France: Restructuring & Insolvency Comparative Guide

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1 Legal framework

1.1 What domestic legislation governs restructuring and insolvency matters in your jurisdiction?

Restructuring and insolvency matters applicable both to entities and to individuals running a business (eg, entrepreneurs, artisans, farmers) are governed by Book VI of the French Commercial Code. This includes all provisions relating in particular to:

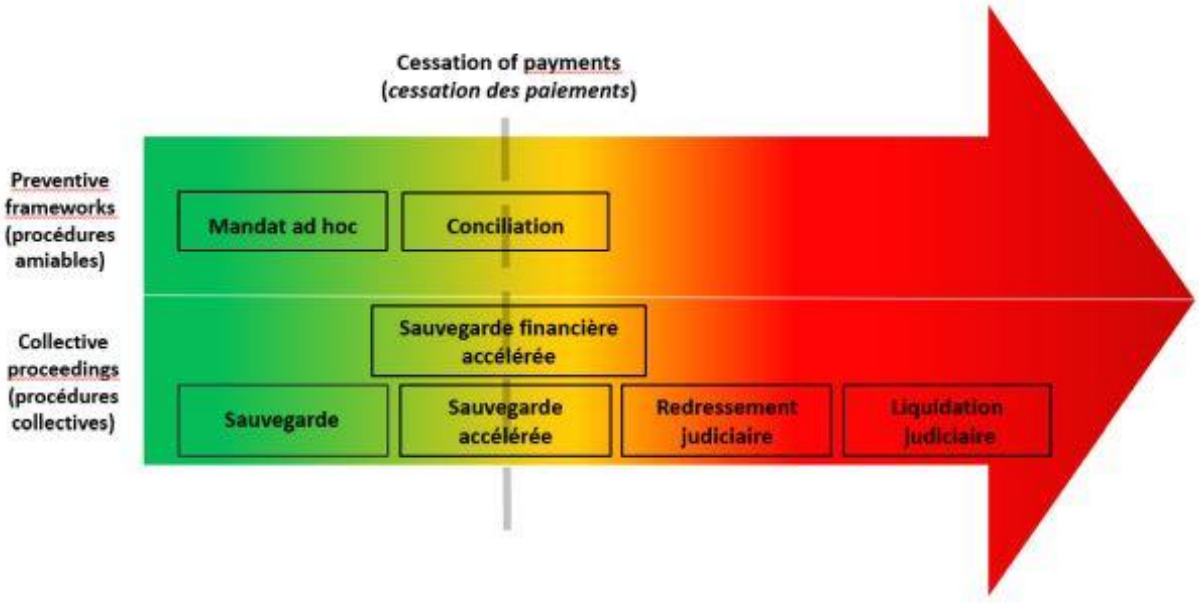
- amicable restructuring proceedings (*mandat ad hoc* and conciliation proceedings);
- formal restructuring and insolvency proceedings (safeguard, rehabilitation and liquidation proceedings); and
- related matters, such as liabilities of directors and creditors.

Insolvency matters applicable to individuals who do not run a business (eg, employees) are governed by specific rules included in the French Consumer Code.

	Preventive proceedings *(confidential)*		Collective proceedings *(public)*				
	Mandat *ad hoc*		Sauvegarde Financière Accélérée	Sauvegarde Accélérée	Sauvegarde		Liquidation Judiciaire
Opening Criteria	No cessation of payments*	Actual or foreseeable legal, economic or financial difficulty and no cessation of payments* or for less than 45 days	After conciliation proceedings Possibility to adopt a restructuring plan	After conciliation proceedings Possibility to adopt a restructuring plan	No cessation of payments* Difficulties that the debtor cannot overcome	Cessation of payments*	Cessation of payments* Impossibility to restructure the business
Initiative	Debtor		Debtor			Debtor, creditor, public prosecutor	
Lengh	Free	5 months max	2 months max	3 months max	Observation period of 18 months max		Continuation of the business for max 6 months No limit for the liquidation process
Aim	Depends on the mission of MAH	Debt Restructuring Or Sale of the company	Debt restructuring			Debt restructuring or sale of the assets as a going concern	Sale of the assets as a going concern or piecemeal

*A debtor is considered in a state of cessation of payments when it is unable to meet its due and payable debts with its immediately available assets

French preventive and collective proceedings



1.2 What international / cross-border instruments relating to restructuring and insolvency have effect in your jurisdiction?

The EU Insolvency Regulation (2015/848) has effect in France when European cross-border issues are at stake.

The EU Restructuring Directive (2019/1023) must be introduced into French law by July 2021. The aim of Title II of the Restructuring Directive is to establish harmonised restructuring frameworks across the EU member states. French law already provides for restructuring proceedings, in the form of *mandat ad hoc* and conciliation proceedings, which are amicable proceedings; as well as safeguard proceedings, which are collective proceedings (see below). Discussions on the expected reform of restructuring and insolvency law in France are ongoing; but it is expected that one of the main changes will be the introduction of a regime of classes of creditors and cross-class cram-down in safeguard proceedings (as well as in rehabilitation proceedings), such regime being currently unknown in France (see question 3.8).

French international private law is mainly ruled by case law.

1.3 Do any special regimes apply in specific sectors?

Book VI of the French Commercial Code does not apply to credit and financial institutions, and to insurance companies.

Insolvency matters applicable to individuals who do not run a business (eg, employees) are governed by specific rules included in the French Consumer Code.

1.4 Is the restructuring and insolvency regime in your jurisdiction perceived to be more creditor friendly or debtor friendly?

The French regime is usually considered debtor friendly, given that it is essentially aimed at the preservation of business and employment, and to a lesser extent the repayment of creditors (unlike under UK or German law, for instance). The main purpose of the restructuring and insolvency regime is to help the debtor to find a restructuring solution. Priority is given to the definition and implementation of restructuring by the debtor itself (mainly through a rescheduling of its debts and the granting of new money). If this solution is not possible, the judicial administrator will try to sell the business as a going concern (asset deal).

In addition, France may be considered a champion in Europe for early warnings and preventive measures. French law provides for alert procedures, which have two purposes:

- to inform the directors of the debtor's financial difficulties; and
- to incentivise them to take appropriate steps to remedy those difficulties.

There are different types of alert procedures, which depend on the organ/entity that initiates them. For instance, alert procedures can be initiated on the action of (among others) employee representatives, auditors, shareholders or the president of the local commercial court.

1.5 How well established is the legal regime and infrastructure relevant to restructuring and insolvency in your jurisdiction (e.g. extent of recent legislative changes, availability of specialist judges / courts / advisers)?

The French restructuring and insolvency regime and infrastructure are well established and efficient.

Insolvency practitioners are members of an independent and regulated profession. There are approximately 150 judicial administrators (‘*administrateurs judiciaires*') and 320 creditors' representatives (‘*mandataires judiciaires*') in France. Access to the profession is conditioned on a specific exam, after specific training in business and law. If certain conditions are met, they are appointed by the court in formal restructuring and insolvency proceedings (safeguard, rehabilitation and liquidation proceedings). They are also the key persons involved in preventive proceedings in the capacity of *mandataire ad hoc* and conciliator. Their authority usually stems from their significant experience of restructuring and insolvency matters, their independence and their judicial appointment.

There are no specific insolvency courts in France. Restructuring and insolvency cases are heard by the commercial courts or, with respect to non-commercial businesses (eg, lawyers, farmers, artisans), by the ordinary courts. The president of the court has exclusive jurisdiction over amicable proceedings (ie, *mandat ad hoc* and conciliation). In 2015 the French legislature created specialised commercial courts with jurisdiction over major restructuring and insolvency cases, especially cross-border cases. Insolvency judges in commercial courts are non-professional judges, are often former businesspeople and have a high level of experience.

2 Security

2.1 What principal forms of security interest are taken over assets in your jurisdiction?

In addition to personal guarantees (‘*sûretés personnelles*'), creditors can benefit from security interests over movable assets (‘*sûretés réelles mobilières*') and security interests over real estate assets (‘*sûretés réelles immobilières*'). Such security interests primarily take the form of real estate pledges (‘*hypothèques*'), pledges over tangible assets (‘*gages*') and pledges over intangible assets (‘*nantissements*').

French law also provides for a security in the form of a trust (‘*fiducie-sûreté*'), which is considered one of the most ‘insolvency-proof' securities available. Ownership of the debtor's secured assets is transferred to the trustee and such assets are therefore not subject to the rules of the insolvency proceedings; as a consequence, the secured creditor can in principle take ownership of such assets if the borrower becomes the subject of insolvency proceedings, subject to certain exceptions. In particular, one exception applies where the secured assets, whose ownership has been transferred to the trustee, remain in the possession of the debtor for the exploitation of its business.

2.2 How can those security interests be enforced (and what factors could complicate or prevent this process)?

In case of *mandat ad hoc* and conciliation proceedings, there is no stay, so secured creditors are in principle entitled to enforce their security interests in accordance with the relevant agreements. However, in practice, waivers are negotiated and creditors usually refrain from enforcing their security interests.

French insolvency law includes various rules on the enforcement of security interests in case of restructuring and insolvency proceedings (safeguard, rehabilitation and liquidation). As a matter of principle, security interests over assets cannot be enforced by creditors if a restructuring solution can be defined – that is, during the so-called 'observation period' when the safeguard plan or rehabilitation plan is negotiated and drafted, as well as during implementation of the plan. Creditors recover their rights if it is not possible to restructure and the debtor enters into liquidation, or if the plan fails.

3 Restructuring

3.1 Are informal workouts available in your jurisdiction? If so, what forms do they typically take, and what are the benefits and drawbacks as compared to formal restructuring proceedings?

Restructuring measures – such as a moratorium, a new money facility or a redundancy plan – can always be negotiated and implemented outside of formal judicial proceedings.

However, French restructuring law provides for confidential and consensual preventive frameworks, in the form of the *mandat ad hoc* and conciliation. These are commonly used by debtors to define and implement restructuring measures if an agreement can be reached on a contractual basis and if insolvency proceedings, with stay of payments and rules for cram-down, are not necessary.

3.2 What formal restructuring proceedings are available in your jurisdiction, and what are the benefits and drawbacks of each?

French law provides for two categories of restructuring proceedings which are governed by different systems

- *mandat ad hoc* and conciliation proceedings, which are amicable or consensual proceedings (also called preventive proceedings); and
- safeguard proceedings ('*sauvegarde*'), which are formal collective proceedings.

Mandat ad hoc **and conciliation:** These are usually intended to facilitate negotiations between the debtor and its main creditors, with a view to reaching agreement and avoiding the commencement of collective proceedings. Debts may only be restructured on a consensual basis in preventive proceedings.

Preventive proceedings are generally used to help a company to renegotiate its financial indebtedness. However, they can also be used to support the company in its negotiations with other stakeholders, such as employees, or to prepare for subsequent collective proceedings or the sale of the business.

They involve the appointment by the president of the court of a third-party 'mediator' (the *mandataire ad hoc* or the conciliator) upon the sole initiative of the legal representative of the debtor, with a mission to assist in identifying solutions to the debtor's financial and economic difficulties.

These proceedings are purely amicable tools: there is no cram-down of creditors and the debtor remains in possession. The mediator has no coercive powers; but *de facto*, his or her authority stems from the fact that:

- he or she reports (confidentially) to the president of the court; and
- if no amicable solution can be found, he or she may recommend the commencement of collective proceedings (safeguard, rehabilitation or liquidation proceedings), if the criteria for the opening of such proceedings are met.

Mandat ad hoc and conciliation proceedings are strictly confidential. The appointment of the mediator and the content of the discussions under his or her aegis are covered by strict confidentiality, which helps to preserve the value of the business and the debtor's relationships with clients and suppliers.

Safeguard proceedings: Their features are similar to those of formal insolvency proceedings. The commencement of safeguard proceedings triggers the application of rules limiting the rights of the debtor and its stakeholders (eg, stay of payments and claims, continuation of ongoing contracts).

Safeguard are usually used to preserve the viability of a business thanks to a debt restructuring (the safeguard plan). Unlike in rehabilitation proceedings ('*redressement judiciaire*'), the court cannot force the debtor to sell its assets to a third party.

French law also provides for two 'fast-tracked' safeguard proceedings: accelerated financial safeguard ('*sauvegarde financière accélérée*') and accelerated safeguard ('*sauvegarde accélérée*'). These can be used to implement very quickly a debt restructuring that has been pre-negotiated with a two-thirds majority of the creditors in the context of conciliation proceedings.

3.3 How, by whom and on what grounds are formal restructuring proceedings initiated? What are the main preconditions for success?

The common feature of *mandat ad hoc*, conciliation and safeguard proceedings is that they can be commenced on the initiative of the debtor only. Third parties – including creditors, shareholders, employees, the public prosecutor and the court itself – are not entitled to file for the commencement of such restructuring proceedings. A petition should be filed with the court by the debtor.

Mandat ad hoc is exclusively available to solvent debtors – that is, debtors which are not in a state of cessation of payments (see question 4.2), but which nonetheless face difficulties of any type. Conciliation can be commenced to the benefit of solvent debtors which are also facing actual or foreseeable legal, economic or financial difficulties, and which have not been in a state of cessation of payments for more than 45 days. *Mandat ad hoc*and conciliation are not appropriate if the debtor needs a general stay of payments or if it is anticipated that a restructuring solution cannot be found on a consensual basis, (ie, with the agreement of 100% of the main creditors). The debtor must indicate in the petition the name of the *mandataire ad hoc* or conciliator it would like to be appointed (usually a judicial administrator or creditors' representative). In practice, after a confidential meeting with the debtor, the president of the court will follow the debtor's choice.

Safeguard proceedings are available to debtors which are not in a state of cessation of payments and which face difficulties that they are unable to overcome. The purpose of this collective procedure is to facilitate the reorganisation of the business in order to allow for the continuation of economic activity, the maintenance of employment and the settlement of liabilities. The debtor is entitled to suggest to the court the name of the judicial administrator it would like to be appointed; in practice, except in specific circumstances, this suggestion is followed by the court.

3.4 What are the effects of the commencement of formal restructuring proceedings, both for the debtor and for creditors?

***Mandat ad hoc* and conciliation:** *Mandat ad hoc* and conciliation proceedings are strictly confidential and the business operates as usual. The directors remain in control of the debtor and the *mandataire ad hoc* or conciliator is not involved in decision taking; his or her role is limited to making proposals and assisting in the negotiation process.

There is no automatic stay of payments (see question 3.5). As a matter of theory, creditors are entitled to take enforcement actions; but in practice, waivers are negotiated while the restructuring agreement is being discussed.

Safeguard proceedings: The judgment opening safeguard proceedings is public. The court appoints (where certain thresholds are met) one or more judicial administrator(s) in order to supervise or assist the directors in drafting the safeguard plan. A creditors' representative is systematically appointed by the court; his or her role mainly involves handling the debt verification process and representing the interests of all creditors.

Unlike *mandat ad hoc* and conciliation proceedings, safeguard proceedings trigger the application of automatic rules limiting the rights of the debtor and its stakeholders (eg, stay of payments and claims, continuation of ongoing contracts). To this extent, safeguard proceedings are similar to formal insolvency proceedings.

3.5 Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

Mandat ad hoc and conciliation proceedings do not involve a stay of individual claims. Creditors are not barred from taking legal action against the debtor to recover their claims; but in practice, they do not usually try to do so.

Pursuant to French contract law, a court may impose on certain creditors deferral or rescheduling of payment obligations for a maximum period of two years (the so-called 'grace period'). Where the debtor benefits from a conciliation proceeding, French insolvency law provides for a grace period mechanism which is more flexible, to the benefit of the debtor.

Unlike *mandat ad hoc* and conciliation proceedings, safeguard proceedings entail a stay of payments, which applies to all creditors. The debtor cannot pay pre-insolvency claims (this is the so-called 'freeze of payments') and creditors must file proof of their claims, which will be paid according to the terms of the safeguard plan. By exception, the insolvency judge may authorise the payment of certain pre-insolvency claims – for instance, to pay certain secured creditors that have a retention title on assets that are crucial to the pursuit of the debtor's operations.

In case of accelerated financial safeguard, the stay applies to financial creditors only (other creditors, such as suppliers, are in principle not affected by the commencement of proceedings).

3.6 What process do restructuring proceedings typically follow (including likely length of process and key milestones)?

***Mandat ad hoc* and conciliation:** *Mandat ad hoc* and conciliation proceedings do not follow any specific process. This mainly depends on the mission of the *mandataire ad hoc* or conciliator and therefore on the needs of the debtor.

However, as a matter of practice, in case of financial restructuring, the *mandataire ad hoc* or conciliator usually starts his or her mission by assessing the financial and economic situation of the debtor and preparing proposals for the main creditors, usually elaborated on the basis of an independent business review conducted by external financial advisers.

The *mandataire ad hoc* or conciliator then convenes a confidential meeting of the main creditors, to present the restructuring proposals and start the negotiation process.

In parallel, the debtor can file for a specific procedure to obtain deferral of payments from social and tax creditors.

Once an agreement has been reached with all main creditors in the context of conciliation proceedings, this can be acknowledged by the president of the court ('*constat*') or approved by the court ('*homologation*'), and thus allow the debtor and creditors to benefit from certain advantages (eg, privilege of new money creditors; protection from claw-back actions).

While there is no maximum duration for *mandat ad hoc* proceedings, conciliation proceedings are limited to a maximum duration of five months.

Usually, when the debtor is solvent, negotiations commence in the context of *mandat ad hoc* proceedings. When the creditors are about to reach an agreement, the proceedings are 'converted' into conciliation, so that the agreement can be acknowledged or approved by the judicial authority.

Where unanimous consensus cannot be achieved, but at least two-thirds of the creditors approved the debtor's proposals, safeguard proceedings can be opened to cram down the dissenting creditors (see question 3.8).

Safeguard proceedings: Safeguard proceedings generally proceed as follows:

- The court order opening safeguard proceedings triggers the commencement of the so-called 'observation period', which may last up to 18 months. During this time the debtor, with the assistance of the judicial administrator, prepares a safeguard plan.
- The creditors are consulted on the draft safeguard plan, either individually or collectively.
- Once the safeguard plan has been approved by creditors, it must be sanctioned by the court in order to be binding.

3.7 What are the roles, rights and responsibilities of the following stakeholders in restructuring proceedings? (a) Debtor, (b) Directors of the debtor, (c) Shareholders of the debtor, (d) Secured creditors, (e) Unsecured creditors, (f) Employees, (g) Pension creditors, (h) Insolvency officeholder (if any), (i) Court.

Mandat ad hoc **and conciliation:**

(a)(b) Debtor/directors of the debtor

Business runs as usual and the debtor remains in possession. Directors are assisted by the *mandataire ad hoc* or conciliator they have chosen.

(c) Shareholders of the debtor

There are no specific requirements with respect to shareholders (which may be unaware of such confidential proceedings).

(d)(e) Secured creditors/unsecured creditors

Negotiations with the main creditors take place on a purely amicable basis. Waivers cannot be imposed, with the exception of grace periods.

(f) Employees

There are no specific rules or requirements with respect to employees, who are usually not aware of the proceedings, except in case of approval of the conciliation agreement by the court, for which the employees' representatives shall be consulted.

(g) Pension creditors

There are no pension creditors.

(h) Insolvency officers

The *mandataire ad hoc* or conciliator can be any independent third party to the debtor, but in practice, he or she is chosen among the 150 judicial administrators registered on the French national list. His or her role is freely determined in the nomination court order, depending on the needs of the debtor. He or she has no coercive powers.

(i) Court

Only the president of the court is involved in *mandat ad hoc* and conciliation proceedings. His or her role is limited to the nomination of the *mandataire ad hoc* or conciliator, who regularly reports to him or her. In case of conciliation proceedings, the debtor may choose to have the agreement acknowledged by the president of the court or have it formally approved by a judgment of the court (in which case confidentiality is lost).

Safeguard proceedings:

(a)(b) Debtor/directors of the debtor

The debtor and/or its directors remain in possession, but are supervised or assisted in the business administration by a court-appointed judicial administrator. Their role is to prepare the draft safeguard plan, with the assistance of the judicial administrator.

(c) Shareholders of the debtor

As a matter of principle, the shareholders retain control of the company. The draft safeguard plan cannot involve the sale of the business as going concern (ie, an asset deal), so the shareholders have a guarantee that they will not ‘lose' their asset. However, they may be diluted if the plan includes debt-to-equity swaps, which cannot be imposed on them unless very strict conditions are met.

(d)(e) Secured creditors/unsecured creditors

Creditors must file proof of their claims, unless they have been ‘pre-filed' by the debtor itself (see question 4.7). They must vote on the draft safeguard plan and can make proposals or suggest an alternative plan to the debtor's. They are entitled to request their appointment by the insolvency judge as controller (‘*controleur*').

(f) Employees

Employees are involved in the proceedings via their representatives, who are invited to the main hearings in order to give their non-binding opinions.

(h) Insolvency officers

The court appoints one or more judicial administrator(s) with a mission to supervise or assist the debtor in the administration of its business activities and the definition of the safeguard plan; but the management remains in place, especially for day-to-day business activities.

The court also appoints one or more creditors' representatives.

(i) Court

Safeguard proceedings are essentially court-driven proceedings in which key decisions must be authorised by the court (eg, safeguard plan). Other transactions, such as payment of certain pre-filing claims, should be authorised by the insolvency judge (‘*juge-commissaire*').

3.8 Can restructuring proceedings be used to "cram down" and bind dissentient creditors to a transaction supported by other creditors? Are creditors separated into classes for the purposes of voting in the proceedings? What are the relevant voting thresholds? Is "cross-class cramdown" available?

In *mandat ad hoc* and conciliation proceedings, the restructuring agreement is freely negotiated between the debtor and its main creditors, and there is no possibility to cram down a minority of dissenting creditors to bind them to the transaction. By exception only, the court may impose deferral of payment on certain creditors (individually) for a period of up to two years, but this process cannot be considered a cram-down mechanism.

By contrast, safeguard proceedings can be used to cram down dissenting creditors.

As a matter of principle, all creditors affected by the safeguard plan shall be consulted and may vote on the plan, either individually or collectively.

Creditors' committees can be set up if certain criteria are met (basically, for debtors of a certain size), with one committee of financial institutions and one committee of main suppliers. If the debtor has issued bonds, a third committee is created for all bondholders. The committees must vote on the draft safeguard plan prepared by the debtor, as well as on those proposed by creditors (if any). Approval is achieved by a majority of two-thirds in value of the claims held by the creditors that vote. Dissenting creditors are bound by the decision of that two-thirds majority.

Once the plan has been approved by the committees or by creditors consulted on an individual basis, the court sanctions the plan, provided that all interests are sufficiently protected. Once the court has sanctioned the plan, all creditors – including dissenting creditors of a committee – are bound by the plan.

If creditors reject the plan, the court is entitled to impose on them a rescheduling of their claims for up to 10 years (no reduction of claims is possible).

The French legal concept of creditors' committees is expected to be modified by mid-2021 in accordance with the terms of the EU Restructuring Directive, which provides for the introduction of classes of creditors and cross-class cram-down rules.

3.9 Can restructuring proceedings be used to compromise secured debt?

In case of safeguard proceedings, dissenting creditors – including secured creditors – can be crammed down and bound to the plan if certain conditions are met. In addition, the court can impose a rescheduling of the debt for a maximum period of 10 years (see question 3.8).

3.10 Can contracts / leases be disclaimed or otherwise addressed through restructuring proceedings?

In principle, restructuring proceedings cannot be used to modify certain contracts or leases, except where they can be consensually renegotiated. In addition, in the case of safeguard proceedings, specific rules apply with respect to the continuation and termination of ongoing contracts (including leases) (see question 4.9).

Clauses that provide for termination of ongoing agreements and clauses that result in a reduction of rights and interests of debtors on the sole ground of the commencement of *mandat ad hoc*, conciliation or safeguard proceedings are of no effect.

3.11 Can liabilities of third parties (e.g. guarantors) be released through restructuring proceedings?

After successful conciliation proceedings, individuals and entities that are co-obliged, or that have granted a personal guarantee or assigned or transferred encumbered property, are entitled to benefit from the provisions of the conciliation agreement, if such an agreement was acknowledged by the president of the court (‘*constat*') or approved by the court (‘*homologation*') at the end of the proceedings. In other words, creditors benefiting from such guarantees cannot enforce them as long as the conciliation is implemented in accordance with its terms and provisions.

In case of safeguard proceedings, the issue of the commencement order shall stay any action against individuals who are co-obligors, have granted a personal guarantee or have allocated or assigned an asset as collateral, until the judgment ordering the plan or pronouncing liquidation. The court may subsequently grant them a moratorium or a deferred payment period for a maximum of two years. Creditors secured by these guarantees may take protective measures. Legal entities that are co-obligors or have granted a personal guarantee cannot benefit from these protective rules.

The order confirming the safeguard plan shall make its provisions binding on anyone. Individual co-obligors and persons who have granted a personal surety or allocated or assigned an asset as collateral may avail of the provisions of the safeguard plan. Again, this rule does not apply to legal entities.

3.12 Is any protection and/or priority afforded to the providers of new money in the context of restructuring proceedings (i.e. is "DIP financing" available)?

There is no specific provision for *mandat ad hoc* proceedings.

In case of conciliation proceedings, and provided that the conciliation agreement is approved by the court (‘*homologation*'), lenders making new money available and/or suppliers making trade credit available to the debtor will benefit from the so-called ‘new money privilege' in case of subsequent collective restructuring or insolvency proceedings. In other words, if the restructuring under the conciliation agreement fails and the debtor files for the commencement of safeguard, rehabilitation or liquidation proceedings, new money claims will rank before most of the pre-insolvency debts and most liabilities generated by the insolvency estate (ie, liabilities that arose in connection with the operation of the business after the insolvency judgment was issued).

French restructuring and insolvency law does not provide for any debtor-in-possession financing in case of safeguard (or insolvency proceedings). However, this concept should be introduced in France before mid-2021, pursuant to Chapter 4 of the EU Directive on Restructuring.

3.13 How do restructuring proceedings conclude?

Mandat ad hoc **and conciliation:** *Mandat ad hoc* and conciliation proceedings may conclude with the signing of an agreement between the debtor and its main creditors, thus avoiding the commencement of collective restructuring or insolvency proceedings. Such procedures are very successful in practice, as an agreement is reached in more than 70% of cases.

If a conciliation agreement is reached, the debtor can choose to have it acknowledged by the president of the court (‘*constat*') or have it formally approved by judgment of the court (‘*homologation*') at the end of the proceedings. If the agreement is merely acknowledged, it is binding only on the parties thereto and remains confidential. If the conciliation agreement is approved by a formal judgment, such judgment will acknowledge that the debtor is not in a state of cessation of payments or that the conciliation agreement will cure such a state of cessation of payments. The judgment will also acknowledge that the terms of the agreement are of such a nature as to ensure the continued operation of the business and will not harm the rights of third-party creditors. Approval of the conciliation agreements grants a privilege of new money to lenders making new money available and/or suppliers making trade credit available to the debtor (see question 3.12). It also prevents the court, in case of subsequent insolvency, from fixing the starting point of the claw-back period earlier than the date of the judgment approving the conciliation agreement.

Preventive proceedings can also be used to support the company in its negotiations with other stakeholders, such as employees, or to prepare for subsequent collective proceedings (pre-packaged plan).

They can also be used as a framework to find potential investors and prepare for the sale of the debtor. It is possible to effect a pre-packaged sale of assets (‘prepack cession'), through the combination of preventive proceedings (mandat ad hoc and conciliation), in the confidential context of which negotiations take place with bidders (thus preserving the value of the business), and rehabilitation proceedings, in the context of which the sale is implemented (under a specific regime, eg, sale of assets, debt free) (see question 7.1).

In addition, it has become market-practice in France to prepare and implement distressed M&A transactions (i.e. sale of underperforming companies, usually for negative prices) in the frameworks of conciliation proceedings. Indeed, the sale of distressed companies to third-party buyers can be a source of liability for sellers. As a matter of practice, the main risk for the shareholder(s) of a distressed company consists in selecting an investor that would finally not be able to successfully restructure the target company after the sale, potentially taking advantage of a "negative purchase price" to enrich itself to the detriment of the target company and its employees. Implementing a sale in preventive allow to have the sale approved by the court, thus reducing, in practice, potential liability risks in case the buyer fails to restructure the company and files for bankruptcy proceedings at a later stage.

Safeguard proceedings: Safeguard proceedings conclude with the approval of the safeguard plan by the creditors and its adoption by the court. Failure to adopt such a plan usually triggers the commencement of rehabilitation proceedings or liquidation proceedings, in the context of which the business can be sold.

4 Insolvency

4.1 What types of insolvency proceeding are available in your jurisdiction, and what are the benefits and drawbacks of each?

French law provides for two types of collective insolvency proceedings: rehabilitation proceedings (‘*redressement judiciaire*') and liquidation proceedings (‘*liquidation judiciaire*').

Rehabilitation proceedings: Rehabilitation proceedings are intended for debtors that are in a state of cessation of payments, but whose business appears viable. The proceedings generally operate along the same lines as safeguard proceedings, except in particular that:

- the judicial administrator has wider powers (and may exceptionally replace the management of the debtor);
- the business can be sold as a going concern; and
- specific rules apply in relation to the claw-back of certain transactions.

If the business can be restructured by the debtor itself, the judicial administrator and/or the debtor will prepare a rehabilitation plan (‘*plan de continuation*') (usually including debt rescheduling and/or write-offs, as well as redundancy measures) and submit it for the approval of the creditors (either individually or within the framework of creditors' committees).

If the business cannot be restructured by the debtor itself, the judicial administrator will try to sell the business as a going concern. Potential buyers are requested to make offers. The buyer is chosen by the court when adopting the sale-of-business plan (‘*plan de cession*'). A sale-of-business plan is in essence an asset transfer (and not a share deal) to one or several independent third-party buyer(s). As matter of principle, the debtor sells its assets free from any debt (subject to limited exceptions).

As regards employees, the law provides for specific simplified rules for redundancy.

Judicial liquidation: Liquidation proceedings are ordered for debtors that are in a state of cessation of payments and for which recovery through rehabilitation is in principle not possible. The purpose of liquidation proceedings is to end the business of the debtor – either through sale of the business as a going concern or through a piecemeal sale of assets.

The court may order the opening of liquidation proceedings either *ab initio* or after rehabilitation proceedings – for instance, if a sale of the business has been implemented or if no rehabilitation solution (ie, a rehabilitation plan or sale-of-business plan) could be implemented within the framework of rehabilitation proceedings.

4.2 How, by whom and on what grounds are insolvency proceedings initiated? Can the instigating party (or any other parties) select the identity of the relevant insolvency officeholder?

Rehabilitation proceedings and liquidation proceedings are intended for debtors which are in a state of cessation of payments.

Under French law, the insolvency test is based on an assessment of cash flow (there is no balance-sheet test). The debtor is considered to be insolvent (ie, in a state of cessation of payments) when it is unable to meet its due and payable debts with its immediately available assets (ie, cash plus assets that can be immediately turned into cash, credit reserves and debt moratoria).

Debtors have a legal duty to file for the commencement of insolvency proceedings (either rehabilitation or liquidation proceedings) within 45 days of the date on which the cessation of payments occurred, unless conciliation proceedings are ongoing. The filing is made by formal request to the court. The debtor is not entitled to choose the insolvency practitioners (ie, the judicial administrator and creditors' representative) whom it would like the court to appoint.

Unlike in consensual proceedings and safeguard proceedings, creditors are entitled to request the commencement of insolvency proceedings if they can prove that the debtor is insolvent, following a writ delivered to the debtor. Proceedings can also be commenced upon petition of the public prosecutor.

4.3 What are the effects of the commencement of insolvency proceedings, both for the debtor and for creditors?

The effects are quite similar to those of the commencement of safeguard proceedings (see question 3.4).

The opening order triggers the application of automatic rules limiting the rights of the debtor and its stakeholders (eg, stay of payments and claims; continuation of ongoing contracts). The court appoints the insolvency officers (ie, one or more judicial administrator(s) and creditors' representative(s)).

4.4 Does a moratorium or stay apply and, if so, what is its scope? Are there exceptions?

As is the case in safeguard proceedings, the commencement of rehabilitation and liquidation proceedings triggers a stay of payments which applies to all creditors. The debtor is not allowed to pay pre-insolvency claims (this is the so-called 'freeze of payments') and creditors must file proof of their claims unless they have already been 'pre-filed' by the debtor itself.

By exception, the insolvency judge may authorise the payment of certain pre-insolvency claims – for instance, to pay certain secured creditors with a retention title on assets that are crucial to the pursuit of the debtor's operations. Certain rules also apply to the set-off of debts.

4.5 What process do insolvency proceedings typically follow (including likely length of process and key milestones)?

Rehabilitation proceedings: For rehabilitation proceedings, the process is quite similar to that for safeguard proceedings where a rehabilitation plan ('*plan de continuation*') – that is, a debt restructuring plan – is at stake. If no rehabilitation plan can be implemented, a sale of the business as a going concern ('*plan de cession*') will be considered.

The process is usually as follows:

- Upon authorisation by the court, the judicial administrator publishes a bid for offers. Potential buyers have access to selected documents and information (usually – but not necessarily – in the form of an electronical data room), in order to prepare their offer to buy the business as a going concern (either as a whole or only certain activities that can be run separately).
- The sale is a sale of assets (not a sale of shares). The buyer is entitled to select ('pick and choose') the assets, as well as the ongoing contracts (including employment contracts), it would like to take. The proposed sale price is usually rather low.
- All offers must be submitted to the judicial administrators before the date set by the court.
- Buyers can improve their offer until two days before the hearing at which they present their offer to the court.
- The buyer is selected by the court and the sale occurs pursuant to the sale-of-business-plan adopted by the court.

Liquidation proceedings: On the commencement of liquidation proceedings, the court appoints a judicial liquidator ('*liquidateur*').

As a matter of principle, the opening of liquidation proceedings immediately ends the debtor's business operations. In such case, the assets of the debtor can be sold individually, upon authorisation of the insolvency judge ('*juge-commissaire*'). All employees are made redundant by the liquidator.

If sufficient cash is available to finance a continuation of the business, and if the assets can be sold as a going concern (within the framework of a sale-of-business plan), the court may order the temporary continuation of the business for up to three months, renewable once.

In such case the court may also appoint a judicial administrator. The process is similar to that described above for rehabilitation proceedings.

4.6 What are the respective roles, rights and responsibilities of the following stakeholders during the insolvency proceedings? (a) Debtor, (b) Directors of the debtor, (c) Shareholders of the debtor, (d) Secured creditors, (e) Unsecured creditors, (f) Administrator, (g) Employees, (h) Pension creditors, (i) Insolvency officeholder, (j) Court.

Rehabilitation proceedings:

(a)(b) Debtor/directors of the debtor

As a matter of principle, the debtor and its directors are partially divested (by exception only, they can be totally divested). The court will appoint one or more insolvency officers (judicial administrator and creditors' representatives).

(c) Shareholders of the debtor

If a rehabilitation plan is implemented, the shareholders retain control over the debtor. However, they may be diluted if the plan includes debt-to-equity swaps, which cannot be imposed on them unless very strict conditions are met. Alternatively, if the business is sold as a going concern (through an asset deal), the shareholders lose their investment.

(d)(e) Secured creditors/unsecured creditors

With certain exceptions, creditors have the same duties and rights as in safeguard proceedings.

(g) Employees

Employees are involved in the proceedings via their representatives, who are invited to the main hearings in order to give their non-binding opinions. Certain claims of employees – in particular, redundancy claims – can be advanced by a state insurance organ, up to certain limited amounts.

(i) Insolvency officers

The court appoints one or more judicial administrator(s) with a mission to assist the debtor in the administration of the business and in the definition of the restructuring plan. By exception only, the court may appoint one or more judicial administrator(s) with a mission to replace the directors or the debtor's representatives (eg, if fraudulent management is suspected or if the directors are absent). The court also appoints one or more creditors' representative(s).

(j) Court

Rehabilitation proceedings are essentially court-driven proceedings in which key decisions must be authorised by the court (eg, redundancy plan for all or certain groups of employees; continuation plan; and sale of business plan).

Other transactions, such as payment of certain pre-filing claims or redundancies, should be authorised by the insolvency judge (‘*juge-commissaire*') who is appointed by the court in the order opening the insolvency proceedings.

Liquidation proceedings: In liquidation, a liquidator is appointed by the court. The liquidator replaces the directors as a whole and acts as representative of the creditors. The liquidator's mission is to sell the (remaining) assets and recover claims, verify the debts and pay the creditors, and – where necessary – initiate legal action against third parties in the interests of the creditors. If the business activities can be continued, the court may appoint one or more judicial administrator(s), especially to help find buyers in the context of a sale-of-business plan.

4.7 What is the process for filing claims in the insolvency proceedings?

Creditors must prove their claims arising prior to the insolvency judgment within two months (four months for creditors residing outside France) of the date of publication of the insolvency judgment in a legal gazette. If a creditor fails to file its proof of debt in a timely manner, it will not be allowed to participate in the distribution of proceeds. Certain post-judgment claims must also be proved.

The 2014 reform of French insolvency law simplified the process for lodging creditors' claims. The debtor must now provide a list of all claims to the creditors' representative following the commencement of proceedings and all listed claims are deemed to have been lodged. Creditors must file proof of claims only if this has not been pre-filed by the debtor or if they disagree with the amounts and characteristics of the claims (eg, privilege) pre-filed by the debtor.

Within the framework of rehabilitation proceedings or liquidation proceedings, the creditors' representative(s) have the duty to receive and verify the lodgement of creditors' claims. If claims are contested by the debtor or the insolvency officers, their admission should be submitted to a decision of the insolvency judge.

4.8 How are claims ranked in the insolvency proceedings? Do any claims have "super priority" and is there scope for subordination by operation of law (e.g. equitable subordination)?

In insolvency proceedings, certain claims – such as pre-filing unpaid employee claims and post-filing administrative expenses (legal costs) – have super-priority over all secured and unsecured creditors.

Claims relating to credit made available to the debtor within the framework of previous conciliation proceedings may also benefit from super-priority (but will be paid after certain employment-related claims and administrative expenses) – this is the so-called ‘new money privilege'.

Certain claims incurred after the commencement of insolvency proceedings in the context and for the benefit of the continuation of the activity must also be paid in a preferential manner (ie, as a matter of principle, when they become due and payable).

4.9 What is the effect of insolvency proceedings on existing contracts? Is the counterparty free to terminate? Can they be disclaimed?

Pursuant to French insolvency law, ongoing contracts cannot be terminated by counterparties on the exclusive ground of the commencement of insolvency proceedings or because of defaults of the debtor which originated prior to such commencement. Clauses providing for such termination have no effect. Ongoing contracts must be performed in accordance with their initial terms and provisions.

However, the judicial administrator is entitled to select ongoing contracts which shall be terminated (either automatically or upon authorisation of the insolvency judge). Such termination usually concerns contracts which are too expensive.

This regime also applies in the case of safeguard proceedings, but not in the context of *mandat ad hoc* or conciliation proceedings.

4.10 Can transactions entered into by the debtor prior to be insolvency be challenged and set aside? What are the relevant grounds / look-back periods / defences?

In rehabilitation and liquidation proceedings, the court shall determine the date on which the debtor is deemed to have become insolvent. This can be any date in the 18 months preceding the date of the insolvency judgment. This marks the beginning of the so-called 'hardening period' ('*période suspecte*').

Certain transactions entered into by the debtor during the hardening period are automatically void or voidable by the court.

Automatically void transactions include transactions or payments which are made during the hardening period and which constitute voluntary preferences for the benefit of some creditors (or third parties) to the detriment of other creditors. These might include, in particular:

- a transfer of assets made for no consideration;
- a contract under which the reciprocal obligations of the debtor significantly exceed those of the counterparty;
- payment of a debt that was not due at the time of payment;
- payment of a due debt that was made in a manner which is not commonly used in the ordinary course of business;
- a security interest granted in consideration of a pre-filing debt;
- any preservation measures (unless the attachment or seizure pre-dates the date of insolvency);
- the transfer of any asset or right to a trust arrangement (unless such transfer is made as security for debt incurred at the same time); or
- any amendment to a trust arrangement that dedicates assets or rights as a guaranty of pre-filing debt.

Transactions made for no consideration may be voided by the court if they occurred in the six months preceding the hardening period.

Certain transactions (eg, transfers of assets for no consideration) can be voided if the counterparty was aware of the debtor's state of insolvency.

However, where rehabilitation or judicial liquidation proceedings follow conciliation proceedings that ended with a court-approved agreement, the court cannot establish the date of cessation of payments on a date which precedes the date of the approval order (see question 3.13).

4.11 How do the insolvency proceedings conclude? Can any liabilities survive the insolvency proceedings?

Rehabilitation proceedings usually conclude with either a continuation plan or a sale-of-business plan. If neither solution is achievable, the debtor will enter into liquidation proceedings, in the context of which its assets will be usually sold piecemeal.

Liquidation proceedings terminate with a court order pronouncing the closure of the proceedings. In most cases there is a deficiency of assets ('*clôture pour insuffisance d'actifs*') (ie, all claims will not be paid). Such liabilities, in principle, will not survive the insolvency proceedings. If the debtor is a legal entity, it is considered automatically wound up by the order closing the proceedings.

The liquidation proceedings may end with a *boni* of liquidation – that is, a situation where all claims can be paid and some cash or assets remain at the end of the procedure ('*clôture pour extinction du passif*'). However, in practice, this is exceptional. The legal entity does not disappear with the order closing the liquidation proceedings (but usually remains as an empty shell).

5 Cross-border / Groups

5.1 Can foreign debtors avail of the restructuring and insolvency regime in your jurisdiction?

As a matter of principle, French courts have jurisdiction to open and rule on restructuring and insolvency proceedings with respect to debtors whose registered office (for legal entities) or domiciled activities (for individual debtors) are located in France. By exception, French courts also have international jurisdiction with respect to foreign debtors where it can be proved that their registered office or domiciled activities abroad are fictitious, and that the true location of their office or activities is in France.

Pursuant to private international insolvency law (ie, where the EU Insolvency Regulation does not apply), the French courts may also have 'secondary' jurisdiction over debtors whose office or activities are not located in France, but whose main centre of interests ('*centre principal des intérêts*') is located in France. According to the decision of the Supreme Court in *BCCI Overseas*, this concept may be defined as "the main secondary establishment in France". In other words, if a debtor has its registered office or domiciled activities in a non-EU state but its main secondary establishment in France, the French courts may have jurisdiction to commence restructuring or insolvency proceedings as long as no foreign proceedings have been opened abroad and recognised in France through an exequatur procedure.

Under the EU Insolvency Regulation, foreign debtors can avail of restructuring and insolvency proceedings in France if their 'centre of main interests' (COMI) is located in France (which is not the same as the concept of 'main centre of interests' applicable under French private international insolvency law). These debtors are entitled to file for the commencement of main insolvency proceedings in France, which can be either safeguard proceedings (as well as accelerated safeguard and financial accelerated safeguard proceedings), rehabilitation proceedings or liquidation proceedings. Secondary insolvency proceedings can be opened where foreign debtors have an establishment in France.

5.2 Under what conditions will the courts in your jurisdiction recognise and/or give effect to foreign insolvency or restructuring proceedings or otherwise grant assistance in the context of such proceedings?

Under the EU Insolvency Regulation, insolvency and restructuring proceedings opened by the courts in EU member states other than France should be immediately and automatically recognised in France from the moment they become effective in the state in which the proceedings are opened. This principle of automatic recognition also applies to decisions which derive directly from the insolvency proceedings and are closely linked with them (eg, decisions related to voidance actions or the set-off of claims).

Where the EU Insolvency Regulation does not apply (ie, for insolvency and restructuring proceedings opened by courts in non-EU states), full recognition and enforcement of the proceedings in France are conditioned upon the satisfaction of an exequatur procedure. The court will ensure that the foreign order complies with international regularity, which involves the satisfaction of three conditions pursuant to the decisions in *Munzer* and *Cornelissen*:

- jurisdiction of foreign courts (ie, the French courts do not have exclusive jurisdiction, the subject matter of the case is connected with the foreign court to which the case has been referred and no fraud has been committed in the court filing process);
- compliance with international public policy; and
- absence of fraud.

In the absence of an exequatur procedure, non-EU foreign insolvency and restructuring proceedings may have certain effects in France. For instance, foreign insolvency practitioners cannot take enforcement actions, but can take certain protective measures in France.

5.3 To what extent will the courts cooperate with their counterparts in other jurisdictions in the case of cross-border insolvency or restructuring proceedings?

The EU Insolvency Regulation provides for cooperation among courts in cross-border insolvency and restructuring proceedings. This is the case not only where main and secondary proceedings against a single debtor are concerned, but also in the case of insolvencies in groups of entities. In both cases, where appropriate, courts may, for instance, appoint an independent person or body to act on their instructions, provided that this is not incompatible with the applicable rules.

Where the EU Insolvency Regulation does not apply (ie, for insolvency or restructuring proceedings opened by courts in non-EU states), French law sets out no specific rules, but the French courts are likely to cooperate and communicate with foreign courts, as happened in the *Nortel* dispute.

5.4 How are corporate groups treated in the context of restructuring and insolvency proceedings? If there is no concept of a group proceeding (or consolidation), is there any regime through which insolvency officeholders must / may cooperate?

In France – unlike in the United States, for instance – there is no concept of group proceedings or substantive consolidation. Each entity in a group is treated as a distinct debtor. Restructuring and insolvency proceedings opened against several entities of a group are autonomous.

However, French law includes rules that streamline restructuring and insolvency proceedings involving groups. For instance, where several entities of the same group are involved and certain criteria are met, restructuring and/or insolvency proceedings can be centralised (ie, commenced and supervised by a single court). In addition, courts may appoint the same judicial administrators and creditors' representatives, which significantly increases the prospects of identifying and implementing a restructuring solution in an efficient, coordinated and successful manner.

The EU Recast Insolvency Regulation also sets out specific rules on coordination and cooperation among insolvency practitioners and courts, where entities of the same group are subject to restructuring and/or insolvency proceedings.

5.5 How is the debtor's centre of main interests determined in your jurisdiction?

Where the EU Insolvency Regulation applies, the debtor's COMI is presumed to be located at the place where it has its registered office or domiciled activities. However, this presumption is rebuttable. In cases such as *Eurofood*and *Interedil*, the Court of Justice of the European Union has defined COMI as "the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". The French courts regularly rule in cases in which the presumption relating to the registered office is rebutted, as happened in the *Nortel*, *Coeur Défense* and *Eurotunnel* disputes, for instance.

5.6 How are foreign creditors treated in restructuring and insolvency proceedings in your jurisdiction?

As a matter of principle, foreign creditors have the same rights and duties in restructuring and insolvency proceedings as all other creditors.

However, the provisions of French law on account of distance offer a certain degree of protection to foreign creditors, in particular with respect to the filing of claims. If a creditor's registered office or domicile is located outside France, that creditor will benefit from an additional two months in which to file its claims (ie, the proof of claims should be filed within four months of publication of the commencement order, instead of two months as for local creditors).

Where the EU Insolvency Regulation applies (ie, to proceedings in respect of a debtor whose COMI is located in the European Union), foreign creditors should receive an individual notice providing information about the proceedings and the lodging of claims (a standard form for the lodging of claims may be included). French law provides that the four-month period in which to file proof of claims is not applicable to foreign creditors that have not received such a notice.

6 Liability risk

6.1 What duties do the directors of the debtor have when the company is in the "zone of insolvency" (or actually insolvent)? Do they have an obligation to commence insolvency proceedings at any particular time?

At all times, the directors have a duty to act diligently in the bests interest of the debtor. They may face personal civil liability *vis-à-vis* third parties if they have committed an intentional and serious fault which is incompatible with the normal exercise of their duties.

These general duties of the directors do not change once the debtor has become insolvent or is at risk of becoming insolvent. However, the directors have a duty to file for insolvency proceedings within 45 days of the cessation of payments, unless they have applied for the commencement of conciliation proceedings.

6.2 Are there any circumstances in which the directors could incur personal liability in the context of a debtor's insolvency?

Failure to comply with their legal duties – in particular, to file for the commencement of insolvency proceedings in a timely manner – exposes the directors to personal liability for the damage sustained by the creditors as a whole as a result of the late filing, including the loss of the possibility to find a rehabilitation solution. In addition, the directors may be barred from managing a company or business for up to 15 years.

Even absent the formal cessation of payments, directors may be held personally liable if it is shown that they abusively continued a loss-making activity, which would inevitably lead to the cessation of payments. Experience shows that common grounds for holding the directors personally liable include failure to take timely preventive measures, when financial difficulties materialised, to remedy the situation or at least avoid it getting worse. This is all the more so since preventive procedures such as *mandat ad hoc* and conciliation are available to debtors under French law in order to remedy their difficulties and ultimately avoid a cessation of payments. However, as a matter of theory, the commencement of *mandat ad hoc* and conciliation proceedings is not a legal duty and arises at the debtor's own discretion only.

6.3 Is there any scope for any other party to incur liability in the context of a debtor's insolvency (e.g. lender or shareholder liability)?

Creditors' liability: In principle, French law includes a specific legal provision whereby, if a borrower becomes subject to insolvency proceedings, lenders cannot be held liable in connection with the facilities they granted to such a borrower.

This specific legal protection can be lost by a lender if one of the three following conditions is met: (i) either the creditor committed a fraud, or (ii) it manifestly interfered in the management of the borrower, or (iii) it obtained manifestly disproportionate security interests.

The claimant has to establish, in addition, that the financing granted (or maintained) was wrongful. Traditionally, financings may be considered wrongful if either (i) they are ruinous for the borrower, i.e. their terms and conditions (in particular the interest rate) are such that they could only lead the borrower to an insolvency, or (ii) the borrower's financial situation was already irremediably compromised (i.e. leaving the borrower manifestly no reasonable chance to turn around) at the time the financing was granted or maintained, and the creditor was aware of that fact at the time when it granted or maintained credit to the borrower.

The key liability risk that creditors might face under French insolvency law is that of being held liable under the so-called "abusive support" concept (*soutien abusif*), i.e. having artificially delayed the opening of insolvency proceedings of a company that had no real prospects of recovery, thus allowing the company to increase the amount of its liabilities. French courts have developed a rather extensive approach of the notion of "credit" (*concours*) when considering abusive support. The risk to be held liable on the ground of abusive support does not only concern banks or credit institutions, but potentially any third party which abusively supported a debtor by granting it *credit* (understood in a broad sense). If a creditor is held liable on the above-mentioned ground, the amount of damages to be paid corresponds to the increase of the company's deficiency of assets during the period of "abusive support".

Shareholders' liability: As a matter of principle, a shareholder of a limited liability company cannot be automatically held liable for the debts of its subsidiary. By exception, if a shareholder has taken actions that are detrimental to the debtor's interests, liability actions can be initiated against it based on the following grounds.

Directors' liability: In theory, a key risk for a shareholder is that of being considered a *de facto* manager of its insolvent subsidiary. It is possible to 'pierce the corporate veil' – that is, to hold the parent liable for all or part of the debts of its subsidiary – in a situation where the parent interfered in the management of its subsidiary and could thus be considered a *de facto* manager of the subsidiary, and committed mismanagement faults.

Liability for environmental damages: Pursuant to French law, both direct shareholders and indirect shareholders may be held liable for environmental damages caused by a subsidiary, provided that the following conditions are satisfied:

- The subsidiary operates a classified facility (ie, facilities that are likely to present a risk to human health and safety, protection of the natural environment or other legally protected interests);
- The shareholder holds more than 50% of the share capital of the subsidiary;
- The subsidiary has entered into liquidation proceedings; and
- The shareholder has committed serious fault which contributed to the subsidiary's shortfall of assets.

Extension of insolvency proceedings: Another risk for third parties, including shareholders of an insolvent entity, is the extension of rehabilitation or liquidation proceedings. Such proceedings can be extended from an entity to another if either:

- the two entities intermingled their assets; or
- one of the two entities is fictitious (ie, a sham).

The French Supreme Court has clearly adopted a restrictive approach of the situations in which such an extension can be ordered.

Creditors' liabilities: A shareholder can further be held liable if it has both interfered in the management of the company and committed a fault in its capacity as a creditor of the company (where it made credit available to the debtor other than in the form of equity).

Tort: Any third party (including a shareholder) can be held liable based on tort if it has committed an act that was detrimental to the debtor. As a matter of principle, such action will be initiated by the liquidator of the debtor, in order to indemnify the loss suffered by creditors as a result (which can be up to the shortfall of assets). By exception, former employees of an insolvent debtor are entitled to initiate legal actions based on tort against third parties and request indemnification for the specific loss they suffered from the insolvency proceedings of their employer.

Co-employment: Finally, if a shareholder behaved like a co-employer of employees of a subsidiary (in broad terms, by exercising direct control over the instructions given to such employees or by interfering with the management of the subsidiary – in the sense of having the same interests, business and management as the subsidiary), the employees may have a direct claim against the shareholder with respect to unpaid salary or claims for damages. The French Supreme Court recently adopted a more restrictive approach to co-employment (which in practice would lead employees to ground liability actions on tort instead of co-employment).

7 Other

7.1 Is it possible to effect a "pre-pack" sale of assets, and is it possible to sell the assets free and clear of security, in restructuring and insolvency proceedings in your jurisdiction?

It is possible to effect a pre-packaged sale of assets, through the combination of preventive proceedings (mandat ad hoc and conciliation) and rehabilitation proceedings.

This combination was commonly used in practice to take advantage of both procedures. In 2014, the French legislature introduced this practice into law, in the form of the so-called ‘prepack cession'. The debtor first requests the appointment of a conciliator with a mission to confidentially prepare a partial or global sale of the debtor's assets, to be completed within the framework of a subsequent ‘fast-tracked' collective proceedings (usually rehabilitation proceedings).

The advantage is that the confidentiality of conciliation proceedings preserves the value of the debtor while the negotiations are ongoing. The completion of the sale through collective proceedings enables the application of specific rules, in particular the sale of assets free from debts.

7.2 Is "credit bidding" permitted?

The concept of ‘credit bidding' (in the sense of the possibility for creditors to acquire existing debts through an auction process) does not exist under the French restructuring and insolvency regime.

As an alternative to making a purchase offer in the context of the sale-of-business process (which is a sale of assets), a bidder can choose to acquire shares of the debtor and negotiate a continuation plan with the creditors (debt rescheduling). By doing so, the purchaser avoids the competition between bidders in a ‘traditional' sale-of-business process.

8 Trends and predictions

8.1 How would you describe the current restructuring and insolvency landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

French law is usually described as being very protective of the interests of the debtor. This has been perceived as hindering the country's attractiveness to foreign investors. Reforms to French law over the last decade reflect the legislature's attempt to rebalance the powers to the benefit of creditors and achieve a new equilibrium. For instance, in 2014 it became possible for creditors to propose a safeguard plan or a continuation plan as an alternative to that prepared by the debtor itself.

This trend may also inform the legislative reforms expected before mid-2021, in order to implement the EU Restructuring Directive. One major anticipated change is the introduction of classes of creditors and cross-class cram-down mechanisms. To this extent, foreign jurisdictions which already provide for these rules (eg, Germany) may be a source of inspiration for the French legislature and thus help to further the goal of harmonisation across the European Union.

9 Tips and traps

9.1 What are your top tips for a smooth restructuring and what potential sticking points would you highlight?

Anticipation is key for a smooth restructuring: the debtor must be able to identify financial problems and spot the potential for an (upcoming) crisis situation. French law thus provides for early warning tools (eg, the alert procedure) in order to ensure that directors are aware of current or potential difficulties and incentivise them to take appropriate measures to resolve such difficulties.

The sooner the debtor and its directors react and take measures (eg, filing for preventive restructuring or insolvency proceedings), the greater the chances of restructuring the business (through a rescheduling of the debts or sale of the business as a going concern to a third-party buyer). Preventive restructuring proceedings are especially designed to help directors to resolve the debtor's financial difficulties at an early stage and thus avoid insolvency proceedings.

In this regard, directors should not hesitate to request protection from courts, via in particular the appointment of a *mandataire ad hoc* or a conciliator (where possible and appropriate). They can also simply request an informal and confidential meeting with an insolvency officer or with the president of the court, who could outline their duties and the solutions available under French law.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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