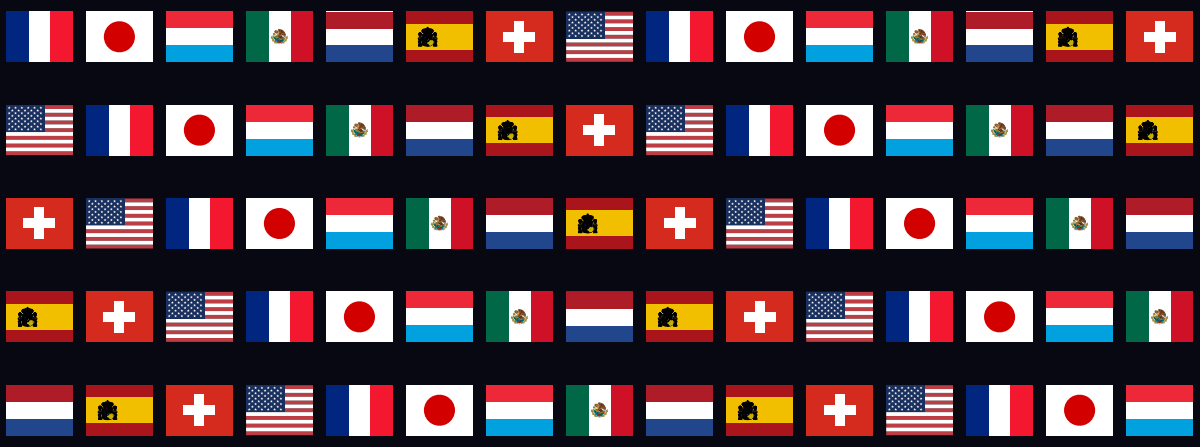
ACQUISITION FINANCE

France



LEXOLOGY
Getting The Deal Through

Consulting editor
Willkie Farr & Gallagher LLP

Acquisition Finance

Consulting editors

Sarah B Gelb, Charlotta Chung, Han Rhee, Viktor Okasmaa, Andres C Mena

Willkie Farr & Gallagher LLP

Quick reference guide enabling side-by-side comparison of local insights, including into general structuring of financing; guarantees and collateral; debt commitment letters and acquisition agreements; enforcement of claims and insolvency; and recent trends.

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Contributors

France

Yann Beckers
yann.beckers@shlegal.com
Stephenson Harwood LLP

Clotilde Billat
clotilde.billat@shlegal.com
Stephenson Harwood LLP

Borislava Koleva
borislava.koleva@shlegal.com
Stephenson Harwood LLP

Alexandre Koenig
alexandre.koenig@shlegal.com
Stephenson Harwood LLP

Guillaume Briant
Guillaume.Briant@shlegal.com
Stephenson Harwood LLP

GENERAL STRUCTURING OF FINANCING

Choice of law

What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

The acquisition and finance documentation is usually governed by French law, especially if the target company is a French entity and has its main assets in France. However, in cross-border transactions with multiple players located in different jurisdictions, it is possible to choose another law such as English or New York law to govern the finance documentation, especially if an international syndication is being sought.

Any security interest created on rights governed by French law or assets located in France will need to be governed by French law. For personal guarantees, the parties may choose either French law or the law governing the other finance documents. If the acquisition transaction involves the issuance of equity or equity-linked instruments by a French company, those instruments would generally be governed by French law, as the law of incorporation of the issuer.

The choice of a foreign law to govern the transaction documents will generally be recognised by French courts based on Regulation (EC) No. 593/2008 (Rome I) on the law applicable to contractual obligations. However, specific French law mandatory provisions will need to be considered when taking security over rights or assets in France.

Judgments obtained in any European Union member state will generally be recognised and enforced by French courts on the basis of the Recast Brussels Regulation ((EU) No. 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provided that the exclusive jurisdiction rules established therein are complied with.

Judgments from the courts of Iceland, Norway and Switzerland are generally recognised and enforced by French courts based on the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. To date, the United Kingdom's application to join the Lugano Convention is still pending.

As to judgments from English courts after BREXIT, the United Kingdom (since 1 January 2021) and the European Union are both parties to The Hague Convention on Choice of Court Agreements, which gives effect to the choice-of-court agreements and recognition of resulting judgments between contracting states. Thus, French courts would recognise English judgments rendered in respect of an agreement concluded after 1 January 2021 provided, however, that such agreement contains a two-way exclusive jurisdiction clause.

For any other foreign judgment not falling into one of the above categories, an inter partes action for recognition and enforcement (exequatur) would need to be conducted before a French court. In such an action, the French court would not re-open the merits of the case but could refuse enforcement on specific grounds.

Law stated - 17 January 2022

Restrictions on cross-border acquisitions and lending

Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

Despite a general principle of freedom of financial dealings, foreign investment may be subject to the requirement to obtain prior authorisation from the French Minister of the Economy if three cumulative criteria are met.

These criteria relate to the foreign origin of the investor, the nature of the planned investment and the activities carried out by the target company.

Three types of investor are subject to foreign investment control: (1) foreign nationals or French nationals not

domiciled in France; (2) entities governed by foreign law (a 'Foreign Entity'); and (3) entities governed by French law (a 'French Entity') and controlled by individuals or entities falling into categories (1) or (2).

These investors are subject to foreign investment control if any of the following types of transactions are considered:

- acquiring a controlling stake in a French Entity;
- acquiring all or part of a branch of a French Entity; or
- crossing directly or indirectly, individually or as a group, the 25 per cent of the voting rights threshold of a French Entity (for equity investments in companies whose shares are listed on a regulated market, the threshold has been temporarily reduced to 10 per cent until 31 December 2022 because of the covid-19 pandemic). This criterion does not apply to (1) nationals of an EU or EEA member state that has entered into an administrative assistance agreement with France that is aimed at combating fraud and tax evasion, nor (2) to entities whose chain of control is exclusively composed of entities governed by the laws of such an EU or EEA member state, or are nationals of and domiciled in one of these states.

Finally, only qualified transactions in certain types of activities are subject to foreign investment control:

- activities that, by nature, affect national defence, the exercise of public authority, public order or national security (for example, weaponry, defence against pathogenic or toxic agents, intercepting correspondence or collecting data);
- activities relating to infrastructure, goods or services that are essential to the national interest (in particular the supply of water and energy, the operation of transport or telecommunications networks, public health, food safety or the media). A case by case analysis is required to verify whether a company falls into this category; and
- research and development activities in certain critical technologies (such as cybersecurity, artificial intelligence, quantum technologies, biotechnologies or technologies involved in the production of renewable energy) or dual-use technologies (civil and military) in connection with the aforementioned sectors.

There are two observations to be drawn from these criteria. The first is that a transaction may be subject to scrutiny by the French authorities even if it is not directly targeted at France: for example, the acquisition by a Chinese investor of an American group, one of whose subsidiaries carries out a protected activity in France. The second is that where the target company carries out a protected activity, even if it is not its main activity, this will suffice to subject the transaction to the prior approval requirement.

Law stated - 17 January 2022

Types of debt

What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Acquisitions in France are usually financed by a combination of equity and debt. Depending on the leverage of the transaction, the acquisition debt often consists of senior debt only, but may, in more complex or leveraged financings, include, inter alia, mezzanine debt (including cash interest, payment-in-kind components or a combination of both), first and second lien debt and junior debt. The senior debt is usually structured in the form of a term loan arranged by the banks, whereas the mezzanine debt is usually structured in the form of bonds with attached warrants offered by private debt lenders. It is important to note that the role of private debt lenders has significantly increased in the French acquisition debt market over recent years. They structure and provide unitranche debt (being a mix in one single

instrument of senior and mezzanine debt and offering a blended margin to the borrower) to overcome complex senior or mezzanine intercreditor issues raised by the implementation of the 'double Luxco structure' in French acquisition finance transactions. Unitranche is usually provided by one single lender (as opposed to a syndicate of lenders in a senior credit facility) making negotiations, consents and waivers more straightforward for the borrower. To comply with French banking monopoly rules, private debt lending was initially structured in the form of bonds but following a recent change in EU and French legislation, some French debt funds and European alternative investment funds (AIF) are now entitled to arrange and fund term loans granted to French borrowers. The junior debt is usually structured in the form of shareholder loans or bonds convertible or redeemable into shares, and is contractually subordinated to the senior and mezzanine debt. For large cap transactions, super-senior revolving credit facility structures ranking in priority to the Term Loan B on enforcement are also available.

Law stated - 17 January 2022

Certain funds

Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

For public takeovers, the prior availability of the financing is a mandatory condition to the launch of the public tender offer. The bidder must appoint a presenting and guaranteeing bank that will file the public tender offer with the French Financial Markets Authority (AMF), guarantee its terms and undertake, as an independent obligation, to settle the purchase price of any securities tendered as part of the bidder's public offer. Before granting its guarantee and agreeing to file the offer, the presenting bank would usually require either a letter of credit or cash collateral in its favour covering at least 100 per cent of the amount of the public tender offer. The presenting bank may also be party to the acquisition facility agreement and be entitled thereunder to request utilisations on behalf of the bidder during a 'certain funds' period to settle the payment of the tendered securities.

For private transactions, there are no specific French law requirements to provide certainty of funds to the seller. Usually, a letter of intent from a lender confirming its willingness to provide the financing to the purchaser would be sufficient for the seller. From time to time, in the context of a bid process, a seller might require a binding financing. This requirement can be addressed by a certain funds commitment of the lender in the financing documentation, or even, in some circumstances, by a bridge loan to be refinanced when the parties agree a long form of the acquisition finance documentation. A financing based on a binding term sheet is not an option.

Law stated - 17 January 2022

Restrictions on use of proceeds

Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

The proceeds of the financing must be used in accordance with the agreed contractual purpose. The documentation usually contains strict rules regarding the purpose and use of the proceeds. In general, the relevant proceeds must be applied to finance the purchase price, fees and other related acquisition costs, to refinance the target's existing indebtedness and to finance its working capital needs. A violation of this provision usually constitutes a breach of contract.

In addition, utilisations made in breach of any international sanctions, anti-bribery, anti-money laundering or anti-terrorist rules applicable in France would result either in an event of default for breach of law, or, if stipulated by the parties, an obligation to prepay the whole financing.

In addition, under French law financial assistance rules, neither the French target company nor its subsidiaries may

provide any kind of financial support or assistance to the company purchasing it. As a result of such prohibition, any financing made available to the target companies may not be upstreamed to finance or refinance the acquisition debt. The use of proceeds must always comply with the borrower's corporate interest.

Law stated - 17 January 2022

Licensing requirements for financing

What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

French banking monopoly rules as set out in articles L. 511-5 et seq of the French Monetary and Financial Code prohibit institutions other than French licensed or European licensed credit institutions from carrying out credit operations in France. As a result, only (1) credit institutions licensed in France (ie, either French institutions or non–EU institutions whose branch in France is licensed by the French banking authorities) and institutions registered in an EU member state (or in another member state of the European Economic Area) that benefit from the 'single passporting' rules under Directive 2006/48/EC (formerly Directive 2000/12/EC); and (2) non-credit institutions that do not carry out credit operations on a habitual basis, may lend money to a borrower located in France. More recently, certain private debt funds incorporated in the form of French undertakings for the collective investment in transferable securities or European AIFs have been added to the list of authorised entities entitled to carry out credit operations in France.

French banking monopoly rules have territorial application. According to article 113-2 al.2 of the French Criminal Code, a criminal offence will be deemed to have been committed on French territory if one of its factual components was carried out in France. However, in the absence of statutory provisions and decisive French case law, the question of whether a particular transaction is carried out in or outside France is subject to legal uncertainty and rather complex, as it is heavily reliant on factual matters requiring a case-by-case analysis. The French banking authorities have informally expressed the view (which is shared by most French academics and legal practitioners) that, in determining where a credit transaction has taken place, in the absence of fraud, the most relevant test is where the funds are actually made available to the borrower, where the loan is to be reimbursed and where the proceeds are used.

There are certain exceptions to the banking monopoly requirements, among which is the recent exception to favour the syndication of funded facilities to non-licensed foreign institutions such as debt funds or securitisation vehicles.

Any breach of the French banking monopoly rules may result in up to three years imprisonment and a fine of up to €1,875,000 for the offender.

Law stated - 17 January 2022

Withholding tax on debt repayments

Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

In general, France does not impose withholding tax on interest paid to non-residents.

As an exception, interest payments made in a non-cooperative state or territory (NCST) are subject to a 75 per cent withholding tax, regardless of the tax residence or the registered office of the recipient, and unless the debtor demonstrates that the main purpose and effect of the transactions to which these payments relate was not that of allowing payments to be made in an NCST.

The list of NCSTs is regularly updated by way of official decree. As at 6 January 2020, this list included: Anguilla,

Bahamas, British Virgin Islands, Seychelles, Vanuatu, Fiji, Guam, Oman, American Samoa, Trinidad and Tobago, Panama and the United States Virgin Islands.

The debtor or the paying institution must deduct the withholding from the interest amount and pay it to the French public treasury. The withholding cannot be borne by the debtor, meaning that it must be assessed on the gross amount of interest.

Facility agreements generally contain a gross-up clause according to which, in the event that interest payments become subject to a withholding after the execution of the agreement (eg, the state in which payment is made is added to the NCSTs list), the borrower undertakes to increase the amount of its payments so that the lender receives the amount it would have received in the absence of such withholding.

Law stated - 17 January 2022

Restrictions on interest

Are there usury laws or other rules limiting the amount of interest that can be charged?

Restrictions on usury interest do not apply to loans granted to individuals acting for their professional needs or to legal entities engaged in any industrial, commercial, artisanal, agricultural or non-commercial professional activity.

It is worth noting that French law prohibits the capitalisation of interest except in the case of interest accrued for a period exceeding one year. This prohibition may raise issues in debt instruments with payment-in-kind features providing for capitalisation of interest every six months.

Law stated - 17 January 2022

Indemnities

What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

The finance documentation typically includes indemnities for, inter alia, currency conversion, late payment, loss incurred in connection with the financing, costs in connection with amendments and waivers, costs in connection with perfecting, enforcing or preserving security interests and all the other usual market standard clauses such as increased costs, break costs and tax indemnities.

Due diligence reports on the target group and its assets prepared for the purchaser are usually disclosed to the finance parties. If such disclosure is made with a reliance letter, the finance parties may also directly sue the purchasers' advisers if their reports are proven incorrect, incomplete or misleading.

Law stated - 17 January 2022

Assigning debt interests among lenders

Can interests in debt be freely assigned among lenders?

The finance documentation typically provides that the rights and obligations of a lender may not be assigned or transferred to a third party without the prior consent of the borrower (such consent not to be unreasonably withheld or delayed) or at least without it being consulted in advance, unless such assignment is made to another existing lender or affiliate or a related fund or made while an event of default has occurred and is continuing. In order to facilitate the syndication of the financing, parties often agree upon an approved list of potential lenders to whom the transfer may be

freely made at any time.

Of course, all usual provisions enabling a lender to refinance or grant security on its participation are customary and would not require borrower consent.

Any new lender purchasing a participation or entering into a sub-participation in a financing made available to a French borrower must ensure that it complies with the French banking monopoly rules, especially if the participation being purchased includes a commitment to lend that is still available to the borrower. For the transfer of participations in a funded term loan, the conditions to their transfer to foreign entities have been recently relaxed by article L.511-6 4° of the French Monetary and Financial Code.

Law stated - 17 January 2022

Requirements to act as agent or trustee

Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

Provided the appointed agent receives no cash deposits and provides no payment services (these are both regulated activities) acting as administrative or collateral agent is not per se a regulated activity. This activity is generally exercised by licensed credit institutions but can sometimes be delegated to non-financial institutions, especially if the financing is structured in the form of bonds, where the appointment of a bondholders' representative is mandatory for the purpose of taking security.

French law does not recognise the concept of a trustee but did introduce in 2007 the concept of fiduciaire, which is very similar to the role of a trustee and remains a regulated activity.

Law stated - 17 January 2022

Debt buy-backs

May a borrower or financial sponsor conduct a debt buy-back?

Debt buy-backs are not prohibited under French law but the finance documentation usually restricts or prohibits borrowers and their sponsors from carrying them out. If permitted, the voting rights of the new lender are usually disenfranchised and are not taken into account in the lenders' decision-making process. If the debt is repurchased by the borrower, it is automatically extinguished by operation of the doctrine of confusion as the debtor and creditor would be the same entity. On the other hand, if the debt is repurchased by any other affiliated entity, it becomes a related party debt.

Separate rules regarding equality of bondholder treatement would apply to certain types of more widely held bond issues.

Law stated - 17 January 2022

Exit consents

Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Outside of the context of certain types of bond issue, there are no general rules under French law restricting or prohibiting how majority, or, unanimous consents are solicited in a buy-back for the purposes of amending the

covenants in the existing documentation. The agreed contractual rules for amendments and waivers would apply.

It is however a criminal offence for a bondholder to obtain or be promised to obtain, or for a person to grant or promise to grant, advantages in exchange for voting in a particular way or refraining from voting at a bondholders' general meeting.

Law stated - 17 January 2022

GUARANTEES AND COLLATERAL

Related company guarantees

Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

Down-stream guarantees are usually not restricted or limited as it is assumed by French case law that it is in the best corporate interest of the parent company to grant credit support to its subsidiary.

For up- and cross-stream guarantees, on the other hand, several cumulative factual conditions, as set out by French case law, must be complied with to avoid any potential misuse of the corporate assets or credit of the guarantors, which is a criminal offence for the individual directors of the guarantor:

- the guarantor and the guaranteed debtor must belong to the same group and that group must be a coherent economic entity with real commercial and economic ties;
- there must be a common interest (from an economic, employment or financial point of view) for the group as a whole (and not only for the parent company);
- there must be adequate consideration (not necessarily monetary) for the subsidiary entering into the guarantee; and
- most significantly, its commitment under the guarantee must not exceed its maximum financial capabilities.

All these criteria must be assessed by the directors of the guarantor at the time the guarantee is granted. Consequently, it is recommended that appropriate limitation language be included in upstream or crosstream guarantees to ensure, inter alia, that the maximum financial capabilities of the guarantor will not be exceeded and to exclude from the scope of the guarantee any acquisition debt to comply with the French law financial assistance prohibition.

Up-stream or cross-stream guarantees granted in violation of the above-mentioned criteria would nonetheless remain valid but could result in a civil and criminal liability for the directors of the relevant guarantor.

French law does not restrict or impose limitations on the granting of guarantees by foreign entities to their French subsidiaries or parents, but there might be consequences as regards the deductibility of interest payments for tax purposes.

Law stated - 17 January 2022

Assistance by the target

Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

Any French company having share capital, such as a société anonyme, a société par actions simplifiée or a société en commandite par actions , is prohibited from financing or granting any kind of support for the acquisition of, its own

shares or the shares of its direct or indirect holding company, in particular by granting guarantees or security or providing up-stream loans to its purchaser. As a result of this financial assistance prohibition, a French target company can neither guarantee nor grant security in respect of its acquisition debt and it is required to exclude such debt from the scope of the guaranteed obligations. It is common practice to apply these rules to the direct and indirect French subsidiaries of the target company. A quick merger between the purchaser and the target company must also be considered very carefully, especially if planned before the acquisition.

There is no whitewash procedure or equivalent in France.

Law stated - 17 January 2022

Types of security

What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

The French security package mostly depends on the borrower's available rights and assets, the financing structure, the ability of the target group companies to grant up- and cross-stream guarantees and the ability of the lenders to push down refinancing and revolving and/or capex debt to the level of the target group.

The concept of floating and fixed charges does not exist under French law. Each security will need to be determined on a case by case basis depending on the assets and rights over which it will be created and the quality of its beneficiaries (eg, bank and credit institutions may benefit from collateral (such as the Dailly assignment) that is not available for private debt lenders or bondholders. The usual security package would comprise, inter alia, pledges over the target shares (to be entered into in the form of a securities account pledge agreement if the pledged shares are issued by a société anonyme or a société par actions), the bank accounts, the 'ongoing concern' of the operating companies and a pledge or assignment by way of security of intra-group or commercial receivables. For costs reasons, security is usually not taken on real estate property.

When structuring and agreeing the French security package, creditors should bear in mind that the security package must not be disproportionate. If creditors have taken disproportionate collateral to support their financing, they can be held liable and the relevant collateral can be cancelled or reduced by a French court.

To mitigate any hardening period nullification risk on the French security package, it is also market practice to grant all the French collateral on the completion date of the acquisition and not subsequently on the basis of agreed security principles as is often the case in cross-border acquisition finance transactions.

Since 1 January 2022 and the coming into effect of the French law security reform enacted by the Ordinance No. 2021-1192 of 15 September 2021, any creditor that is not eligible for the Dailly assignment may nonetheless benefit from the new assignment of receivables by way of security (cession de créances à titre de garantie) introduced in the Civil Code that provides for a legal regime very similar to the Dailly assignment.

The legal regime of the cash collateral (gage-espèces) has been clarified and strengthened with the creation of a new cash assignment by way of security (cession de somme d'argent à titre de garantie) .

It is also worth noting that in the context of this security reform, the legal regime of the 'third-party security interests' (cautionnement réel) (ie, security interests granted by a third party on its assets or rights to secure the obligations of another obligor) has been significantly amended to strengthen the information rights of the security providers and to extend the duties of the secured creditors that will have to apply a great number of protective provisions set out for personal guarantees .

Law stated - 17 January 2022

Requirements for perfecting a security interest

Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

As general principle, a security interest must be entered into in writing, and it becomes valid and enforceable between the parties on its signing date. Unless the security interest is taken over over real estate, there is no particular requirement as to its form of execution, it being specified that as from 1 January 2022, any security interest or guarantee may be executed in electronic format.

Depending on the type of security interest, it becomes enforceable against third parties on the signing date, on the date it is registered with the competent registry or on the date the relevant third party is notified.

For example, a securities account pledge agreement is validly created by executing a statement of pledge, normally appended to the pledge agreement. The signing of this statement of pledge is the sole requirement for legally creating the pledge. It becomes enforceable between the parties and against third parties on such date; it being specified that the securities account holder will need to register such pledge in its books and to issue a pledge certificate.

A pledge over receivables is validly created between the parties and is enforceable against third parties (other than the debtor of the pledged receivables) upon the signing of the pledge agreement. To become enforceable against the debtor, the debtor must either be notified of the pledge or become a party to it. In the absence of such perfection formalities, the debtor may continue to validly discharge its payment obligations with the pledgor.

A non-possessory pledge over movable assets must be filed with the competent commercial registry in order to become effective against third parties whereas a possessory pledge over movable assets will become effective upon dispossession of the pledged assets in favour of the secured creditor or an appointed third-party holder.

A mortgage over real estate must be executed in the form of a notarial deed before a French public notary and registered with the Land Registry. It becomes enforceable against third parties on the date of its registration after the payment of various costs including real estate registration duties.

Law stated - 17 January 2022

Renewing a security interest

Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

Security interests filed with a French public registry need to be renewed in certain circumstances. For example, a pledge over ongoing concern is valid for a period of 10 years and must be renewed before the expiry of such period if the obligations it secures have not been discharged or released by that time. The registration of a non-possessory pledge over movable assets is valid for a period of five years and should also be renewed before its term. As part of the security legal reform, a decree establishing a new general French public registry is expected to be adopted on or before 1 January 2023.

For all other security interests that are not subject to filing perfection formalities with a public registry, the general rule is that they remain attached to the obligations they are securing until such obligations have been extinguished, discharged or otherwise released by the secured creditor.

Law stated - 17 January 2022

Stakeholder consent for guarantees

Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

This depends on the corporate form of the French guarantor or security provider.

For the two main types of companies (société anonyme and société par actions simplifiée), the rules are as follows:

- In a French société anonyme, the granting of a guarantee or security is subject to the prior approval of its board of directors or supervisory board and failure to obtain such prior approval will result in the guarantee or security not being binding and enforceable against the company. The decision must specify the amount of the collateral and can only authorise the general manager or the deputy general manager to execute the collateral on behalf of the company. The board of directors may also grant an annual and global authorisation for guarantees made for the benefit of controlled companies within the meaning of article L. 233-16 II of the French Commercial Code. In addition, if the transaction involves group companies with common directors, managers or shareholders, it is also often necessary to approve in advance the transaction documents to which they will be a party as interested related-party transactions.

- In a société par actions simplifiée, the president (the company's legal representative) is in principle entitled to grant a security interest unless provided otherwise in the by-laws or the corporate decisions relating to his or her appointment. However, the prior approval of the shareholders is generally required if the enforcement of the security may lead to the transfer of the majority of the company's assets.

Consultation with the works council (in companies with more than 50 employees) is mandatory for any important decision pertaining to the organisation or the management, or where the decision may have concrete consequences for the employees and their working conditions.

In principle, the granting of a security interest would not qualify as a decision requiring the works council to be consulted per se. However, in instances where the granting of a pledge over a portion of the shares of the company may result in a change of control (if the loan is not repaid and the collateral enforced), there is an argument for consulting the works council before the collateral is granted. In the context of LBO transactions, the works council of the target company will be consulted in any event, and information on the financing structure and security package will be shared with the works council during that process.

In any case, a negative opinion from the works council would not prevent the company from granting the collateral. On the other hand, not consulting it could lead to criminal sanctions against the company and its legal representative (should a court decision rule that the granting of the collateral had a significant impact on the company and on its employees).

Law stated - 17 January 2022

Granting collateral through an agent

Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

Both options are available: security can be granted (1) directly for the benefit of all the lenders as represented by a security agent appointed by them to create, perfect and enforce the security for their account and on their behalf, or (2)

for the sole benefit of a security agent acting in its own name but for the benefit of the lenders pursuant to the recently-introduced security agent regime set out in article 2488-6 of the French Civil Code. Since this security agent regime is rather new and raises accounting concerns for French banks wishing to use it, the preferred option is still to rely on security agency provisions, which would be included in the facility agreement or in the intercreditor agreement.

Note however that if the financing is structured in the form of bonds, the bondholders must be grouped in a Masse represented by a bondholders' representative appointed by the bondholders. The appointment of the bondholders' representative is mandatory for the purpose of receiving the benefit of the security as the Masse does not have legal personality and may not itself benefit from any security.

In cross-border finance transactions governed by a foreign law, the use of a parallel debt obligation to take certain French law security in favour of a sole security agent has been recognised by the French supreme court.

Law stated - 17 January 2022

Creditor protection before collateral release

What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

There is no specific protection afforded by French law. The usual way to address this risk is to grant a conditional release that becomes effective upon confirmation by the security agent that the secured obligations have been repaid or discharged. However, if the payment received is later challenged by a judicial administrator in the context of insolvency proceedings, it is very unlikely that the existing released security could be reinstated.

Law stated - 17 January 2022

Fraudulent transfer

Describe the fraudulent transfer laws in your jurisdiction.

French law contains specific provisions (action paulienne) dealing with fraudulent transfer both in and outside insolvency proceedings. These provisions aim at offering creditors protection against a decrease in their means of recovery.

Pursuant to these rules, legal acts (including, notably, agreements through which the debtor guarantees the performance of the obligations of a third party or provides security to a third party) prejudicing a creditor in its means of recovery can be challenged in or outside insolvency proceedings and be declared unenforceable against all creditors or a particular creditor (depending on whether the action paulienne is lodged by a court-appointed officer in the context of insolvency proceedings of the debtor or an individual creditor).

The court will grant the action if it is established that (1) the debtor performed the challenged act without an obligation to do so; (2) the creditor concerned (or, in case of insolvency proceedings of the debtor, any creditor) was prejudiced in its means of recovery as a consequence of the act; (3) at the time the act was performed, both the debtor and the counterparty to the contested act knew or should have known that one or more of the debtor's creditors (whether actual or future) would be prejudiced in their means of recovery (it being specified that such knowledge is not required when the challenged act was entered into for no consideration).

In addition, French law provides for clawback provisions applicable only in the context of rehabilitation or liquidation proceedings.

Law stated - 17 January 2022

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation

What documentation is typically used in your jurisdiction for acquisition financing? Are short-form or long-form debt commitment letters used and when is full documentation required?

Market practice is to fund the acquisition following signing of long form versions of the finance documents (including all security documents) which in turn have been based on a negotiated short-form commitment letter and term sheet. Funding is not done solely on the basis of commitment documents, but parties may agree on a short form bridge loan (including security): this would be refinanced when the long form version of the finance documentation is agreed among the parties.

The standard Loan Market Association (LMA) finance documentation for leverage financing or a Term Loan B facility is usually used as the basis for discussions in large cap transactions, whereas for small and mid-cap transactions there is no available standard and the documentation may vary significantly from one lender to the other.

If the acquisition debt is arranged by a private debt fund, the documentation is often structured in the form of a subscription agreement with the terms and conditions of the bonds appended to it.

French market practice is for the finance documentation to be prepared by the lender's counsel, but in a sponsor-backed transaction, the sponsor may negotiate the right for its legal advisers to prepare the first drafts of the finance documentation.

Law stated - 17 January 2022

Level of commitment

What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

This depends on the factual circumstances of the transaction, the sector in question, the creditworthiness of the borrower (or its sponsor) and the parties involved. For acquisition debt arranged by banks and credit institutions, all the above options are usually available; though the trend in small and mid-cap transactions is rather to arrange club deals with a limited number of lenders appointed at the outset of the transaction. For unitranche debt arranged by private debt funds, the debt is usually underwritten and arranged by one single entity which might distribute it to related funds managed by the same management company. In general, unitranche debt is more expensive than bank debt but offers more flexibility in the covenants for the borrower and can usually be executed more quickly. In addition, unitranche lenders often have a bigger hold appetite than banks, as well as an appetite to fund higher multiples of EBITDA.

Law stated - 17 January 2022

Conditions precedent for funding

What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

The conditions precedent to funding contained in the commitment letter usually include, inter alia, the following:

- the signing of the finance documentation in form and substance satisfactory to the parties based on the agreed term sheet and the satisfaction of all conditions precedent to signing and first utilisation thereunder (no potential

event of default or event of default, no misrepresentation, no material adverse effect, the creation and perfection of the agreed security package, final due diligence reports addressed to the finance parties with release or reliance letters, a satisfactory tax and structure memorandum);

- the satisfaction of all conditions precedent under the acquisition documents (works council consultation, anti-trust clearance, if agreed with the purchaser, the absence of material adverse change on the business, operation, management, financial situation or assets of the borrower, the target company and the target group);
- no disruption of the international or domestic capital markets or interbank markets that would likely impair the lender from obtaining its funding for the contemplated financing;
- no insolvency proceedings on the borrower, the target company or the target group; and
- no incomplete, false, incorrect or misleading information provided to the finance parties regarding the transaction.

Law stated - 17 January 2022

Flex provisions

Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Market flex provisions are usually included in commitment letters that are not fully underwritten or subject to successful syndication. They are always included in Term Loan B financings. They generally cover margin, fees and contractual terms. On the other hand, reverse flex provisions for the benefit of the borrowers and aimed at reducing the margin and the fees if the commitments within the syndication process are oversubscribed are rarely seen.

Law stated - 17 January 2022

Securities demands

Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

This kind of feature is not commonly seen in France.

For acquisitions initiated by listed corporates, it happens from time to time that the acquisition is financed by a bridge loan, which is refinanced at a later stage by the issuance of listed securities (bonds, shares or hybrid instruments) depending on the available capital market conditions.

Law stated - 17 January 2022

Key terms for lenders

What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

In arranging its acquisition financing, a lender would usually consider the following key elements in the acquisition agreement:

- the purchase price payment terms and the purchase price formula (being a multiple of the target's EBITDA that may vary from one sector to the other); if any earn-out is payable in the future, it is key to understand how it will

be financed by the purchaser;
- the seller's warranties (if any and if so whether they include liability caps and limitations on bringing claims) and how they can be delegated to the lenders to prepay the acquisition debt in whole or part;
- the conditions precedent to the acquisition as set out in the sale and purchase agreement and the ability of the purchaser to walk away from its acquisition if a material adverse change impairing the target company and its business has occurred;
- the potential liabilities and tax issues disclosed in the due diligence reports and the structure memorandum;
- if the target's activity is regulated, how the appropriate licence and authorisations will be maintained after the change of control;
- a long-stop date for the acquisition; and
- if there are any sellers' rights surviving completion of the acquisition.

Law stated - 17 January 2022

Public filing of commitment papers

Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

For the acquisition of private companies, there is no requirement to make commitment letters or acquisition agreements publicly available. The seller may require a copy of the commitment letters to check that the purchaser will be able to obtain its financing.

Conversely, for the acquisition of a French listed company, the following requirements must be complied with:

- the purchaser must file a tender offer with the Financial Markets Authority (AMF) in accordance with the General Regulations of the AMF in respect of all of the outstanding listed securities granting access to the share capital of the target company;
- the terms and conditions of the public tender offer must be set out in a draft information note and in a deposit letter to be filed with the AMF; the terms of the tender offer (timing, purchase price, fairness opinion or squeeze-out option) are made public after being approved by the AMF; and
- the initiator of the tender offer must irrevocably appoint a presenting bank to guarantee the content and irrevocable nature of its undertakings as set out in the draft information note and deposit letter filed with the AMF.

The commitment letter and terms of the financing do not need to be disclosed to the public since the presenting bank gives a direct undertaking to pay for the tendered securities at the end of the tender offer.

Law stated - 17 January 2022

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement

What restrictions are there on the ability of lenders to enforce against collateral?

Although French insolvency law may now be regarded as more balanced and less debtor-friendly than it historically was, especially since the entry into force, on 1 October 2021, of a French government's ordinance of 15 September 2021 transposing the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (the Ordinance of 15 September 2021), French insolvency law provisions can still have a significant impact on the ability of

lenders to enforce debt claims and security interests.

There are four main types of insolvency proceedings under French law:

- accelerated safeguard proceedings (which may be opened at the end of conciliation proceedings to allow the imposition of a restructuring plan on dissenting creditors through a cross-class cramdown);
- safeguard proceedings (available to debtors that are not insolvent but experience difficulties they cannot overcome);
- rehabilitation proceedings (that must be mandatorily requested by cash-flow insolvent debtors within a maximum of 45 days); and
- judicial liquidation proceedings (that concern cash-flow insolvent debtors whose recovery is manifestly impossible).

A non-French debtor may apply for the protection of French insolvency proceedings if it can demonstrate that it has its centre of main interest (COMI) in France.

The opening of insolvency proceedings may notably impact the enforceability of a lender's rights against its debtor in that it triggers a general stay of action against the debtor and its assets for all pre-petition claims (ie, debts incurred by the debtor before the judgment opening the insolvency proceedings). Under French insolvency law, the sums due under a loan are considered as pre-petition debts if said sums have been lent prior to the opening of the insolvency proceedings (even if their maturity falls after the commencement of the insolvency proceedings).

As from the opening of any safeguard or rehabilitation proceedings, the debtor will be precluded from paying any debt arising before the opening of the proceedings (with a few exceptions), and any pledge enforcement action (eg, by way of private foreclosure) is frozen. Creditors (whether secured or not) are prohibited from pursuing any legal action against the debtor in respect of these debts if such actions aims at obtaining the payment of a sum of money, the termination of a contract with the debtor for non-payment of a sum of money or the enforcement of security over the debtor's assets (including when the security interest granted over the debtor's assets secures a third party's obligations). Contractual events of default triggered by the opening of insolvency proceedings are (although generally provided for in finance documentation) not enforceable under French insolvency law and cannot be relied upon to accelerate the debt. Furthermore, collateral 'top-up' clauses (which, for instance, require a borrower to post additional collateral or provide for the automatic replenishment of a securities account pledge when the value of the collateral falls below a certain threshold) are, subject to limited exceptions, also frozen as from the date of the commencement of French insolvency proceedings.

When a debtor is subject to safeguard, rehabilitation or liquidation proceedings, security interests may be annulled or reduced by the court if (1) they are disproportionate to the amount of the loan granted and (2) such disproportion caused damage to the debtor for which the lender is held liable.

Creditors must file a statement of claim within a time limit of two months (four months for creditors residing outside France) from the date when the judgment opening the insolvency proceedings is published. If the claim is secured, the nature and scope of the security interest as well as, if applicable, the indication that it secures a third party's obligations must be mentioned in such statement.

In order to mitigate the detrimental consequences of any stay of action on their security package, lenders generally strive to obtain security interests vesting them with ownership rights on the debtor's assets (eg, by requesting the transfer in fiducie of certain assets or rights to an appointed fiduciaire) or granting them effective retention rights on the pledged assets (eg, by requiring a possessory pledge on movable assets of their debtor). In cross-border transactions with private equity sponsors located in Luxembourg the 'double Luxco structure' is also common. This structure allows creditors to enforce their share security at the level of a Luxembourg law parent company by relying on the more favourable security enforcement regime offered by Luxembourg law.

Law stated - 17 January 2022

Debtor-in-possession financing

Does your jurisdiction allow for debtor-in-possession (DIP) financing?

Prior to the entry into force of the Ordinance of 15 September 2021, French law provided for a mechanism through which lenders that provided new money to a debtor subject to pre-insolvency conciliation proceedings that lead to a court-approved conciliation agreement could benefit from the 'new money privilege' in the case of subsequent insolvency proceedings opened against the debtor. Such new money privilege gives the concerned creditors a priority of payment over all pre-petition claims and most post-commencement claims in the event of subsequent insolvency proceedings. It also protects them from having their claims benefiting from such privilege being written off or rescheduled without their consent in the context of the adoption of a restructuring plan in safeguard or rehabilitation proceedings (even through a cram-down).

As an incentive for new financings granted to debtors after the commencement of insolvency proceedings, the Ordinance of 15 September 2021 added to this mechanism a new privilege called the 'post-money privilege'. This new privilege applies to all new cash contributions (except when made through a share capital increase) made (1) during the observation period of insolvency proceedings to ensure the continuity of the debtor's business during the procedure and/or (2) for the implementation of a safeguard or rehabilitation plan.

Like the new money privilege, claims benefiting from the post-money privilege cannot be written-off or rescheduled without their holders' consent in the context of the adoption of a restructuring plan in safeguard or rehabilitation proceedings (even through a cram-down). Such claims will also be subject to a preferential treatment in the context of possible subsequent liquidation proceedings.

Law stated - 17 January 2022

Stays and adequate protection against creditors

During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

The judgment opening insolvency proceedings will stay all individual actions and creditor recourse, subject only to very limited exceptions such as enforcement of retention of title clauses, set-off of related claims, and rights of retention attached to certain security interests.

There is no specific protection for existing lien holders who become subject to superior claims.

Law stated - 17 January 2022

Clawbacks

In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders. What are the rules for such clawbacks and what period is covered?

When a debtor is subject to rehabilitation or liquidation proceedings, any transaction (eg, payments under a loan, a sale of assets or the creation of a security interest) entered into during the hardening period can be subject to clawback provisions.

The hardening period runs from the actual date of insolvency of the debtor (defined as the date on which the debtor becomes unable to pay its debts as they fall due with its immediately available assets, taking into account available credit lines, existing debt rescheduling agreements and moratoria) up until the date on which insolvency proceedings are opened by a court. If the court finds out that the date of insolvency declared by the debtor is not its actual date of insolvency, it may move back the recorded date of insolvency to the actual date of insolvency, by 18 months at most.

French insolvency law provides for a list of transactions and payments that may be challenged in court if they have been entered into by a debtor during the hardening period:

- some must be annulled by the court: these mainly include transactions or payments that constitute voluntary preferences for the benefit of some creditors to the detriment of other creditors (eg, transfers of assets made for no consideration, contracts under which the debtor's obligations significantly exceed those of the other party, payment of non-payable debts, payments using methods that are not commonly employed in the relevant business sector, protective measures, security granted for debts previously incurred by the debtor, transfer of assets or rights to a trust arrangement); and
- some may be declared void by the court: these mainly include transactions, payments or seizures made while the other party actually knew that the debtor was already insolvent at the date of such transaction or payment.

Law stated - 17 January 2022

Ranking of creditors and voting on reorganisation

In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

The rank of creditors in insolvency proceedings mainly depend on whether they are secured or unsecured (and, if so, on the nature of the privilege or security interest securing each creditors' claim) as well as on the outcome of the insolvency proceedings, that may notably affect the substance of a lender's rights against a debtor. In summary, creditors are divided into secured and unsecured creditors. And, among secured creditors, those who have been granted a security vesting them with an effective retention right over assets or rights of the debtor or with ownership rights such as under a fiducie (to the extent the debtor has not retained use or enjoyment of the assets contributed to the fiducie) are, under certain conditions, entitled to be paid first or to ask for the transfer of the relevant assets.

In accelerated safeguard proceedings (ie, fast-track proceedings of a maximum duration of four months available to all companies in conciliation proceedings, regardless of their size), all the creditors concerned by the proceedings (that may be picked up by the debtor prior to the opening of the proceedings) are collectively consulted on a reorganisation plan through a class-based system introduced by Ordinance of 15 September 2021. If the plan is not adopted within the required time limit, the proceedings will automatically terminate with no possibility for the court to impose a term-out.

In ordinary safeguard proceedings, the rules of adoption of a restructuring plan (which may feature a debt-rescheduling, debt write-offs, debt-to-equity swaps or a combination of these) differ depending on the size of the companies concerned. In companies with fewer than 250 employees and €20 million turnover or €40 million turnover (these thresholds being assessed on a consolidated basis for holding companies), the creditors whose payment terms are affected by the proposed restructuring plan are, in principle, consulted on the plan on an individual basis (save where the debtor has specifically requested to the insolvency judge that a class-based consultation process be organised). They can be imposed a term-out over a maximum period of 10 years by the court (subject to limited exceptions). In companies exceeding these thresholds (or in companies below these thresholds having specifically requested it), the creditors and, as the case may be, equity holders whose rights (or equity interest) are affected by the proposed restructuring plan are consulted within classes of affected parties (which notably excludes the holders of employment claims, claims secured by the new money and post-money privilege and claims secured by a fiducie). These classes

are constituted based on certain criteria such as a sufficient economic interest test, compliance with intercreditor and subordination agreements and the requirement that secured creditors, unsecured creditors and equity holders (if affected by the plan) vote in separate classes. The restructuring plan may only be proposed by the debtor. The approval of the members of each class on the restructuring plan is obtained through a two-thirds majority vote within each class. For a restructuring plan to be approved despite the negative vote of one or more classes of affected parties, a cross-class cram-down mechanism is available provided that, in summary: (1) a majority of classes or at least one class that is 'in the money' voted in favour of the plan; and (2) such plan complies with the 'absolute priority rule' according to which the members of a class that voted against the plan must be fully repaid or compensated (by identical or equivalent means) when a more junior class is entitled to a payment or keeps an interest under the plan. The court may, however, waive this rule when necessary to achieve the plan's objectives (eg, treatment of strategic suppliers or equity holders) and such derogation does not unfairly prejudices the rights or interests of any affected parties. Further rules must be complied with when the cross-class cram-down is implemented against one or more classes of equity holders who have not approved the plan.

In either process (ie, through the regular process or through a cross-class cram-down), in order to be court-sanctioned, the plan must also satisfy a 'best interest of creditors' test: any affected member of a class who voted against the plan must not be worse off under the plan than it would have been in the event of liquidation proceedings, an asset sale plan or a better alternative solution. If no agreement is found on a plan through the class-based system or the plan is not approved by the court, the ordinary safeguard proceedings are directly converted into rehabilitation proceedings.

In rehabilitation proceedings, the rules for the adoption of a restructuring plan are essentially the same as in ordinary safeguard proceedings, subject to a few notable exceptions:

- any affected party has the right to present an alternative restructuring plan that may compete with the debtor's;
- the cross-class cramdown may be implemented without the debtor's consent; and
- if no agreement is found on a plan through the class-based system, the creditors must be re-consulted pursuant to the individual consultation process in the framework of which the court may notably impose a 10-year term-out to dissenting creditors (subject to specific regimes such as the one applicable to claims benefiting from the new money lien or post-money lien).

Liquidation proceedings (but also rehabilitation proceedings, if no restructuring plan is possible) may end up with the adoption of a sale of assets plan (through which all or part of the debtor's assets constituting an autonomous branch of activity are sold to a third party) or in a sale of the debtor's assets on a piecemeal basis. When a sale of assets plan includes pledged or mortgaged assets, the creditors benefiting from these security interests may, if they hold a retention right, block the sale of the pledged assets until full repayment of their secured claim. If they do not hold a retention right or consent to the sale, they will be allocated a portion of the sale price calculated based on a ratio between the value of the pledged or mortgaged assets and the total value of the assets transferred to the purchaser. In the case of a sale of the debtor's assets on a piecemeal basis, the creditors are repaid out from (and up to) the liquidation proceeds according to their legal rank, which may be broadly summarised as follows:

- if applicable, the remuneration due to the manager(s);
- super-privileged claims of employees;
- legal costs falling due after the judgment opening the proceedings (other than lawyers' fees);
- claims secured by the new money privilege granted in conciliation proceedings;
- claims secured by a mortage;
- privileged claims of employees;
- claims secured by the post-money privilege granted in safeguard or rehabilitation proceedings;
- claims that have arisen after the opening judgment and that are in relation to the business operations or

proceedings; and
- unsecured creditors.

Law stated - 17 January 2022

Intercreditor agreements on liens

Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

Intercreditor agreements are recognised and commonly used in practice. As far as French insolvency law is concerned, the only provisions expressly recognising such agreements and requiring their application concern the preparation and adoption of a restructuring plan through the class-based consultation process available in both types of safeguard and rehabilitation proceedings. The law provides in this framework that the affected parties shall inform the court-appointed administrator of the existence of subordination agreements entered into prior to the opening of the safeguard or rehabilitation proceedings, otherwise those agreements will be unenforceable. If such information has been duly carried out, the court-appointed administrator of the debtor in safeguard or rehabilitation proceedings will have the obligation to comply with these subordination agreements in the creation of classes of affected parties. In such class-based restructurings, the court will therefore have to control that subordination agreements have been duly applied before it sanctions a rehabilitation plan.

In other insolvency situations, although not directly bound to do so, the courts and insolvency practitioners generally take into account these agreements when addressing lien and ranking priorities. Senior creditors generally deal with this uncertainty by incorporating in intercreditor or subordination agreements clauses obliging junior creditors to transfer to senior creditors any payment received in disregard of the payment order instituted by the contractual agreement.

Law stated - 17 January 2022

Discounted securities in insolvencies

How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

In principal, all receivables, including discounted receivables should be declared in full.

Law stated - 17 January 2022

Liability of secured creditors after enforcement

Discuss potential liabilities for a secured creditor that enforces against collateral.

Potential liabilities may arise after the creditors have foreclosed the secured assets and have become the legal owner. From that point on, they become liable in their capacity as owners of the assets. For this reason, the documentation normally provides for the following alternative solutions:

- the assets are owned by the security agent for the account of the secured creditors;
- a newco is specifically created for the purpose of holding the foreclosed assets; or
- the creditors publicly auction the assets to avoid any potential liabilities.

The value of the foreclosed assets must be estimated by an independent expert and this valuation is binding on the secured creditor. If the expert's estimated value is greater than the amount of secured obligations discharged as a result of the security enforcement, the difference must be paid in cash by the secured creditor to the security provider. Parties usually agree to postpone the payment of that difference to such time as the secured creditor has been able to dispose the foreclosed assets to a third party for a consideration in cash.

In addition, disproportionate security may be set aside.

Law stated - 17 January 2022

UPDATE AND TRENDS

Proposals and developments

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? If so, please give a reference to any written material, whether official or press reports. Are there any other current developments or trends that should be noted?

As an answer to the companies' financial needs raised by the coronavirus crisis, a new legislation Relance has been enacted by the French government to strengthen the balance sheet and cashflows of small, medium-sized and mid-cap companies. Banks and credit institutions may grant in the form of participating loans denominated Prêts Participatifs Relance and alternative investment funds (AIFs) may grant in the form of bonds denominated Obligations Relance financings to eligible companies benefitting from a partial French state guarantee.

To benefit from the state guarantee, the financings must, among others, meet the following criteria:

- the obligors must be registered in France and evidence a turnover exceeding €2 million in 2019. They must not be subject to liquidation proceedings and if subject to safeguard or rehabilitation proceedings, a safeguard or rehabilitation plan should have been approved by a court prior to the signing date of such financings;
- the financings should provide for a minimum four-year grace period on amortisation, an eight years' duration and a capped maximum amount;
- the financings are also subject to the prior approval of a business or investment plan and shall be used to implement such plan; and
- the loans shall contain an undertaking of the borrower not to use the loan to extinguish its existing financial indebtedness (eg, a PGE).

For the avoidance of doubt, companies acquired under LBO transactions are not automatically excluded from these new financing instruments.

As from 16 November 2021, access to the participating loans has been simplified, as follows:

- the eligibility criteria for companies belonging to a group have been clarified and simplified;
- the criteria relating to the creditworthiness of the companies have been simplified so that no external rating is required; and
- it is now possible for companies to benefit from a six years grace period (versus four years previously).

Furthermore, a new insolvency procedure entitled procédure de traitement de sortie de crise was introduced by Law No. 2021-689 dated 31 May 2021. This procedure can be summarised as an accelerated and simplified judicial rehabilitation proceedings for small undertakings (in terms of employees and turnover), whose purpose is the

endorsement of a debt rescheduling. It will enter into force on 2 June 2023.

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Law stated - 17 January 2022

Jurisdictions

France	Stephenson Harwood LLP
Japan	Miura & Partners
Luxembourg	Vandenbulke
Mexico	Von Wobeser y Sierra, SC
Netherlands	CMS Netherlands
Spain	King & Wood Mallesons
Switzerland	Lenz & Staehelin
USA	Willkie Farr & Gallagher LLP