FRANCE

Law and Practice

Contributed by:
Saam Golshani, Alexis Hojabr and Alicia Bali
White & Case LLP

Contents

White & Case LLP has a team in Paris that is one of the most complete and developed in the market, with 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. The team adapts efficiently to difficult environments and crisis situations, and is particularly known for its capacity to assist proactively and avoid foreseeable crises. It works routinely 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. It also represents buyers and sellers of distressed loans and claims, and in distressed M&A mandates.

Authors

Saam Golshani is a partner in White & Case's Paris office, and a restructuring, private equity and M&A lawyer. He has more than 20 years' experience in representing French and multinational clients, including investment funds, investment banks, entrepreneurs, industrials, listed and non-listed companies, and distressed companies. Saam acts on behalf of creditors, debtors, investors and potential buyers on the many issues arising from difficult situations, corporate reorganisations and insolvency proceedings. He has recently led the team in advising on matters that were widely covered in the press, including Solocal, Technicolor, Europcar Mobility Group, Vallourec, Comexposium, Dream Yacht, THOM Group, Conforama, Arc Holdings, VIA Location and Antalis.

Alexis Hojabr is a restructuring, private equity and M&A partner based in White & Case's Paris office. He is qualified both in France and in England & Wales, and has particular skill in advising on multi-creditor and financial restructurings involving private equity funds, hedge funds, special situation investors and distressed companies. Alexis also supports clients in successfully completing M&A, divestitures, joint ventures and equity investments, often involving multiple jurisdictions. He recently advised on the Europcar Mobility Group, Comexposium, JJW Hotel, Arc Holdings, Hertz, Antalis and Swissport mandates. Alexis is a frequent author and commentator on restructuring and private equity matters.

Alicia Bali is a counsel in the EMEA private equity team of the global M&A practice at White & Case. She is fluent in French and English, and has worked on a number of transactions, including corporate financial restructuring operations. Alicia is at ease navigating both domestic and cross-border M&A, as well as private equity and venture capital matters, on behalf of multinational clients, including investment funds, investment banks, entrepreneurs, industrials, listed and non-listed companies, and distressed companies.

White & Case LLP

19, place Vendôme
75001 Paris
France

Tel: +33 1 55 04 15 15
Fax: +33 1 55 04 15 16
Email: saam.golshani@whitecase.com
Web: www.whitecase.com

1. State of the Restructuring Market

1.1 Market Trends and Changes

In the first half of 2023, the number of insolvencies rose by 28% compared to the first half of 2022 (27,583 insolvencies in the first half of 2023 versus 19,798 over the same period in 2022).

After a fall in the number of bankruptcies for almost two years, mainly due to the financial support provided by the government, the number of insolvencies is now back to where it was before the health crisis.

The second quarter of 2023 perfectly illustrates this return to pre-crisis indicators. The number of judicial reorganisation proceedings opened in Q2 2023 was close to 2019 figures over the same period (3,465 judicial reorganisations in Q2 2023, compared with 3,751 in 2019 over the same period). Likewise, the number of judicial liquidations proceedings opened coincides with pre-crisis data, if not higher (9,370 judicial liquidations in Q2 2023, compared with 9,667 in 2016 over the same period).

Another sign of the resurgence of insolvency proceedings is the growing number of safeguard proceedings opened in the second quarter of 2023: 431 safeguard proceedings were opened, compared to 289 in 2022 over the same period, and 328 in 2016.

Unsurprisingly, very small entities represented 91% of all insolvencies in the second quarter of 2023, with a total of 12,130 insolvencies listed, which is the highest number in the past ten years.

Although medium-sized and large companies accounted for only 9% of bankruptcies in 2023, it should be noted that 56 of them filed for bankruptcy during the first two quarters compared to 23 in 2022 over the same period, representing an increase of 142%.

No sector seems to have been spared this increase in bankruptcies, even if it comes as no surprise that hotels and restaurants are among the hardest hit, with bankruptcies up 69% this year with the start of the COVID-19-related state-guaranteed loan (PGE) reimbursement.

2. Statutory Regimes Governing Restructurings, Reorganisations, Insolvencies and Liquidations

2.1 Overview of Laws and Statutory Regimes

The major laws applicable to French restructuring and insolvency that have been passed in the last ten years are as follows.

- Law No 2005-845 dated 26 July 2005, together with its enforcement Decree No 2005-1677 dated 28 December 2005, has deeply modernised restructuring and insolvency law by giving priority to the negotiation and prevention of financial difficulties. The safeguard proceeding was one of the major innovations introduced by this law.
- Ordinance No 2008-1345 dated 18 December 2008 had the main objective of making safeguard proceedings more accessible and attractive by relaxing the conditions for their initiation and improving a company's reorganisation conditions.
- Law No 2010-1249 dated 22 October 2010 introduced the accelerated financial proceeding.

- Ordinance No 2014-326 dated 12 March 2014 and complementary Order No 2014-1088 dated 26 September 2014 introduced significant changes to restructuring and insolvency proceedings (eg, pre-pack proceedings).
- Law No 2015-990 dated 6 August 2015 introduced the shareholder squeeze-out, intended to promote economic growth, activity and equal opportunity. This law has also created specialised commercial courts with exclusive jurisdiction for large companies.
- Law No 2016-1547 dated 18 November 2016 (*Loi pour la modernisation de la justice du 21ème siècle*) brought, among other things, modifications with respect to changes to the by-laws and the share capital of a debtor under a restructuring plan, and clarified certain existing doubts with respect to the reconstitution of equity and the rights of new money creditors.
- Law No 2021-1193 dated 9 December 2016 amended the regime governing directors' liability in insolvency scenarios in order to encourage the recovery of honest directors of failed businesses.
- Law No 2019-486 dated 22 May 2019 (*Loi Pacte*) introduced additional amendments and empowered the government to substantially amend the French insolvency law in order to transpose European Directive No 2019/1023 dated 20 June 2019, which aimed to harmonise European legislation regarding preventative restructuring proceedings and debtors' recovery.
- Ordinance No 2020-341 dated 27 March 2020, Ordinance No 2020-596 dated 20 May 2020 (in force from 22 May 2020), Ordinance No 2020-1443 dated 25 November 2020 (in force from 27 November 2020) and Law No 2020-1525 dated 7 December 2020 (in force from 9 December 2020) temporarily amended French restructuring and insolvency laws to deal with the COVID-19 health crisis. Some measures that were initially adopted by these ordinances were due to expire on 31 December 2020, but Article 124 of Law No 2020-1525 extended them until 31 December 2021.
- Ordinance No 2021-1193 dated 15 September 2021 (the 2021 Ordinance), effective from 1 October 2021 in respect (with limited exceptions) of preventative and insolvency proceedings opened as of such date only, and Decree No 2021-1218 of 23 September 2021 for the implementation of the 2021 Ordinance (the 2021 Decree) transposing EU Directive No 2019/1023 of 20 June 2019 on preventative restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (the EU Restructuring Directive).

2.2 Types of Voluntary and Involuntary Restructurings, Reorganisations, Insolvencies and Receivership

Under French law, there are two categories of proceedings:

- consensual or out-of-court proceedings; and
- insolvency or court-administered proceedings.

The first category includes *mandat ad hoc* and conciliation proceedings. The second category includes safeguard, accelerated safeguard, and judicial reorganisation and liquidation proceedings, although the debtor under safeguard pro-

ceedings is not cash-flow insolvent (*état de cessation des paiements*).

Note that accelerated financial safeguard proceedings no longer exist separately under French law as they were merged into accelerated safeguard proceedings (whose scope may be limited to financial creditors) by the 2021 Ordinance, as of 1 October 2021.

2.3 Obligation to Commence Formal Insolvency Proceedings

The distressed debtor (through its legal representatives) is required to file a petition for judicial reorganisation or liquidation proceedings within 45 days of the date of insolvency, unless conciliation proceedings are ongoing. If the debtor fails to file for such proceedings within the timeframe, de jure managers (including directors) and, as the case may be, de facto managers are exposed to civil liability.

2.4 Commencing Involuntary Proceedings

Unless conciliation proceedings are ongoing, the opening of judicial reorganisation or liquidation proceedings against the debtor can be initiated by the court at the request of either the public prosecutor upon petition or any creditor upon summons, regardless of the nature of the claim.

2.5 Requirement for Insolvency

A state of insolvency is required in order to commence judicial reorganisation proceedings and liquidation proceedings. However, debtors wishing to initiate an ad hoc mandate or safeguard procedure must not be cash flow insolvent; in conciliation proceedings, the debtor must not be cash flow insolvent for more than 45 days.

The French insolvency test is a pure cash flow test, defined as the debtor's inability to pay its debts as they fall due with its immediately available assets, taking into account available credit lines and moratoria.

2.6 Specific Statutory Restructuring and Insolvency Regimes

The general insolvency regime applies to all French companies. However, some specific provisions apply to regulated sectors, such as banking and insurance, in order to ensure the protection of customers and to prevent systematic effects.

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the Bank Recovery and Resolution Directive – BRRD) is designed to enable a wide range of actions to be taken by the competent authorities in relation to credit institutions whose failure is known or predictable. The stated objective of the BRRD is to provide the resolution authorities with harmonised and effective instruments and powers in order to prevent a banking crisis, preserve financial stability and reduce taxpayers' exposure to losses arising from the failure of a credit institution.

The BRRD was implemented in France by Ordinance No 2015-1024 of 20 August 2015, which contains various provisions for adapting legislation in line with the European Union in financial matters. This ordinance has modified and supplemented the provisions of Law No 2013-672 of 26 July 2013 on the separation and regulation of banking activities, which grants various powers of resolution to the resolution panel of the *Autorité de contrôle prudentiel et de résolution* (ACPR). Accordingly, the ACPR is given a broad

range of tools with respect to defaulting banks (appointing a temporary administrator, dismissing executive officers, transferring all or part of the bank's assets and activities, checking credit institutions' compliance with minimum capital requirements, including prudential ratios and compliance with banking laws and regulations in general, implementing a recovery plan, etc).

The BRRD applies to credit institutions and investment firms that meet certain conditions (Articles L. 613 to 34 et seq of the Monetary and Financial Code). However, credit institutions that are classified as significant fall under the direct supervision of the European Central Bank with regard to resolution, in accordance with the implementation of the European Single Supervisory Mechanism.

In addition, Decree No 2015-1160 of 17 September 2015 and three Ministerial Ordinances of 11 September 2015 transposing the provisions of the ordinance on the recovery plan, the resolution plan and the criterion to assess the solvency of an institution or a group were published on 20 September 2015, mainly to transpose the BRRD in France.

This framework was amended in 20 May 2019 by the adoption of Directive (EU) 2019/879 (BRRD II), which has been transposed by Ordinance No 2020-1636 of 21 December 2020 relating to the resolution regime in the banking sector. The amendments introduced requirements relating to total loss-absorbing and recapitalisation capacity, which are applicable to global systemically important banks. Specific resolution rules for co-operative banking groups have also been set up, by adding the central bodies of co-operative banks to the list of entities that can be subject to measures for the prevention and management of banking crises, or clarifying that the assessment of the circumstances under which an institution shall be considered as failing or likely to fail shall be made in light of the central body and its affiliated entities.

Insurance and reinsurance companies are subject to the ACPR's control, which focuses on safeguarding the interests of policyholders, insureds and beneficiaries. The ACPR may take all appropriate measures to safeguard an insurance company by appointing a temporary manager or requiring an increase in the solvency margin. If the entity's financial difficulties become critical and jeopardise the insureds' interests, the ACPR may fully withdraw the insurance company's licence (*agrément*), thereby triggering liquidation proceedings. The ACPR will then appoint a liquidator, whose duty is to verify the insurer's receivables and the company's statement of assets and liabilities. In addition, Ordinance No 2015 378 dated 2 April 2015, completed by Decree No 2015 513 and dated 7 May 2015, has implemented European Directive 2009/138/CE dated 25 November 2009 (Solvency II Directive) by introducing new prudential requirements for insurance companies, mutual funds and provident institutions in terms of governance, due diligence and reporting.

3. Out-of-Court Restructurings and Consensual Workouts

3.1 Consensual and Other Out-of-Court Workouts and Restructurings

French legislation tends to create bridges between out-of-court amicable proceedings and insolvency proceedings, with the idea that restructuring solutions could be negotiated during the amicable phase and implemented in the context of subsequent insolvency proceedings. These evolutions concern both the implementa-

tion of traditional restructuring plans and the sale of business.

While out-of-court proceedings have the advantage of confidentiality, their positive outcome requires the debtor's creditors called up to participate in the negotiations to agree to make the necessary efforts to ensure the continuation of business. Neither the court-appointed conciliator nor the debtor have the power to impose those efforts on dissenting creditors in the context of consensual proceedings.

To overcome the opposition of dissenting creditors preventing the adoption of a restructuring agreement negotiated during the amicable proceedings, practitioners use accelerated safeguard proceedings to benefit from the cram-down system and force the adoption of the safeguard plan (ie, a pre-pack plan). A conciliation may also be opened to organise the partial or total sale of the business (ie, a pre-pack sale plan), which could be implemented, where appropriate, in the context of a subsequent safeguard (for partial sale only), judicial reorganisation or liquidation proceedings. As in the pre-packaged safeguard plan, the main interests in using the pre-pack sale framework lie in the confidentiality attached to the court-assisted amicable proceedings during the preparation phase and the reduction of the duration of the subsequent court-administered proceedings.

3.2 Consensual Restructuring and Workout Processes

With a view to reaching a consensual restructuring, two proceedings are available:

- *mandat ad hoc* proceedings, which are without time limit; and
- conciliation proceedings, which last up to five months.

Neither procedure triggers an automatic stay of payment and enforcement actions. Creditors are therefore not barred from taking legal action against the debtor to recover their claims, but those that have agreed to take part in such proceedings usually also agree to abstain from such action while they are ongoing.

In any event, the debtor retains the right to petition the relevant judge for a grace period under Article 1343-5 of the French Civil Code. More particularly and pursuant to Article L. 611-7 of the French Commercial Code, the debtor retains this right to petition the judge if a creditor has formally put the debtor on notice to pay, is suing for payment, or does not accept a request to stay payment of its claim by the deadline set by the conciliator. In the latter case, the judge may order the postponement or rescheduling of the creditor's claims that have not yet fallen due, for the duration of the conciliation proceedings.

Ad hoc creditor groups or steering committees may be formed during out-of-court proceedings but there are no mandatory rules or obligations related to creditor steering committees. The agent for lenders under a secured credit facility may form a steering committee of lenders to help organise the lenders. Noteholders may organise ad hoc groups to represent them during restructuring negotiations. Sometimes, a single creditor purchases a large portion of outstanding debt and then negotiates directly with the company or plays an outsized role in an ad hoc group or steering committee.

Prior to or during restructuring negotiations, competing creditor groups may negotiate and reach intercreditor agreements, or other closely related subordination agreements, between two or more of a company's creditors, and may arrange their competing rights to receive

payments of cash or other property from a company, as well as determine timelines and details with respect to such creditor groups' respective abilities to exercise remedies. Such agreements will have particular importance in the opening of subsequent court-administered proceedings that require classes of affected parties, with intercreditor agreements being taken into consideration by the judicial administrator in the class composition under certain conditions.

3.3 New Money

"New money" privilege (*privilege de conciliation*) granted to investors injecting new cash into a business exists under a conciliation agreement (*homologué*) that has been approved by the court. It only applies to new investors that have provided new money, goods or services during conciliation proceedings to ensure the continuation of the business, and aims to secure the payment of this new debt in the event of subsequent insolvency proceedings.

A debt claim benefiting from a new money privilege may be given different treatment from old money in any subsequent court-administered proceedings. The new investors will enjoy a priority of payment over all pre-commencement and post-commencement claims (subject to certain exceptions, including with respect to certain post-commencement employment claims and procedural costs) in the event of subsequent court-administered proceedings. Such claims benefiting from this new money privilege may also not be rescheduled or written off by a safeguard or reorganisation plan without their holders' consent, not even through a cram-down or a cross-class cram-down (in the event that classes of affected parties are formed). See **6.10 Priority New Money** regarding the new money privilege under safeguard and judicial reorganisation proceedings.

3.4 Duties on Creditors

There is no special principle in French insolvency law that imposes special duties on creditors, the distressed debtor or third parties; there are general principles only. However, insolvency judges must ensure that the equality principle between creditors sharing common interests and the test of best interest of creditors with respect to dissenting creditors are properly met in the adoption of the plan.

Another general principle prevents a creditor, the distressed debtor or any third party from acting through fraud – for example, in the case of a creditor that attempted to be reimbursed individually by the debtor through fraudulent means. Furthermore, the general principle of good faith applies between all stakeholders in insolvency proceedings.

3.5 Out-of-Court Financial Restructuring or Workout

Out-of-court proceedings do not provide for a cram-down system. However, conciliation proceedings can be a preliminary step to prepare a pre-pack plan that will be implemented in subsequent accelerated safeguard proceedings where the cram-down mechanism is available, provided that such restructuring plan is supported by a large majority of the relevant affected parties (see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**).

4. Secured Creditor Rights, Remedies and Priorities

4.1 Liens/Security

The two most common types of security over real estate property are the mortgage (*hypothèque*) and the lender's lien (*privilège du prêteur de deniers*). Both require a notarial deed,

which entails the payment of fees to the notaries involved (which is proportional to the principal amount secured, but negotiable above a certain level) and must be registered in order to take rank. Both a mortgage and a lender's lien give the secured party the same rights over the property, but a mortgage only takes rank upon the date of its registration, while a lender's lien takes rank from the date of the acquisition, provided that it is registered within two months (if not, it takes rank upon registration, like a mortgage). However, this difference ceased to exist on 1 January 2022 in respect of liens granted after that date, as such liens will be regarded as statutory mortgages (*hypothèque légale*).

In either case, enforcement may be effected by means of a court-supervised public auction or a court-ordered attribution of the property to the secured creditor(s) (subject to the creditor(s) paying the amount, if any, by which the value of the property as appraised independently exceeds the secured amount). In the case of a contractual mortgage only, enforcement may also – if agreed in the mortgage deed (or at the time of enforcement) – result from the direct appropriation of the secured property by the secured creditor (subject to the payment of any excess, as in the case of court-ordered attribution). Direct appropriation is seldom agreed by borrowers in normal financing circumstances, but may more likely be imposed in a restructuring context.

A French security trust arrangement (*fiducie*) may also be used for security purposes in relation to real estate (but costs may be higher than a mortgage, as the notarial fees and the registration fee and duty are based on the value of the property rather than the amount secured).

The most usual types of security are the pledge over shares (*nantissement de parts*) and the pledge over a company's securities accounts (*nantissement de comptes titres*), depending on the corporate form of the company. As such, pledgors will fictitiously retain the shares/financial securities until they are fully paid up by the debtor. In addition, a French security trust arrangement may be used (see above).

One of the main types of security over movable property is the pledge, known as *gage* in respect of tangible assets and *nantissement* in respect of intangible assets. If the secured obligation is not performed, the pledged assets may be sold and the price paid to the secured creditor who has a priority right on that price (although not a first-rank priority right). Contractual appropriation is also possible if it is provided for in the security documents. The existence of a pledge is subject to a written instrument (which may be in electronic format), and its efficiency against third parties is subject either to a recording in a special register or to the transfer of possession of the movable asset into the hands of the creditor. The secured creditor can invoke its priority right in insolvency proceedings.

In respect of receivables, an assignment by way of security (transferring title in the collateral) may be used. When the secured assets are professional receivables and certain other conditions are met, parties can use the special regime (known as Dailly security assignments) provided for by the Monetary Financial Code. As of 1 January 2022, it is also possible to use the general assignment regime provided for by the Civil Code, which enables the transfer by way of security of all types of receivables, between all types of parties.

In relation to intellectual property rights, a pledge over trade marks, patents or software requires

registration in the national register held at the *Institut National de la Propriété Intellectuelle*.

Under a cash collateral, title to cash collateral is transferred to the creditor. If the debtor defaults, the creditor should be able to set off all sums owed by the debtor against the creditor's obligation to return the charged cash to the debtor, even under safeguard or insolvency proceedings.

4.2 Rights and Remedies

In out-of-court proceedings, an agreement (if any) will be reached by secured and unsecured creditors alike. Since there is no automatic stay on claims or proceedings, secured creditors may keep pursuing the debtor to recover their secured claims through security enforcement.

In court-administered proceedings, the automatic stay on claims prevents creditors from enforcing security (except for security interests relying on title transfer, such as a security trust or a Dailly security assignment). However, secured creditors would benefit from privileged rights due to their security interests. In particular, certain security interests may confer a retention right upon their beneficiaries, which is generally effective (but not enforceable) despite the occurrence of court-administered proceedings. For example:

- during the observation period, at the request of the judicial administrator, the supervisory judge may exceptionally authorise the payment of a pre-filing secured creditor to obtain the surrender of the retained asset to the extent that the asset is necessary for the debtor's pursuit of its business activity – in such a case, the related creditors shall have an exclusive right over the proceeds; and
- in the case of a disposal plan, these secured creditors (benefiting from pledges over inventory or certain types of pledges over shares) would be entitled to retain their security interest over the asset on which they have such right (and therefore in practice prevent its sale) until they are repaid in full for their claim so secured or unless an agreement is reached with the relevant parties.

Please note that, since the 2021 Ordinance, any increase in the scope of a contractual security interest or a contractual retention right, regardless of the method used (by addition, complement or transfer of assets or rights – eg, dividends under pledged securities), would be prohibited as of the opening of court-administered proceedings. The exact extent of this principle remains uncertain, and certain exceptions to this principle are provided, particularly with respect to Dailly security assignments.

The creditors' right in respect of the ranking (in terms of priority of payment and application of proceeds) and enforcement of security interests (with potentially a second or lower ranking pledges), among others, can be organised under an intercreditor agreement (known as a subordination agreement).

Although these agreements may influence the negotiating power of certain creditors during out-of-court proceedings (notably, the priority creditors, in particular according to their ranking and their voting rights in relation to the majorities required to implement the security package), they are not binding vis-à-vis the bodies of such proceedings (the conciliator, the court, etc).

This differs in court-administered proceedings, following the 2021 Ordinance. Pursuant to the new provisions of the French Commercial

Code (Articles L. 626-30 and L. 682-7), the class composition determined by the judicial administrator shall comply with the provisions of subordination agreements between creditors entered into prior to the opening of court-administered proceedings (if classes are set up), provided that such subordination agreements have been brought to the administrator's attention within the required deadline. As a consequence, contractual intercreditor covenants are likely to have a substantial impact in the context of court-administered proceedings with regard to the new class composition system.

4.3 Special Procedural Protections and Rights

With respect to special procedural protections, any secured creditor that has a published security interest or that is bound to the debtor by a published contract benefits from specific proof of claim proceedings. These creditors shall be notified personally or, where applicable, at their elected domicile, by registered letter with acknowledgement of receipt by the creditors' representative (*mandataire judiciaire*) that they have to file their claim. The two-month period for filing their claim will only start to run from the date of receiving this notice.

With respect to special rights, secured creditors are likely to have a stronger position in out-of-court proceedings to negotiate a workout agreement considering their rights under their security interests.

In court-administered proceedings, secured creditors shall benefit from a better priority of payments in a judicial liquidation and from preferential or exclusivity rights, depending on the nature of the related security interest. In addition, in court-administered proceedings where classes of affected parties are formed, these secured creditors shall be grouped into one class of secured affected parties (or several according to a sufficient commonality of economic interest) that could potentially cram-down dissenting (non-secured) affected parties, subject to specific conditions being met.

5. Unsecured Creditor Rights, Remedies and Priorities

5.1 Differing Rights and Priorities

In the course of court-administered proceedings, creditors will be subject to the same rules regardless of whether they are secured or unsecured, particularly the prohibition of payments and the stay on proceedings and petition of claims in relation to pre-insolvency claims.

However, where the constitution of classes would be required in the context of court-administered proceedings, the allocation of affected parties into classes shall be carried out according to a sufficient commonality of economic interest (*communauté d'intérêt économique suffisante*) on the basis of objective verifiable criteria. There shall be at least a distinction between affected parties whose claims are secured by security interests in rem (*sûretés réelles*), in respect of their claim so secured, and other affected parties.

As a result, secured and unsecured affected creditors shall belong to different classes. Secured creditors shall therefore be treated differently from unsecured creditors, reflecting their respective economic rights. Secured creditors will also enjoy a priority of payment over all unsecured creditors in the event of subsequent court-administered proceedings.

5.2 Unsecured Trade Creditors

Unsecured pre-petition trade claims are generally entitled to no higher priority or better treatment than other general unsecured claims. Nevertheless, most restructuring processes tend to protect trade creditors and focus on financial creditors and/or shareholders in order to avoid affecting the operation of the business itself.

However, suppliers of goods also typically include retention of title clauses to enable goods to be recovered as a matter of contract if payment is not made by a specified date. If the contract has been published, the supplier will have to request the restitution of the goods (*action en restitution*). Otherwise, the supplier will have to file a French *action en revendication* within three months of the publication of the judgment opening the proceedings.

5.3 Rights and Remedies for Unsecured Creditors

In out-of-court proceedings, unsecured creditors may be involved in the discussions if they are affected by the restructuring plan. Without a cram-down mechanism, their consent will be necessary to reach a consensual agreement. Furthermore, these unsecured creditors have the right to petition the Commercial Court to file a petition commencing a judicial reorganisation proceeding or a liquidation proceeding case against a debtor if they can prove that the debtor is insolvent.

In court-administered proceedings, affected unsecured creditors shall basically be grouped into a class that is entitled to vote on the restructuring plan. However, such a class of unsecured creditors is likely to be crammed down by a higher ranking affected party, with the class generally being qualified as "out of the money".

5.4 Pre-judgment Attachments

Prior to the start of court-administered proceedings, an unsecured creditor may try to obtain an attachment order and seize one or more of the debtor's assets, provided that the debt is overdue. Unless it is completed prior to the opening judgment, such seizure is stayed during the court-administered proceedings. An attachment order can be obtained on an expedited basis.

5.5 Priority Claims in Restructuring and Insolvency Proceedings

Employment claims, procedural costs and new money claims (including conciliation and safeguard/reorganisation privilege) have a very favourable ranking in the legal waterfall of liquidation proceedings under French insolvency law. The priority of payment among these creditors is as follows:

- any allowances granted by the supervisory judge by way of remuneration to managers or individual debtors (Article L. 631-11 of the French Commercial Code);
- claims benefiting from the wage super-privilege (Articles L. 3253-2, L. 3253-4 and L. 7313-8 of the Labour Code);
- legal costs arising after the opening judgment;
- claims benefiting from the privilege of sums due to farm producers (Article L. 624-21 of the French Commercial Code);
- claims benefiting from the "new money" privilege or conciliation privilege (Article L.611-11 of the French Commercial Code);
- claims secured by real estate security interests, classified amongst each other in accordance with the ranking provided for in the Civil Code;

- claims benefiting from the privilege of wages (where not paid by the Association for the Management of the Employees' Debt Guarantee Scheme (AGS) (Articles L. 3253-6 and L. 3253-8 to L. 3253-12 of the Labour Code);
- claims benefiting from the "post money" privilege (Articles L. 626-10 and L. 622-17- III 2° of the French Commercial Code);
- "meritorious" claims resulting from the performance of ongoing contracts and for which the contracting party has agreed to receive deferred payment (Articles L. 622-13 and L. 622-17, III 3° of the French Commercial Code);
- claims benefiting from the privilege of wages (where paid by the AGS) (Article L. 3253-8 of the Labour Code);
- other post claims and prior claims for which payment is authorised;
- claims benefiting from the Treasury's lien (except for indirect taxes);
- claims secured by movable securities or the lessor's lien;
- tax and social security claims (indirect taxes); and
- unsecured claims, pro rata to their amount.

Note that this order of priority is not relevant to all creditors – for example, creditors benefiting from a retention right over assets with respect to their claim related to such asset will be treated separately.

6. Statutory Restructuring, Rehabilitation and Reorganisation Proceedings

6.1 Statutory Process for a Financial Restructuring/Reorganisation

In certain conditions, a French debtor facing difficulties may request the opening of out-of-court proceedings (*mandat ad hoc* or conciliation), the aim of which is to reach a consensual agreement on a confidential basis with their main creditors and stakeholders.

Mandat ad hoc proceedings can only be initiated by the debtor itself, at its sole discretion. In practice, *mandat ad hoc* proceedings are used by debtors that are facing any type of difficulties but are not insolvent. A *mandataire ad hoc* shall be appointed, whose name may be suggested by the debtor itself, and their missions shall be laid down by the President of the Commercial Court. The proceedings are not limited in time.

Conciliation proceedings can only be initiated by the debtor itself if it faces actual or foreseeable difficulties of a legal, economic or financial nature and is not insolvent or has not been insolvent for more than 45 calendar days. A conciliator (*conciliateur*) shall be appointed, whose name may be suggested by the debtor itself, and their missions shall be laid down by the President of the Commercial Court. The proceedings may last up to five months (after an initial period of a maximum of four months, upon request of the conciliator, the court may extend the conciliation up to a maximum of five months).

As these proceedings are consensual and optional by nature, no cram-down has been provided for by French law. A conciliation proceeding requires the unanimous agreement of the creditors involved. As the interests of the parties involved in the conciliation proceeding are not aligned, the preparation of the agreement will require mutual concessions. However, the plan prepared in conciliation proceedings with the support of a majority of creditors could be forced upon the dissenting affected creditors by the opening of accelerated safeguard proceedings where a cross-class cram-down is avail-

able through a class-based consultation (see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**).

In order to be eligible to access accelerated safeguard proceedings (court-administered proceedings), the debtor must meet the following conditions:

- its financial statements must have been certified by an auditor (*commissaire aux comptes*) or drawn up by a chartered certified accountant (*expert-comptable*);
- it must be subject to ongoing conciliation proceedings;
- it must have prepared a draft safeguard plan ensuring the continuation of its business as a going concern that is likely to be supported by enough parties that will be impaired by such plan to render its adoption plausible within an initial two-month period, which may be extended to up to four months upon the request of the debtor and the court-appointed administrator; and
- it must not have been insolvent for more than 45 days when it initially applied for the opening of conciliation proceedings.

If the debtor does not meet the conditions that require creditors' classes to be formed, the court must order such constitution in the decision opening the proceedings. The regime applicable to standard safeguard proceedings is broadly applicable to accelerated safeguard proceedings (see **6.3 Roles of Creditors** regarding the class-based consultation rules).

6.2 Position of the Company

Out-of-court proceedings do not trigger any automatic moratorium nor any stay of enforcement actions. However, financial institutions, social security organisations or institutions managing an unemployment scheme may grant a stay on claims to the debtor on a voluntary basis. In any event, the debtor retains the right to petition the relevant judge for a grace period under Article 1343-5 of the French Civil Code (see **3.2 Consensual Restructuring and Workout Processes**). If an agreement has already been reached, however, the creditors of this agreement will only be bound by the contractual terms and will have no obligation to provide for additional moratoria or stays on claims.

See **9.2 Statutory Roles, Rights and Responsibilities of Officers** regarding business and management operations.

See **3.3 New Money** and **6.10 Priority New Money** regarding new money during the process.

6.3 Roles of Creditors

There are no creditors' committees nor classes of affected parties in out-of-court proceedings, but creditors are not prevented from organising themselves through ad hoc committees to facilitate negotiations (see **3.2 Consensual Restructuring and Workout Processes**).

In court-administered proceedings, and notably in safeguard or accelerated safeguard proceedings, creditors (and, if applicable, equity holders) must be consulted on the manner in which the debtor's liabilities will be settled under the safeguard plan (debt write-offs, payment terms or debt-for-equity swaps) prior to the plan being approved by the court. The rules governing consultation will vary depending on the size of the business.

If a class-based consultation is mandatory in accelerated safeguard proceedings, the creation of such classes will only be compulsory if the debtor is above certain thresholds in safeguard

or judicial reorganisation proceedings (as described below).

This applies to companies that meet or exceed either of the following thresholds on the date of the petition for the commencement of proceedings:

- 250 employees and EUR20 million in net turnover; or
- EUR40 million in net turnover (on a standalone basis or together with other entities that they hold or control, within the meaning of Articles L. 233-1 and L. 233-3 of the French Commercial Code).

Classes can also be created upon the debtor's request and with the authorisation of the supervisory judge if the company concerned does not meet such thresholds. If the debtor in accelerated proceedings does not meet the thresholds that require affected creditors' classes to be formed (as mandatory), the court must order such formation in the decision opening the proceedings.

The judicial administrator is responsible for drawing up the classes and informing each affected party that it is a member of a class. On the basis of objective verifiable criteria, they must also allocate the affected parties in classes representing a sufficient commonality of economic interest (*communauté d'intérêt économique suffisante*) in compliance with the following conditions:

- creditors whose claims are secured by security interests in rem (*sûretés réelles*) and other creditors (such as unsecured) shall belong to different classes;
- the class formation shall comply with subordination agreements entered into before the commencement of proceedings, which must have been brought to the attention of the judicial administrator within ten days of their notification to each affected party of its membership in a class;
- equity holders shall make up one or more classes; and
- in respect of creditors secured by a security trust (*fiducie*) granted by the debtor, only the amount of their claims that are not secured by such security trust is taken into account.

The judicial administrator shall notify each affected party of the criteria for class formation and the determination of the voting rights corresponding to the affected claims or rights allowing them to cast a vote.

The consultation involves the submission of a draft plan prepared by the debtor with the assistance of the judicial administrator for consideration by the affected parties (except in judicial reorganisation proceedings, where any affected party may submit an alternative plan to the vote of the class(es)).

The decision shall be taken by each class by a two-thirds majority of the votes held by the members casting a vote.

The creditors are informed of the opening of insolvency proceedings through the publication of the opening judgment in the BODACC (a French legal gazette). Upon such publication, the creditors' representative must ensure special procedural information to the benefit of creditors is provided, to enable them to file their proof of claims (see **4.3 Special Procedural Protections and Rights**).

At the creditor's request, the supervisory judge (*juge commissaire*) can appoint creditors as

controllers (*contrôleurs*), whose duties are to assist the creditors' representative in their functions, including the supervision of the company's administration. The supervisory judge may appoint up to five controllers from among the voluntary creditors. At least one of them is selected from the security interest holders and another is selected from the unsecured creditors (*créanciers chirographaires*); in any event, the judge needs to make sure that controllers do not act in their own interest. A controller holds a right of information regarding the proceeding, and has the right to examine all documents sent to the judicial administrator and the creditors' representative.

Each creditor bears its own expenses, such as for experts or counsels. Nevertheless, in the largest matters, the fees incurred by the creditors are generally borne by the debtor according to the provisions of the finance documentation and up to a generally pre-negotiated amount. Procedural costs (the fees of the judicial administrator, etc) are covered by the debtor and benefit from a super-privileged payment priority.

6.4 Claims of Dissenting Creditors

No cram-down is provided for in conciliation proceedings: creditors' rights cannot be modified without their consent. However, pre-pack proceedings may be used to implement a pre-pack plan prepared in conciliation through accelerated safeguard proceedings to cram-down dissenting minority creditors (also applicable in safeguard proceedings at the request of the debtor or the judicial administrator with the approval of the debtor).

This mechanism enables the court to adopt a plan despite the negative vote of one or several classes, subject to the following general conditions:

- the plan complies with these conditions for its adoption by the court:
  - (a) the classes have been duly formed in accordance with the rules;
  - (b) affected parties that share a sufficient commonality of interest within the same class are treated equally and in proportion to their claim or right;
  - (c) the plan has been duly notified to all the affected parties;
  - (d) if there are dissenting affected parties, the plan meets the "best interests of creditors" test – ie, no dissenting party is worse off as a result of the plan than it would be if the order of priority of payments in a judicial liquidation were applied (whether in the event of a piecemeal sale or a court-ordered disposal plan – *plan de cession*) or in the event of a better alternative solution if the plan was not approved;
  - (e) where applicable, any new financing is necessary to implement the plan and does not excessively impair the interests of the affected parties; and
  - (f) the interests of all affected parties are sufficiently protected;
- approval of the plan by a majority of classes (necessarily including a class of secured claims or a class having a higher rank than the class of unsecured creditors) or by a class "in the money" other than capital holders;
- compliance with the absolute priority rule – ie, the claims held by a dissenting class of affected parties are fully paid (by identical or equivalent means) if a lower ranking class is entitled to be paid or retains an interest within the plan; and
- compliance with the rule according to which the plan shall not permit a class to receive or retain more than the total amount of its receivables or interests.

Where one or more classes of equity holders have been constituted and have not approved the plan, the plan can be imposed on such dissenting equity holders in the following circumstances:

- if the threshold criteria are met (see above);
- if there is no economic interest left – it is reasonable to assume that the shareholders will be "out of the money" in the event of a liquidation/disposal plan;
- in respect of the preferential subscription rights of the shareholders; and
- if the plan does not provide for the transfer of all or part of the rights of the dissenting class or classes of equity holders.

Judicial reorganisation proceedings broadly take place in a manner that is similar to safeguard proceedings, subject to certain specificities. The main differences are as follows:

- if the debtor does not meet the required threshold(s), the authorisation to form classes of affected parties may also be requested from the supervisory judge by the judicial administrator on its own, without the debtor's approval (in addition to being requested by the debtor);
- any affected party may submit a draft plan to the vote of the classes;
- if the plan has not been approved by all classes of affected parties, the court can decide to apply the cross-class cram-down mechanism at the request of any affected party (in addition to the debtor or the administrator with the debtor's consent); and
- if the plan is not approved through the class-based consultation procedure (whether by regular approval by the classes of affected parties or by a cross-class cram-down), the approval of the plan may occur through the individual consultation rules.

6.5 Trading of Claims Against a Company

French insolvency law does not prevent a creditor from assigning its claims to a third party after the judgment opening safeguard proceedings.

The right of an affected party to vote in a class shall be considered an accessory to the claim arising prior to the judgment opening the proceedings and shall be transferred ipso jure to its successive holders, notwithstanding any provision to the contrary.

The holder of the assigned claim will only be informed of the debtor's proposals and be entitled to vote from the time when the assignment is brought to the attention of the judicial administrator.

6.6 Use of a Restructuring Procedure to Reorganise a Corporate Group

French law provides that court-administered proceedings of corporate groups can be opened by the court in the jurisdiction of the registered office of any company of the group, and this court will remain competent for the opening of all other insolvency proceedings of the group. In such cases, the court can appoint a judicial administrator and a creditors' representative that is common to all the proceedings.

6.7 Restrictions on a Company's Use of Its Assets

In out-of-court proceedings, the debtor can freely sell its isolated assets without any conditions, except contractual consents if required (notably under the existing finance documentation according to negative covenant).

During safeguard proceedings, however, the debtor is allowed to carry out day-to-day transactions, and any transaction that would entail the sale of an important asset of the business would be subject to the supervisory judge's authorisation. The judge may indeed authorise the sale of certain assets on a piecemeal basis if the situation so requires.

6.8 Asset Disposition and Related Procedures

In out-of-court proceedings, the sale of a business or an autonomous branch is carried out by the legal representatives of the debtor. The *mandataire ad hoc* or the conciliator can supervise a total or partial sale of the company's assets, which would then be adopted under a court-administered proceeding after solicitation of the public prosecutor's opinion. This proceeding offers the possibility of avoiding compulsory public advertising for the submission of tenders. In subsequent insolvency proceedings, several pre-pack sales will be submitted to the judicial administrator or the liquidator, as the case may be (see **3.1 Consensual and Other Out-of-Court Workouts and Restructurings**).

In safeguard proceedings, the sale of the business as a whole is not possible (in contrast to judicial reorganisation proceedings). However, the court may authorise the sale of certain assets, either on a piecemeal basis or as a going concern if such assets form an autonomous branch, provided that the debtor can continue to run its business as a going concern without affecting its ability to present a safeguard plan. It can also be a term of a restructuring plan that disposals are executed on a pre-agreed basis and that certain creditors voting on the plan can acquire those assets. The plan needs to be approved by the requisite majorities, and the price needs to be legitimate and at a fair value to avoid claims of unfair prejudice and material irregularity.

6.9 Secured Creditor Liens and Security Arrangements

In conciliation proceedings, securities over the company's assets may be released only as part of the undertakings provided for in the conciliation agreement.

In safeguard proceedings, securities over the company's assets or claims may be released during the observation period, subject to the authorisation of the supervisory judge.

6.10 Priority New Money

See **3.3 New Money** regarding the new money privilege under conciliation proceedings.

The 2021 Ordinance officially introduced a new safeguard/reorganisation new money privilege (inspired by US debtor-in-possession financing and resulting from the COVID-19 temporary measures), which is applicable to all new cash contributions (excluding contributions made prior to the opening of the relevant proceedings and contributions made by shareholders as part of a capital increase) by any person, including shareholders of the debtor, as follows:

- during the observation period, for the interim financing granted to ensure continuity of the debtor's activity during the observation period – such financing must be authorised by the supervisory judge and is subject to publicity; and
- for the implementation of the safeguard or reorganisation plan (including a plan ordered by the court that substantially modifies a previous one), in which case the amount and the privilege must be specifically mentioned in the draft plan upon which the affected

parties are called to vote, and also in the court decision adopting the plan.

Similar to the "new money" privilege in conciliation, claims benefiting from the safeguard/reorganisation privilege cannot be rescheduled or written-off without the consent of the relevant creditors, not even through a cram-down or a cross-class cram-down (in the event that classes of affected parties are formed), in ongoing or subsequent court-administered proceedings. They will also enjoy a priority of payment in the context of a subsequent judicial liquidation (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**).

6.11 Determining the Value of Claims and Creditors

An amicable proceeding enables the debtor and the court-appointed representative to value claims and select the main creditors that have an economic interest in the company.

As they are more regulated, safeguard proceedings are supervised by the court. The debtor must give the judicial administrator a list of its creditors, the amount of debts and the main current contracts. A mandatory inventory is established by the judicial administrator.

6.12 Restructuring or Reorganisation Agreement

When the conciliation agreement (*homologué*) is formally approved by the court, the judge assesses the fairness between the creditors involved in the agreement, and more particularly ensures that the agreement does not impair the rights of the non-signatory creditors.

In safeguard and judicial reorganisation proceedings, after the draft plan has been adopted by the class(es), the court must ensure that certain conditions are met, and notably that the interests of all parties affected are sufficiently protected (for further details, see **6.4 Claims of Dissenting Creditors**). In any case, the court may refuse to adopt the plan if it does not provide a sufficient perspective to avoid the debtor's insolvency or to ensure the viability of the business.

The judgment adopting the plan makes its provisions enforceable against all parties.

6.13 Non-debtor Parties

In safeguard or judicial reorganisation proceedings, the non-debtor parties must fulfil their duties despite the debtor's failure to respect its commitments prior to the opening judgment.

Contractual provisions pursuant to which the commencement of the proceedings triggers the acceleration of the debt (except with respect to judicial liquidation proceedings in which the court does not order the continued operation of the business) or the termination or cancellation of an ongoing contract are not enforceable against the debtor. Any contractual provision that modifies the conditions for the continuation of an ongoing contract by reducing the debtor's rights or increasing its obligations simply by reason of the designation solely upon the opening of judicial reorganisation proceedings is deemed null and void (in accordance with a decision of the French Supreme Court dated 14 January 2014, No 12-22.909, which case law is likely to be extended to safeguard or accelerated safeguard proceedings).

However, the court-appointed administrator can unilaterally decide to terminate ongoing contracts (*contrats en cours*) if it believes the debtor will not be able to continue to perform such contracts.

6.14 Rights of Set-Off

From the date of the judgment opening court-administered proceedings, the debtor is prohibited from paying debts incurred prior to the opening of the proceedings, subject to specified exceptions, which essentially cover:

- the set-off of reciprocal receivables arising prior to the opening judgment, provided that debts were certain, due and payable (*créances certaines, liquides et exigibles*) before the opening judgment;
- the set-off of related (*connexes*) debts (ie, when they arise from the same account, from the same contract or from different agreements that all belong to a global contractual framework);
- payments authorised by the supervisory judge (*juge commissaire*) to recover assets, whether they are pledged or retained by a creditor based on a retention right, or constitute collateral in a security trust estate (*patrimoine fiduciaire*) required for the continued operation of the business; and
- paying a carrier requesting payment directly from the debtor.

6.15 Failure to Observe the Terms of Agreements

If the debtor or a creditor fails to perform the terms of the conciliation agreement, any related party may petition the President of the Commercial Court or another court (depending on whether the agreement was acknowledged or approved) for the termination of the agreement. However, termination will not extend to the provisions of the conciliation agreement addressing the consequences of such termination. New conciliation proceedings cannot be opened until three months have passed from the end of the previous ones.

If the debtor fails to observe the terms of the safeguard plan and becomes insolvent, a creditor, the judicial administrator in charge of supervising the implementation of the plan (*commissaire à l'exécution du plan*) or the public prosecutor can request from the court the termination of the safeguard plan and the opening of judicial reorganisation proceedings or, if the rescue of the company appears obviously impossible, the opening of liquidation proceedings.

6.16 Existing Equity Owners

Existing equity owners may be entitled to receive dividends but, because of their moral duty towards the company, they should not in principle accept them if such distribution would compromise the company's chances of recovery.

In safeguard or judicial reorganisation proceedings, equity owners will be regrouped into classes of equity holders if required under thresholds or if the thresholds requiring the constitution of classes of affected parties are met. In this case, they shall vote on the drafting plan under the rules governing votes at shareholders/equity holders' general meetings, except the decision is taken at the same two-thirds majority. Similar to dissenting creditors, a plan may be imposed on equity holders if specific legal conditions are met (see **6.4 Claims of Dissenting Creditors** regarding the cross-class cram-down applicable to dissenting equity holders).

7. Statutory Insolvency and Liquidation Proceedings

7.1 Types of Voluntary/Involuntary Proceedings

When the debtor is insolvent (under the cash flow insolvency test – see **2.5 Requirement for**

Insolvency) and rescue does not appear to be impossible, the management of the distressed company must request the opening of judicial reorganisation proceedings no later than 45 days from the date on which the company becomes insolvent (provided that conciliation proceedings are not pending).

Any unpaid creditor or the public prosecutor may request the court to open judicial reorganisation proceedings. The effects of an involuntary judicial reorganisation are similar to those of voluntary judicial reorganisation proceedings.

The purposes of judicial reorganisation proceedings are the sustainability of the business, the preservation of employment and the payment of creditors, in that order.

As it is a court-administered proceeding, the insolvency judge opens a six-month "observation period", renewable for up to 18 months (against a maximum of 12 months under safeguard proceedings), during which the debtor will negotiate a waiver of debt or rescheduling with its creditors. Unlike out-of-court proceedings, a judicial reorganisation is public, and pre-filing claims are automatically stayed against the company.

At the end of the observation period, the judge will make an order for:

- the continuation of the business through a reorganisation plan;
- the sale of all or part of the debtor's assets through a sale plan; or
- if the latter fails, the conversion into liquidation proceedings.

Judicial liquidation proceedings apply to a debtor that is insolvent and whose recovery is manifestly unfeasible. The liquidation proceeding may be initiated by an insolvent debtor, a creditor or the public prosecutor.

The purpose of such a proceeding is to liquidate a company by selling it as a whole or by selling each branch of activities or asset one by one.

In order to request the court to open an immediate liquidation proceeding, the debtor must show evidence that its recovery is obviously impossible. The court may order the immediate liquidation of the debtor's assets and will appoint a liquidator to manage the debtor and proceed with the sale of the assets (private sale or auction).

However, when it seems possible that all or part of the business has the chance to be sold to a third party, the operation of the company will continue temporarily for up to six months.

The court will end the judicial liquidation proceedings when either of the following occurs:

- no due liabilities remain or the liquidator has sufficient funds to pay off the creditors; or
- continuation of the liquidation operations becomes impossible due to insufficient assets.

Creditors must file a petition for their claims within two months from the publication of the opening judgment in the BODACC (the Official Gazette for Civil and Commercial Announcements). Creditors residing outside of France can avail themselves of an extension period of up to four months for declaring their claims. Failure to file a claim within this time limit will render the creditors unable to take part in the subsequent distribution of funds as part of the plan.

All claims are required to be declared, whether contingent or unquestionable.

The proceedings may be officially commenced from the judgment ruling the opening of the judicial reorganisation or liquidation proceedings.

The judgment ordering the commencement of judicial reorganisation proceedings opens an observation period that may last six months (or less) and up to a maximum of 18 months. At the end of the observation period, the court may decide to approve a continuation plan or a sale plan (as a subsidiary way only) that has been prepared during the observation period by the debtor, the judicial administrator or the liquidator.

As indicated above, the observation period of judicial reorganisation proceedings may last up to 18 months. The law does not provide any maximum duration for liquidation proceedings; in practice, the duration will depend on the ongoing litigation, the size of the company and the value of its assets. A simplified form of liquidation proceedings is available for small businesses, which lasts for a maximum of one year.

During the observation period of a judicial reorganisation or during a liquidation proceeding (if applicable), all secured and unsecured creditors are subject to a stay on legal individual proceedings and enforcement actions against the company for proceedings or claims that arose before the opening judgment. However, in order to be stayed, legal proceedings or enforcement actions must be related to a default of cash payment. Otherwise, legal proceedings or enforcement actions related to a specific performance (*execution forcée en nature*), such as the release of a document, the termination of a contract or the reimbursement of defective hardware, are not subject to the stay on proceedings principle.

During the observation period of judicial reorganisation proceedings, the court appoints a judicial administrator to be in charge of assisting the management of the debtor's business. The management of the debtor will continue the daily management of the business, while the judicial administrator supervises and sometimes authorises in advance any exceptional decisions to be taken about the debtor's assets. During liquidation proceedings, however, a liquidator is appointed by the court, and the management of the debtor is usually (but not necessarily) divested of all rights pertaining to the business of the debtor and the disposal of assets. Given the severity of the financial difficulties encountered by the distressed debtor, the business of the company will usually be managed entirely by the liquidator.

In judicial reorganisation proceedings, the judicial administrator has the exclusive power to continue or terminate the debtor's contracts. The judicial administrator may request the termination of a contract that is deemed necessary to the safeguarding of the debtor and if the contract involved does not excessively prejudice the other party's rights. If contracts are continued, the debtor and the creditor remain in the same situation as existed prior to the opening of the proceeding. The creditor shall continue to honour its commitments despite the default of payment by the debtor prior to the proceedings. If the contract is rejected, the effect may also be favourable to the debtor since the burden will be reduced. The creditor will have to file its claim resulting from the rejection of the contract. The same provisions apply in liquidation proceedings that open with an observation period.

Despite the principle of a stay on proceedings, creditors who are part of insolvency proceedings may be paid by set-off if they have reciprocal

receivables against the debtor. If arising prior to the opening judgment, the set-off occurs by effect of law to the extent that receivables are due, liquid and payable. Otherwise, set-off can occur post-filing only if the two receivables are deemed connected (see **6.14 Rights of Set-Off**).

The creditors' representative gives notice to the secured creditors by a registered security interest or by leasing agreements at the beginning of the insolvency proceedings. The other creditors (unsecured ones) will be aware of the start of the proceedings from the notice published in the official gazette (BODACC).

Insolvency proceedings are concluded with the distribution of the realised company value to the different claims holders in the selected assets of the debtor. The value distribution follows a predetermined rank order. Creditors' claims are settled hierarchically with respect to asset collateralisation and rights of priority. However, creditors' ranking is very complex to describe since it will depend on many factors. Hereinafter, the basic principles that normally apply to the ranking of creditors will be described (see **5.5 Priority Claims in Restructuring and Insolvency Proceedings**).

7.2 Distressed Disposals

In the context of judicial reorganisation proceedings, the sale of the business can be one of the outcomes of the proceedings if it appears that a reorganisation plan is not possible. The judicial administrator organises an auction process, in which only third parties can bid.

The offers should contain a list of the assets to be transferred, the ongoing contracts essential for the continuation of the business without liabilities (with exceptions) and a list of the employment contracts to be transferred. The price offered for the transferred assets (including real estate assets) is usually at a significant discount compared to their going-concern market value. The purchaser acquires assets free and clear of claims, subject to some exceptions.

The court selects the most serious offer with regard to the sustainability of the offer, the number of employees transferred and the proceeds of the sale.

There are no stalking horse bids under French insolvency law. There is also no credit bid, since a creditor seeking to purchase assets from the debtor cannot pay the purchase price by reducing the amount of its claim against the debtor.

The open bid process can be prepared in the course of conciliation proceedings in order to preserve the business. In this situation, the court-administered proceedings are opened once at least one offer has been made, and can be approved by the court within two to three weeks.

The same open bid process can be organised in liquidation proceedings.

7.3 Organisation of Creditors or Committees

There are no committees under French law for new proceedings opened since 1 October 2021, but rather classes of affected parties, which are grouped according to the nature of their claims and not depending on their quality.

The rules for safeguard proceedings apply regarding the creation of classes of affected parties and their powers and expenses (see **6.3 Roles of Creditors**).

8. International/Cross-Border Issues and Processes

8.1 Recognition or Relief in Connection With Overseas Proceedings

The principal legislation that applies to cross-border restructuring and insolvency cases involving France and other EU member states is European Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), as amended, in particular by Regulation (EU) 2018/946 of the European Parliament and of the Council of 4 July 2018 (the EU Insolvency Regulation).

The EU Insolvency Regulation applies within the European Union (other than Denmark) to public insolvency proceedings as defined therein and listed in its Annex A (including safeguard, accelerated safeguard, judicial reorganisation and judicial liquidation proceedings). It provides that the courts of the member state in which a debtor's "centre of main interests" (COMI) is situated have jurisdiction to commence the main insolvency proceedings relating to such debtor. The determination of a debtor's COMI is a question of fact on which the courts of the different member states may have differing and even conflicting views.

The COMI is the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. The presumption that the COMI is in the place of the registered office will not apply if the registered office has shifted in the preceding months.

When the other country is as EU member state (excluding Denmark), the European texts applicable in this matter – particularly the European Regulation – are based on the principle of the immediate and automatic recognition of decisions relating to the opening, running and closing of insolvency proceedings in all other EU member states, without any special procedure or declaration of enforceability being required. There are few defences available that could prevent enforcement (eg, public policy incompatibility).

See **8.5 Recognition and Enforcement of Foreign Judgments** for further details.

8.2 Co-ordination in Cross-Border Cases

France has not adopted the UNCITRAL Model Law on Cross-Border Insolvency (1997) (Model Law) (in contrast to the UK). However, the EU Insolvency Regulation has introduced some provisions to facilitate the co-ordination of insolvency proceedings opened against companies that are part of the same group.

8.3 Rules, Standards and Guidelines

The main rules under French insolvency law determining which jurisdiction's decisions, rulings or laws are paramount are those provided by the EU Insolvency Regulation, with the main test being the COMI (see **8.1 Recognition or Relief in Connection With Overseas Proceedings**).

8.4 Foreign Creditors

Foreign creditors benefit from the following specific provisions:

- an additional delay of two months to file their claims from the date of publication of the opening judgment in the BODACC (four months for French creditors); and
- in accordance with the EU Insolvency Regulation, the opening of insolvency proceedings in France will not affect the rights in rem of creditors or third parties in

respect of tangible or intangible, movable or immovable assets, nor specific assets and collections of indefinite assets as a whole which change from time to time, belong to the debtor and are situated within the territory of another member state at the time of the opening of proceedings.

8.5 Recognition and Enforcement of Foreign Judgments

In countries where the EU Insolvency Regulation does not apply and insolvency judgments are made in a jurisdiction that does not have a treaty with France, recognition will no longer be automatic but will be subject to a court declaration of enforceability (exequatur).

9. Trustees/Receivers/Statutory Officers

9.1 Types of Statutory Officers

In out-of-court proceedings, the President of the court appoints a *mandataire ad hoc* or a conciliator, whose mission is laid down in the order.

In safeguard and judicial reorganisation proceedings, the court appoints a supervisory judge, a judicial administrator and a creditors' representative.

In liquidation proceedings, the court appoints a liquidator and a judicial administrator if the company continues to operate, in order to organise the sale of the business as a whole through an open bid process.

9.2 Statutory Roles, Rights and Responsibilities of Officers

In out-of-court proceedings, the *mandataire ad hoc* or conciliator does not have any management responsibilities; they will only assist the debtor in negotiating an agreement with all or part of its creditors and/or other stakeholders.

Under safeguard proceedings, the judicial administrator generally supervises the debtor, who stays in possession and prepares the safeguard plan (*mission de surveillance*). The court may decide that the judicial administrator assists the debtor, which means that all the payments should be controlled by the judicial administrator (*mission d'assistance*).

Under reorganisation proceedings, the judicial administrator generally assists the debtor (*mission d'assistance*). The court may decide in extreme situations that the judicial administrator should administer the company (*mission de gestion*).

In any case, acts that are not considered to be within the ordinary course of business are subject to the prior authorisation of the supervisory judge.

In safeguard and judicial reorganisation proceedings, the creditors' representative is mandatorily appointed to represent the creditors and protect their collective interest, and also to receive and verify all the proofs of claims from creditors.

The liquidator is mandatorily appointed to carry out transactions regarding the disposal of the business of the debtor (as the management is usually divested of all its rights) and to distribute the proceeds among the creditors.

9.3 Selection of Officers

Out-of-court proceedings are carried out by a *mandataire ad hoc* or conciliator, whose name may be suggested by the debtor itself, under the

supervision of the President of the Commercial Court.

In court-administered proceedings, the court appoints the officers and fixes their mission within the judgment opening insolvency proceedings.

In safeguard and judicial reorganisation proceedings, the public prosecutor may submit to the court the name of a judicial administrator and the creditors' representatives to be appointed, upon which the court shall request the debtor's observations. The rejection of such proposals must be duly motivated. The debtor may also propose the name of a judicial administrator.

In liquidation proceedings, the public prosecutor can suggest the appointment of a particular liquidator.

The court can replace the officers on its own initiative or at the request of the public prosecutor or the supervisory judge (at the request of the debtor or creditors). The officers can request their own replacement.

To be eligible, the officers must pass a national exam and be registered on a list.

10. Duties and Personal Liability of Directors and Officers of Financially Troubled Companies

10.1 Duties of Directors

While managing the distressed business, directors need to act in the ordinary course of business. As a matter of corporate law, directors have fiduciary duties towards the company first and, as such, need to preserve it as a going concern and act in accordance with its corporate interest.

Within the scope of liquidation proceedings, directors may be personally liable for acts of mismanagement that would have contributed to an insufficiency of assets in accordance with Article L. 651-2 of the French Commercial Code. The liability of directors may be retained for having increased the financial difficulties of the company. Since the Sapin II Law No 2016-1691 dated 9 December 2016 entered into force on 11 December 2016, directors' liability is excluded in the event of mere negligence in the management of the company.

Directors may also incur criminal liability for criminal bankruptcy (*banqueroute*), as set out in Articles L. 654-1 et seq of the French Commercial Code, or for other criminal offences, as set out in Articles L. 654-8 et seq of the French Commercial Code.

Directors may be sanctioned with personal insolvency (*faillite personnelle*) or a prohibition on managing, administering and controlling (directly or indirectly) a company for a maximum period of 15 years (*interdiction de gérer*). Only facts arising prior to the opening of insolvency proceedings can justify these sanctions, such as the use of legal entity assets as their own or for personal purposes, wrongfully continuing a loss-making activity in a personal interest, or late filing for insolvency proceedings.

Under French law, the concept of a shadow directorship or de facto management (*gestion de fait*) targets any person who, directly or indirectly, interferes or has interfered with the management decisions of the company. Creditors can become shadow directors, as can shareholders or more generally anyone. A de facto manager has the same responsibilities as a de jure manager of the company.

10.2 Direct Fiduciary Breach Claims

Creditors do not hold any individual direct right to sue a distressed debtor held liable; the right to pursue is generally deferred to the liquidator (*mandataire judiciaire*) or the public prosecutor. However, if the liquidator fails to fulfil its duties, the majority of the creditors may have recourse to request the court to do so.

11. Transfers/Transactions That May Be Set Aside

11.1 Historical Transactions

In judicial reorganisation or liquidation proceedings, when a debtor goes into insolvency, the insolvency court may declare void certain transactions that have been entered into during the hardening period (*nullités de la période suspecte*).

An exhaustive list of transactions that are set aside by the court when carried out during the hardening period is provided by the French Commercial Code, as follows:

- any deed entered into without consideration transferring title to movable or immovable property;
- any bilateral contract in which the debtor's obligations significantly exceed those of the other party;
- any payment, by whatever means, made for debts that had not fallen due on the date when payment was made;
- all payments for outstanding debts, if not made by cash settlement or wire transfers, remittance of negotiable instruments, or Dailly assignment of receivables;
- deposits or consignments of money made under Article 2350 of the Civil Code in the absence of a final judgment;
- any contractual security interest or contractual right of retention granted over the debtor's assets or rights for debts previously incurred, unless they replace a previous security interest of at least an equivalent nature and base and with the exception of the assignment of a professional receivables (Dailly assignment) made in the execution of a framework agreement entered into prior to the date of insolvency;
- any legal mortgage attached to judgments of condemnation constituted over the debtor's assets for debts previously incurred;
- any protective measure, unless it gave rise to a recordation or registration before the date of insolvency;
- any granting exercise or reselling of stock options;
- any transfers of movables or assignment of rights into a trust estate, unless this transfer or assignment occurred as security for a debt simultaneously incurred; and
- any amendment to a trust agreement affecting the rights and movables already assigned or transferred to a trust estate as security for debt incurred prior to such amendment.

In addition, any payment made or any transaction entered into during the hardening period is subject to optional voidance at the discretionary power of the insolvency court, subject to the fulfilment of two conditions:

- the payment or transaction took place during the hardening period; and
- at the time of the payment or transaction, the contracting party knew that the debtor was insolvent at the relevant time.

11.2 Look-Back Period

The hardening period starts from the date the debtor becomes insolvent and may be backdated by the insolvency court up to 18 months before the insolvency judgment. If a conciliation agreement has been reached and formally approved prior to the opening of the judicial reorganisation or liquidation proceeding, the insolvency date cannot be set at a date before the court order approving the conciliation agreement.

11.3 Claims to Set Aside or Annul Transactions

A petition to annul a voidable payment or a transaction may be brought by the judicial administrator/liquidator, the creditors' representative, the c *ommissaire à l'exécution du plan* or the public prosecutor. Under French law, a petition relating to the hardening period may only be brought in an insolvency proceeding to the extent that the insolvency test is met.

Trends and Developments

Contributed by:
Saam Golshani, Alexis Hojabr and Alicia Bali
White & Case LLP

White & Case LLP has a team in Paris that is one of the most complete and developed in the market, with 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. The team adapts efficiently to difficult environments and crisis situations, and is particularly known for its capacity to assist proactively and avoid foreseeable crises. It works routinely 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. It also represents buyers and sellers of distressed loans and claims, and in distressed M&A mandates.

Authors

Saam Golshani is a partner in White & Case's Paris office, and a restructuring, private equity and M&A lawyer. He has more than 20 years' experience in representing French and multinational clients, including investment funds, investment banks, entrepreneurs, industrials, listed and non-listed companies, and distressed companies. Saam acts on behalf of creditors, debtors, investors and potential buyers on the many issues arising from difficult situations, corporate reorganisations and insolvency proceedings. He has recently led the team in advising on matters that were widely covered in the press, including Solocal, Technicolor, Europcar Mobility Group, Vallourec, Comexposium, Dream Yacht, THOM Group, Conforama, Arc Holdings, VIA Location and Antalis.

Alexis Hojabr is a restructuring, private equity and M&A partner based in White & Case's Paris office. He is qualified both in France and in England & Wales, and has particular skill in advising on multi-creditor and financial restructurings involving private equity funds, hedge funds, special situation investors and distressed companies. Alexis also supports clients in successfully completing M&A, divestitures, joint ventures and equity investments, often involving multiple jurisdictions. He recently advised on the Europcar Mobility Group, Comexposium, JJW Hotel, Arc Holdings, Hertz, Antalis and Swissport mandates. Alexis is a frequent author and commentator on restructuring and private equity matters.

Contributed by: Saam Golshani, Alexis Hojabr and Alicia Bali, **White & Case LLP**

Alicia Bali is a counsel in the EMEA private equity team of the global M&A practice at White & Case. She is fluent in French and English, and has worked on a number of transactions, including corporate financial restructuring operations. Alicia is at ease navigating both domestic and cross-border M&A, as well as private equity and venture capital matters, on behalf of multinational clients, including investment funds, investment banks, entrepreneurs, industrials, listed and non-listed companies, and distressed companies.

White & Case LLP

19, place Vendôme
75001 Paris
France

Tel: +33 1 55 04 15 15
Fax: +33 1 55 04 15 16
Email: saam.golshani@whitecase.com
Web: www.whitecase.com

Contributed by: Saam Golshani, Alexis Hojabr and Alicia Bali, **White & Case LLP**

Insolvency in France: an Introduction

2023 is a continuation of 2022, which was marked by relatively lacklustre economic activity due to the slowdown post-COVID and the repercussions of the Russian conflict in Ukraine on the cost of primary materials, combined with high inflation and worsening financing conditions.

French borrowers' cost structures have been heavily impacted by ever-increasing operating expenses. This is due to low cash flow combined with an inability to take out bank loans due to the rise in interest rates. Such inflation has also resulted in a decrease in the valuation of listed companies.

The liquidity concern also challenges financial sponsors whose post-LBO investment horizon is complete and who are now facing the difficulty of selling without sacrificing value, since any potential buyer is now burdened with a heightened level of acquisition and refinancing indebtedness.

This environment has, in fact, become much less favourable for businesses, and while the drop in energy prices provides a welcome breath of fresh air, it is not enough to compensate for all the exogenous factors listed above, which are closely correlated with the increase in bankruptcies.

In some respects, this process of reorganisation can be viewed as healthy, since it is helping to restore the French entrepreneurial network by restructuring or liquidating "zombie" companies that survived in recent years solely on public support during the pandemic, as well as those that over-leveraged themselves by refinancing pre-existing loans with PGEs (state-guaranteed loans).

However, a number of viable companies are being affected by the combination of rising raw material costs and increasing interest rates, which are putting margins under pressure. This is all the more true since economic activity has been slowing down since the end of 2022, generating insufficient growth to stabilise the number of insolvencies, especially in the most competitive businesses, which are finding it hard to pass on cost increases to their consumers.

Only one sector seems to be holding up well: agriculture, forestry and fishing, where bankruptcies are up by just 7%. In all other sectors, the counter is in double digits. Transport and warehousing, real estate and consulting and business services lost between 31% and 32% more companies than last year, while the construction sector lost 38%. The sectors of education and health, finance and insurance, information and communication, and automotive trade and repair all recorded 45% more business failures than last year.

Industry lost 53% more companies than the previous year. However, it is the accommodation and catering sector that is by far the hardest hit, with an increase of 69%.

If we now consider the procedures most frequently used to remedy these difficulties, the following comes as no surprise.

- With 7,850 procedures opened in the summer of 2023, the number of judicial liquidations is up by (only) 19% after having soared by more than 70% in the summer of 2022. More than three quarters of the companies liquidated have fewer than three employees, which necessarily limits the impact on the social structure in France – fortunately, these judicial liquidations still represent the vast majority

of insolvency proceedings opened in France (75%).
- 25% of the procedures opened in the third half of 2023 are judicial reorganisations – their number is still significantly lower than before COVID-19 (3,200 judicial reorganisations were opened during the third quarter of 2019), although the number of such procedures is up by 34% this quarter.
- Safeguard procedures are still rarely implemented in practice, with only 20,000 procedures having been opened since the creation of this procedure in 2005. In the third half of 2023, they accounted for only 2.5% of procedures.

Looking more closely at the types of company affected, it is clear that very small businesses are still at the top of the list of cases of bankruptcy, accounting for 92% of all insolvencies opened in the third quarter of 2023. In practice, this represents more than 10,000 bankruptcies and over 15,000 jobs at risk.

By comparison, SMEs now account for 8.2% of insolvencies, which is 2% more than in summer 2019 and the highest rate since the financial crisis. Indeed, such a proportion of SME bankruptcies had not been seen since the third quarter of 2010. Although there are fewer of these procedures, given the larger size of the businesses, nearly 21,800 jobs are at risk.

In these conditions, the number of jobs at risk in the third quarter returned to above the 37,000 mark for the first time in seven years.

Against this backdrop, there is no doubt that insolvencies are likely to exceed their pre-pandemic levels in the months ahead. However, the vast majority of insolvencies appear to be the result of adjustments, with no real wall of debt, which means that France does not appear to be heading for a crisis similar to that of 2008, but is simply in the process of restoring its economic structure.