



**INSOL International**

**DIRECTORS IN THE TWILIGHT ZONE V**

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# FRANCE<sup>1</sup>

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<sup>1</sup>. This Chapter is up to date as of 15 May 2016 and has been specifically adapted for educational or for information purposes only. As such, the answers are limited to the questions raised and do not go into detail on specific subjects of French law. The chapter is not intended to be a substitute for professional advice.

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## QUESTION 2

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### 2. Actions potentially giving rise to liability for directors

- (a) In respect of which acts during the twilight period may a director be held personally liable or which may otherwise have adverse consequences for the director?
- (b) In relation to each act identified in (a) above:
  - (i) Is the director's liability considered to be civil, criminal or both?
  - (ii) Can a director be made personally liable for all or part of the company's losses or for all or part of the deficit to creditors?
  - (iii) Will liability attach to all the directors or to individual directors in proportion to their specific involvement?
  - (iv) Is there a specified period before commencement of a subsequent insolvency procedure within which the relevant act must have been undertaken in order for liability to attach to a director? and
  - (v) What defences, if any, will be available in relation to each offence?

#### 2.1 General

French law does not address the potential liability of directors and/or others involved in the management of a company in formal insolvency proceedings on the basis of the type of act performed. Rather French law starts from the causes of action available against such persons based on their behaviour. The responses to this question are therefore explained below on the bases of the main types of causes of action available.

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<sup>20</sup> Article L. 632-1, II of the French Commercial Code.

## 2.2 Action “en responsabilité pour insuffisance d’actif” (based on the shortfall of assets on the date the Court rules on the sanction)

2.2.1 *De jure* and *de facto* directors<sup>21</sup> of the debtor may be subject to personal liability in the case of judicial liquidation proceedings in the event of a shortfall of assets arising as a result of an act of “mismanagement” of the directors. Claiming against the directors for the shortfall of assets is commonly used by liquidators as a means of augmenting the assets available to cover the debts of the insolvent company.

For a director to be held personally liable for the shortfall of assets, the following criteria must be met:<sup>22</sup>

- (i) There must have been an act of “mismanagement”. However, under French law, “mismanagement” is not defined. Instead, it has been left to the relatively broad interpretation of the Courts. Each case is determined on its own facts. The most common examples of mismanaging a business are failing to put adequate measures in place whilst operating the business at a loss and the management granting excessive remuneration to itself during financially turbulent times for the company. Other examples of mismanagement include: corporate asset misappropriation (*abus de biens sociaux*),<sup>23</sup> the distribution of fictitious dividends (*distribution de dividendes fictifs*) and management making decisions which *prima facie* are badly prepared and destined to fail (for example burdensome investment decisions taken in an uncertain and difficult economic climate or acquisitions made as a result of poor negotiations); failure to comply with fiscal legislation (for example failing to comply with compulsory taxation requirements, as a result of a failure to declare tax obligations<sup>24</sup> including the failure of a director to notify the non-compliance with tax legislation by other directors, including, previous directors, even if the failure to comply with fiscal legislation occurred prior to the director's nomination)<sup>25</sup>; failure to comply with social legislation (for example, failing to comply with compulsory taxation requirements, as a result of a failure to declare social taxes)<sup>26</sup>; or favouring one creditor over another (for example, paying a specific creditor who was aware that the debtor was in cessation of payments).<sup>27</sup> Such acts (and many others) that result in a shortfall of assets may be considered as acts of mismanagement and may consequently result in sanctions against individual directors of the company.
- (ii) The liabilities of the company must exceed the value of its assets (*une insuffisance d’actifs*), to be assessed at the time the Court determines liability. Debts that arise after the opening of judicial liquidation are not included in the company’s liabilities for the purposes of this analysis.
- (iii) The claimant must demonstrate that the act or acts of mismanagement contributed to the shortfall of assets. However, the act(s) need not have been the sole and exclusive, unique or principal cause of the shortfall. It is enough that the act or acts of mismanagement were one of a number of causes that contributed to the shortfall. The question as to how much an act or acts contributed to the shortfall is for the Courts to decide. The Court’s decision is based on the facts of each case and this can sometimes lead to varied and unpredictable results. Furthermore, the acts and omissions of one director do not automatically exonerate the other directors because, as stated above, an act of mismanagement is not required to be the sole and exclusive cause of the asset shortfall.
- (iv) at least a partial<sup>28</sup> causal link must exist between the act of mismanagement and the shortfall of assets.<sup>29</sup>

<sup>21</sup> *De jure* directors who are appointed in accordance with the company’s articles of association and with the law. Please refer to Question 3, below for an explanation of *de facto* directors.

<sup>22</sup> Article L. 651-2 of the French Commercial Code. A reform bill known as *Loi Sapin II* (Article 48), may amend this article and complete it with a new paragraph which provides “However, in the case of a *de jure* or *de facto* director’s slight negligence in the management of the company, he/she will not be held liable in case of a shortfall of assets”.

<sup>23</sup> Commercial chamber of the Cour de cassation. 21 February 2012 n°11-13.513.

<sup>24</sup> Commercial chamber of the Cour de cassation 13 November 2007, n°06-13.212.

<sup>25</sup> Paris, 3° ch.A, 16 mai 2006, RG°2005/15820.

<sup>26</sup> Commercial chamber of the Cour de cassation 13 Novembre 2007, n°06-13.212

<sup>27</sup> Commercial chamber of the Cour de cassation 11 June 1996, n°94-16.067.

<sup>28</sup> Commercial chamber of the Cour de cassation, 17 February 1998, n°95-18.510.

<sup>29</sup> Commercial chamber of the Cour de cassation, 14 May 1991, n°89-19.081.

Pursuant to Article L 651-3 of the French Commercial Code, only the liquidator or the public prosecutor has the right to bring a claim for the shortfall of assets and within three years from the date of the Court decision opening the judicial liquidation of the company. Should the liquidator decide not to bring such a claim, the majority of the Court-appointed *contrôleurs* (creditors representing the interests of all creditors, usually large creditors) will have the right to bring this claim.<sup>30</sup>

2.2.2 If (i) to (iv) of 2.2.1 above are satisfied:

- (i) It is for the Court to decide, on the facts presented before it, whether the directors are to be held personally liable for the shortfall of assets.
- (ii) Directors found liable will be required to pay damages, which will form part of the assets of the debtor available for distribution to creditors. It is up to the Court to decide, on the basis of the seriousness of the act(s) of mismanagement and the strength of the causal link, whether the director in question should pay damages or not. That is, even if (i) to (iv) of 2.2.1 above are satisfied, the Court is not required to impose a sanction.
- (iii) It is up to the Court to decide the amount of damages that the director must pay. The amount is not necessarily proportionate to the level of contribution caused to the debts of the company. Indeed, Courts often materially reduce the amount of damages imposed on a director if the latter has endeavoured to solve the financial distress of the company, including by requesting the appointment of a *mandataire ad hoc* or a *conciliateur* (see hereafter under Appendix – Pre-insolvency proceedings). However, the appointment of a *mandataire ad hoc* or a *conciliateur* is not *per se* sufficient to avoid or mitigate any liability relating to a shortfall of assets. The maximum amount of damages that a director can be ordered to pay is the total liabilities of the company less the available assets. If more than one director is liable, they may be held severally liable if the Court considers this reasonable and justifiable.
- (iv) There is no specific time period prior to the commencement of formal insolvency proceedings during which an act of mismanagement must have occurred. In practice, the period is limited by the need for there to be a causal link between the act of mismanagement and the insolvency of the company. In the vast majority of cases, the last possible act is the failure to file the declaration of cessation of payments within the requisite (45) days after the date of cessation of payments.<sup>31</sup>
- (v) Other than the general defence of absence of act of mismanagement (including, in the case of an alleged *de facto* director, absence of the person's implication in the management of the company) or absence of causal link or a shortfall of assets, there are no specific defences to this allegation.<sup>32</sup>
- (vi) The claim must be brought within three years from the date of the Court decision opening the judicial liquidation of the company.<sup>33</sup>

### 2.3 Liability for the debts of the company

Since the entry into force of law n°2008-1345 dated 18 December 2008, claims against directors having committed faults pursuant to Article L.624-5 of the French Commercial Code may only be brought in judicial reorganisations or judicial liquidations which were opened prior to 15 February 2009. This permitted the Court to hold an individual *de jure* or *de facto* director liable for the debts of the insolvent company if there was a fault pursuant to the old Article L.624-5 of the French Commercial Code and if the fault had a causal link with the cessation of payments.

<sup>30</sup> Commercial chamber of the Cour de cassation, 11 May 1993 : Bull. civ. IV, n°187; D. 1993. IR 195.

<sup>31</sup> Pursuant to Article L. 631-1 of the French Commercial Code, the company is in cessation of payments whenever it is unable to meet its current liabilities with its available funds.

<sup>32</sup> Subject however to: i) the amendment which may be implemented by the *Projet de Loi Sapin II* - see footnote 22 above, and ii) the provisions of Article L. 653-8 of the French Commercial Code – see footnote 36 hereafter.

<sup>33</sup> Commercial chamber of the Cour de cassation, 19 May 2004, n°02-11.199.

## 2.4 Personal bankruptcy – prohibition on management

2.4.1 Personal bankruptcy is a professional sanction, which, in essence, prevents a director from being involved in the management, administration or control of any commercial or business entity or any company engaged in economic activity. In some ways, it is similar to director disqualification in the UK but in addition, French personal bankruptcy may prevent a director from being elected in any public election and holding any public function (see below). An individual *de jure* or *de facto* director may be subject to personal bankruptcy during the course of judicial reorganisation or judicial liquidation against the company;<sup>34</sup> personal bankruptcy may not therefore be sought during safeguard proceedings nor accelerated financial safeguard proceedings.<sup>35</sup> The sanction of personal bankruptcy may be imposed on an individual as a result of that person:

- (i) abusively (wrongfully) carrying out an unprofitable business activity that would necessarily lead to the company's insolvency;
- (ii) misappropriating or concealing all or part of the assets of the company or fraudulently increasing the liabilities of the company;
- (iii) committing any of the violations listed under Article L. 653-4 of the French Commercial Code which are as follows:
  - (a) using property of the company as his or her own. This concept covers a wide range of behaviours including, most typically, excessive remuneration, withdrawals from the company's bank account for personal ends, performance of renovation or other works by the company for personal ends, payment of personal expenses;
  - (b) undertaking commercial transactions for his or her own interests in the name of the company. This typically applies to directors who abuse of their majority position in the company and manage the company for their own personal interests;
  - (c) using property or assets of the company in a manner contrary to the company's own interests for personal ends or the ends of another company in which the director has a direct or indirect interest. This type of behaviour is in practice very similar to that covered by (b);
  - (d) pursuing abusively and for personal ends a loss-making activity which would inevitably lead to the company falling into a state of cessation of payments. This concept typically covers directors who, using artificial financial methods, maintain a company afloat for the purpose of continuing to receive remuneration, to reduce the amount of a personal shareholder loan or to pay off company debts that he or she has guaranteed; or
  - (e) misappropriating or concealing all or part of the assets of the company or fraudulently increasing the liabilities of the company. This is the most serious type of behaviour, where the director may seek to organise the insolvency of the company or to deal with the assets of the company to the detriment of the company's creditors.
- (iv) carrying out a management role in the company when prohibited from doing so;
- (v) with the intention of avoiding or delaying the opening of formal insolvency proceedings, entering into purchases with a view to resale at below market price or using other inappropriate means to obtain funds;
- (vi) entering into, for the account of a third party, and without consideration, undertakings judged to be too significant or important at the time given the situation of the company;
- (vii) paying or causing to be paid, after the date of cessation of payments, one creditor in preference to others;

<sup>34</sup>. Article L. 653-1 of the French Commercial Code.

<sup>35</sup>. Article L. 628-1 of the French Commercial Code.

- (viii) intentionally failing to co-operate with the good progress of the insolvency proceedings; and/or
- (ix) keeping accounts that are fictitious, manifestly incomplete or irregular according to applicable law, not keeping accounts when required by applicable law, or causing accounting books and records to disappear.

Although the provisions of the law do not specifically require, typically there must be a link (if not the cause) between the wrongful act in question and the insolvency of the company – apart from those cases where, by definition, no link is necessary, for example, in respect of (vii) and (viii) above.

#### 2.4.2 If any of (i) to (ix) are satisfied:

- (i) the Court is not required to impose sanctions on the director liable. If it does, liability is civil, whether the sanction imposed is personal bankruptcy or prohibition on management (see further below);
- (ii) although liability is civil, certain characteristics of personal bankruptcy are penal in nature.
  - (a) The sanction of personal bankruptcy carries with it a prohibition on directly or indirectly managing, administering and/or controlling a commercial business or any form of company which has an economic business activity. Furthermore, the Court may also prohibit a director from carrying out certain professions or functions which have a public nature (for example, the judiciary, the legal profession, and activities as a financial intermediary, insurance agent, etc.), meaning that a director sanctioned by personal bankruptcy may not take part in public elections.
  - (b) Alternatively, the Court may impose a prohibition on management, which is a diluted form of personal insolvency. The most severe form of this sanction is the prohibition on managing, administering and controlling a commercial business or any form of company which has an economic business activity where the director knowingly failed to file for insolvency in a timely manner.<sup>36</sup>
  - (c) It must be noted, however, that a director held liable for personal bankruptcy may request that instead of being subject to the sanctions of personal bankruptcy or prohibition of management, he/she/it will instead incur personal liability for the shortfall of assets of the insolvent company that he/she/it manages.<sup>37</sup>
- (iii) The Court has discretion over the duration of the personal bankruptcy or the prohibition on management, subject to a maximum of 15 years<sup>38</sup> and a maximum of 5 years for any prohibition on public functions, professions and office.<sup>39</sup>
- (iv) Except in certain limited circumstances, there is no specific time period prior to the commencement of formal insolvency proceedings during which the wrongful action must have occurred. In practice the period is limited by the “informal” requirement that there be a link between the act in question and the insolvency of the company. In respect of (vii) and (viii) above, by definition the wrongful act must have taken place after the date of cessation of payments which, as explained above, depends upon a finding of fact by the Court. This date cannot be more than 18 months prior to the date of the Court order opening formal insolvency proceedings.

Other than the general defence of absence of one or more of the specific requirements for the offence, there are no specific defences to this action. A person may have some or all of the prohibitions lifted if he/she can show that they have made a sufficient contribution to the payment of the insolvent company’s debts.

#### 2.4.3 The following persons may also be subject to personal bankruptcy:

- (i) any director who has been found liable for having contributed to the shortfall of assets;<sup>40</sup> and

<sup>36</sup> Article L. 653-8-3 of the French Commercial Code

<sup>37</sup> Article L 653-11 of the French Commercial Code

<sup>38</sup> Commercial chamber of the Cour de cassation, 15 February 2000 n°97-16770

<sup>39</sup> Article L. 653-10 of the French Commercial Code.

<sup>40</sup> Article L. 653-6 of the French Commercial Code.

(ii)=any director who has been found guilty of criminal bankruptcy.

In both cases, personal bankruptcy or prohibition on management is a complementary penalty= decided upon by the criminal Court and, can be either permanent or temporary and, if temporary,= must not exceed five years.<sup>41</sup>

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<sup>41</sup>. Commercial chamber of the Cour de cassation 22 March 2011 n°10-14889; of the Cour de cassation 22 May 2012 n°11-14366

[...]

## 2.6 Fraudulent organisation of insolvency

2.6.1 Any director or associated person can be held liable for this offence if:<sup>45</sup>

- (i) that person fraudulently misappropriates or conceals part of their own personal property to avoid paying the debts of the company in insolvency; and
- (ii) such a person fraudulently acknowledges and accepts debts that do not exist.

2.6.2 If (i) or (ii) are satisfied:

- (i) Liability is criminal. The answers to 2.5.2 (ii) and (iii) apply.
- (ii) The offence can only be committed once a company is in a state of cessation of payments.
- (iii) Absence of intent to defraud is a defence.

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## QUESTION 3

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### 3. Other persons involved with the company's affairs who may become liable in relation to their actions during the twilight period

- (a) In addition to those persons referred to in 1(a) above, can others be held liable in respect of the company's activities during the twilight period?
- (b) In respect of which acts may other persons be held liable and to what extent does the liability of those other persons differ from that for directors identified in Question 1(a) above?
- (c) Can those other persons be made personally liable for all or part of the company's losses or for all or part of the deficit to creditors?

#### 3.1 Introduction

- 3.1.1 French insolvency law provides expressly that liability that may attach to a formally appointed director of a company, also known as a *de jure* director, extends to *de facto* directors – known in French as *dirigeants de fait*. The definition of *de facto* director is explained below.
- 3.1.2 In certain circumstances, third parties may be found liable to a company subject to formal insolvency proceedings. For example, third parties who commit certain offences: in particular if their behaviour has provoked the insolvency of the company or aggravated its consequences, may be liable for the damage they have caused.

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<sup>45</sup> Criminal chamber of the Cour de cassation, 22 November 2011, n°10-81.562.

### 3.2 *De facto* directors (*dirigeants de fait*)

3.2.1 Before going into any detail, it is important to note that being qualified as a *de facto* director does not make such individual or legal entity liable *per se*.

3.2.2 French legislation offers no definition of a *de facto* director. In the absence of such a definition, French case law fills the gaps. According to the Court of Appeal of Paris<sup>46</sup>, a *de facto* director is an individual who, or legal entity which, is not a *de jure* director but assumes similar functions and has similar powers in the management of the company that he/she/it exercises independently and has an influence on the decisions made within the company.

Hence, whether an individual or a legal entity is a *de facto* director is a question of fact for the French lower Courts to determine, subject to the control of the *Cour de cassation*.<sup>47</sup>

3.2.3 In establishing the question of fact based on a body of corroborating evidence, the two criteria below are the most significant:

- (i) The management or administrative acts of the *de facto* director have been carried out without restriction and independently, so that the director had autonomous decision-making power. This implies that the *de facto* management situation is inconsistent with a position of subordination; such as results from an employment contract (for example, if the claimed *de facto* director is given orders by another person to whom he is subordinated, such other person is the real *de facto* director).<sup>48</sup>
- (ii) An active and positive decision-making role, implying that the *de facto* director has directly intervened in the management of the company, behaved as the master of the business and “unofficially” ran the company. There is no need to find that the person was treated as a director by the other directors. The key is the active involvement by the person in the determinative management of the company.<sup>49</sup>

3.2.4 Examples of other corroborating evidence that may be taken into account by the French Courts are the nature of the technical functions granted to the alleged *de facto* director (for example, commercial management, supply management), the powers granted to the *de facto* director (for example, placing orders with suppliers, signing cheques, hiring or dismissing employees) and the *de facto* director’s behaviour (for example, the fact that he/she/it considers that the company belongs to him/her/it, that he/she/it behaves as a director of the company).

3.2.5 Based on such evidence, shareholders of the company are often targeted by liquidators as *de facto* directors to compensate for the shortfall of assets.

Shareholders who are regularly involved in the daily management of a company which later files for insolvency, may be considered *de facto* directors. Having a majority shareholding will not in itself be regarded as evidence of intervention in the management of a company. It is for the French lower Courts to determine whether or not a shareholder is a *de facto* director. The following are examples of where shareholders have been held to be *de facto* directors:

- The Paris Court of Appeal concluded that multiple factors such as attending a number of board meetings without being a board member, signing letters as a director without having the appropriate status and authority to do so and granting oneself the benefit of a company car meant that a shareholder with 38% of the share capital was considered a *de facto* director.<sup>50</sup>

<sup>46</sup> Court of Appeal of Paris, 16 December 1997, JCP E 1998, 718 p 250.

<sup>47</sup> Commercial chamber of the Cour de cassation, 16 March 1999, n°95-17.420.

<sup>48</sup> Commercial chamber of the Cour de cassation 12 July 2005, n° 02-19.860.

<sup>49</sup> Commercial chamber of the Cour de cassation 30 May 2006, n°05-14.958. Commercial chamber of the Cour de cassation, 27 June 2006, n°04-15.831.

<sup>50</sup> Court of Appeal of Paris, 11 October 1996.

- The Paris Court of Appeal, in a different matter, ruled that a parent company was a *de facto* director of its subsidiary, not on the basis of the two criteria mentioned above, but on the basis that the business unit that the parent company transferred to its subsidiary continued to be operated by the parent company<sup>51</sup> as if it had remained within the parent company's scope of activities. In doing so, the Court took into account the common operating mechanisms which often exist within group companies (such as paying for raw materials and packaging for products, making personnel available to the subsidiary as well as administrative accounting services). One may therefore conclude that the Court held that what the parent company did went beyond just providing administrative and technical support in respect to the transferred business unit to determining the distribution strategy of the trademarked products of the transferred business unit, requesting the sale at a fixed price for each unit sold and invoicing for products in its own name without indicating that the sales were carried out in the name of its subsidiary.

### 3.2.6 Shareholders holding external roles with a company have also, albeit rarely, been considered *de facto* directors. Two examples are as follows:

- Statutory auditors: the French Courts have held that a founding partner of a company, who also acted as the statutory auditor for that company, was a *de facto* director as he did not act solely as the auditor of the company, but took important decisions, in particular, concerning the company's financing and the attempt to wind-up the company when he acknowledged that the company was in debt by as much as the total of its capital.<sup>52</sup>
- Lawyers: it has been held by the French Courts that a lawyer who was also the majority shareholder of a company could be considered a *de facto* director where he held a decisive role in the management of the company, especially where he fixed the price for the purchase of the business as a going concern; the registered office was located at his domicile whilst the activity of the company was located elsewhere; he decided on the financial and economical functioning of the company; and the *de jure* director was actually in a position of subordination.<sup>53</sup>

### 3.2.7 Other individuals or legal entities that may be considered by the French Courts as *de facto* directors include:

- Banks: the *Cour de cassation* held on 30 October 2007 that the exercise by a banking institution of its obligation to advise its clients (see below) on the use of loaned funds may not be considered in itself as *de facto* management of the borrower company. However, a situation where the bank takes over the control of the company in financial difficulties by artificially maintaining credits in the current account and covering all its expenses where the *de jure* director could not hold the company's cheque books could amount to *de facto* management.<sup>54</sup>
- Franchisers: a franchiser who interfered in the management of its franchisee by giving orders to the franchisee, firing one of its employees and by deciding the working conditions of the franchisee's employees.<sup>55</sup>
- Suppliers / clients: a supplier has been held to be *de facto* director due to its intrusion in the management of its client. In one instance, this interference was characterised by the fact that the supplier sold the client's registered office, put the client's shop in his building and the client was obliged to pay his supplier in priority.<sup>56</sup>
- Family: the brother of the *de jure* director of a company, who negotiated and signed the quote for the company and the commitment it represented, negotiated payment terms with customers depending on the precise progress of the work and the release of funds to customers and who negotiated payment terms with the supplier and had free access to the cheque books of the company which he could sign to pay suppliers.<sup>57</sup>

<sup>51</sup> Commercial chamber of the Cour de cassation 23 November 1999 n°1860 : RJDA 3/00 n°270.

<sup>52</sup> Criminal chamber of the Cour de cassation June 27, 1983 n°81-94465.

<sup>53</sup> Commercial chamber of the Cour de cassation 15 February 2011 n°10-11.781.

<sup>54</sup> Commercial chamber of the Cour de cassation, 23 September 2010, n°09-83.274.

<sup>55</sup> CA Rouen 23 May 1978 :JCP 1979 II n°19235 note Notté.

<sup>56</sup> Commercial chamber of the Cour de cassation 4 April 1962, Rauscher c/ Ferrari : Bull. civ. III n° 215.

<sup>57</sup> Commercial chamber of the Cour de cassation 17 September 2002 n°1427 : RJDA 12/02 n°1307.

[...]

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## QUESTION 5

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### 5. Enforcement

**By whom may action be brought against directors and other persons identified in Question 3 above?**

#### 5.1 Introduction

- 5.1.1 The persons who may bring proceedings, whether civil or criminal, against the directors or associated persons are defined in the French Commercial Code.
- 5.1.2 Civil liability claims for the shortfall of assets and personal bankruptcy can only be brought by the liquidator, the public prosecutor or by the majority of the *contrôleurs* in the event the liquidator fails to bring such a claim after formal notice to do so.<sup>91</sup> These civil claims are brought before the commercial Court (*Tribunal de Commerce*) or the civil Court (*Tribunal de grande instance*) depending upon which has jurisdiction over the insolvency proceedings in respect of the company.<sup>92</sup> Should the debtor be a company which carried on a commercial activity, the commercial Court has jurisdiction and in all other cases, it is that of the civil Court.
- 5.1.3 Criminal claims based on criminal bankruptcy (*banqueroute*) or on the fraudulent 'organisation' of bankruptcy may only be brought by the public prosecutor. However, other persons may initiate the criminal claim if the public prosecutor decides to not bring a criminal claim by forming a civil party which will seize the relevant *Juge d'Instruction* who will then proceed with criminal investigations.<sup>94</sup> In the case of criminal bankruptcy, only the liquidator, the administrator, the *mandataire judiciaire*, the employees' representative and the person appointed by the Court to execute the plan of reorganisation may form a civil party.<sup>95</sup> Furthermore, in the event the judicial representative fails to initiate such a claim, the majority of the Court-appointed *contrôleurs* may initiate such a claim after formal notice from the judicial representative to do so. These criminal claims are brought before the criminal Court (*tribunal correctionnel*). Any creditor may also join the criminal proceedings as civil party if the criminal claim has already been brought and if he or she is able to establish an individual specific loss that is different from the amount of the creditor's claim and results directly from the offence.

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<sup>89</sup> Article L. 651-3 of the French Commercial Code.

<sup>90</sup> Article L. 621-2 of the French Commercial Code.

<sup>93</sup> Articles 1 and 2 of the French Criminal Procedure Code: criminal proceedings may be initiated by civil parties, meaning all those who have personally

suffered damage directly caused by an offence, it being a felony, misdemeanour or a petty offence, in accordance with the provision of the French Criminal Code. May only form a civil party, those who have filed a prior complaint in front of the public prosecutor or the French police services (Article 85 of the French Criminal Procedure Code).

<sup>94</sup> Article 85 of the French Criminal Procedure Code.

<sup>95</sup> Article L. 654-17 of the French Commercial Code.

[...]

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**QUESTION 8**


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**8. Appeals and limitation periods****(a) What limitation period, if any, applies to the actions referred to above?****(b) What rights of appeal are available from the decisions of the lower Courts?****8.1 Limitation periods**

## 8.1.1 Limitation period for criminal proceedings

Criminal bankruptcy (*banqueroute*) and fraudulent organisation of insolvency (*organisation de son insolvabilité* – see Question 6) fall within the category of offences known as *délits correctionnels*. The applicable limitation period is three years. Article L. 654-16 of the French Commercial Code provides that the limitation period starts to run only from the date on which formal bankruptcy proceedings have been opened if the incriminating facts occurred prior to that date. This Article of the Commercial Code, however, does not indicate the date from which the limitation period begins to run for such criminal proceedings where the incriminating facts occurred after the commencement of formal insolvency proceedings. For criminal proceedings, the limitation period is of utmost importance and therefore, the majority of French academics believe this omission to be deliberate so that the limitation period for such incriminating facts would be the period provided under general principles of criminal law. This is the period starting on the date on which these incriminating facts were discovered or took place. If the view is taken that it should be the same date as for other similar corporate offences, the limitation period would commence on the date the incriminating facts were discovered.

## 8.1.2 Limitation period for civil proceedings

Civil liability claims for the shortfall of assets are barred three years after the date on which the Court orders judicial liquidation.<sup>115</sup>

It should be noted that if a claim is brought against one director, this claim does not bar the possibility of bringing another civil liability claim for the shortfall against another director of the same insolvent company if the directors are not severally liable.<sup>116</sup>

8.1.3 Civil liability claims for personal bankruptcy are also barred after three years from the date of the Court decision opening the judicial reorganisation or judicial liquidation, as appropriate.<sup>117</sup>**8.2 Appeals**

## 8.2.1 Appeal in criminal proceedings

Appeal from a decision at first instance (before the *correctionnel* Court) in respect of *délits correctionnels* is to the Court of Appeal of the district in which the Court at first instance was sitting.<sup>118</sup> Only the director in question, the civil party, the public prosecutor or the general public prosecutor of the Court of Appeal may bring an appeal. Where the director is present at the hearing at which the judgment is rendered at first instance, the period for appeal is 10 days from the date of the judgment.<sup>119</sup> However, the period of appeal runs from the date the judgment was served where the director in question was judged in his or her absence (but after having heard a counsel that was present to ensure the director's defence without having the letter of instruction signed by the director).

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<sup>115</sup> Article L. 651-2 of the French Commercial Code.

<sup>116</sup> Cour de cassation, 7 November 2006, n° 05-16.693.

<sup>117</sup> Article L. 653-1 of the French Commercial Code.

<sup>118</sup> Article 496 of the French Criminal Procedural Code.

<sup>119</sup> Article 498 of the French Criminal Procedural Code.

### 8.2.2 Appeal in civil proceedings

Pursuant to Article R. 661-6 of the French Commercial Code, judgments holding directors liable for the shortfall of assets or personal bankruptcy may be subject to appeal by the director in question by application of the applicable general civil procedural rules. The director's appeal must be made to the Court of Appeal of the district in which the first instance Court was sitting. The appeal must be filed within ten days of the date on which the judgment at first instance was notified to the director.<sup>120</sup>

Pursuant to Article L. 661-11 of the French Commercial Code, judgments holding directors liable for the shortfall of assets or personal bankruptcy may be subject to appeal by the public prosecutor and the general public prosecutor of the Court of Appeal even if neither of them were the main claimants in the case.<sup>121</sup> The appeal must also be filed within ten days, but ten days from the date the public prosecutor receives notification of the judgment from the Court clerks.<sup>122</sup>

[...]

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<sup>120</sup>. Article R. 661-3 of the French Commercial Code.

<sup>121</sup>. Articles L. 661-11 and L. 661-12 of the French Commercial Code.

<sup>122</sup>. Article R. 661-3 of the French Commercial Code.

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## Appendix

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### Overview of French pre-insolvency and insolvency proceedings

#### – Preventative measures before insolvency proceedings

With the aim of preventing businesses going into insolvency, French law provides for two different but similar proceedings for companies experiencing financial difficulties or anticipating foreseeable financial difficulties: the *mandat ad hoc* and *conciliation* proceedings.

#### 1. *Mandat ad hoc*

The *mandat ad hoc* is a confidential procedure<sup>139</sup> (a special mediation process) which enables companies experiencing difficulties to avoid insolvency proceedings by instigating confidential negotiations, usually with their main creditors, with the assistance of the *mandataire ad hoc*.

##### 1.1 Filing<sup>140</sup>

Any debtor<sup>141</sup> facing difficulties, usually of a financial, economic or legal nature but without being in cessation of payments, may file a motion (*requête*) with the president of the local Court to appoint a *mandataire ad hoc*. The motion must be in writing and set out the grounds for the request. Certain other documents must also be filed which are along the same lines as for the *conciliation* proceedings below.

##### 1.2 Appointment and remuneration of the *mandataire ad hoc*

If a debtor company requests the appointment of a *mandataire ad hoc*, it can propose the appointment of a specific person. However, the president of the local Court can refuse the proposal. This will depend on the practice of the local Court. The president of the Court is nevertheless limited in its choice of *mandataire ad hoc*. A person who has received, directly or indirectly, a remuneration or payment from the debtor, or a person who controls or is controlled by the debtor, (or has done so within the last 24 months) may not be appointed as *mandataire ad hoc*.<sup>142</sup>

The president of the Court will also fix the remuneration of the *mandataire ad hoc*, having approved this with the debtor.

##### 1.3 Objectives of the *mandataire ad hoc*<sup>143</sup>

On the appointment of the *mandataire ad hoc*, the president of the Court will determine its objectives and powers. These will normally be to:

- assist the company in its negotiations with creditors, employees and all other relevant commercial partners, including, when required, the main shareholders;
- help the company to evaluate its financial situation;
- try to resolve these difficulties;
- when requested by the company, organise the sale of a part of the business or of the whole business operated by the company, possibly in the frame of subsequent safeguard or insolvency proceedings, and
- report back to the president of the Court.

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<sup>139</sup> Article L. 611-15 of the French Commercial Code.

<sup>140</sup> Article L. 611-3 of the French Commercial Code.

<sup>141</sup> For the sake of simplicity, we will consider hereafter that the debtor is a commercial company.

<sup>142</sup> Article L. 611-13 of the French Commercial Code.

<sup>143</sup> Article R. 611-19 of the French Commercial Code.

## 1.4 The main advantage of the *mandat ad hoc*

The main advantage of this process is that it remains confidential and is very flexible - the process is not legally limited in time<sup>144</sup> and the *mandataire ad hoc* is appointed to assist the directors who remain in charge of the company's management. In this respect, the French *Cour de cassation* recently ruled<sup>145</sup> that the duty of confidentiality applicable to parties involved in pre-insolvency preventative proceedings also applies to third parties (i.e not involved in these proceedings), including the foreign financial press.<sup>146</sup>

## 1.5 Stay of proceedings

Under a *mandat ad hoc*, the only way a debtor can stay proceedings is by contractual agreement with the creditors concerned.

## 1.6 Outcome of *mandat ad hoc* proceedings

Even if the company comes to an agreement with some of its creditors, this will not affect the company's other creditors or commercial partners who remain outside the agreement and who will be entitled to take legal action as they see fit to recover sums due to them.

Therefore, it is common for the *mandat ad hoc* to be followed either by *conciliation* proceedings to render these agreements enforceable by Court or by safeguard proceedings under which a restructuring plan may be adopted. (See section 2.4.1 below.)

Since the implementation in French insolvency law of pre-packs<sup>147</sup> prepared during the pre-insolvency proceedings, the sale of major businesses organised during *mandat ad hoc* and/or *conciliation* proceedings have taken place in subsequent insolvency proceedings.

For example, NextiraOne, a subsidiary of Alcatel was the subject of such a pre-pack in June 2015, and FRAM, the tour operator selling packaged holidays in North Africa, was also the subject of a prepack in November 2015.

## 2. Conciliation proceedings

*Conciliation* is a confidential procedure<sup>148</sup> available to companies experiencing legal, economic or financial difficulties or likely to experience such difficulties in the future. Unlike the *mandat ad hoc*, conciliation is also available to companies which have been in cessation of payments for less than 45 days.<sup>149</sup>

### 2.1 Filing<sup>150</sup>

The director of a company may file a motion with the president of the local Court requesting the appointment of a conciliator. The motion must be made in writing and set out the financial, economic, social situation of the company, its financing needs and proposals to deal with its difficulties.

Certain corporate and financial information must be filed with the motion, as set out in Article R. 611-22 of the French Commercial Code. If the company is in cessation of payments, this will also need to be mentioned in the motion, including the date on which cessation of payments began.

### 2.2 Appointment and remuneration of the Conciliator<sup>151</sup>

The appointment of the conciliator is very similar to the appointment of the *mandataire ad hoc* whereby the president of the local Court:

<sup>144</sup> Article R. 611-21 of the French Commercial Code.

<sup>145</sup> Commercial Chamber of the Cour de cassation, 15 December, 2015, n°14-11.500

<sup>146</sup> Please refer to section 7.8.6

<sup>147</sup> Articles L. 611-7 and L. 642-1 of the French Commercial Code.

<sup>148</sup> Article L. 611-15 of the French Commercial Code.

<sup>149</sup> Article L. 611-4 of the French Commercial Code.

<sup>150</sup> Article L. 611-6 of the French Commercial Code.

<sup>151</sup> Article L. 611-6 of the French Commercial Code.

- appoints a conciliator of its choice (within the limits provided by the Commercial Code);<sup>152</sup> and,
- determines the remuneration of the conciliator, having agreed this with the director of the company.<sup>153</sup> Since a reform implemented in 2014<sup>154</sup> (the “2014 Reform”), Article L. 611-14 of the French Commercial Code put an end to the common practice of compensating the *mandataire ad hoc* or conciliator in proportion to the amount of debts waived by creditors, thus removing gratification from the conciliator’s main objective.

The debtor may suggest a conciliator but the president of the local Court is not obliged to take this suggestion into account.

## 2.3 Objectives of the Conciliator<sup>155</sup>

The conciliator’s role is to put an end to the company’s difficulties by promoting and encouraging the debtor company to enter into an amicable agreement with its main creditors and, if applicable, its usual commercial partners.

It is not the conciliator’s role to assist the directors in managing the company or to supervise the company, nor does the conciliator have the power to impose a conciliation agreement, although the conciliator may put forward suggestions regarding running the business and maintaining employment levels.

The conciliator must report back to the president of the local Court on the progress of the conciliation and on any useful information concerning the debtor.

## 2.4 Duration

### 2.4.1 Time Constraints<sup>156</sup>

The conciliator is appointed for a maximum of four months, with a possible extension limiting the total duration of his mission to five months.

At the end of this period, it is not possible to open another conciliation, until three months have passed. It is therefore not uncommon for companies to file for a *mandat ad hoc* during this three month period or to start with a *mandat ad hoc* and then open conciliation proceedings.

### 2.4.2 Stay of proceedings

Since conciliation proceedings are not insolvency proceedings, there is no stay on individual proceedings. Creditors may bring individual proceedings against the debtor during conciliation, including enforcement proceedings. However, creditors will often agree to a temporary postponement of proceedings.

Furthermore, the French Commercial Code provides companies with limited protection against creditor claims during the conciliation by: i) permitting a company to request the president of the local Court to postpone or spread out payments due to creditors for a period of up to two years.<sup>157</sup> and ii) obtaining a temporary suspension against the enforcement of measures taken by creditors.

## 2.5 Outcome of conciliation proceedings

### 2.5.1 Conciliation agreement

When the company reaches a conciliation agreement with one or more of its creditors or commercial partners, it may apply to the president of the local Court or to the local Court to have the agreement acknowledged or approved.

#### 2.5.1.1 Acknowledgement of the conciliation agreement

<sup>152</sup> Article L. 611-13 of the French Commercial Code.

<sup>153</sup> Article L. 611-14 of the French Commercial Code.

<sup>154</sup> Insol International’s Electronic Newsletter 15 July, 2014 - Yet another major change in French law and recommendations at EU level, Anker Sorensen

<sup>155</sup> Article L. 611-7 of the French Commercial Code.

<sup>156</sup> Article L. 611-6 of the French Commercial Code.

<sup>157</sup> Articles L. 611-7 of the French Commercial Code and 1244-1 of the French Civil Code.

The debtor may opt for the acknowledgement of the conciliation agreement by filing a joint motion with those creditors who are party to the agreement with the president of the local Court. To accelerate the process, creditors may authorise the company to file the motion on their behalf.

Before acknowledging the agreement, the president will check that the conciliation agreement exists and that the company has declared that it is not in cessation of payments or will no longer be by entering into the agreement.

On acknowledgement of the agreement, it is filed at the Court registry where all parties to the agreement may obtain an official copy. The content of the agreement remains confidential, as the Court registry will not provide copies to third parties.<sup>158</sup> The acknowledged agreement does not affect third parties, including creditors who are not a party to it. Such creditors may still bring claims against the company for payment of sums due to them.

No appeal can be lodged against the order acknowledging the agreement.

The main purpose of the acknowledgement of the conciliation agreement is to make the agreement enforceable against the creditors who are party to it, whilst the content and existence of the agreement remains confidential.

#### 2.5.1.2 Approval of the conciliation agreement<sup>159</sup>

Alternatively, the company may opt for the approval of the conciliation agreement. In this case, the existence of the judgment approving the agreement will be published in the official gazette but the content of the agreement will remain confidential.<sup>160</sup>

The motion for approval must be filed before the end of the conciliation period.

The directors of the company, the creditors who are party to the conciliation agreement, the representatives of the workers' council, the conciliator and the public prosecutor<sup>161</sup> must all be given notice of the approval proceedings and are invited to attend the hearing.

To obtain approval, the company must satisfy three conditions:

- the company is not in cessation of payments or will no longer be in this state by entering into the agreement;
- the terms of the agreement will achieve continuity of the company's business;
- the interests of creditors who are not party to the agreement are protected.

Once satisfied in respect of these three conditions, the Court's judgment containing its approval of the conciliation agreement but not the terms and conditions of the agreement will be filed at the Court registry, where any interested party can access it.<sup>162</sup>

The main reason for getting the conciliation agreement approved is because of the consequences/benefits (see below) if the debtor subsequently goes into formal insolvency proceedings.

To this effect, debtors and creditors will normally seek to obtain the approval of a conciliation agreement (as opposed to an acknowledgement) for the following reasons:

<sup>158</sup> Articles L. 611-8 of the French Commercial Code and R. 611-39 of the French Commercial Code.

<sup>159</sup> Article L. 611-8, II of the French Commercial Code.

<sup>160</sup> Article R. 611-40 of the French Commercial Code.

<sup>161</sup> Article L. 611-9 of the French Commercial Code.

<sup>162</sup> Article L. 611-10 al 2 of the French Commercial Code.

- If creditors grant any new financing, services or goods to keep the company afloat, they will benefit from priority if the company subsequently enters into insolvency proceedings (a ‘New Money Privilege’);<sup>163</sup> The 2014 Reform increased the protection of new money creditors by extending the scope of their privileged status from contributions made in the approved conciliation agreement to all contributions made during the course of the conciliation process. In addition, creditors are now given a real incentive to make new money contributions since they will be treated as proper privileged creditors if the debtor is subsequently subject to safeguard or reorganisation proceedings: the Court cannot impose delays for their reimbursement, only they can accept them (Article L. 626-20 I. 3° of the French Commercial Code). On paper, this is a positive innovation but in practice, national creditors or creditors with a large presence and activity in France<sup>164</sup> may be urged, including by governmental bodies who have recently demonstrated strong state intervention,<sup>165</sup> to accept delays.
- If the company subsequently enters into insolvency proceedings, the date of cessation of payments decided by the Court will not pre-date the Court’s approval of the agreement,<sup>166</sup> unless fraud is proven, and therefore, the payments made and securities granted under the conciliation agreement cannot be declared null and void.
- Certain guarantors of the company, may invoke the approved conciliation agreement against creditors who are party to the agreement. This applies to guarantors who have guaranteed a security (caution), are co-debtors, or have granted a personal security.<sup>167</sup>

The judgment approving the conciliation agreement is subject to appeal.

#### 2.5.1.3 Waiver of part of the claim of creditors in the public sector

In certain circumstances, the debtor may obtain a waiver from its public creditors as to part of their claims, pre-emption rights, and position in the ranking of creditors as holders of a charge or mortgage (See Section 3.3.3).

#### 2.5.1.4 Further role for the conciliator after acknowledgment or approval of the conciliation agreement

The 2014 Reform enshrined existing practices regarding conciliation agreements (whether acknowledged or formally approved) by codifying the appointment of the conciliator (at the end of his mission) as a *mandataire à l’exécution de l’accord*. The latter’s role will then consist in the supervision of the enforcement of the agreement once it has been reached.<sup>168</sup> The implementing decree adds, what seemed self-evident, that the *mandataire à l’exécution de l’accord* must agree to take on this role.<sup>169</sup> This was a useful innovation as it reinforced the effectiveness of conciliation agreements. It also created a logical new mission for the conciliator who helped reach the agreement and eventually enables the parties to the agreement to be informed in a timely manner by the *mandataire* of any issue arising during the implementation of the agreement.

#### 2.5.1.5 Pre-packs

The 2014 Reform introduced a new Court-authorized pre-pack sale during *mandat ad hoc*<sup>170</sup> or conciliation proceedings,<sup>171</sup> upon the debtor’s request and consultation of the key creditors, for the partial or total transfer of its business, to be subsequently implemented in safeguard or insolvency proceedings.<sup>172</sup> This further expands the *mandataire ad hoc* and conciliator’s role and codifies existing practices (see Appendix under “Three important recent updates in French insolvency law”).

<sup>163</sup> Article L. 611-11 of the French Commercial Code.

<sup>164</sup> Recent history in France (and elsewhere, for example American hedge fund Elliot Management) shows that foreign creditors who do not have a large presence in the debtor’s country and who may rely on their home Courts, for example because of jurisdiction and choice of law clauses, are less pressure-sensitive.

<sup>165</sup> One of the former Ministers of the Economy and Productive Recovery, has been largely involved in recent sales of French companies, such as Ascometal or Alstom, in order for the French government to retain a say in jobs and decision-making in the selection of acquirers of companies in strategic sectors.

<sup>166</sup> Article L. 631-8 of the French Commercial Code.

<sup>167</sup> Article L. 611-10-2 of the French Commercial Code.

<sup>168</sup> Article L. 611-8 III of the French Commercial Code.

<sup>169</sup> Article R. 611-40-1 of the French Commercial Code.

<sup>170</sup> Article L. 642-2 of the French Commercial Code.

#### 2.5.1.6 Other innovations of the 2014 Reform common to both pre-insolvency proceedings.

The 2014 Reform also introduced two sets of innovative provisions in Article L.611-16 of the French Commercial Code.

Firstly, any contractual provision, which modifies an ongoing agreement by reducing the rights or increasing the obligations of the debtor on the sole basis that the latter has obtained the opening of conciliation proceedings or the appointment of a *mandataire ad hoc*, is paralyzed.

More importantly, this should render inapplicable in France termination, forfeiture, acceleration, default and penalty clauses that are often included in loan agreements and contracts with foreign companies until different provisions based on other criteria are put in place.

Secondly, also paralyzed is any contractual provision which, due to the mere appointment of a *mandataire ad hoc*, or the opening of conciliation proceedings, charges the debtor with creditors' advisory fees incurred in relation to the *mandat ad hoc*, or conciliation proceedings, in excess of an amount set by a resolution (*arrêté*) of the Minister of Justice, which is 75% of the advisor's fees.

#### 2.5.2 Failure of the proceedings

##### 2.5.2.1 No conciliation agreement

In the event the conciliator does not obtain creditor approval to enter into a viable conciliation agreement, the president of the local Court will bring the conciliation proceedings to an end.<sup>173</sup> This decision is then notified to the debtor and communicated to the public prosecutor;

If the debtor is not in cessation of payments for more than 45 days, the debtor subject to on-going conciliation proceedings may file a motion to open accelerated safeguard proceedings which may force recalcitrant financial creditors to come to an agreement.<sup>174</sup>

##### 2.5.2.2 Refusal to approve the conciliation agreement

If the company is not in cessation of payments, it may still be possible to file a motion to obtain the acknowledgement of the conciliation agreement even where the approval of the conciliation agreement has failed.

### Insolvency proceedings

#### 3. Safeguard proceedings

When considering whether to enter into safeguard proceedings or to use pre-insolvency proceedings, it is important to evaluate the difference in level of assistance and interference in the company's management.

Safeguard proceedings are public proceedings, benefiting from more powerful tools than the pre-insolvency proceedings whereby recalcitrant creditors, who may not agree to a moratorium in the pre-insolvency proceedings, can be bound by the terms of a restructuring plan voted by a qualifying majority of the creditors (see hereafter under 3.4.1).

#### 3.1 Filing

##### 3.1.1 Motion<sup>175</sup>

Under safeguard proceedings, a company in difficulty but without being in cessation of payments may file a motion for the Court's assistance and protection in order to turn itself around.

- Only the director of a company can file a motion to open safeguard proceedings.

<sup>171</sup> Article L. 611-7-1 of the French Commercial Code.

<sup>172</sup> Article L. 611-7 section 1 of the French Commercial Code.

<sup>173</sup> Article L. 611-7 al 6 of the French Commercial Code.

<sup>174</sup> Articles L. 628-1 to L. 628-7 of the French Commercial Code.

<sup>175</sup> Article L. 620-1 of the French Commercial Code.

- Safeguard proceedings may only be opened when the debtor is experiencing difficulties which it cannot overcome alone.
- The Court will look into the financial, economic, social and legal situation of the company (the turnover, the annual income, the implementation of a restructuring plan, etc.) as on the day of opening proceedings and not on the day the motion is filed.<sup>176</sup>

### 3.1.2 Filing<sup>177</sup>

Certain corporate information and documents must be filed with the motion to open proceedings which must be dated, signed and certified as true by the company.

## 3.2 Players in the safeguard proceedings

### 3.2.1 The Court-appointed administrator<sup>178</sup>

A Court-appointed administrator will assist or supervise the company during safeguard proceedings. As with the *mandat ad hoc* and conciliation proceedings, the company may propose an administrator, but the Court has the right to refuse this proposal and appoint an administrator of its choosing.

During the observation period, (see below), the company's business continues to be run by its directors under the supervision of the administrator. However, certain powers are vested in the administrator including whether the company's ongoing contracts (other than employment contracts) should be terminated.

As from 3 April 2016,<sup>179</sup> the appointment in safeguard proceedings (and also in the other insolvency proceedings) of two *mandataires judiciaires* or *administrateurs judiciaires* is mandatory if the debtor company operates three or more businesses in another jurisdiction in France from the one where it is registered. It is also mandatory when (i) the debtor controls at least two companies undergoing *sauvegarde*, *redressement* or *liquidation judiciaires* proceedings, or (ii) when the debtor company is controlled or owned by a company subject to ongoing insolvency proceedings and the company itself holds or controls at least one other company which is also subject to insolvency proceedings. These entities will have to meet the following turnover levels:

- 20 million euros generated by the debtor, or
- 20 million euros generated by one of the companies controlled by the debtor, or by the company controlling the debtor; the notion of control being set out under Articles L. 233-1 or L. 233-3 of the French Commercial Code.

### 3.2.2 The *juge-commissaire*<sup>180</sup>

Certain decisions (those not in the ordinary course of business or decisions as to sale of assets) require the prior approval of the *juge-commissaire*, the judge nominated to monitor the proceedings.

### 3.2.3 The *mandataire judiciaire*<sup>181</sup>

As well as the administrator, the Court will also appoint one or two *mandataire(s) judiciaire(s)*, from the list of *mandataires judiciaires* registered within the Court's jurisdiction.

The *mandataire judiciaire* has one objective: to represent creditors' interests and, more specifically, to receive their claims and verify whether they exist.

<sup>176</sup> Commercial chamber of the Court de cassation 26 June 2007, n° 06-20.820.

<sup>177</sup> Articles R. 611-22 and R. 621-8 of the French Commercial Code.

<sup>178</sup> Articles L. 621-4 and L. 622-1 of the French Commercial Code.

<sup>179</sup> The publication date in the French Official Gazette being 3 April 2016.

<sup>180</sup> Articles L. 621-4 and L. 621-9 of the French Commercial Code.

<sup>181</sup> Articles L. 621-4 and L. 622-20 of the French Commercial Code.

### 3.2.4 The *contrôleurs*<sup>182</sup>

Additionally, up to five creditors may be appointed by the *juge-commissaire* as *contrôleurs*, if requested. The *contrôleurs* complement the role of the *mandataire judiciaire* in protecting the interests of creditors and assisting the *juge-commissaire* in his mission to supervise the running of the business.

### 3.2.5 The Court

As from 1 March 2016, specific commercial Courts will deal with *sauvegarde*, *redressement* and *liquidation judiciaires* proceedings where the debtor is a legal entity exceeding a certain size. The outcome sought is the management of complicated matters in a more efficient manner by concentrating large insolvencies within a limited number of Courts. These Courts will have jurisdiction where the following criteria are met:<sup>183</sup>

- (i) entities employing 250 or more employees with a turnover of at least 20 million euros and/or
- (ii) entities with a turnover of more than 40 million euros irrespective of the number of employees or (iii) companies which hold or control other entities where the total combined number of employees is 250 or more and where they have a combined total turnover of at least 20 million euros or (iv) companies which hold or control other entities, irrespective of the number of employees and where the combined turnover is at least 40 million euros.
- proceedings where the international jurisdiction of the Court is determined according to acts taken as per the European Union and related to insolvency proceedings.
- proceedings under which the international jurisdiction of the Court results from the presence in its jurisdiction of the debtor's centre of main interests.
- conciliation proceedings initiated by the debtor, at the request of the Public Prosecutor or by decision of the president of the commercial Court, when the debtor is an entity or a group fulfilling the conditions cited above at 1 (i) to (iv).

The specialized Courts will also have jurisdiction for any proceeding regarding a company held or controlled, as per Articles L.233-1 and L.233-3 of the French Code of Commerce, by another company and in respect of which an insolvency proceeding has been commenced before a specialized Court.<sup>184</sup> In such cases, all proceedings will be handled by one and the same Court regardless of the commencement date of the different proceedings.

The specialized Courts are the following:

- Bobigny;
- Bordeaux;
- Dijon;
- Evry;
- Grenoble;
- Lyon;
- Marseille;
- Montpellier;
- Nanterre;
- Nantes;
- Nice;
- Orléans;
- Paris;
- Poitiers;
- Rennes;
- Rouen;
- Strasbourg;
- Toulouse; and
- Tourcoing

<sup>182</sup> Article L. 621-10 of the French Commercial Code.

<sup>183</sup> Article L. 721-8 of the French Commercial Code.

<sup>184</sup> Article L. 662-8 of the French Commercial Code.

Given that there are only 19 Courts (18 commercial Courts and the commercial section of the high Court of Strasbourg) selected to deal with such insolvency matters, the affected proceedings will be dealt with by specialized professionals who will develop an expertise in complex matters. This should in the longer term lead to greater efficiency and competency to the benefit of the economy as a whole.

Finally, as from 1 March 2016, one Court will have jurisdiction to deal with insolvency proceedings commenced against a company held by another company or controlling another company, where the holding company or the controlled company is subject to insolvency proceedings commenced before that Court. This will make the various practitioners' tasks much easier in such cases. This aspect is also innovative and welcome.

### 3.3 During the proceedings

The Court will automatically stay all payments and all ongoing interest on payments (with limited exceptions, such as the enforcement of retention of title clauses and loans of more than one year), to grant the company a breathing space to draw-up a restructuring plan to be submitted to the Court for approval.

The Court will open an observation period which lasts six months and may be renewable once and in very limited circumstances, twice, for the purposes of preparing and obtaining the approval from the Court on a restructuring plan. The observation period comes to end upon approval of the restructuring plan by the Court.

#### 3.3.1 Creditors' committees

Usually under safeguard proceedings, creditors' committees will be formed. The Court has discretion to create creditors' committees even where the required thresholds are not met (i.e 150 employees and an annual turnover of 20 million euros).<sup>185</sup>

The committees are composed as follows:<sup>186</sup>

- the first committee: trade creditors (suppliers who individually are owed receivables representing at least 3% of the total amount of the company's supplier liabilities);
- the second committee: banking establishments, financial and credit institutions (including hedge funds)<sup>187</sup> and finance companies regardless of the size of their claim; and
- the third committee: bondholders convened in the form of a meeting, if any.<sup>188</sup>

The purpose of the committees is to allow the creditors to discuss and vote on the proposed restructuring plan.<sup>189</sup>

#### 3.3.2 Safeguard restructuring plan

With the assistance of the administrator, the company (through its directors) draws up a draft restructuring plan.<sup>190</sup> The term of the plan will be fixed by the Court, subject to a maximum of ten years.<sup>191</sup>

The plan is very flexible, for example by allowing the company to treat each committee differently if economically justifiable to do so.

Since the 2014 Reform, any creditor who is a member of a creditor committee is also entitled to draw up and submit a draft restructuring plan which will be presented to the committees.<sup>192</sup>

<sup>185</sup> Article L. 626-29 of the French Commercial Code.

<sup>186</sup> Article L. 626-30 of the French Commercial Code.

<sup>187</sup> Pursuant to Article L. 626-30 of the French Commercial Code, hedge funds all credit institutions and those assimilated to these institutions, as well as all those that purchased a claim from these institutions, from a supplier of goods or from a service provider also members of the second committee.

<sup>188</sup> Article L. 626-32 of the French Commercial Code.

<sup>189</sup> Article L. 626-30-2 of the French Commercial Code.

<sup>190</sup> Article L. 626-30-2 al 1 of the French Commercial Code.

<sup>191</sup> Article L. 626-12 of the French Commercial Code.

<sup>192</sup> Article L. 626-30-2 of the French Commercial Code.

The restructuring plan may provide for:<sup>193</sup>

- the postponement of repayment of claims;
- the reduction or full relief from interest payments;
- debt forgiveness also known as “debt cram down”;
- debt for equity swaps, meaning the conversion of claims into equity/shares if the debtor is a joint stock company
- reserved increase of share capital; and
- the issuing of convertible bonds (obligations convertibles en actions).

### 3.3.3 Partial waiver of claims of creditors in the public sector<sup>194</sup>

The debtor may obtain a waiver from its public creditors as to part of their claims, pre-emption rights, and their ranking between creditors holding a charge or mortgage.

## 3.4 Outcome of the safeguard proceedings

### 3.4.1 Approval by creditors and the Court of the draft restructuring plan

Not all creditors will vote on the proposed restructuring plan. Creditors will not vote if:

- the plan does not modify their payment terms; and
- their claim is to be fully reimbursed in cash pursuant to the plan.<sup>195</sup>

All committee creditors vote in their respective committee and the approval threshold is two thirds of the total value of the claims of all the creditors who actually vote. If this majority is achieved, the dissenting minority will be bound by the decision of the majority.<sup>196</sup>

Voting must take place in each committee within 20 to 30 days of receiving the draft plan<sup>197</sup> and within six months from the opening of safeguard proceedings.<sup>198</sup>

Non-committee creditors, including state creditors, are consulted individually. If they cannot come to an agreement, the Court cannot reduce their claims but can defer or reschedule the due date for payment.<sup>199</sup>

Before approving the plan, the Court will ensure that all creditors’ interests are protected. The Court can reject the restructuring plan in order to protect creditors even though it would safeguard the company’s business and clear most of its debts.<sup>200</sup>

Once approved by the Court, creditors will be bound by the plan and all its terms become enforceable. Individuals or legal entities in their position as guarantors may invoke the terms of the plan. This does not concern every guarantor of the company but only those who guarantee a security (caution), are co-debtors, autonomous guarantors or have granted a personal security.<sup>201</sup>

### 3.4.2 Failure of the safeguard proceedings

The Court has the power to convert safeguard proceedings into judicial reorganisation or judicial liquidation in the following circumstances:<sup>202</sup>

<sup>193</sup> Article L. 626-30-2 of the French Commercial Code.

<sup>194</sup> Article L. 626-6 of the French Commercial Code.

<sup>195</sup> Articles L. 626-5 al 4 and L. 627-3 of the French Commercial Code.

<sup>196</sup> Article L. 626-30-2 al 4 of the French Commercial Code.

<sup>197</sup> Article L. 626-30-2 al 3 of the French Commercial Code.

<sup>198</sup> Article L. 626-34 of the French Commercial Code.

<sup>199</sup> Articles L. 626-5 and L. 626-6 of the French Commercial Code.

<sup>200</sup> Article L. 626-31 of the French Commercial Code.

<sup>201</sup> Article L. 626-11 of the French Commercial Code.

<sup>202</sup> Article L. 622-10 of the French Commercial Code.

- if evidence is brought during the observation period that the company was at the opening of safeguard proceedings or is now in cessation of payments; and
- if it appears manifestly impossible to adopt the plan and/or the company would rapidly become insolvent if the safeguard came to an end.

#### 4. Accelerated safeguard proceedings (*sauvegarde accélérée*)

This procedure, created further to the 2014 Reform, evolved from a fairly recent procedure called the accelerated financial safeguard (which has now been incorporated as a subset of the SA and described hereafter under section 4.4). It is aimed at implementing a restructuring plan, already negotiated during preliminary conciliation proceedings, despite the opposition of minority creditors, by forcing a vote through creditors' committees.

##### 4.1 Filing

Only debtors who are under on-going conciliation proceedings and who have been in “cessation of payments” for less than 45 days on the date of filing<sup>203</sup> may file for an SA.

A debtor who applies for an SA must convince the Court that the restructuring plan elaborated during the conciliation proceedings will not only address the financial difficulties it faces but will also be adopted by the creditors' committees (described in section 3.3.1 above)<sup>204</sup> including the bondholders. As a result of this, the formation of creditors' committees is always mandatory during an SA procedure.<sup>205</sup>

Certain documents must be attached to the motion<sup>206</sup> and certain conditions must be fulfilled by the debtor, as follows:<sup>207</sup>

- the company's accounts must be certified by a statutory auditor, or prepared by an accountant or the company must establish consolidated financial statements pursuant to Article L. 233-16 of the French Commercial Code.; and
- the company's turnover must equal or exceed 3 million euros per year; or
- the company's balance sheet total must equal or exceed 1.5 million euros; or
- the company has 20 or more employees on the date of filing for the SA.

##### 4.2 During the proceedings

Many of the provisions of the French Commercial Code apply to both the SA and the general safeguard proceedings<sup>208</sup> but, unlike the general safeguard proceedings, fast-track proceedings follow directly on from conciliation proceedings during which a restructuring is negotiated.

One of the main objectives of these proceedings is to act as leverage against dissenting minority creditors by converting a conciliation agreement with the key creditors, which would require unanimous approval, into a mandatory restructuring plan which does not require unanimity.

Creditors who have taken part in the conciliation proceedings will be considered as having already filed their proof of debt with the *mandataire judiciaire*.<sup>209</sup>

Other creditors with claims born before the opening of the proceedings are also affected<sup>210</sup> and must therefore proceed to the filing of their claims. They will, however, likely not be seriously affected by the plan as it results from the negotiations having taken place during the conciliation.

<sup>203</sup> Article L. 628-1-4 of the French Commercial Code

<sup>204</sup> Articles L. 628-1 of the French Commercial Code.

<sup>205</sup> Article L. 628-4 of the French Commercial Code.

<sup>206</sup> Article R. 628-2 of the French Commercial Code.

<sup>207</sup> Articles L. 628-1 and D628-3 of the French Commercial Code.

<sup>208</sup> Article L. 628-1 al 1 of the French Commercial Code.

<sup>209</sup> Article L.628-7 of the French Commercial Code.

<sup>210</sup> Article L.628-6 of the French Commercial Code.

### 4.3 Outcome of these proceedings

#### 4.3.1 Adoption of the safeguard plan

The plan will be adopted if approved by the creditors' committees in the same condition as in an ordinary safeguard procedure.<sup>211</sup>

After the Court's approval to proceed under an SA, the creditors have three months to vote on and adopt the restructuring plan (instead of six months under the standard safeguard proceedings).<sup>212</sup>

#### 4.3.2 Non-adoption of the plan

If the plan is not adopted by the creditors within the given time limit, the Court will bring the SA to an end.<sup>213</sup> If the company is in cessation of payments, the Court will open judicial reorganisation or liquidation proceedings.

### 4.4 The accelerated financial safeguard (*sauvegarde financière accélérée* – SFA)

The SFA, originally created in 2010 was the inspiration for the SA. Since the 2014 Reform it has become a specific kind of SA aimed at implementing a restructuring plan without affecting non-financial creditors.<sup>214</sup> The overall mechanisms of the SFA are identical to those of the SA with a couple of notable exceptions:

Only financial creditors (mainly banking establishments<sup>215</sup> and bondholders) are affected by the SFA. Trade creditors are not directly affected and their claims will be payable in accordance with their terms. As such, only the banking establishments' committee and, as the case may be, the bondholders' committee are gathered and called upon to approve the plan.<sup>216</sup>

The deadline for the adoption of the restructuring plan is reduced to a single month (which may be extended by an additional month).<sup>217</sup>

The first SFA was opened on 27 February 2013 by the Commercial Court of Nanterre against the company Soflog-Telis. Here, the company was in conciliation proceedings but one of the five banks in a bank pool, creditor of the company, refused to sign the conciliation agreement which required unanimity. Due to the dissenting bank, the company decided to file for an SFA, to convert the conciliation agreement into a mandatory restructuring plan forcing the dissenting bank to abide by what was accepted by the other four banks of the bank pool under conciliation proceedings.

More recently, in December 2015, an SFA procedure was used to restructure the bank debt of a company named DPAM, as a first step in its sale process to another market player in the children's clothing sector.

## 5. Judicial reorganisation (*redressement judiciaire*)

Judicial reorganisation is very similar to the standard safeguard proceedings except for the fact that the company needs to be in cessation of payments when filing for *redressement judiciaire*.

The purpose of these proceedings is to safeguard the company's business, maintain its activities, preserve as many jobs as possible and clear its debts.

<sup>211</sup> Article L. 628-8 of the French Commercial Code with reference to Article L. 626-31.

<sup>212</sup> Article L. 628-8 of the French Commercial Code.

<sup>213</sup> Article L. 628-6 of the French Commercial Code.

<sup>214</sup> Article L. 628-9 of the French Commercial Code.

<sup>215</sup> Banking establishments include all legal entities whose customary business activity is the carrying out of banking transactions or linked with such transactions such as banking and financing operations and also institutions which provide means of payment. Basically, this group mainly includes banks, financial institutions, leasing companies etc. Article L. 511-1 of the French Financial and Monetary Code.

<sup>216</sup> Article L. 628-10 of the French Commercial Code.

<sup>217</sup> Article L. 628-10 of the French Commercial Code.

## 5.1 Filing<sup>218</sup>

A motion to open reorganisation proceedings may be filed by the company, a creditor or the public prosecutor. The Court can no longer bring its own motion to open judicial reorganisation proceedings.<sup>219</sup>

The company is under an obligation to file a motion to open either judicial reorganisation or judicial liquidation proceedings when it is in a state of cessation of payments. The motion must be filed within 45 days of the date of cessation of payments (unless the company has already decided to enter into conciliation proceedings).

## 5.2 The administrators

Occasionally, the Court may decide that an administrator should take over the management of the company but generally<sup>220</sup> the company will continue to be managed by its directors although the administrator will be granted more extensive powers by the Court than compared to those granted to the administrator in safeguard proceedings.

The administrator's objective will still be to assist and supervise the company, to assess the company's financial situation, come up with solutions to the company's difficulties and report back to the Court.<sup>221</sup>

## 5.3 Stay on payments during the proceedings

As well as for safeguard proceedings, judicial reorganisation provides for a stay on payments upon the opening of proceedings by the Court and an observation period of up to 12 months (possibly extended by a further six months).<sup>223</sup>

The purpose of the observation period is to:

- give the company time to implement its own reorganisation plan (the continuation plan), if it can evidence that it will be in a position to repay its creditors over a maximum period of 10 years;<sup>224</sup> or
- allow potential acquirers, who must be third parties, to present offers (sales plans) for the company's business.<sup>225</sup>

### 5.3.1 Restructuring continuation plan and sales plans

#### 5.3.1.1 Restructuring continuation plan

A) During judicial reorganisation, a restructuring plan may be drawn up by the administrator with the assistance of the directors. The plan will need the approval of the Court, which will be subject to the Court being satisfied that all creditors are sufficiently protected under the plan.<sup>226</sup>

For the Court to adopt the plan, the company must show that the plan will enable it to continue operating its business. If the Court determines that the plan is not viable, the Court can, unlike under safeguard proceedings, require a sale of business plan (the plan de cession) to be drawn up.<sup>227</sup>

If the company does not appear to be viable, or if no offer is lodged during the observation period, the Court also has the power to open judicial liquidation proceedings.<sup>228</sup>

<sup>218</sup> Article L. 631-4 and L. 631-5 of the French Commercial Code.

<sup>219</sup> Constitutional Council Decision dated 7 December 2012, n°2012-286.

<sup>220</sup> Article L. 631-9 of the French Commercial Code.

<sup>221</sup> Article L. 631-12 of the French Commercial Code.

<sup>222</sup> Articles L. 631-14 and L. 622-7 of the French Commercial Code.

<sup>223</sup> Articles L. 631-7 and L. 621-3 of the French Commercial Code.

<sup>224</sup> Articles L. 626-12 and L. 631-19 of the French Commercial Code.

<sup>225</sup> Article L. 631-22 of the French Commercial Code.

<sup>226</sup> Articles L. 631-19 and L. 626-1 to L. 626-32 of the French Commercial Code.

<sup>227</sup> Articles L. 631-15-II, L. 631-21-1 and L. 631-22 of the French Commercial Code.

<sup>228</sup> Articles L. 631-15-II of the French Commercial Code.

B) Cram down of recalcitrant shareholders in reorganisation proceedings. A reform implemented in 2015, which came into force on 8 August 2015 for some of its measures, sets out two ways in which the commercial Courts may force out recalcitrant shareholders who may oppose the plan. These powers are only available within reorganisation proceedings. They are not available in safeguard or liquidation proceedings.

Nor will they apply to any pre-insolvency process such as conciliation and *mandat ad hoc*. This is consistent with the notion that in such proceedings coercion is anathema to what is expected and sought by the parties. Also, it would be difficult to justify expropriation or dilution of shareholders in companies that may not be seriously in trouble.

Since entry into force of the 2014 Reform,<sup>229</sup> the committee creditors<sup>230</sup> of a company in *sauvegarde* or *redressement judiciaire* have been allowed to submit a reorganisation plan. The 2015 reform (known as the Macron Law) now allows them, as well as shareholders, who present a reorganisation plan, to “cram down” recalcitrant shareholders. “Cram down” will happen where the recalcitrant shareholders in question have sufficient voting power to block the proposed reorganisation plan.<sup>231</sup> In this scenario, and provided a number of strict conditions are met, the commercial Courts may take steps which will lead to either (i) the forced dilution of shareholders, or (ii) the forced sale of dissenting shareholders’ shares.

#### 5.3.1.2 Sales plan

Before making an offer, potential offerors may obtain limited information about the company from the registry of the Court where the company is registered. The register will detail the debtor’s assets and liabilities and also state the time within which offers may be made.<sup>232</sup>

Offers may be made within a specific period commencing with the date the proceedings are opened until the deadline fixed by the Court (or by the administrator in reorganisation proceedings).<sup>233</sup>

The length of this period varies and is often influenced by the debtor’s financial situation and the availability of cash flow. Because the administrator is personally liable for debts incurred during his administration, he will wish to present a report to the Court for review and adoption well before funds dry up. The report will analyse and evaluate all offers and recommend one of them to the Court.<sup>234</sup>

Offers made by directors of the company or their immediate relatives (in the second degree) may not be accepted.<sup>235</sup>

The key points when presenting an offer are:

- the Court can only consider and choose offers in respect of an autonomous business activity comprising assets and some or all of the corresponding employees. The Court will exclude offers in respect of assets only;
- an offer, once filed, is binding until the Court makes its decision in relation to the sales plans filed;<sup>236</sup>
- an offer must set out all relevant information provided under Article L.642-2-II of the French Commercial Code including a description of the assets and activities in respect of which the offer is made, the price and payment conditions etc;

<sup>229</sup> Order n°2014-326 of 12 March 2014 regarding pre-insolvency measures and insolvency proceedings (*Ordonnance portant réforme de la prévention des difficultés des entreprises et des procédures collectives*)

<sup>230</sup> *Tout créancier membre d’un comité*, Article L. 626-30-2 of the French Code of Commerce

<sup>231</sup> “The Macron Bill about to introduce a right to remove shareholders of distressed companies : a new threat for investors or new opportunities for creditors of French companies in need of turnaround ? », INSOL International Electronic Newsletter, April 2015, Brice Mathieu ; Also further changes to French corporate and insolvency legislation, INSOL, International Electronic Newsletter, 15 October 2015, Anker Sorensen.

<sup>232</sup> Article R. 642-40 of the French Commercial Code.

<sup>233</sup> Article L. 642-2-I of the French Commercial Code.

<sup>234</sup> Article L. 642-5 paragraph 1 of the French Commercial Code.

<sup>235</sup> Article L. 642-3 of the French Commercial Code.

<sup>236</sup> Article L. 642-2-V of the French Commercial Code.

- although not encouraged by the Courts, offers frequently include conditions precedent. Typical conditions may include renegotiating key contracts, confirming orders or supplies or even obtaining authorisations from governmental authorities. Offerors must notify the Court by the hearing date whether the conditions have been met and, if not, whether the offer still stands;
- the administrator files all offers made with the Court registry, where they are at the disposal of any interested party;<sup>237</sup>
- once an offer has been filed, it can only be amended by improving it within two working days before the hearing.<sup>238</sup>

If the offer is approved by the Court, the payment of the purchase price, which is ratified by the Court, clears most securities and charges over the assets sold.<sup>239</sup> This, however, will not affect security held by the creditor who financed the acquisition of the assets secured by the charge. In other words, *liability for special securities over assets guaranteeing the repayment of a loan granted to the insolvent company for the financing of the asset sold under the restructuring sales plan shall be conveyed to the purchaser. The Purchaser shall be required to pay to the creditor the instalments agreed with the creditor and that remain due as of the sale of assets under the plan.*<sup>240</sup>

Only those employees whose positions, on a no name basis, are referred to in the offer adopted by the Court will be transferred with the business. The Court does not have the power to impose the transfer of all employees to the buyer, although the number of employees included in an offer will be a factor taken into account by the Court when deciding which offer to accept.

Employees who are not transferred to the purchaser will be made redundant.

#### 5.3.2 Agreement with public creditors to waive their claim<sup>241</sup>

In judicial reorganisation proceedings, as in conciliation and safeguard proceedings, the debtor may come to an agreement with its public creditors, listed under Article D. 626-9 of the French Commercial Code, with regard to waiving part of their claims.

The types of claims a public creditor may waive are listed and ranked in accordance with the French Commercial Code. Their ranking is as follows:

- Legal costs, price increases and fines.
- Interest for late payment and moratorium interest.
- Principal sums due (but these cannot be waived in full).

The exact agreement reached with public creditors will depend on the outcome of negotiations with the company's private creditors as the French Commercial Code provides that both efforts must be coordinated.

The decision to waive the claims of public creditors is subject to the prior approval of the CCSF (Committee regrouping the directors of financial services and representatives of the public entities concerned).

Creditors in the public sector can also decide to waive their pre-emption rights, their ranking as holders of a charge or mortgage, to abandon these rights altogether, or even to postpone payment.

## 5.4 Outcome of the proceedings

### 5.4.1 Restructuring continuation plan

In principle, the rules applicable to the restructuring continuation plan are the same as those that apply to the safeguard restructuring plan (see section 3 above), except:

<sup>237</sup> Articles L. 642-2-IV and L. 642-4 of the French Commercial Code.

<sup>238</sup> Article R. 642-1 paragraph 3 of the French Commercial Code

<sup>239</sup> Articles L. 642-12 of the French Commercial Code

<sup>240</sup> Article L. 642-12 of the French Commercial Code.

<sup>241</sup> Articles L. 626-6 and L. 631-19-I of the French Commercial Code.

- if the plan provides for redundancies, the workers' council or the workers' representatives will need to be informed and consulted and their opinion (avis) will need to be given at least one working day prior to the hearing ruling on the plan (Article L. 631-19-III of the French Commercial Code);
- if the plan provides for redundancies, the redundancies must take place within one month after the Court decision adopting the plan (Article L. 631-19-III §2 of the French Commercial Code);
- the adoption of the plan may be conditional upon the replacement or revocation of the directors at the request of the public prosecutor (Article L. 631-19-1 of the French Commercial Code);
- the Court may hold that shares or any other rights giving access to share capital may not be transferred to or held by director(s) and may direct that voting rights will be held for a fixed period by a Court agent (Article L. 631-19-1 of the French Commercial Code);
- the Court may decide to sell such shares or other rights giving access to the share capital (Article L. 631-19-1 of the French Commercial Code);
- directors and representatives of the workers' council shall be heard or called in front of the tribunal (Article L. 631-19-1 of the French Commercial Code); and
- guarantors who may rely on the safeguard plan may not rely on the provisions of the restructuring plan (Article L. 631-20 of the French Commercial Code).

If the restructuring plan is not adopted or is not held to be viable, the Court may impose a sales plan.

#### 5.4.2 Sale of the business – sales plan

If the offer is approved by the Court, the payment of the purchase price ratified by Court clears most securities and charges over the assets sold. This however will not affect the security held by the creditor who financed the acquisition of the assets secured by the charge<sup>242</sup> (see section 5.3.1 under judicial reorganisation).

Following the sale, creditors will be repaid from the proceeds of the sale depending on their ranking, as determined by the French Commercial Code.

#### 5.4.3 Failure of the reorganisation proceedings

If at any time during the reorganisation proceedings, the Court concludes that the company is in a situation where the judicial reorganisation may no longer save the business and that, the business is no longer viable, the Court will open judicial liquidation proceedings.<sup>243</sup>

If the Court does not approve the plan, the Court will open judicial liquidation proceeding.<sup>244</sup>

## 6 Judicial liquidation

### 6.1 Filing

A company in cessation of payments is under an obligation to file a motion to open judicial liquidation proceedings if judicial reorganisation would have no prospect whatsoever of saving the business.<sup>245</sup>

As with judicial reorganisation, the company, a creditor or the public prosecutor may open judicial liquidation, (provided that the company is not in conciliation proceedings).<sup>246</sup>

The motion must be filed within 45 days of the date of cessation of payments.<sup>247</sup>

<sup>242</sup> Article L. 642-12 of the French Commercial Code

<sup>243</sup> Articles L. 631-15-II, L. 631-19 and L. 631-22 of the French Commercial Code.

<sup>244</sup> Article L. 631-22 of the French Commercial Code.

<sup>245</sup> Article L. 640-1 of the French Commercial Code.

<sup>246</sup> Article L. 640-5 of the French Commercial Code.

<sup>247</sup> Article L. 640-4 of the French Commercial Code.

The documents and evidence which must be filed with the motion are the same as for judicial reorganisation, but must also show that the opening of reorganisation proceeding is “manifestly impossible”.<sup>248</sup>

## 6.2 The liquidator

On the opening of judicial liquidation, the insolvency Court will appoint one or more liquidators<sup>249</sup> (see 3.2.1 of the Appendix for the mandatory appointment of two liquidators). If more than one liquidator is appointed, each liquidator has the power to represent the debtor.

If the judicial liquidation proceedings supersede a judicial reorganisation, the mandataire *judiciaire* will usually be appointed as liquidator. Unlike the other pre-insolvency and insolvency proceedings, the liquidator not only takes over the management of the company but also represents the creditors.

The liquidator’s objective is to sell the assets of the insolvent company in the most profitable way and to pay off the creditors in order of priority out of the sales proceeds.<sup>250</sup> It is rare for there not to be a shortfall of assets, in which case, as set out in the answer to the questions above, de jure and de facto directors may be held liable.<sup>251</sup>

## 6.3 During the proceedings

Generally, the business of the company will cease to facilitate the winding-down of the company and to prevent existing debts increasing. However, the business may continue for three months (and possibly a further three months thereafter) with a view to selling the business (in whole or in part) or if it is in the public interest or the interest of creditors for it to continue.<sup>252</sup>

The liquidator may sell the assets in two different ways. First by selling the business in whole or in part as a going concern, but if this is not possible, by selling the company’s assets on a piecemeal basis.

## Three important recent updates in French insolvency law

### 1. The 2012 Petroplus Reform

Amongst the recent reforms in French insolvency law, the “Petroplus” Law adopted on 1 March 2012 (Petroplus Law) aimed at preventing the misappropriation of assets of companies in difficulty.

The Petroplus Law introduced two important measures:

- for the president of the Court to authorise the seizure of assets of third parties during safeguard and reorganisation proceedings;
- on the approval of the *juge-commissaire*, for the seized assets to be sold by the Court and the proceeds deposited at the *Caisse des Dépôts et des Consignations*. The proceeds will then be used to pay legal costs and to make good the breach of social and environmental obligations committed by the debtor company.

The Petroplus Law gave rise to a number of questions including what if the assets seized on the Court’s approval were subject to guarantees in favour of third parties and does the right of seizure conflict with property rights granted under the European Convention of Human Rights (see Question 7).

To our knowledge, this law has rarely been applied.

<sup>248</sup> Article R. 640-1 of the French Commercial Code

<sup>249</sup> Article L. 641-1, II of the French Commercial Code.

<sup>250</sup> Article L. 641-4 of the French Commercial Code.

<sup>251</sup> Article L. 651-2 of the French Commercial Code.

<sup>252</sup> Article L. 641-10 and R. 641-18 of the French Commercial Code.

## 2. The liability of foreign or French parent companies as co-employer of its French subsidiary

The French *Cour de cassation* has recently upheld case law developed by the lower Courts under which parent companies, foreign or French, may be held liable for the redundancies of employees of their underperforming subsidiaries as a “co-employer”.

The French *Cour de cassation* laid down three criteria for considering whether a parent company may be a “co-employer”: (i) an interest in the subsidiary (for example, an 80% holding in the subsidiary’s share capital or a lack of real autonomy by the subsidiary); (ii) activities (for example, the parent and the subsidiary being involved in the same business activity); and (iii) shared management (for example, one or more directors sitting on both the parent’s and the subsidiary’s board).

The most debated cases were *Jungheinrich*, *Jungheinrich A.G*, *Jungheinrich Finance Holding* and *Aspocomp* in 2011, in which the *Cour de cassation* challenged the principle that companies are separate legal personalities. (This case law is especially relevant in the context of jurisdiction and applicable law in a cross-border scenario under Article 19 of the EC Regulation n° 44/2001 dated 22 December 2000, which provides that the “employer” can be brought before the tribunal where the employment was usually performed). Elevating the notion of “employer” to that of “co-employer” has never been referred to or upheld by the CJEU.

More recently, the *Cour de cassation* restricted its own case law in various decisions and ruled that the coordination of economic action between various companies of the same group, the economic domination resulting from the membership to a group, the fact that the managers of the subsidiary are employees of other group companies and that the group has funded the redundancy plan do not suffice to characterize a co-employment situation.

## 3. The introduction of “prepacks” in French insolvency law

The introduction of pre-packs in French insolvency law may impact the nature and purpose of either judicial reorganisation or liquidation proceedings, which could be used in some instances essentially as a conduit for the sale of businesses organised in prior pre-insolvency proceedings, rather than proceedings per se (See 2.5.1.5 and also 1.6 of the Appendix).

The information provided in this country chapter is correct as at 15/05/2016