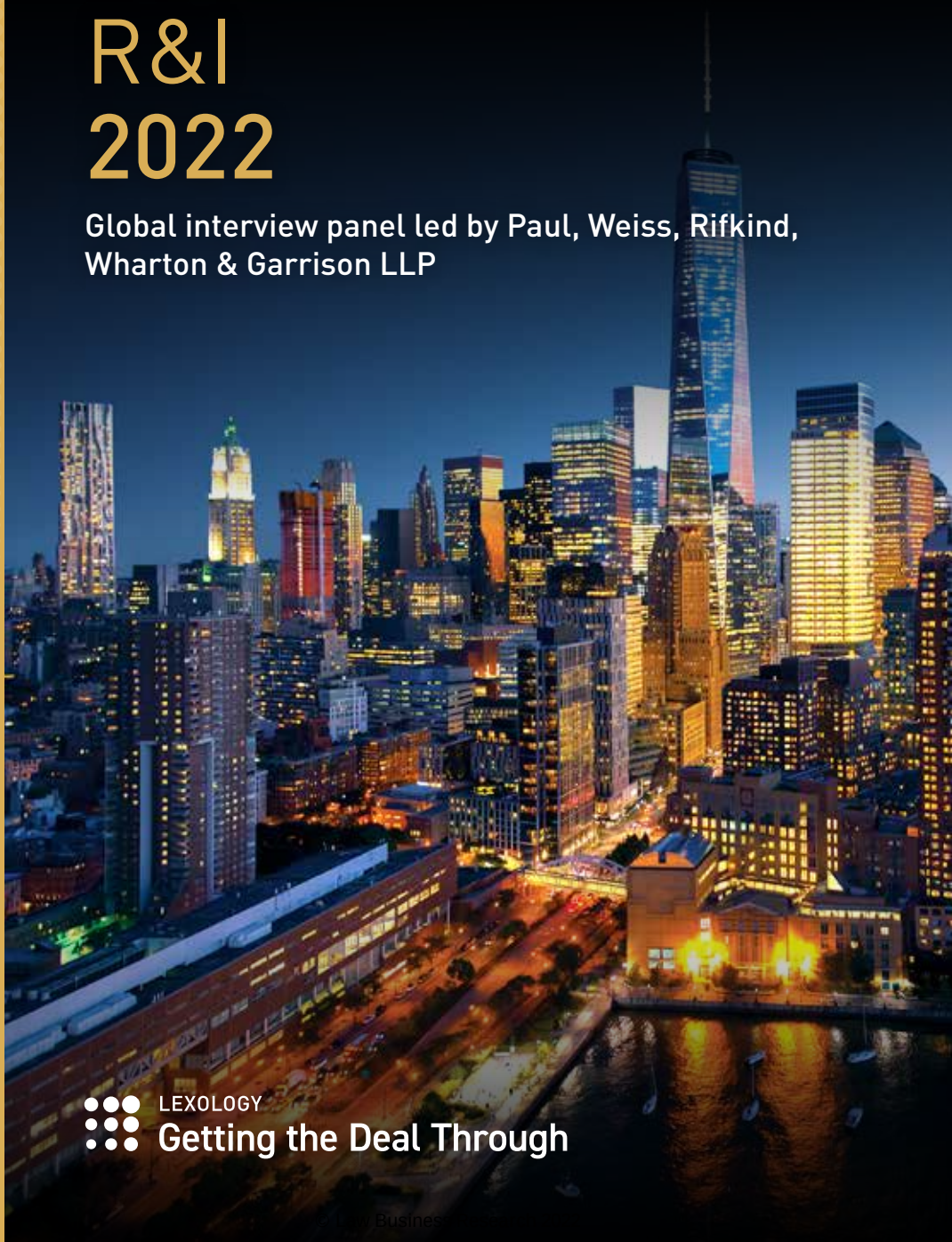
Market Intelligence

R&I 2022

Global interview panel led by Paul, Weiss, Rifkind, Wharton & Garrison LLP



LEXOLOGY
Getting the Deal Through

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R&I 2022

France

White & Case's Paris team is one of the most complete and developed in the market, with an interdisciplinary expertise and experience that is second to none.

White & Case is one of the very few international firms to offer such a high level of expertise in handling the most delicate and complex restructuring briefs and this is combined with the added value of the firm's corporate litigation expertise.

White & Case's Paris team closely follows and adapts efficiently to difficult environments and crisis situations, and is particularly known for its capacity to assist proactively to avoid foreseeable crises.

The team routinely works on complex restructurings, from negotiation and mediation to litigation and counselling. White & Case represents debtors, creditors, committees, fiduciaries and lender groups in formal bankruptcy and insolvency proceedings in courts worldwide, as well as in intricate out-of-court financial restructurings, recapitalisations and rescue financings.

The firm also represents buyers and sellers of distressed loans and claims, and in distressed merger and acquisition mandates.

Recently, the Paris team intervened in the restructurings of Vallourec, Europcar, Technicolor, Comexposium, Solocal, Arc Holdings, JJW Hotels and Resorts Group, Dream Yacht, THOM Group, Air Austral, Hertz, Swissport, Conforama, Antalis and Orchestra Premaman.

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1 | In the past year, have you seen any developments or trends in the nature and volume of insolvency filings?

The covid-19 outbreak in France has caused significant disruptions and slowdowns of business activity. In this uncertain economic environment, many companies with high levels of debt are in trouble and experiencing unprecedented difficulties. As a result, companies across different sectors may face a range of adverse financial consequences, with the most obvious being liquidity needs. There is also a new concern regarding the soaring price of raw materials.

To address the situation, during 2020 and 2021, the government implemented immediate measures aimed at assisting French companies throughout the current crisis. As a result of those protective measures, insolvencies reached a historically low level in France: at the end of 2021, corporate bankruptcies (for most company sizes and in most sectors) were at their lowest level compared to the pre-covid-19 figures from 2019, with a 50 per cent drop in insolvency proceedings and a 10 per cent decrease in pre-insolvency situations. While the use of the state-guaranteed loan regime has been a vital solution to remedy short-term liquidity needs for some companies, for others it is most likely only a temporary cure. Many companies will be required to call upon additional financial support to repay their debt and, above all, to cover their liquidity needs.

That being said, the current economic cycle is quite unusual. Some companies are over-leveraged, while the financial markets are in turmoil and more and more investors are attracted to the high-yield debt market. This trend offers new perspectives on both the debt and equity markets. In fact, most of the major deals in the restructuring market have involved a reorganisation of both debt and equity. Far beyond the traditional restructuring and insolvency paradigms, this crisis has highlighted the need for multidisciplinary, timely and targeted action involving a deep reshuffling of the often complex equity and debt structure.

2 | Describe the one or two most notable insolvency filings in your jurisdiction in the past year.

From our point view, the most notable fillings and restructurings during the covid-19 outbreak were the following:

- *Comexposium* case: four companies of Comexposium group, one of the world's leading event organisers, initiated safeguard proceedings in September 2020, which led to the adoption of safeguard plans through imposed repayment schedules in October 2021. This case serves as an example of probably one of the last imposed safeguard plans (term-out) adopted under the law prior


Saam Golshani


Alexis Hojabr


Alice Léonard


Amélie Jungbluth

to the implementation of Ordinance No. 2021-1193 dated 15 September 2021 (see below), which has profoundly changed the French restructuring and insolvency regime, and no longer allows, among others, the term-out in safeguard proceedings (although it is still possible in reorganisation proceedings). Several instances of litigation are currently ongoing in the *Comexposium* case both in France and in the UK.

- *Vallourec* case: White & Case advised Vallourec's ad hoc group Crossholder (ie, bondholders and RCF holders) on the negotiation, delivery and implementation of a restructuring agreement backed by the majority of Vallourec's financial creditors, avoiding a free-fall safeguard of Vallourec, a world leader in premium tubular solutions for the energy markets and for demanding industrial applications. This agreement was entered into between the various stakeholders on 3 February 2021. It primarily envisaged (i) a major deleveraging of Vallourec, representing approximately €1.8 billion, which was more than half of the principal amount of its debt; and (ii) the refinancing of the residual debt and the securing of significant liquidity and operational financing. The implementation of this agreement and the completion of the financial restructuring contemplated thereby enabled the company to consolidate its balance sheet and reduce its debt and interest expenses to a suitable level that accounted for the consequences and uncertainties related to the coronavirus and oil markets crises.

3 Have there been any recent legislative reforms? Is there a perceived need for reform?

A directive was adopted by the European Union in June 2019 and a reform has been adopted in France.

European Directive No. 2016/0359 was adopted on 6 June 2019 by the European Council. It provides a common framework for the bankruptcy law of all member states. Among other things, it encourages the introduction of out-of-court proceedings, the cross-class cramdown and new-money privilege.

The French PACTE (Action Plan for Business Growth and Transformation) provides for the capacity of transposition of European Directive No. 2019/1023 adopted on 20 June 2019 by the European Council, especially the introduction of cross-class cramdown, recognition of subordination agreements and diminution of duration of proceedings. It also provides for the governmental capacity to amend security law by way of an order.

Due to the covid-19 pandemic, certain temporary measures were enacted by the French government to adapt French restructuring and insolvency laws to the

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health crisis. Notably, French Ordinance No. 2020-341 dated 27 March 2020 adapts the rules applicable to companies facing difficulties during the covid-19 outbreak (in particular, more flexibility and amendment of usual deadlines).

Likewise, the purpose of French Ordinance No. 2020-596 (dated 20 May 2020) is (i) to consolidate the provisions of Ordinance No. 2020-341 dated 27 March 2020, and (ii) to adapt the provisions of Book VI of the Commercial Code to make these more effective. French Ordinance No. 2020-1443 (dated 25 November 2020) amends previously adopted emergency rules to reflect the evolution of the health and economic crisis.

European Directive No. 2016/0359 quoted above was transposed by French Ordinance No. 2021-1193 (dated 15 September 2021) effective from 1 October 2021 with respect to preventive and insolvency proceedings (with limited exceptions) opened as of such date only and Decree No 2021-1218 of 23 September 2021 was taken for the implementation of this Ordinance.

Over the past 15 years, French insolvency law has undergone major reforms, with changes happening at a greater pace than they have during the past century. Fundamental changes have taken place in the context of a global financial crisis,

giving rise to a new and more appropriate set of legal tools. The nature and extent of the reforms have necessitated careful consideration from both financial actors and practitioners. Some entirely new procedures have been introduced into law, effectively preventing difficulties from arising. The reforms have also enabled the reorganisation of difficult cases, impacting cases and major actors beyond the sole area of insolvency law (including public and listed groups).

That said, France is still perceived as a debtor-friendly jurisdiction in this matter, which remains a real incentive for creditors, particularly financial institutions, to opt for other jurisdictions or to create alternative credit protection through sophisticated (and often expensive) collateral structures (such as the Double LuxCo although this is becoming obsolete). However, creditor-friendly measures have increased in France in recent years, particularly with the transposition of European Directive No. 2016/0359, which aims to rebalance powers between the stakeholders.

Most recently, French Ordinance No. 2021-1192 (dated 15 September 2021), which reforms the law of securities, came into force on 1 January 2022, with the exception of provisions that require implementing regulations (these will enter into force on 1 January 2023 at the latest). This Ordinance intends to reinforce the effectiveness of guarantees and security interests.

4 | In the international insolvency field, have there been any legislative or case law developments in terms of coordination of cross-border cases? What jurisdictions are you most likely to have contact with?

The new EU Insolvency Regulation (Regulation 2015/848), which replaced the previous EU Regulation on Insolvency Proceedings from 2000, came into force on 26 June 2017. The updated Regulation aims, in particular, to make cross-border insolvency proceedings more efficient and to establish a common framework for the benefit of all stakeholders.

The main features of the Regulation are: the extension of its application to pre-insolvency proceedings that promote the rescue of economically viable but struggling companies and give entrepreneurs a second chance; the creation of a pan-European online insolvency registers; the possibility of avoiding the opening of multiple proceedings and preventing forum shopping; the updating of the rules on secondary insolvency proceedings to, inter alia, extend to 'pre-insolvency' or 'hybrid' proceedings; amendment of the rules on information regarding creditors and the lodging of claims; and the introduction of new procedures to facilitate cross-border coordination and cooperation between multiple insolvency proceedings in different member states relating to members of the same corporate group. On 2 November

2017, an ordinance was published in France to specify the terms of the Regulation and provide for its implementation.

Regarding other jurisdictions that we have the most contact with, prior to Brexit, a flourishing restructuring business was developing in the United Kingdom as the English courts approved pleas of arrangement for companies incorporated outside England. We were therefore most likely to have contact with UK jurisdictions.

Since Brexit, the UK is, however, no longer subject to the EU Insolvency Regulation. Any insolvency proceedings opened in EU member states – including France – will therefore not be automatically recognised in the UK.

Without the benefit of the EU Insolvency Regulation, recognition of proceedings and other relief taking place in EU member states within the UK (EU to UK) could still be considered based on the UNCITRAL Model Law on Cross-Border Insolvency, which has been adopted in UK law via the Cross-Border Insolvency Regulations 2006 (CBIR). That being said, the *Gibbs* principle, under which only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding (*Bakhshiyeva ex rel Int'l Bank of Azerbaijan v Sberbank of Russia* [2018] EWCA (Ch) 59 [158(1)] (Eng)), may give rise to

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challenges where debtors would seek to discharge or amend English law-governed debt through foreign proceedings. This could mean that English law debts will require a particular process under the aegis of the English court.

Moreover, the assistance provided by the UNCITRAL Model Law is much more limited for recognition of UK restructuring and insolvency proceedings within EU member states (UK to EU), as only four EU member states have adopted it (Greece, Poland, Romania and Slovenia). As a result, it will be harder for UK-based debtors to gain recognition and deal with assets located in France. The recognition of insolvency judgments made in the UK will now be subject to the exequatur process.

Based on these considerations, it seems likely that cross-border restructurings involving companies with assets and businesses in both the EU and the UK will take longer, be more costly and be more likely to involve parallel proceedings. As an interesting and recent illustration, we can notably mention Comexposium, which reflects the interactions that can occur between French and UK law. The main outstanding senior facility was governed by an English-law contract with an exclusive jurisdiction clause for English courts in the frame of French safeguard proceedings. As a result, some senior creditors under the facility documentation decided to refer to the English courts in order to force the debtor to comply with its disclosure undertakings under the terms of the English law debt agreement. Finally, the English High Court approved that request and has ruled that the provisions of the facility agreement remain valid and enforceable despite the opening of safeguard proceedings in France.

5 | In your country, is there a particular court or jurisdiction that sees a higher concentration of insolvency filings? What is the attraction of that forum?

In France, the courts that see the highest concentration of insolvency filings are the specialised insolvency courts created by Law No. 2015-990 of 6 August 2015 (for example, Bobigny, Bordeaux, Dijon, Évry, Grenoble, Lyon, Marseille, Montpellier, Nanterre, Nantes, Nice, Orléans, Paris, Poitiers, Rennes, Rouen, Toulouse and Tourcoing).

The specialised insolvency courts have jurisdiction over companies that reach certain thresholds in terms of number of employees or turnover, and that are subject to safeguard, reorganisation or liquidation proceedings. It is interesting to note that the new thresholds resulting from Ordinance No. 2021-1192 for the mandatory constitution of classes of affected parties are partly aligned with those of specialised insolvency courts. With respect to conciliation proceedings, specialised insolvency courts have jurisdiction, provided that it has been requested by the public prosecutor or where the president of the court has given his or her consent.

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Specialised insolvency courts also have jurisdiction with respect to insolvency proceedings falling within the scope of European Insolvency Regulation 2015/848 when the debtor's centre of main interests is located in France or where the debtor is located outside the territorial scope of the European Insolvency Regulation but has an establishment in France.

Among those courts, Paris and Nanterre naturally remain the most active for bigger deals and cases, given the number of global actors legally incorporated in both areas.

Forum shopping is very limited in France as the territorial jurisdiction depends on the localisation of the registered office. In the case of a change of address of the registered office within six months before the opening of a proceeding, the relevant jurisdiction is the one related to the former registered office.

6 Is it fair to describe your jurisdiction as either 'debtor-friendly' or 'creditor-friendly' in terms of how insolvency filings proceed?

The founding law of the French bankruptcy regime of 1985 was quite debtor-friendly and, as a result, the French restructuring system was perceived as a debtor-friendly system for a very long time. However, a certain shift began in 2005 with, in particular, the introduction of committees and the strengthening of controllers' power.

The shift was further emphasised with Decree No. 2014-326 dated 12 March 2014, which, for example, granted creditors the right to propose a restructuring plan (when committees are constituted). More recently, the Law dated 6 August 2015 introduced a shareholder squeeze-out system under which shareholders may be forced to sell their shares if they do not consent to share capital increases required to redress the distressed business.

This shift in the French legislation has been followed by the French courts, which have favoured a number of lender-led restructurings carried out by lenders, allowing lenders or a group of lenders to take control of the debtor, outside the reach of its existing shareholders (mainly financial sponsors). Furthermore, a number of hedge funds have strengthened their focus on the French market, providing liquidity to French banks willing to sell their claims on the secondary market. In line with these changes and with a view to attract and encourage new investors, the temporary framework implemented in the context of the covid-19 health crisis introduced new measures, such as the safeguard/reorganisation privilege benefiting creditors who have made a new cash contribution to the debtor in the context of the observation period of such proceedings with the authorisation of the supervisory judge (juge-commissaire), or for the implementation of the safeguard or reorganisation plan adopted or amended by the court. In cases of subsequent insolvency proceedings, claims benefiting from this privilege shall be paid in priority (with certain exception) and shall not suffer debt write-offs or debt rescheduling without the relevant creditors' consent. This privilege has been permanently implemented through the Ordinance No. 2021-1193 dated 15 September 2021. Another key change resulting from this Ordinance is the introduction of the cross-class cramdown mechanism, whereby a continuation plan may, under certain conditions, be adopted and bind dissenting creditors notwithstanding a negative vote of one or several classes. These new rules finally adopt a more economic approach to creditors' rights and rebalance their economic power and negotiating leverage to reflect their level of securitisation. The windfall effects of out of the money creditors or even of shareholders are now restricted or may even be stopped. Finally, we could say that our jurisdiction is no more

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shareholder-friendly but remains protective of the interests of both the debtor and the creditors to the extent that they are in the money.

7 What opportunities exist for businesses wanting to purchase assets out of an insolvency, and how efficient is the process? What are the best ways to take advantage of opportunities in this area?

Businesses wanting to purchase assets out of an insolvency can do so either under a classic sale plan or under a pre-pack sale.

A classic sale plan involves the transfer of assets, contracts and employment contracts of the debtor to a third-party purchaser without the consent of the transferred party. As the sale plan is constructed as an asset deal, debt and claims are therefore not transferred to the purchaser of the distressed business (except notably for security interests granted in favour of creditors who financed the acquisition of the secured assets).

Another advantage for companies wanting to purchase assets out of an insolvency is the sale price, which is typically very low, as the main criteria retained

by French courts are the number of jobs preserved and the purchaser's ability to continue operating the business.

However, the sale plan process is interpreted as an open bidding process where there is no exclusivity to the benefit of one bidder and the courts often base their decision (and election of the final bidder and transferee) on mostly employment-driven criteria.

The pre-pack sale plan concept was introduced in France in a decree dated 12 March 2014. Pre-pack sales consist of companies appointing an ad hoc representative or a conciliator in charge of supervising a plan for the partial or total sale of the company's assets, which will then be adopted under in-court insolvency proceedings after obtaining the public prosecutor's consent and the formal (but not binding) opinion of the participating creditors. Pre-pack sales offer the option to avoid compulsory public advertising for submission of offers and can therefore provide the buyer chosen under the amicable proceeding with a certain form of exclusivity. Pre-pack sales are also faster than asset plans implemented under reorganisation proceedings.

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The Inside Track

What two things should a client consider when choosing counsel for a complex insolvency filing in this jurisdiction?

In the event of a complex deal, counsel needs to be creative with all the possibilities offered by French insolvency law. Therefore, the client must ensure that counsel not only knows all the tools offered by the law – including those resulting from the recent reform – and has extensive experience of domestic and cross-border insolvency matters, and also understands the business including numbers and economics. These are key to a successful sophisticated restructuring.

Furthermore, lawyers in this matter need to know the courts and preferably be familiar with all the other parties involved (judicial administrators, creditors' representatives, liquidators, financial experts, etc).

What are the most important factors for a client to consider and address to successfully implement a complex insolvency filing in your jurisdiction?

The most important factors to be considered when conducting a successful and complex insolvency filing in France are the choice of the appropriate legal counsel (and also financial advisers) and the appropriate strategy and global timeline (including the choice of the proceedings, jurisdiction, etc) sufficiently in advance and at the very early stages of financial distress or other difficulties.

What was the most noteworthy filing that you have worked on recently?

The *Comexposium* case highlights the impact of the outbreak of the covid-19 health crisis on the events industry. This case raises several unregulated law issues relating notably to the continuation of contracts during both the observation period and the execution of safeguard plans, and questions the relevance of certain legal rules such as the constitution of creditors' committees – now replaced by the classes of affected parties – that are mandatory but, however, not sanctioned if not complied with.

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