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LEXOLOGY
Getting the Deal Through

Market Intelligence

R&I 2023

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

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Paul, Weiss, Rifkind, Wharton & Garrison LLP, this R&I volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

**Legislative reforms
Insolvency filings
Pandemic disruption
Uncertainties**

START READING



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France

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INSIDE TRACK

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

As a result of the state-driven emergency measures and financings, which were implemented to cope with the covid-19 pandemic in France, the number of insolvencies drastically dropped, and was therefore very low, over the past two years. Although these measures have now been lifted, the disruptions to and the slowdown of business activity caused by the pandemic have left many companies with high levels of debt and unprecedented difficulties, with insolvencies gradually returning to pre-covid-19 crisis levels.

According to the National Council of Judicial Administrators and Creditors' Representatives, in 2022, the number of filings for in-court proceedings (including safeguard, reorganisation and liquidation proceedings) increased by more than 43 per cent compared to 2021, with about 39,278 proceedings initiated as of 19 December 2022 (compared to 27,563 in 2021). The proceedings were mostly located in the Ile de France region.

In terms of sectors, business-to-consumer services were heavily impacted in 2022, particularly in the tourism, aerospace, automotive, beauty and body care, retail and construction industries.

Given the complex geopolitical context, the market was mainly driven by four areas of tension: liquidity concerns, inflation, soaring energy prices, and more expensive borrowing and debt.

Regarding liquidity needs, the use of the French state-guaranteed loan (PGE) regime has proven to be a good solution for short-term liquidity needs for some companies, while only being a temporary remedy for others. Many companies will, therefore, need to call upon additional financial support to repay their debt, especially to cover those liquidity needs.



Saam Golshani

Alexis Hojabr



Alice Leonard

“Business-to-consumer services were heavily impacted in 2022.”





Amélie Jungbluth



Ophélie Clain

The first examples of PGE restructurings occurred in 2022, when the first instalments became due (by way of rescheduling, partial write-offs or equitisation). Many companies have had to repay their PGEs without having returned to their pre-pandemic profitability.

Regarding the economy, the current cycle is quite unusual, with some companies being over-leveraged, the financial markets being in turmoil, and more and more investors being attracted to private lending. More specifically, some companies are and will continue to suffer from rising interest rates, difficulties in implementing bank syndications of a certain size, and the quasi-closure of the high-yield bond markets, especially when it comes to paying large instalments in 2023 and 2024.

This trend offers new perspectives on both the debt and equity markets. 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, the pandemic has highlighted the need for multidisciplinary, timely and targeted action involving a deep reshuffling of the often complex equity and debt structure.

Finally, the increase in energy prices, notably because of the war in Ukraine, is and will remain a source of concern. Companies are facing supply chain disruptions and rising operating costs. Some manufacturers have even had to reduce their production to avoid producing at a loss given the soaring cost of energy.

As for the expected trends for 2023, an increase in the number of companies experiencing difficulties is expected in the first quarter of 2023 onwards, particularly because of the continuing rise in energy costs and difficulties in the supply of energy and raw materials, which may lead to significant cost increases and even interruptions to production in several sectors.

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

Many of the most significant proceedings in the past year were conciliation proceedings subject to confidentiality; however, in terms of insolvency filings, the *Pierre & Vacances SA – Center Parcs* and the *Recylex SA* cases are two notable cases.

Pierre & Vacances SA – Center Parcs

Pierre & Vacances SA initiated a whole financial restructuring of the *Pierre & Vacances SA – Center Parcs* group, the European leader in holiday apartments and villages, in February 2021 through out-of-court proceedings that ultimately led to the adoption of an accelerated safeguard plan by the Paris Commercial Court in July 2022. The group



benefited from both a massive deleveraging and recapitalisation through, among other things:

- its takeover by a consortium of investors, Alcentra Limited, Fidera Limited and Atream (the group's financial creditors and institutional lenders); and
- the debt-to-equity swap of half of its debt, including, for the first time, the conversion of PGEs granted during the covid-19 pandemic, which resulted in the state becoming an indirect shareholder of the group.

This case is particularly emblematic as Pierre & Vacances' plan is the first major accelerated safeguard plan (term-out) adopted by classes of affected parties under the new French insolvency regime. As such, it is very instructive, particularly in light of the following:

- the qualification of holders of bonds that can be voluntary repaid by cash and new and existing shares (ORNANE) as equity holders within the meaning of French law, as well as their classification in a class distinct from the other classes of affected parties;
- the signing of a lock-up agreement to ensure the application of a cramdown;
- the application of the discounted cash flow method to assess the company's going-concern valuation;
- the allocation of warrants to ORNANE holders alongside investors to confirm that the new money financing did not unduly impair their rights; and
- the treatment of creditors benefiting from the new money privilege outside the plan and, therefore, not grouped in a class of affected parties.

Recylex SA

The pre-packaged sale of Recylex SA was negotiated and announced in the context of a conciliation procedure and implemented in the context of reorganisation proceedings. In a judgment released

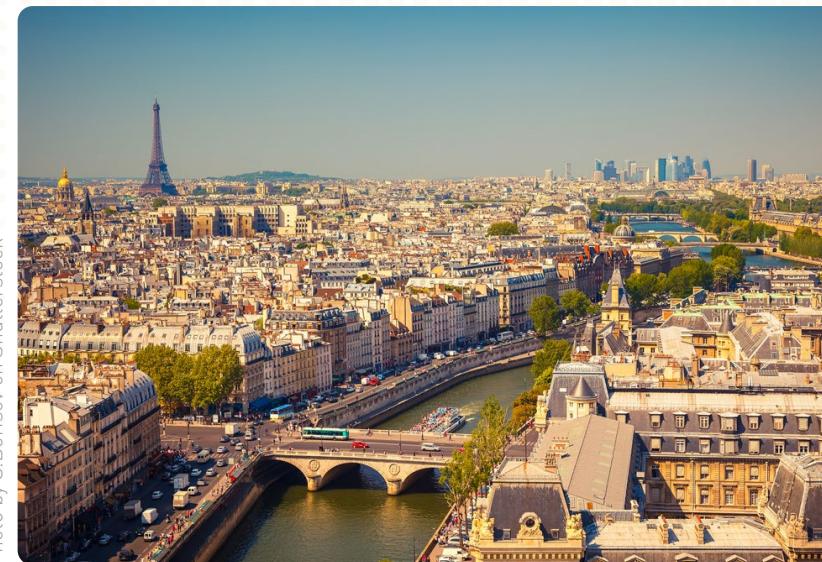


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on 6 July 2022, the Paris Commercial Court ordered the sale of part of the assets and activities of Recylex SA (formerly Metaleurop) to Campine NV for a purchase price of approximately €4.2 million.

The case highlights the fact that the French system is prone to 'consensualism' and provides efficient preventive out-of-court proceedings, especially when used as a first step to initiate and prepare solutions that may need to be implemented in subsequent court-administered proceedings. Further, as Recylex SA is a listed company, the case also serves as an example of the reconciliation issues between two distinct regimes – those regarding securities law and restructuring considerations – notably in terms of communication and disclosure versus confidentiality.

Ultimately, by a judgment of 9 November 2022, the reorganisation proceedings of Recylex SA were converted into liquidation proceedings to liquidate the residual assets.



“Over the past 15 years, French insolvency law has undergone major reforms.”

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

The European Council adopted Directive (EU) 2019/1023 on 6 June 2019. It provides a common framework in bankruptcy law for all member states. Among other things, it encourages the introduction of out-of-court proceedings, the cross-class cramdown mechanism and new money privilege.

The French PACTE law (the Action Plan for Business Growth and Transformation) empowered the government to transpose the above-mentioned directive into French law, particularly the introduction of the cross-class cramdown mechanism, the recognition of subordination agreements and the reduction of the duration of proceedings. It also authorised the government to amend security law by way of an order.

Owing to the covid-19 pandemic, temporary measures were enacted by the government to adapt French restructuring and insolvency law to the crisis.

Directive (EU) 2019/1023 was transposed into French law by Ordinance No. 2021-1193 of 15 September 2021 and entered into force on 1 October 2021. Preventive and insolvency proceedings (with limited exceptions) have been available as of that date. Decree No. 2021-1218 of 23 September 2021 implemented the Ordinance.

Over the past 15 years, French insolvency law has undergone major reforms, with changes occurring at a greater pace than in the last century. Fundamental changes have been implemented in the context of the global financial crisis, resulting in a new and more appropriate set of legal tools. The nature and extent of the reforms required careful consideration from both financial actors and practitioners. Some entirely new procedures, which have been effective in preventing difficulties, have been introduced into law.

France is still perceived as a debtor-friendly jurisdiction in this respect. This explains why creditors (particularly financial institutions) still have an incentive to opt for other jurisdictions or to create alternative credit protection through sophisticated and often expensive collateral structures (eg, the ‘double Luxco’ structure, although this is becoming obsolete); however, creditor-friendly measures have increased in France in recent years, particularly with the transposition of Directive (EU) 2019/1023, which aims to rebalance the powers between the stakeholders.

Most recently, Ordinance No. 2021-1192 of 15 September 2021, which reforms the securities law, entered into force on 1 January 2022. It intends to reinforce the effectiveness of guarantees and security interests.





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Finally, a new proposal for a directive that aims to harmonise certain aspects of insolvency law and establish common minimum standards was unveiled in January 2023.

4 In the international insolvency field, has 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 (EU) 2015/848), which replaced the previous EU regulation on insolvency proceedings from 2000, entered into force on 26 June 2017. The updated Regulation aims to, among other things, make cross-border insolvency proceedings more efficient and 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, which help rescue economically viable but struggling companies and provide entrepreneurs with a second chance;
- the creation of a pan-European online insolvency register;
- the possibility to avoid the opening of multiple proceedings and to prevent forum shopping;
- the updating of the rules on secondary insolvency proceedings to, among other things, extend them to pre-insolvency or hybrid proceedings;
- the modification 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 concerning 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 jurisdictions with which France has the most contact, prior to Brexit, there was a thriving restructuring business in the United Kingdom, with the English courts approving pleas of arrangement for companies incorporated outside England. France was, therefore, likely to have contact with the English jurisdiction.

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

UK recognition of proceedings and other relief in EU member states could still be considered on the basis of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), which was adopted in the United Kingdom by the 2006 Cross-Border Insolvency Regulations;



however, the Gibbs Principle – under which only an English court may discharge an English law debt, even if that debt was first discharged in a foreign insolvency proceeding (*Bakhshiyeva ex rel Int'l Bank of Azerbaijan v. Sberbank of Russia*) – may give rise to challenges where debtors seek to discharge or modify an 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.

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

Based on the above-mentioned considerations, it is likely that cross-border restructurings involving companies with assets and businesses in both the European Union and the United Kingdom will take longer, be more costly and be more likely to involve parallel proceedings.

A recent illustration that reflects the interactions that can occur between French and UK law is *Comexposium*. The main outstanding senior facility was governed by an English-law contract with an exclusive jurisdiction clause for English courts in the context of French safeguard proceedings. As a result, some senior creditors under the facility documentation decided to apply to the English courts to force the debtor to comply with its disclosure undertakings under the terms of the English law debt agreement. Ultimately, the English High Court approved the request and ruled that the provisions of the facility agreement remain valid and enforceable despite the opening of safeguard proceedings in France.

“It is likely that cross-border restructurings involving companies with assets and businesses in both the European Union and the United Kingdom will take longer.”



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?

The courts that hear the most insolvency filings are the specialised insolvency courts created by Law No. 2015-990 of 6 August 2015. The specialised insolvency courts have jurisdiction over companies that reach certain thresholds in terms of the number of employees or turnover, and that are subject to safeguard, reorganisation or liquidation proceedings.

The new thresholds resulting from Ordinance No. 2021-1193 for the mandatory constitution of classes of affected parties are partly aligned with those of the specialised insolvency courts. The specialised insolvency courts have jurisdiction over conciliation proceedings, provided that the proceeding was requested by the public prosecutor or the president of the court has given his or her consent.

The specialised insolvency courts also have jurisdiction over insolvency proceedings falling within the scope of the EU Insolvency Regulation where the debtor's centre of main interests is located in France, or the debtor is located outside the territorial scope of the Regulation but has an establishment in France.

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

Forum shopping is very limited in France as the territorial jurisdiction depends on the location 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.



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Finally, the specialised insolvency courts are also preferred with regard to corporate groups. French law provides that any pending proceedings concerning a company owned or controlled by a company for which proceedings are opened before a specialised insolvency court are referred to that court.

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 from 1985 of the French bankruptcy regime was quite debtor-friendly, which resulted in the French restructuring system being perceived as debtor-friendly 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 by Ordinance No. 2014-326 of 12 March 2014, which, for example, granted creditors the right to



propose a restructuring plan (where committees are constituted). More recently, the Law of 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 the 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 increased 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 to attract and encourage new investors, the temporary framework implemented in the context of the covid-19 pandemic introduced new measures, such as the safeguard or reorganisation privilege benefiting creditors who have made a new cash contribution to the debtor during the observation period of those proceedings with the authorisation of the supervisory judge, or for the implementation of the safeguard or reorganisation plan adopted or amended by the court. In the event of subsequent insolvency proceedings, claims benefiting from this privilege will be paid in priority (with certain exceptions) and will not suffer debt write-offs or debt rescheduling without the relevant creditors' consent. This privilege has been permanently implemented through Ordinance No. 2021-1193.

Another key takeaway from this Ordinance is the introduction of the cross-class cramdown mechanism, whereby a continuation plan may, subject to 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

“The temporary framework implemented in the context of the covid-19 pandemic introduced new measures.”

out-of-the-money creditors or of shareholders are now restricted or may even be stopped.

Finally, we could say that our jurisdiction is no longer 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.

On the one hand, 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



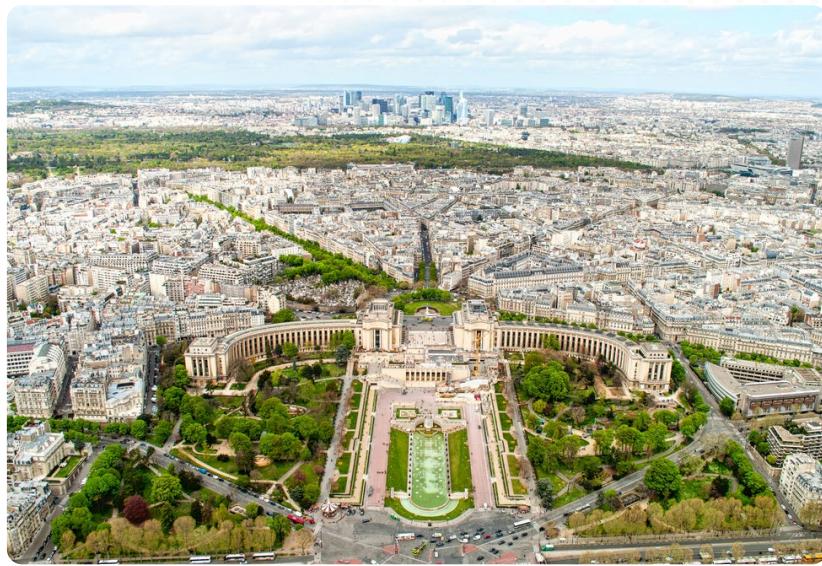


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sale plan is structured as an asset deal, debt and claims are not transferred to the purchaser of the distressed business (except security interests granted in favour of creditors who financed the acquisition of the secured assets).

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.

On the other hand, the pre-pack sale plan concept was introduced in France by Ordinance No. 2014-326. Pre-pack sales comprise 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 having obtained 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 chosen purchaser under the amicable proceeding with a certain form of exclusivity. Pre-pack sales are also faster than asset plans implemented under reorganisation proceedings since the deadlines are shortened and the plan has been pre-negotiated during the amicable phase.

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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 must be creative with all the possibilities offered by French insolvency law; therefore, the client must ensure that the counsel knows all the tools offered by the law, has extensive experience of domestic and cross-border insolvency matters and understands the business, including the numbers and economics. These are key to a successful and sophisticated restructuring. Lawyers in this field must also 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 appropriate legal counsel and financial advisers and of 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 *Les Mercuriales* case, concerning a real estate complex in Bagnolet, illustrates the numerous sale plans that are likely to occur in a gloomy real estate market. In guarantee of the financing granted by the European Real Estate Debt Fund II (ERED II) for the acquisition, the shares of the three Capena companies owning this complex were transferred to a trust. The companies failed to meet their obligations, and ERED II triggered an event of default and instructed the trustee to initiate a sale process of the assets.

As the assets could not be sold *in bonis*, reorganisation proceedings for the three companies were opened on 28 October 2021, and a bid process was launched. Only the bids of Bain Capital Credit, represented by the White & Case Paris team, were deemed acceptable, as they were the only ones that provided the guarantee relating to the payment of the price and that had a financial standing in line with the stakes of the project.

On 30 June 2022, the Bobigny Commercial Court authorised the transfer of the assets of the three companies to Bain Capital Credit.



About Market Intelligence

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