implement in order to get out of the crisis.

Such experts include accountants, attorneys, corporate bankers, and other crisis management specialists.

The accountant assists the company on a daily basis. Their role is essential for small and medium-sized enterprises and preparing financial statements. They also frequently serve as an advisor to the CEO, especially when the CEO has not set up the appropriate dashboards with financial or operating indicators.

The attorney is often called in to help when a dispute arises, while their early role as an advisor is essential for the CEO. They are acquainted with disputes with the company's partners, and can advise the CEOs on procedures to be considered in order to prevent incurring their liability, and particularly to convince them to use preventive measures or problem-solving measures.

The corporate banker is an expert who knows the company well, having advised and supported it. The company's CEO should not hesitate to ask them for advice in implementing new strategies, modifying repayment terms, or establishing less burdensome lines of financing.

Crisis management experts, the CEOs should use their recommendations without hesitation, in order to ensure that they are able to stay in business. In particular, their skills may encompass the economic, legal, and technical sectors. This support may also prove beneficial when the CEOs have decided to use measures for preventing or dealing with financial difficulties.

C. Conducting an analysis of the types of difficulties and the impact of the choices of legal solutions to be considered

For the CEOs, this means conducting an analysis of their financial position and the type of difficulties their company is facing, in order to choose the most appropriate solution.

An analysis of the financial position to :

- Determine the company's overall debt, whether it is a question of financial debt, late payments to suppliers, or late tax or social security payments.
- Examine the debt restructuring options.
- Identify the solutions available to the company, particularly in terms of assets that can be disposed of or financed (leasing).

Taking into account the impact of the choices of legal solutions to be considered :

CEOs must necessarily consider the impact of the use of a legal procedure on the company's future.

In fact, collective insolvency proceedings are public and may create a defiant behaviour by clients, which will have an impact on the company's level of activities and very often leads, considering the still uncertain practice of collective insolvency procedures in Morocco, to the dismantling of the company through the conversion of the judicial receivership into liquidation.

Lastly, the collective insolvency proceedings may be extended to the CEOs, and they may be held liable as a result.

Regardless, the use of collective insolvency proceedings is considered by CEOs when they cannot manage on their own to reach a solution with their creditors. The Commercial Code has provided them with several measures, depending on the nature of the difficulties they are facing.

Such procedures are for the most part ignored, while it is possible to use them starting from the onset of the first difficulties, in order to prevent or end difficulties, but with the reserves that will be explained below.

II. The choice of legal proceedings depends on the nature of the difficulties

Moroccan legislators enacted an initial law in 1996[4] to prevent and deal with company difficulties by favouring the prevention of difficulties, avoiding the risk of liquidation and aggravating difficulties, by establishing mechanisms for preventing company difficulties.

While giving priority to the recovery of companies that were still viable and relatively healthy, it tried to introduce an essential component of the company difficulties prevention system, namely out of court settlements, while promoting negotiations and talks between antagonistic parties, and encouraging the use of debt forgiveness and rescheduling in order to give the debtor a moment's respite to enable them to improve their situation.

Then, in 2018[5], lawmakers introduced safeguard measures aimed at companies encountering difficulties that they are unable to overcome, but which have not gone into a state of suspension of payments.

The procedures vary depending on whether it is a question of proven or foreseeable legal, economic, or financial difficulties, insurmountable difficulties, without the company being in a state of suspension of payments or difficulties that have led to a suspension of payments, but with a possibility of recovery.

A summary table appears at the end of this study.

4 Dahir No. 1-96-83 of 1 August 1996 enacting Act No. 15-95 establishing the Commercial Code
5 Dahir No. 1-18-26 of 19 April 2018 enacting Act No. 73-17 repealing and replacing Title V of Act No. 15-95 establishing the Commercial Code concerning company difficulties.

A. Proven or foreseeable legal, economic, or financial difficulties

1. The special representative to respond to strained cash flows

The main interest of the special representative[6] is that a third party can intervene as an objective intermediary between the various protagonists in order to find settlement solutions.

Opening conditions : This procedure is open to companies experiencing pressures in their cash flows but without being in payment default.

Opening the procedure : The CEO petitions the Presiding Judge of the Court with a request to appoint a special representative, specifying the nature of the difficulties encountered.

In practice, they request a meeting with the Presiding Judge of the Court in order to submit their request and propose a special representative.

The Presiding Judge of the Court appoints the representative, establishes their mission and compensation, which will be payable by the company.

Characteristics of the procedure : This procedure is not restricted by deadlines. The representative's assignments depend on the CEO's needs, and their decisions are not binding.

Advantages of the procedure : this is a procedure that is confidential, informal, and flexible. The ad hoc representative's mission is to assist the CEO in solving the company difficulties and there is no restriction to the CEO's authority. The intervention of a third party to assist the CEO may appear beneficial in that they have a certain experience and perspective with regard to the company's position in order to negotiate with its partners under the best conditions.

Failure of the procedure : In the event of the representative's failure to conclude settlement agreements, the representative will send their mission report to the Presiding Judge of the Court, who will therefore decide to extend the representative's mission or to change it, with the CEO's approval.

However, the representative can always alert the Presiding Judge of the Court about the company's position, who may then draw the necessary conclusions or suggest a more appropriate measure to the CEO.

6 Art. 549 et seq. of the Commercial Code.

2. Financial difficulties in the absence of adapted financial capacities

The conciliation procedure is a preventive procedure aimed at companies encountering financial difficulties that cannot be resolved by a financing capacity adapted to the company's capacities.

Conditions of opening the procedure : The Presiding Judge of the Court, after ensuring that the company is not in a state of suspension of payments, particularly through additional information[7] collected from third parties, shall issue an order, not subject to appeal, appointing the **conciliator** proposed by the CEO, establishing their assignment and the time limit for preparing their report.

Opening the procedure : Only the CEO may file the application with the Presiding Judge of the Commercial Court. This application must explain the nature of the difficulties in addition to funding requirements, as well as the resources available to meet them. In practice, the CEO may meet with the Presiding Judge of the Court to explain the situation and the funding requirements to them.

Time limits for the procedure : The procedure lasts three months and may be renewed just once.

Characteristics of the procedure : The conciliator is exclusively tasked with negotiating agreements with creditors.

Possibility of suspending judicial proceedings : The CEO may request that the Presiding Judge of the Court temporarily suspend legal proceedings or enforcement measures that may have been engaged by their creditors. The Presiding Judge may honour it after having heard the various creditors concerned by the said suspension.

In exchange, the CEO is prohibited in particular from settling all debts incurred before the mediation or granting a mortgage or pledge, except for payroll.

Failure of conciliation : If no agreement can be reached with the creditors, the conciliation procedure ends automatically.

Global or collective agreement : If the conciliator reaches a collective agreement with the creditors, or only with the company's main creditors, the agreement is submitted to the Presiding Judge of the Court for approval.

In any case, even the creditors who do not sign the agreement are informed of it, since the legal payment deadlines will then be binding upon them.

7 Art. 552 of the Commercial

Advantages of the procedure : While the approval of the agreement lifts the veil of confidentiality over the procedure, it is useful for the following reasons :

- All lawsuits and all individual proceedings aimed at obtaining payment on debts that are the subject of the agreement are suspended. That suspension also applies to joint and several sureties or those not having guaranteed the debts that are the subject of the mediation agreement.

- It establishes a privilege for creditors who financially support the company either through a new cash contribution or by providing goods or services during the mediation period; excluded from this benefit however are contributions made by partners or shareholders in the context of a share capital increase.

Failure in the performance of the conciliation agreement is penalised by its termination and early forfeiture of the time limits granted. This decision of the Presiding Judge of the Court is not subject to any appeal, the case will be sent to the Court in order to decide whether the company should be placed into receivership or into court-ordered liquidation.

B. Insurmountable difficulties, without a state or suspension of payments, the safeguard procedure

The safeguard procedure is one of the major innovations of the reform of Book V of the Commercial Code. Its main objective is to intervene very quickly in order to multiply the chances of saving the company in the event of insurmountable difficulties to make it possible to prevent a payment default, protect the continuity of business, and protect jobs.

Opening the procedure

Only the CEO can approach the Presiding Judge of the Court with a request for the purpose of opening the safeguard procedure. The request must specify the nature of the difficulties threatening the continuation of the company, to which must be attached the documents listed in Article 577 of the Commercial Code, as well as a safeguard plan. The Court has 15 days to decide after hearing the CEO.

The right to

The Court may also collect all information from third parties or use an expert[8] aevaluation to verify the company's actual position. In practice, it is often a prerequisite when a case is brought before the court to conclude a settlement agreement with one or more creditors in order to demonstrate the viability of the position in the long term. In a case brought before the Commercial Court of Casablanca[9], the conclusion of a loan consolidation agreement and payment in kind with the company's banker convinced the judge that the company was not in a state of suspension of payment.

Non-confidential nature of the procedure

It is not a confidential procedure, since the judgement is the subject of publication in the official bulletin and the trade and companies register.

Freezing liabilities

The company's liabilities are frozen, since the principle of prohibiting proceedings is systematically implemented. CEOs retain their management authority.

Specifics of the safeguard procedure

This procedure has the benefit of sheltering the company for a period not exceeding five years, in order to optimise these restructuring resources.

The CEO remains the sole CEO of the business, their draft safeguard plan is examined by a receiver who will be tasked with establishing a financial, economic, and social assessment of the company, with the participation of the CEO.

Advantages of the safeguard procedure

- The suspension of all legal proceedings against the company and sureties, whether natural persons or legal entities, joint and several or not, which can use the safeguard plan and the stoppage of interest accrual.

8 Judges have honoured the counter-claim aimed at placing the company under the safeguard procedure because *«the judicial expert evaluation confirmed the existence of creditors, the lack of a payment default in absolute terms, the continuation of business, the performance of its obligations, the use of significant labour, the existence of a table of orders and equity capital. The expert evaluation also specified that the company may exceed the current situation as long as it has deadlines for settling its debts. The safeguard procedure is aimed at enabling the company to overcome its difficulties in order to ensure continuity of its operations, maintain jobs, and pay its creditors. »*
Commercial Court of Casablanca, 12 July 2018, Case No. 59/8301/18 in Jurisprudence.ma ID 21988

9 Commercial Court of Casablanca, 1/10/2018, Case No. 113/8315/2018 in Jurisprudence.ma ID 21983

- Penalties on assets (liability for insufficient assets, social debt obligations) as well as the offence of bankruptcy are not applicable to the CEO.
- Only the acts of having and performing the CEO's safeguard plan are subject to the control of the receiver, who sends a report on it to the official receiver.
- The prohibition on payments for previous debts for the debtor under the same conditions as the principle governing the judicial receivership procedure,
- Undeclared debts are not binding upon the debtor during the performance of the safeguard plan and at its conclusion if the plan is performed.

Purposes of the safeguard procedure

The safeguard plan determines the terms and conditions of repaying the company's liabilities and the terms of continuing its activities.

Failure of the safeguard procedur

In the event of a failure in the performance of the safeguard plan, the court may, automatically or at the request of one of the creditors, order the conversion of the procedure into a judicial receivership or liquidation procedure.

Such a conversion may also occur if, following the opening of the safeguard procedure, the company goes into payment default.

A judgement handed down by the Commercial Court of Agadir specified that only the Presiding Judge of the Court has the ability to order that conversion[10].

Closure of the procedure

If the CEO performs the terms of the safeguard plan, the Court pronounces the plan closed.

This procedure is reserved for companies that are not in payment default, yet the impact of COVID-19 may be sudden for small businesses, they may find themselves in payment default during the health state of emergency period, and thus may not be able to benefit from a procedure that presents many advantages.

It would have been desirable, following the example of French lawmakers[11], to freeze the financial position of a company at 25 March, the day after the promulgation of the health state of emergency.

10 Commercial Court of Agadir, 11 February 2020, Case No. 112/8319/19 in Jurisprudence.ma ID 21996
11 Order of 27 March 2020 adapting the rules regarding the difficulties of companies and agricultural operations under the health emergency and modifying certain criminal procedure provisions

C. Difficulties that have led to the suspension of payments, but with a possibility of recovery

The goal of the procedure is to enable continuation of business, maintain jobs, and settlement of liabilities using a "recovery plan" presented following a so-called "observation" period. The procedure is open to companies **in a state of suspension of payments.**

1. The judicial receivership procedure

Opening conditions

The judicial receivership procedure applies to any commercial business that is in suspension of payments but whose recovery may be considered. The judicial receivership is pronounced if it appears that the company's position is not irretrievably compromised. Otherwise, judicial liquidation is pronounced.

Legal definition of suspension of payments

The suspension of payments is defined in Article 575 of the Commercial Code as being "the inability to meet current liabilities with available funds". In accounting terms, current liabilities are made up of all liabilities due.

Available funds are made up of cash on hand and in the bank, including usable overdraft facilities (bank overdraft cap unused) and debts due that are subject to immediate conversion into available funds (outstanding debts).

The status of suspension of payments arises from an analysis of the cash flow and the immediate requirements to pay outstanding debts.

However, it is regrettable that there are varying and sometimes contradictory court rulings on evaluating the concept of suspension of payments.
Some decisions have also supplemented this definition, excluding the concept of outstanding liabilities, considering in particular that the lack of liquidity during the enforcement proceedings launched against the company does not necessarily mean that the company is in a state of suspension of payments.[12]
Other decisions have acknowledged that if the company has guarantees and the capacity to pay its payable debts subject to a rescheduling, the suspension of payment is not characterised.[13]

In reality, an analysis of decisions reveals that judges adopt contradictory positions that cast doubt on the assessment of the suspension of payments.

12 CAC Casablanca, 30 November 1999, Case No.1865/99, www.caccasablanca.com
13 CAC Casablanca, 6 October 2015, Case No. 894/8301/14, www.caccasablanca.com

Thus, in certain cases the suspension of payments will be ruled out even if the company has ceased activities, with the judges considering that this element is not enough to justify the opening of a company difficulties procedure if the applicant has not proven the existence of collections proceedings against it.[14] In other cases, the suspension of payment will be characterised solely on the grounds of the existence of various court decisions ordering payment against the company, the issuing of payment orders, the existence of summons to pay served on the company, as well as the CEO's admission of their inability to honour the payment of such creditors and to recover the company's debts. [15]

Standing

Proceedings may be opened at the initiative of a creditor[16] regardless of the nature of their claim or of the CEO **within thirty days following the date of the company's**[17] **suspension of payments**.

The application must mention the suspension of payments. It should be specified that Moroccan case law is not unanimous in the definition of the status of suspension of payments. It is appropriate to draft a brief cover note in order to explain the origin of the difficulties and the prospects of recovery in support of the documents whose disclosure is required.

Goal

The goal of this procedure is to enable the company to continue its activities in the context of a continuity plan or a plan to discontinue all or part of its activities. The pronouncement of the judgement does not result in early maturity, i.e., the payability of debts not yet due.

14 CAC Casablanca, 8 March 2002, Case No. 245/2002/11, www.caccasablanca.com

15 CAC Casablanca, 19 April 2002, Case No. 266/2002/11 in "La responsabilité bancaire au titre des opérations de crédit" Editions 2018

16 " Any creditor, regardless of their nature, may request the opening of the procedure for dealing with company difficulties, and the same applies for the debt that enables the opening of a procedure, regardless of its nature, civil or commercial, ordinary or commercial, guaranteed by mortgage or pledge. Regardless of whether the creditor is privileged or unsecured, and regardless of whether or not the pledged assets are sufficient to repay the debt or not, the procedure that has been opened by a privileged creditor is subject to the same conditions as that required for other creditors. This means that the recourse for a special privileged creditor of the procedure for dealing with company difficulties, deprives them of their privileges provided for by the Decree of 17/12/1968, since the opening judgement prohibits any enforcement procedure.
Cass. Com, 26 September 2001, Case No. 465/00 in Jurisprudence.ma ID 21994

17 The simple fact of not paying one or more commercial debts that the company owes is not enough to characterise a suspension of payment. It is the actual suspension of payments that indicates a disturbance in the financial situation of a merchant who is not able to pay the outstanding liabilities with the available funds that is taken into account. The court must verify the actual state of suspension of payments before making its decision to initiate the judicial receivership procedure.
CAC Marrakesh, 1 October 2002, Case No. 2/6/02 in Jurisprudence.ma. ID 21993

Opening judgement

The Court rules on the opening of the procedure after having heard or duly called the CEO in chambers. The Court may also hear any person whose testimony may appear useful without them being able to invoke professional secrecy. They will rule within fifteen days of being petitioned.
Judicial receivership is pronounced if it appears that the company's position is not irretrievably compromised. Failing this, the company shall be wound up by the court.[18]

Publication of the judgement

A notice of the decision containing the company's name as listed in the trade and companies register and its registration number is published in a legal announcements newspaper and in the Official Gazette, in order to invite creditors to declare their claims to the appointed receiver designated. It has been adjudged that, in the event of multiple publications in the Official Gazette, only the one initiated by the Clerk's Office must be taken into consideration.[19]

Statements of claim

Only creditors benefiting from duly published security or lease agreements are personally notified by the receiver for the purpose of declaring their claims.

The other creditors must file their declaration with the receiver within the statutory period of 2 months starting from the publication in the Official Gazette, under penalty of foreclosure, i.e., the extinction of their claims unless the foreclosure statement is ordered by the official receiver under extremely strict conditions.[20]

18 *« The court has made a proper application of the provisions of the Commercial Code, by pronouncing the opening of the judicial receivership, after finding that the company's position is irretrievably compromised. »* Commercial Court of Rabat, 27 November 2002, Case No. 31/2002/5 in Jurisprudence.ma ID 20056

19 *« The publication of the opening judgement is that which occurs at the request of the registry of the Court that handed down the decision in order to publish the notice of its pronouncement within a period of 8 days. Any other publication is inadmissible. Any other additional declaration of claims based on another publication in the Official Gazette cannot be taken into account since it occurs outside the time period. »* CAC of Fez, 2 March 2005, Case No. 65/04 in Jurisprudence.ma ID 21998

20 Cass. Com, 12 November 2003, Case No. 1135/3/2/2003 in Jurisprudence.ma ID 18880

This is an extremely severe arrangement, because not all creditors regularly read the legal announcement newspapers.
Moreover, the Official Gazette is not accessible online, it can only be purchased in Rabat or available by subscription.
Thus, all creditors who were unable to declare their claims in time because they were not aware of the existence of the procedure, will lose the right to the claim and can no longer claim it unless the official receiver agrees to lift the foreclosure on their behalf, that option being granted very rigorously.

Among the many criticisms made by practitioners regarding the provisions of the Commercial Code, is this publication formality, considered highly prejudicial to the rights of creditors and which should be substituted with the receiver's obligation to personally notify each creditor of the opening of the procedure. The list of creditors must mandatorily be submitted by the CEO in support of their judicial receivership application.

In this troubled time, reading the Official Gazette should be systematic in order to facilitate the statement of claims within the statutory time limits.

Bodies of the procedure

Upon the pronouncement of the opening of the procedure, the Court appoints a receiver and an **official receiver (bankruptcy judge)** tasked with overseeing compliance with the procedure and the protection of the interests of the parties. The role of receiver can be performed by court clerks who have no particular training, but in practice the Court generally appoint experts chosen from a list of sworn experts.

The official receiver may appoint **comptrollers** chosen from among the creditors to assist the receiver and report to the other creditors. They check the claims declared by each creditor, since they are often disputed by the CEO.

Act No. 73-17 introduced the **creditors' meeting**, but only for any company subject to the obligation to appoint an auditor or whose annual turnover is greater than 25 million dirhams, or if the number of employees exceeds 25 employees for the year preceding the year in which the procedure is opened.

Observation period

This is set at four months and can be renewed once by the official receiver for the same time period, at the request of the receiver. Since no penalty is provided for in the event that deadlines are surpassed, they are frequently largely surpassed by the receivers, which delays the procedure as a whole by as much time.
The receiver consults the creditors individually in order to request debt remission and payment deadlines, with the creditors having a period of thirty days to accept or reject the receiver's proposals. A lack of a response from the creditor within the deadline implies their acceptance.
During this observation period, the receiver must compile a report with the help of the CEO and the possible assistance of one or more experts detailing the financial, economic, and social assessment of the company. In light of that assessment, the receiver will propose either a recovery plan ensuring continuity of the company, or its

disposal to a third party, or judicial liquidation.

Adoption of the continuation plan, or the total or partial disposal of the company

A plan for the continued operation of the company is submitted by the receiver to the Court in order to propose the terms for settling the liabilities, the time period of which cannot exceed ten years, as well as any guarantees that may be undertaken by any person or entity in order to ensure its performance.

When the company's survival so requires, the Court may, at the request of the receiver or of its own motion, make the adoption of the business recovery plan subject to the replacement of one or more CEOs.

Total or partial disposal of the company. This is a process which, in Moroccan judicial practice is rarely implemented, although it is a mechanism that presents undeniable advantages, since it enables third-party takers to present a takeover plan for all or part of the company's business and staff.

This takeover plan takes the form of a total or partial « **disposal plan** » aimed at preserving a maximum number of jobs, ensuring creditors are paid through the disposal price, and offering a performance guarantee, while the company remains subject to the collective proceedings.
It can make it possible to save companies and prevent their dismantling, as long as the financial institutions can now consider implementing financing tools for such assets.

Indeed, companies have always been somewhat reluctant to agree to this type of financing. Banks require the registration of the mortgage on the property whose disposal is considered, prior to any release of financing, while in the case of a sale by auction, the auction report can only be released by the Clerk's Office after payment of the transfer price. The courts must also be able to accept a bank guarantee in exchange for the release of the adjudication report and agree that the payment of the price, covered by the guarantee, is made after the registration of the guarantees, but here again an amendment of the provisions of the Civil Procedure Code is required.

In a recent publication, one colleague even felt that it was necessary in the very short term to consider all types of funding for such operations, specifying *« that the same applies to a certain form of patriotism in this time »*.[21]

He added that *« The preservation of the economic framework will involve significant funding, and therefore a redirection of capital toward this type of distressed acquisitions. Without funding, there can be no recovery, but only the permanent destruction of businesses and their jobs.*
There are currently too few investment funds capable of making this type of investment. It is, of course, urgent and essential that all institutions equipped with the capacity for investments, family offices, private equity funds, venture capital funds, which generally are prohibited in their bye-laws from making this type of acquisitions in companies in difficulty, consider the possibility of giving themselves the capacity to intervene quickly in such cases »

In our opinion, this is a discussion to be had in Morocco in order to prevent company liquidations, and lawmakers and the banking system alike need to implement specific measures of encouragement for the funding of acquisitions of companies in difficulty.

Outcomes of the judicial receivership procedure

A judicial receivership procedure can result in one of the following scenarios :

- Performance of the continuation plan, when the company has complied with its commitments provided for in the continuation plan, the judicial receivership procedure is terminated. The CEO regains control of their company.

- Non-performance of the continuation plan. If the commitments provided for in the plan are not respected by the company, the court may pronounce the termination of the plan and convert the receivership plan into a judicial liquidation.

21 Nicolas Morelli, *« L'enjeu du financement des reprises à la barre pour sauver le tissu économique français »*, la Tribune, 2 April 2020

2. Property sanctions against the CEO in the context of collective procedures

Preventive or safeguard procedures do not provide for any civil or criminal penalties against the de jure or de facto CEO, which concern only collective procedures as set forth in Article 736 et seq. of the Commercial Code.
However, the CEO will not be sheltered from any penalties in the event of the conversion of the safeguard procedure into receivership or liquidation.
Sanctions may be imposed either automatically by the court or at the request of the public prosecutor or the receiver.

Civil penalties on assets

This involves the CEO's liability for insufficient assets which punishes the acts listed on a limited basis in Article 740 of the Commercial Code, in the event of management misconduct by the CEO.
Under such conditions, the collective procedure will be extended to the CEO.
The procedure may also be extended to one or more other companies following a confusion of their property with that of the company subject to the collective procedure or in the case of a fictitious legal entity. It may also be extended at the request of the receiver, the official receiver, the public prosecutor, or automatically by the Court.[22]

Professional civil penalties

This involves the deprivation of the right to conduct a commercial business, and the CEO can no longer conduct a commercial business nor hold elective office for a period not exceeding five years if they have committed one of the acts listed in Article 745 and 747 of the Commercial Code.
This deprivation is not irreversible, since it ends with the settlement of the liabilities or the consequent contribution by the CEO making it possible to pay off the insufficient assets, subject to the Court's evaluation.

22 The Court may decide to extend the receivership or liquidation proceedings to other companies due to a confusion of assets. There is a confusion of ownership when the companies in question have the same CEO, the same registered office and identical management processes.
CAC Casablanca, 10 November 2006, Decision No. 5209 in Jurisprudence.ma ID 21999

3. Difficulties arising from the failure to adapt current legislation to the health crisis with regard to the law on dealing with difficulties

a. The suspension of deadlines

In a press release from the Minister for the Interior, a health state of emergency was announced on 19 March, for the period from Friday 20 March 2020 at 6 p.m. to 20 April 2020 at 6 p.m.

Decree-Act No. 2.20.292 establishing provisions regarding the health state of emergency and the procedures of its declaration, was published in the Official Gazette on 24 March 2020 and established the health state of emergency, but without however mentioning its effective date.

Article 6 regarding the suspension of deadlines specified that during and until the first day following the lifting of the health state of emergency, the progress of all statutory time limits (including fiscal time limits) provided for by legislative and regulatory provisions in effect is suspended, with the exception of time limits to appeal judgements in criminal matters against defendants prosecuted while in detention, as well as all time limits associated with police custody and preventive detention.

Decree-Act No. 2.20.330, published on 18 April 2020 extended the health state of emergency throughout the national territory from Monday 20 April 2020 at 6 p.m. to Wednesday 20 May 2020 at 6 p.m.

More specifically concerning judicial proceedings, as of 16 March 2020, the deputy President of the Supreme Council of the Judiciary declared the suspension of all hearings in all courts of the Kingdom until further notice, except those associated with criminal and misdemeanour cases for defendants in provisional detention, criminal investigations, criminal cases involving minors, and emergency proceedings in which the Presiding Judges of the courts rule in interim proceedings in the event of an emergency.

The Economic Monitoring Committee (CVE) also adopted, on Monday 16 March, a tolerance measure under which companies whose turnover is less than 20 MDH can, if they so desire, receive a postponement on tax declarations and payments without any formalities, from 31 March until the end of June.

The difficulty is in the starting point of the time limit suspension since, as we already noted, the decree did not establish an effective date and, in accordance with Article 6[23] of the Constitution, a legal text may not take effect retroactively and only the publication in the Official Gazette can attest to its existence.

23 Article 6 of the Constitution "Affirmed are the principles of constitutionality, hierarchy, and the obligation to publish legal standards. The law cannot take effect retroactively.

The Court of Cassation made a pronouncement in this respect, finding that in the absence of a clarification of an effective date, a law is considered to take effect the day after its promulgation.[24]

That date is very important for those to be tried and their attorneys, since the time limit suspension date will very likely result in many legal disputes.

b. The impact of the absence of specific measures regarding the handling of company difficulties in the health state of emergency

The procedures for handling company difficulties contain very strict deadlines since in judicial receivership matters, the CEO is obligated to seek the opening of the procedure within thirty days following the date of the company's suspension of payments.[24]

No specific provision was made in Morocco for the postponement of deadlines that may make it possible to adapt rules regarding handling company difficulties in the health state of emergency.

The status of suspension of payments is considered in terms of cash flow and is reached when the available funds no longer make it possible to pay off the outstanding liabilities. That situation must, in normal times, be declared within a period of 30 days by petitioning the competent court.

In France, following Act No. 2020-290 of 23 March 2020 establishing the health state of emergency, Order No. 2020-341 of 27 March 2020 provided for a certain number of adaptations to rules regarding company difficulties for the period corresponding to the health state of emergency plus **three months**.

Thus, French lawmakers established a **so-called "protected" period**, which consists of :

- Suspending the obligation of companies and their CEOs to declare the status of suspension of payments ;
- Giving them the choice of using difficulty prevention procedures ;
- And making it easier to carry out the formalities for declaring the status of suspension of payments or filing a statement of claims.

Companies that were not in in a state of suspension of payments on 12 March 2020 but which are subsequently in said state, will then be able to seek the appointment of a representative, or the use of a conciliation or safeguard procedure, until 23 August 2020.

24 Article 576 of the Commercial Code *« The CEO shall request the opening of a judicial recovery procedure within thirty days following the company's payment default. »*

In Morocco, the lack of specific deadlines for handling company difficulties may jeopardize company activities. Indeed, a company in a state of suspension of payments on 20 May will have to refer the matter to court before 23 June, i.e., 30 days starting from the deadline suspension period, which represents an extremely short time period.

By adopting specific deadlines, lawmakers would have enabled companies in difficulty to use prevention procedures, whereas in the current situation they will be bound to seek judicial receivership or even judicial liquidation.
The court may automatically order it, since it is not bound by the subject matter of the application.

Likewise, the CEOs of companies in difficulty will be subject to penalties for not having declared a state of suspension of payments within 30 days.

Lastly, the company risks being at the mercy of its creditors, who may apply for it to be placed in receivership or court-ordered liquidation with a view to court decisions ordering it to pay before or on resumption of the deadlines without it having been able to benefit from preventive measures.

With regard to safeguard plans, their duration is set at 5 years and recovery period cannot exceed 10 years.

In the current state of things, the procedure suspension time limits cannot be increased except by the equivalent length of the health state of emergency.

III. The conduct of the CEO during the difficulty handling procedure

Whether it is a confidential procedure (out-of-court procedure) or a public one (collective procedure), the CEOs must continue to be involved with both their employees and partners and the bodies of the procedure.

A. The use of internal communications

In times of crisis, companies favour their external image and external communications, to the detriment of internal communications and dialogue with employees.

The team's cohesion is essential, since it is the company's main resource due to the work, but also the image conveyed to the outside world.

It is important to anticipate in order to inform employees very quickly of difficulties and measures considered even before embarking on an external communications plan in order to maintain the relationship of trust. Those employees will be the company's best ambassadors and spokespersons with regard to third parties.

B. The use of external communications and a collaboration with the bodies of the procedure

With partners, bankers, clients, suppliers, shareholders, distributors, etc...

Even when the procedure is confidential, it is inevitable that the outside world will find out about it. The company may take the risk of worrying its usual partners.

It is essential that the CEO consider establishing a communications policy to inform their partners of origin of the difficulties, and to inform them of the measures put in place, in order to reassure them and inform them.

It is important not to give in to environmental pressures and to take the time needed to communicate accurate data, based on a good understanding of the origin of the difficulties and the assumptions about a recovery.

Communications in a crisis situation should aim to restore trust with partners, as well as the company's image. Above all else, the CEOs must demonstrate their good will and good faith, and the desire to solve the problems
they encounter, and their predisposition to do everything to pay their creditors.

With the bodies of the procedure Communication with the bodies of the procedure, receiver and official receiver is extremely important.

The progress of the procedure is made much easier, in the interest of everyone, through the CEO's collaboration.

The CEO who does not attend the appointments made for them, who does not submit any documents or any usable documents, may be subject to penalties[25].

Excluding the traditional bodies of the recovery procedure, the CEO must also maintain communications with the creditors' meeting. In practice, we observe that the CEO cuts off all contact with their creditors as soon as the recovery procedure is pronounced, and leaves it up to the receiver to send them settlement proposals in writing.

It is extremely important that the CEO and the receiver come together with the creditors' meeting to justify that the efforts that may be granted are essential to the recovery.

Such negotiations will have the merit of renewing or strengthening the bonds broken with the creditors, and may also make it easier to adhere to the CEO's proposals and to restore the bonds of trust, a guarantee of success of the continuation plan.

25 Court of Cassation, 23/06/2016, Decision No. 266, Case No. 198/3/1/2015 in Jurisprudence.ma ID 22 000

Conclusion

In Morocco, after over twenty years of the application of Book V on the procedures for handling difficulties and despite the innovations made to it, it is difficult to evaluate the actual effectiveness of collective procedures, in the absence of statistical data.

Such data would make it possible to establish an actual, complete analysis that could be of service to economic policies, since it would give a faithful, detailed picture of the companies subject to such procedures. It could help to identify companies by size, by industry, by type of difficulty handling procedure followed, the success or failure of such procedures, the fates of the continuity plans and the conversion rates of safeguard procedures to recovery procedures, or recovery procedures to liquidation procedures.

As for many texts in effect, the regulatory decrees of Act No. 73-13 have yet to be promulgated. The most highly-awaited one concerns the provision specifying the required qualifications to serve as receiver[26], even though the duties assigned to the receiver are extremely important. This decree could make it possible to organise their training, the terms of their compensation, their incompatibilities and the regime of their responsibility.

The decree regarding formalities carried out electronically mentioned in Articles 545 and 609 no longer appears to be current.

In Morocco, the Act on dealing with difficulties was based on French law, but it is not enough to copy foreign provisions, the laws promulgated in Morocco need to be adapted to the judicial,social, financial, realities...

In France, the majority of legislative provisions are supplemented by regulatory provisions which we do not have, and French case law is published systematically, which is not the case in Morocco.

The lack of specialisation of the bodies of procedures, particularly in management or accounting, constitutes a very serious handicap. Likewise, case law is not published systematically, and the practices from one jurisdiction to another vary and very often are contradictory, which **creates real legal insecurity.**

The use of judicial mechanisms for handling difficulties must remain the last resort for a CEO. They must be made aware in order to act very quickly starting from the initial difficulties reveal themselves, since the number of recovery plans that have been a success in Morocco is extremely low, they are fragile and inappropriate in almost all cases.

26 Article 673 of the Commercial Code

In conclusion, the CEOs and their advisors must systematically keep in mind that no law and no court can replace a policy of anticipation and prevention of the risks which may face the company.

However, in the current state of the crisis, all of the Nation's driving forces must mobilise in order to protect companies and jobs.

The development and implementation by the Economic Monitoring Committee, with the help of the private sector and professional organisation, of specific solutions to enhance the solvency of companies, prevent payment defaults, and to implement support tools for CEOs, before the decision is made and over the course of the judicial procedure will be beneficial, even vital. ■

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