

France

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SECURITY AND PRIORITIES

1. What are the most common forms of security taken in relation to immovable and movable property? Are any specific formalities required for the creation of security by companies?

Immovable property

The most common types of security for immovable property are:

- **Mortgage (*hypothèque*).** A mortgage is created by deed, operation of law or a judicial decision. If the debtor defaults, it gives the creditor a right to:
 - require the sale of the property at a public auction and to be repaid out of the proceeds; and
 - benefit from a priority right (*droit de suite*) if the secured property is sold to a third party without the creditor being notified; if the third party cannot settle the claim, it can be forced to surrender the property to the secured creditor.

An order dated 23 March 2006 relating to security interests (23 March 2006 Order) created the possibility for the secured creditor to obtain a court order transferring title to the secured property as payment of its claims. In addition, it can be provided for in the mortgage agreement that, in case of default, the mortgagee will be automatically vested with the title to the property after an expert's appraisal (the expert is appointed either by the parties or by the court). That provision is, however, of no effect if the mortgaged property is the principal residence of the debtor.

- **Seller's privilege (*privilege de vendeur d'immeuble*).** A seller's privilege is created by operation of law. A buyer of immovable property grants a privilege for the seller's benefit to secure the portion of the price that cannot be paid in cash. This security interest confers the same rights as a mortgage (*see above*).
- **Lender's privilege (*privilege de prêteur de deniers*).** A lender's privilege is created by deed. A buyer of immovable property grants a privilege for the benefit of the lender funding the purchase. A lender's privilege can only secure the sum lent to the buyer for funding the purchase and it confers the same rights as a mortgage (*see above*).
- **Fiducie.** The law of 19 February 2007 introduced the concept of a trust (*fiducie*) to the French legal system. In a *fiducie*, one or several settlers transfer assets, rights or

security interests to a trustee which manages those assets according to the terms of the trust agreement for the benefit of designated beneficiaries.

Movable property

The most common types of security for movable property are:

- **Pledge without transfer of possession (*gage sans droit de rétention*).** This is a security interest over a tangible or intangible asset created by contract or a judicial decision. It can be used to secure the payment of any type of debt. The pledged asset remains in the debtor's possession. If the debtor defaults, the creditor can:
 - apply for a court order transferring ownership of the pledged asset to it; or
 - be paid in cash from the proceeds of auctioning the asset.

Parties to a pledge agreement can provide, at the time the security interest is created or thereafter, that where the creditor wishes to enforce the pledge, it can choose an alternative out-of-court enforcement process (*pacte commissoire*), by which the secured creditor is automatically vested with title to property after an expert's appraisal (the expert is appointed either by the parties or by the court).

- **Pledge with transfer of possession (*gage avec droit de rétention*).** This works in the same way as a pledge without transfer of possession (*see above*), except that the pledged asset is transferred to, and retained by, the creditor until the debt has been paid in full. An increasingly common type of pledge is one taken over the securities account opened at a bank to record the securities' book entry (*nantissement de compte d'instruments financiers*). The creditor can retain the securities (*droit de rétention*) until it has been paid in full, even if the debtor becomes insolvent and if the trustee tries to claim the securities so that they can be included in a transfer plan (*plan de cession*) (*see Question 5, Rehabilitation proceedings (redressement judiciaire): Effect*).
- **Daily assignment of receivables (*cession Dailly* or *cession de créances professionnelles à titre de garantie*).** A debtor can transfer present or future debts owed to it by third parties to the creditor together with all security interests attached to them (*Article L 313-23, French Monetary and Financial Code*). A *Dailly* assignment of receivables can only be used if:
 - the creditor is a credit institution licensed in France or carrying out its activities in France;

- the claims are assigned to secure facilities granted in connection with business activities; and
- the assigned claims arose during business or professional activities.
- **Assignment of claims against third parties (*délégation*).** A debtor transfers claims against its own debtor to the creditor under an agreement between the three parties. This type of assignment is used when the conditions for the more simple *Dailly* assignment of receivables (see above) are not met. Such *délégation* can either be:
 - *parfaite*, in which case the transferred debtor is no longer bound to pay its initial creditor; or
 - *imparfaite*, in which case the transferred debtor continues to be bound to pay its initial creditor and/or the creditor benefiting from the assignment.
- **Cash collateral charge (*gage-espèces*).** Title to cash collateral is transferred to the creditor. If the debtor defaults, the creditor can set off all sums owed by the debtor against the creditor's obligation to return the charged cash to the debtor.
- **Fiducie.** See above, *Immovable property: Fiducie*.
- if a pledge is granted over shares, a bailiff must notify the company that issued the shares.
- **Daily assignment of receivables.** Claims must be assigned using a special transfer form (*bordereau*) signed by the assigner, describing the amount and type of receivables to be assigned. The assignment comes into effect from the date specified on the form. Failing any agreement to the contrary, the remittance of the transfer form results, by operation of law, in the assignment to the assignee of the security interest attached to the assigned receivables.
- **Fiducie.** The grantor of a trust must be a legal entity subject to corporation tax and a resident of an EU member state or of a state which has concluded a double tax treaty with France. The trustee (which must, if the grantor so requests, be a credit institution or an insurance company) must also reside in an EU member state or in a state which has concluded a double tax treaty with France. The trust agreement must be registered with the French tax authorities within one month of signing.

2. Where do creditors and shareholders rank on the insolvency of a company?

Where creditors rank on insolvency is complex, and any attempt to provide a simple list can be misleading. However, the following basic principles apply:

Formalities

The following formalities apply:

- **Mortgage.** A mortgage must be created by a deed drafted, stamped and executed before a notary or under an agreement deposited with a notary. As a debtor can grant more than one mortgage as well as privileges over the same immovable property, the deed must be registered with the Mortgage Registry (*Conservations des Hypothèques*) so that the rank of creditors can be established.
- **Seller's privilege and lender's privilege.** These must be created by a deed drafted, stamped and executed before a notary.

A lender's privilege is documented in the same deed as the purchase of immovable property.

The deed in which a privilege is created must be registered at the Mortgage Registry (see above, *Mortgage*).
- **Pledge.** Generally, there are no specific formalities to create a pledge. However, to ensure that third parties do not dispute their existence or date of creation, they are usually documented in an agreement registered with the Ministry of Finance (*bureau de l'enregistrement*) or by a deed executed before a notary. These formalities are not necessary for commercial pledges as their existence can be proved by any means of evidence.

Specific rules apply to pledges granted over certain types of assets, for example:

 - a pledge of goodwill must be registered with the clerk of the commercial court;
- On insolvency, there is a stay of proceedings. As a result, creditors cannot enforce their rights relating to debts that arose before insolvency proceedings. There are a few exceptions to this rule, such as claims protected by a pledge with transfer of possession, receivables assigned by way of *Dailly* assignment, or more generally assets assigned by way of trust (see *Question 1, Movable property*) and claims secured by a retention of title clause (see *Question 3*).
- A portion of employees' pre-petition claims benefit from a preferential status (*superprivilège des salariés*). This protects the last 60 days of wages in arrears before the judgment opening insolvency proceedings. If the bankruptcy estate cannot pay these claims from its available cash, they are paid as advances by a national wage insurance body (*Association pour la Gestion du régime de garantie des créances de Salariés*), which then replaces the employees' ranking as a creditor.
- Lenders that extended credit to a company as part of a workout agreement during conciliation proceedings (see *Question 5, Conciliation proceedings (conciliation)*) rank ahead of all pre-petition and post-petition claims (except for arrears of wages and legal costs) if it does not prevent insolvency (*Law No. 2005-845 of 26 July 2005*).
- In rehabilitation proceedings (see *Question 5, Rehabilitation proceedings (redressement judiciaire)*), post-petition creditors must be paid when their debts fall due. If not paid when they fall due, post-petition debts rank above both secured and unsecured pre-petition debts provided that:

- they arise for the purpose of funding the observation period; or
 - they represent consideration due to a lender, or to a provider of goods or services, in a business transaction directly connected to the company's activities continued during the observation period.
- In liquidation proceedings (*see Question 5, Liquidation proceedings (liquidation judiciaire)*), the creditors' ranking is the same as in rehabilitation proceedings, except that the following pre-petition claims rank above post-petition claims:
 - claims secured by a mortgage;
 - claims secured by a pledge with transfer of possession;
 - claims secured by a specific registered lien over property, plant or equipment.
 - Shareholders do not receive any repayment of their capital investment, unless a surplus remains after all the creditors have been paid in full (which is extremely rare).

3. Are there any mechanisms used by trade creditors to secure unpaid debts?

Retention of title clause (*clause de réserve de propriété*)

This is a guarantee that a buyer grants to a seller when purchasing a movable asset and payment is deferred. The seller benefiting from this guarantee retains the legal title to the asset until the purchase price has been paid in full. If the buyer defaults, the seller can repossess the asset.

There are no specific formalities to create a retention of title clause, but it must be:

- In writing.
- Clear.
- Visible on invoices before delivery.

Seizure of the debtor's property

A creditor can seize any asset belonging to the defaulting debtor provided that the creditor has an immediately enforceable debt instrument (*titre exécutoire*), that is, an instrument that is created by a deed executed before a notary or a court decision.

If the debtor persists in not paying, the creditor can auction the asset and be paid out of the proceeds.

The main types of seizure are:

- **Seizure of tangible property (*saisie-vente*).** This applies to all of the debtor's tangible assets.
- **Seizure of intangible property (*saisie-attribution*).** The creditor seizes a sum of money belonging to the debtor and

held by a third party (usually a bank). There is an accelerated procedure lasting eight days, which allows a creditor to seize listed securities that have been deposited in a securities account.

- **Seizure of immovable property (*saisie-immobilière*).** Mortgaged property is transferred to the creditor or a third party bidder through the civil court.

Protective measures

If a creditor does not have an enforceable debt instrument, protective measures over the debtor's assets (*mesures conservatoires*) can still be granted by court order provided that:

- There is a sound basis for the creditor's claim.
- There is a risk that the creditor will not recover the claim.

Once a court order granting protective measures is obtained, the creditor must begin an action within a month, otherwise the order becomes invalid.

Protective measures can be granted as either:

- **Attachments (*saisies conservatoires*).** These allow a creditor to freeze any asset (tangible or intangible) belonging to the debtor. The asset then cannot be transferred until the creditor obtains an enforceable debt instrument. Specific rules apply to certain types of attachments (such as attachments of wages).
- **Orders authorising the taking of security (*sûretés judiciaires*).** These authorise a creditor to take security over the debtor's:
 - immovable property (*hypothèque judiciaire provisoire*);
 - goodwill (*nantissement judiciaire provisoire de fonds de commerce*);
 - shares or securities (*nantissement judiciaire provisoire d'actions, de parts sociales ou de valeurs mobilières*).

4. Are there any procedures (other than the formal rescue or insolvency procedures described in Question 5) that can be invoked by creditors to recover their debt?

Creditors can obtain an emergency order granting them a provisional payment (*provision*) provided that there are no clear grounds for challenging the basis of their claims. An application must be made to the president of the court and is usually dealt with in eight days (or 24 hours if a real emergency can be shown). While the order only lasts until a final decision is made on the merits of the case, it is immediately enforceable. Creditors must begin a full action against the debtor to recover the balance of their claims.

To secure their claims, creditors can ask the court to grant protective measures over the debtor's assets until a final decision is made (*see Question 3*).

RESCUE AND INSOLVENCY PROCEDURES

5. Please briefly describe rescue and insolvency procedures that are available in your jurisdiction. In each case, please state:

- The objective of the procedure and, where relevant, prospects for recovery.
- Companies to which it can potentially apply.
- How it is initiated, when and by whom.
- Substantive tests that apply (where relevant).
- How long it takes.
- The consents and approvals that are required.
- The effect on the company, shareholders and creditors.
- How the procedure is formally concluded.

Ad hoc proceedings (*mandat ad hoc*)

- **Objective.** These are flexible and confidential proceedings in which the president of the court appoints an agent to carry out appropriate tasks. In practice, the proceedings are used to organise an informal negotiation between a company and its major creditors.
- **Companies.** The proceedings apply to all private (as opposed to government) legal entities.
- **How, when and by whom.** The company's management can file a petition to the president of the court provided that the company is solvent (*see below, Substantive tests*).
- **Substantive tests.** The company must be solvent under a pure cash flow insolvency test (as opposed to a balance sheet test). A company is insolvent (*en état de cessation des paiements*) when it is unable to meet its current debts out of its current assets (those in the form of cash or those which can be quickly turned into cash).
- **How long.** It usually takes a few days to obtain a court order to appoint an agent. There is no statutory time limit in which the agent must complete his tasks, but the process usually lasts from one month to a year.
- **Consents and approvals.** The board of directors does not need to approve the proceedings unless the company's articles of association (articles) state otherwise.
- **Effect.** The management must co-operate with the appointed agent and the major creditors to negotiate a solution to the company's difficulties. The most important creditors are invited to consider debt rescheduling and cancellation. In addition, the main shareholders can be invited to negotiate and, potentially, re-capitalise the company.

The process is confidential and voluntary. A debt-rescheduling plan accepted by some creditors cannot be imposed on

other dissenting creditors. However, the management can apply to the court for a moratorium (lasting no more than two years).

- **Conclusion.** If an agreement is reached between a company and its creditors, this remains of a purely contractual nature and the agent's duties end. However, if there is no solution to the company's financial difficulties and it later becomes insolvent, the only option is to initiate insolvency proceedings.

Conciliation proceedings (*conciliation*)

- **Objective.** These are voluntary proceedings that aim to reach a workout agreement (*protocole de conciliation*) between a company and its creditors under the supervision of a court-appointed agent (*conciliateur*).

A workout agreement sets out any loans extended by creditors or shareholders, and any consents by creditors to grant waivers, rescheduling or cancellation of existing debts.

- **Companies.** The proceedings apply to all private (as opposed to government) entities and to all individuals acting as merchants, craftsmen or independent professionals (*professions libérales*) such as lawyers.
- **How, when and by whom.** The company's chairman files a petition for conciliation proceedings with the president of the court.
- **Substantive tests.** The company must face legal or financial difficulties (whether actual or foreseeable), but must not have been insolvent for 45 days or more.
- **How long.** It takes a few days to obtain an order appointing an agent. The court appoints the agent for a maximum of four months, but this period can be extended by up to a month at the agent's request.
- **Consents and approvals.** Unless otherwise specified in the company's articles, no specific consent or approval is required to begin conciliation proceedings.

A company has two options:

- it can request formal court approval of the workout agreement. This is to encourage creditors to extend credit to the company. Except where fraud has taken place, a court-approved workout agreement is protected from the risk of future voidance. However, this approval must be recorded in a full judgment accessible to the public and is therefore subject to challenge by a third party (*tierce opposition*) or appeal;
- it can obtain the president of the court's approval. This option does not involve publicity, but implies that the creditors waive their right to priority of payment and to protection against the risk of future voidance of the workout agreement.
- **Effect.** The management must co-operate with the appointed agent and the major creditors to negotiate a solution to the company's difficulties. Trade creditors and major share-

holders can also be invited to take part in the negotiations. The social and tax authorities can be asked to consent to a debt-rescheduling plan or a cancellation of debts. Conciliation proceedings do not involve an automatic stay. However, the court can force creditors that attempt to enforce their rights while conciliation proceedings are taking place, to accept a moratorium for up to two years.

- **Conclusion.** If the workout agreement is successful, the court agent's duties end. However, the agent can be reappointed if a party to the workout agreement fails to comply with its obligations. If no solution can be found to the company's financial difficulties and the court agent reports that the company is insolvent, the court must begin insolvency proceedings on its own initiative.

Safeguard proceedings (*procédure de sauvegarde*)

- **Objective.** Safeguard proceedings allow solvent companies to be restructured under the court's supervision.
- **Companies.** This is the same as for conciliation proceedings (see above, *Conciliation proceedings (conciliation): Companies*).
- **How, when and by whom.** Only the management of the company can file a petition for safeguard proceedings with the court having jurisdiction.
- **Substantive tests.** The company must be solvent, but face difficulties that cannot be overcome. If the company is insolvent, the court can order the proceedings to be replaced by rehabilitation or liquidation proceedings (see below, *Rehabilitation proceedings (redressement judiciaire)* and *Liquidation proceedings (liquidation judiciaire)*) at any time.
- **How long.** Safeguard proceedings begin with an observation period of up to six months to assess the company's financial position. This period can be extended once for six months and, in exceptional circumstances, can be extended further at the Public Prosecutor's request for an additional six-month period.
- **Consents and approvals.** Unless otherwise specified in the company's articles, no specific consent or approval is required to file a petition for safeguard proceedings. Before filing a petition, the management must inform and consult with the employees' representatives. However, these representatives do not need to approve the filing.

If classes of creditors are created (optional for small-sized companies) (see below, *Effect*), a safeguard plan is deemed approved by the classes if a two-thirds majority in value of the creditors in each class vote in favour. The court must then approve the safeguard plan. Bondholders, even though not members of the classes, must be consulted separately as a group (see below). If classes of creditors are not created, the plan must be negotiated on a one-to-one basis with each creditor.

- **Effect.** Once a petition has been filed, there is an automatic stay of all actions against the company and individuals acting as guarantors and joint debtors. The following exceptions to the automatic stay are provided:

- **Set-off between connected claims.** The French Supreme Court held that obligations are connected when:
 - they result from a single contract or they are carried out under a contract setting out the business relationship between the parties; or
 - the obligations are carried out under separate contracts which constitute a single global contractual arrangement.
- **Claims secured by a security interest conferring a retention right.** During the observation period, at the request of the trustee, the insolvency judge may exceptionally authorise the payment of a pre-filing creditor to obtain from that secured creditor, the surrender of the retained pledged asset to the estate. The pledged asset must be necessary to the debtor's pursuit of its business activity.
- **Claims assigned by way of *Dailly* assignment of receivables.** The creditor, to which the debtor's receivables have been assigned by way of *Dailly* assignment, can directly seek payment of such assigned receivables notwithstanding any filing (be it for safeguard or rehabilitation proceedings). This right, however, has recently been denied in safeguard proceedings to creditors benefiting from a *Dailly* assignment of future receivables in a recent case pending before the Paris Commercial Court, and not settled yet.

All creditors (except employees) must file proof of their claim within two months after the judgment opening safeguard proceedings has been published in the legal gazette (*Bulletin Officiel des Annonces Civiles et Commerciales*). The period is four months for creditors located outside of France.

The judgment opening safeguard proceedings appoints:

- an insolvency judge (*juge commissaire*) who oversees the whole procedure;
- a trustee (*administrateur*) who supervises and assists the management to prepare a safeguard plan (*plan de sauvegarde*);
- a court agent (*mandataire judiciaire*) who represents the creditors' interests and assesses proofs of claim. This agent can be assisted by one to five advisers (supervising creditors (*créanciers contrôleurs*)) appointed by the court.

For companies of a certain size, there are two classes of creditors: credit institutions and major suppliers (that is, suppliers holding more than 3% of the total of the suppliers' claims), which are organised through committees. Any creditor holding claims that were initially held by a credit institution or by a major supplier will be invited to participate and vote within the class of credit institutions. In exceptional circumstances, classes of creditors can also be organised for small companies by court order. The classes can discuss and vote on the safeguard plan proposed by the company. Bondholders, although not members of the classes, must be consulted separately as a group once the classes of creditors

have approved the plan. In the Eurotunnel matter, the Paris Commercial Court convened two separate bondholders' meetings (one for bondholders having subscribed Euro-denominated bonds and one for bondholders having subscribed GBP-denominated bonds) and applied to bondholders the majority rules then applicable to creditors' classes. The recent reform (see *Question 10*) now provides that only one meeting will be organised for all bondholders (whatever the currency of the various bond indentures may be) and that the majority rule within the creditors' classes and within the bondholders' group must be a two-thirds majority in amount. In addition, social and tax authorities are invited to negotiate and are now authorised to grant a debt rescheduling or cancellation.

The safeguard plan can involve:

- debt-restructuring;
- re-capitalisation of the company;
- debt-for-equity swap;
- sales of assets;
- partial sale of the business.

However, it cannot include a proposal to sell the business as a whole.

Once approved by the court, the safeguard plan is enforceable against all members of the creditors' classes, including the dissenting minority. Should the classes of creditors, or creditors consulted on an individual basis (either after a failure of the voting process within the classes or because the creation of the classes was not mandatory) refuse to approve the draft plan circulated by the company, the Court can impose a ten-year maximum term-out to dissenting creditors. The Court cannot impose any debt write-off. Such ten-year maximum term-out is however without prejudice to any longer maturity date that could have been initially agreed on in the loan agreement. The yearly instalments under the plan must not, after year two, be less than 5% of the total admitted pre-filing liabilities except if either:

- the classes of creditors voluntarily accept a yearly repayment of less than 5%;
- the contract initially provides for a longer maturity date.

- **Conclusion.** Once the court approves a safeguard plan, it appoints an agent to supervise its implementation (*commissaire à l'exécution du plan*). If the company fails to meet its obligations under the plan and becomes insolvent, the court must order the plan to be cancelled and initiate rehabilitation or, if the rescue of the company appears as obviously impossible, liquidation proceedings (see below, *Liquidation proceedings (liquidation judiciaire)*).

Rehabilitation proceedings (*redressement judiciaire*)

- **Objective.** The aims of rehabilitation proceedings, in order of priority, are:
 - to safeguard a company's activities and prospects of recovery;

- to save jobs;
- to pay creditors.

- **Companies.** This is the same as for safeguard proceedings (see above, *Safeguard proceedings (procédure de sauvegarde): Companies*).

- **How, when and by whom.** The company must file for rehabilitation no later than 45 days from the date on which it becomes insolvent (provided that conciliation proceedings did not precede the filing).

The court must initiate rehabilitation or liquidation proceedings if:

- the company fails to reach an agreement with its creditors during a pre-bankruptcy conciliation proceeding; and
- the court agent reports that the company has become insolvent.

Rehabilitation proceedings can also be initiated:

- by the court if it becomes aware that a company registered in its jurisdiction is insolvent;
- at the request of the Public Prosecutor or of any creditor, whether secured or unsecured (regardless of the amount of its claim).

- **Substantive tests.** Rehabilitation proceedings are appropriate if the company is insolvent, but has not ceased operating, and its rescue seems possible.

If it becomes clear that a rehabilitation will not succeed, the court can order its conversion into liquidation (see below, *Liquidation proceedings (liquidation judiciaire)*).

- **How long.** This is the same as for safeguard proceedings (see above, *Safeguard proceedings (procédure de sauvegarde)*).
- **Consents and approvals.** The board of directors does not need to approve a decision to file for rehabilitation proceedings, unless the company's articles state otherwise. However, the company's legal representatives usually seek the board's approval as a precautionary measure. Before filing a petition, the management must inform and consult with the employees' representatives. However, these representatives do not need to approve the filing.

If committees of creditors are appointed, the rehabilitation plan must be approved by the same percentages as for safeguard proceedings (see above, *Safeguard proceedings (procédure de sauvegarde)*).

- **Effect.** Rehabilitation proceedings trigger an automatic stay of proceedings against the company. However, this does not usually extend to actions against individuals acting as guarantors. The same exceptions apply as in safeguard proceedings (see above, *Safeguard proceedings (procédure de sauvegarde): Effect*).

The judgment opening rehabilitation proceedings appoints:

- an insolvency judge to oversee proceedings;
- a trustee in charge of assisting the management or taking control of the company's management;
- a court agent to represent the creditors' interests and assess proofs of claim.

One to five advisers appointed by the court from among the creditors can assist the court agent.

All creditors other than employees must file a proof of their claim within two months of the judgment opening rehabilitation proceedings being published (or four months in the case of foreign creditors).

As with safeguard proceedings (*see above, Safeguard proceedings (procédure de sauvegarde)*), there are two classes of creditors (credit institutions and major suppliers), which are organised through committees. These committees are automatically appointed for companies of a certain size and at the option of the debtor, and with the court's approval, for small companies.

The rehabilitation plan can combine all of the following:

- a debt restructuring;
- a re-capitalisation of the company;
- a debt-for-equity swap;
- the sale of certain assets or of portions of the business.

A proposal to auction the business as a whole or by portions can be made by the trustee, only if the court rules that the company cannot continue to operate. In these circumstances, the transfer plan is implemented within the legal framework of the rehabilitation but following the rules applicable to liquidation proceedings (*see below*).

The rehabilitation plan can postpone the date on which the claims of creditors that are not members of a committee must be paid by up to ten years (unless the initial maturity was already in excess of ten years). However, the court cannot impose any write-offs.

- **Conclusion.** This is the same as for safeguard proceedings (*see above, Safeguard proceedings (procédure de sauvegarde)*).

Liquidation proceedings (*liquidation judiciaire*)

- **Objective.** The aim of these proceedings is to liquidate a company by selling its business, as a whole or per branch of activity, or its assets one by one.
- **Companies.** This is the same as for safeguard proceedings (*see above, Safeguard proceedings (procédure de sauvegarde): Companies*).

- **How, when and by whom.** This is the same as for rehabilitation proceedings (*see above, Rehabilitation proceedings (redressement judiciaire)*). Liquidation is the appropriate remedy when the company is insolvent and its rehabilitation appears as obviously impossible.

- **How long.** Liquidation proceedings last until the liquidator finds that no more proceeds can be expected from the sale of the company's business or assets. After two years (computed from the judgment ordering liquidation), any creditor can request the court to order the liquidator to close the liquidation. There is a simplified form of liquidation proceedings available for small businesses, which last for a maximum of one year.

- **Consents and approvals.** *See above, Rehabilitation proceedings (redressement judiciaire).*

- **Effect.** Liquidation proceedings trigger an automatic stay of proceedings against the company. This does not usually extend to actions against individuals acting as guarantors. Secured creditors benefiting from a pledge are, however, entitled to enforce their security interest through a court-monitored allocation process (*attribution judiciaire*); that is, request the court to transfer ownership of the pledged asset(s).

The judgment opening liquidation proceedings appoints:

- an insolvency judge to oversee proceedings;
- a liquidator, who is responsible for:
 - collecting in all of the company's assets and paying the creditors to the extent that funds are available;
 - assessing proofs of claim and representing the creditors' interests.

One to five advisers appointed by the court from among the creditors assist the liquidator.

- **Conclusion.** Liquidation closes when the business (as a whole or branch by branch) and any residual assets have been sold and the proceeds distributed to the creditors.

LIABILITY AND TRANSACTIONS

6. **Are there any circumstances in which a director, parent company (domestic or foreign) or other party can be held liable for the debts of an insolvent company?**

Actions against the company's management: mismanagement (*action en comblement de passif*)

Liability can arise where, as a result of management errors, a company's assets do not cover its debts. This action, which only applies in liquidation proceedings, can lead to an insolvent company's management being liable for all or part of its debts. This liability can extend to formally-appointed directors or managers, as well as to any individual or entity, not officially a director or manager, that in practice repeatedly influenced the company's management or strategic decisions.

A parent company can also be held liable for an insolvent subsidiary's debts if it has been appointed as a director or can be deemed a shadow director or manager of that subsidiary (through (an) individual(s) appointed at the shareholders' request).

The liquidator, the creditors' representative (*mandataire judiciaire*) or the prosecutor can initiate the action. In addition, those creditors which would have been appointed by the court to help the liquidator (*contrôleurs*) can summon the liquidator to bring an action or commence proceedings on their own initiative if the liquidator does not do so.

Directors found liable of certain specific breaches can be (independent of any liability action or criminal prosecution based on the same facts):

- Forced to assign their equity interest in the company.
- Prohibited from managing any business for up to 15 years and holding any public office for up to five years.

Those breaches include:

- Using the company's assets or credit for their own benefit, or the benefit of another corporate entity in which they have a direct or indirect interest.
- Using the company to conduct and conceal business transactions for their own benefit.
- Carrying out business activities at a loss to further their own interests, knowing that this would lead to the company's insolvency.
- Fraudulently applying or concealing all or part of the company's assets.
- Fraudulently increasing the company's debts.

Actions against a lender

All types of lender (not only credit institutions) are exempt from liability, except in the following circumstances:

- Fraud.
- Improper interference with the company's management.
- Where the lender has obtained a security interest that is disproportionate to the amount of the loan.

Consolidation of insolvency proceedings (*extension de la procédure*)

The court can order the debts of different companies to be paid from a larger consolidated pool of assets if:

- A fictitious company (one without an independent management body) has been created in an attempt to disperse assets so that they are placed beyond the creditors' reach.
- The estates of two or more companies are so closely connected that it is impossible to separate one company's activities from the other (*confusion de patrimoines*). This can be shown if, for example, the companies share the same assets, debts or bank accounts.

7. Can transactions that are effected by a company that subsequently becomes insolvent be set aside?

Transactions can be challenged by the trustee, court agent, liquidator or Public Prosecutor if they are entered into during the suspect period before an insolvency judgment (*période suspecte*). This runs from the date on which the company is deemed to be insolvent and can be backdated by the court by up to 18 months before the judgment but not before the court order approving a workout agreement (see *Question 5, Conciliation proceedings (conciliation)*).

The following transactions are automatically void if performed during the suspect period:

- Transfers of movable or immovable assets without consideration (*à titre gratuit*).
- Agreements in which the company's obligations substantially exceed those of the other party.
- Payments, in any form, made on account of debts that have not fallen due.
- Payments on account of debts that have fallen due made by any means other than:
 - cash;
 - bank transfer;
 - negotiable instrument;
 - assignment of receivables;
 - any other method of payment commonly used in business transactions.
- Any deposits or consignments of money made under Article 2075-1 of the Civil Code (governing pledges over certain intangible assets, including claims) in the absence of a final judgment.
- Any mortgages or pledges over the company's assets on account of pre-existing debts.
- Any protective measures (see *Question 3*), unless the security is registered or the attachment occurred before the suspect period.
- Any granting, exercise or reselling of stock options made under Article L 225-177 *et seq* of the Commercial Code.

The court can also set aside transfers of movable or immovable assets made without consideration, if they were entered into six months before the date of insolvency.

Any payment of debts that have fallen due or any transaction for consideration (*acte à titre onéreux*) during the suspect period is voidable if, at the time of the payment or transaction, the other party knew, or was in a position to know, of the company's insolvency.

In addition, any seizure of property (whether tangible or intangible) is voidable if carried out during the suspect period by a creditor that knew the company was insolvent.

8. Please set out any conditions under which a company can continue to carry on business during insolvency or rescue proceedings. In particular:

- **Who has the authority to supervise or carry on the company's business?**
 - **What restrictions apply?**
-

Ad hoc proceedings and conciliation proceedings

The court agent does not have any management responsibilities in these types of proceedings. There are no restrictions on the company's business activities.

Safeguard proceedings

The company can continue to operate the business and prepare a safeguard plan. The trustee is in charge of monitoring or assisting the company, but cannot take over any management responsibility.

Rehabilitation proceedings

The scope of the trustee's responsibilities is determined by court order. The trustee may simply assist the management to make decisions or he may be appointed to take control of the company's management, either in whole or in part.

Liquidation proceedings

The liquidator has sole authority to bind the company and assumes all management responsibilities. As he has considerable freedom to organise liquidation operations as he deems appropriate, it is common for creditors to negotiate settlements of their individual claims with the liquidator to speed up the liquidation process.

INTERNATIONAL CASES

9. Please state whether:

- **Courts in your jurisdiction recognise insolvency and rescue procedures in other jurisdictions.**
 - **Courts co-operate where there are concurrent proceedings in other jurisdictions.**
 - **There are any international treaties relating to insolvency to which your jurisdiction is a signatory.**
 - **There are any special procedures that apply to foreign creditors.**
-

- **Recognition.** If insolvency judgments are made in a jurisdiction that is party to a treaty with France, they are recognised

and enforceable in France. In addition, Regulation (EC) No. 1346/2000 on insolvency proceedings (Insolvency Regulation) allows insolvency procedures in different European member states to be automatically recognised.

If a company's centre of main interests (COMI) is in France, the main proceedings can be commenced before the French courts under the Insolvency Regulation. A company's COMI is presumed to be the place of its registered office unless proved otherwise. Secondary proceedings can subsequently be commenced to liquidate an establishment's assets located in another EU member state. Secondary proceedings under the Insolvency Regulation are also appropriate if a company has an establishment in France, but its COMI is in another EU member state.

If the Insolvency Regulation does not apply and insolvency judgments are made in a jurisdiction that does not have a treaty with France, they are not automatically recognised. Foreign judgments can only be enforced if they have been subject to a review procedure (*exequatur*), which is intended to verify that the foreign court had proper jurisdiction, international public policy has been complied with and no fraud has taken place.

- **Concurrent proceedings.** The French court tends to consider an insolvency estate as a whole (*universalité de patrimoine*). This means that the court that has jurisdiction to open insolvency proceedings also has jurisdiction over all the company's assets, whether they are located in France or abroad. There may be some exceptions to this rule for assets located in EU member states. These exceptions apply when secondary proceedings (which can only be liquidation proceedings) are opened to liquidate the assets of a company's branches operating in another EU member state.
- **International treaties.** France has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency 1997. However, France is party to some bilateral conventions, including the convention between France and Monaco on insolvency proceedings dated 13 September 1950 (*Convention Franco-Monégasque relative à la faillite et à la liquidation judiciaire*).
- **Special procedures for foreign creditors.** No special procedures apply to foreign creditors.

PROPOSED REFORMS

10. Are there any proposals for reform to insolvency law in your jurisdiction?

Insolvency law has been widely reformed by Law No. 2005-845 of 26 July 2005 (*see Question 5*). In spite of an overall positive appraisal of the new law, some important improvements to the safeguard mechanism appeared necessary to fill in loopholes identified since 2006 (the first widely reported practical examples of a successful implementation of the new law are the Eurotunnel and GAL cases). These necessary improvements were set out in the Information Report issued by the House Judiciary Committee in January 2007.

In order to clarify these difficulties, an order (*ordonnance*) (that is, legislation adopted by the Executive duly empowered by the House/Senate) was prepared by the Ministry of Justice and adopted on 18 December 2008. The major improvements provided for in the order, which entered into force on 15 February 2009, can be summarised as follows:

- **Substantive test applied to safeguard proceedings.** It is no longer a requirement that the difficulties faced by the still-solvent company may lead to insolvency.
- **Classes of creditors in safeguard and rehabilitation proceedings.** The order still provides for two classes of creditors:

- one class gathering credit institutions;
- class gathering major suppliers holding more than 3% of the total of suppliers' claims (compared with 5% before the adoption of the order).

Any creditor holding claims which were initially held by a credit institution or by a major supplier will be invited to participate and vote within the class of credit institutions.

- **Voting rules within the classes of creditors.** The order provides that the safeguard or continuation plan in rehabilitation is approved by the classes if at least two-thirds (in amount) of the creditors within each class votes in favour of the plan.

- **Bondholders.** Once the plan has been adopted by the classes, all bondholders, whatever the currency or the law applicable to their indenture, will vote together in one single group at a two-thirds majority in amount.
- **Debt-for-equity swap.** The two-thirds majority in the creditors' classes, or as the case may be in the bondholders' group, can approve a debt-for-equity swap which would then be imposed to the dissenting minority within the classes (or as the case may be within the bondholders' group), but there is no impairment provision for the existing equity which must therefore approve any share capital increase at the required majority.

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