Answers from a French law perspective

1. Governance and Supervision of a rescue in court and out-of-court

1.1. Conditions for out-of-court workouts, conditions for opening of such 'proceedings', conditions for opening formal pre-insolvency and insolvency proceedings

1.1.1. Out-of-court workouts:

(a) Are there any established practices for facilitating out-of-court workouts (i.e. workouts conducted without recourse to any formal restructuring or insolvency procedure)?

For instance: some jurisdictions have developed (e.g. through their Central Bank, or Banking Association) a framework for enabling restructuring negotiations to be conducted for debtors with exposure to multiple banks.

Mandat ad hoc[1] *Mandat* ad hoc proceedings are very flexible. A debtor may request the appointment of a *mandataire* ad hoc, in charge of facilitating and supervising discussions with its main creditors. The debtor may propose a *mandataire* ad hoc to be appointed by the president of the court. The debtor continues to manage his business without being divested. There is no statutory time limit within which the *mandataire* ad hoc must complete his or her tasks. The task of the *mandataire* ad hoc is set by the President of the Commercial Court according to the debtor's needs.

Conciliation [2] A debtor facing 'legal, economic or financial difficulties' may request the appointment of a conciliator to assist it in reaching an agreement with its main creditors and contractual partners provided it has not been insolvent for more than 45 days. The debtor may propose a conciliator to be appointed by the president of the court. The conciliator's duty is to promote the conclusion of an amicable agreement between the debtor and its main creditors as well as, if applicable, its usual contracting partners, which is intended to put an end to the business's difficulties.

If, during the proceedings, the debtor is sued by a creditor, the judge who has commenced the proceedings may, at the debtor's request and after having been informed regarding the situation by the conciliator, apply articles 1244-1 to 1244-3 of the Civil Code.

At the end of the process, if an agreement has been found, it may be either acknowledged by the President of the Commercial Court or approved by the Commercial Court. Acknowledgment gives the agreement the legal force of an enforceable court decision.

[1] Article L. 611-3 of the Commercial Code
[2] Article L. 611-4 et seq. of the Commercial Code

Approval of the agreement allows new financing provided to the distressed debtor (new money) to be granted a legal privilege in case of future liquidation. Such approval of the agreement will be subject to the following conditions:

- The debtor is not insolvent or the agreement puts an end to it;
- The terms of the agreement should normally ensure the continuity of the business;
- The agreement does not harm the interests of non-signatory creditors.

The court cannot appoint the conciliator for longer than four months, extendable at the conciliator's request provided that the total duration of the conciliation proceedings cannot exceed five months.

In practice, conciliation proceedings are often preceded by a Mandat ad hoc and these pre-insolvency proceedings are often implemented to restructure distressed leveraged buyouts (LBOs) or to secure share capital reorganisations and spin-offs of distressed companies

(b) Does the law include specific rules to enable or facilitate out-of-court workouts?

For instance: are there rules of taxation law that facilitate restructuring or the sale of the business on a going concern basis either by providing incentives or removing disincentives to restructure? Does the law provide for a state agency, judge, court or tribunal to offer assistance in the negotiation of an out-of-court workout?

There are no specific rules providing incentives or removing disincentives to restructure in the context of out of court workouts.

French law however provides for several rules aiming at anticipating difficulties through various alert procedures, which can be triggered by the statutory auditor[3], the employees' council[4], the shareholders[5], the President of the Court.[6]

In addition, any person registered on the commercial and companies register or on the register of professions as well as all private-law corporate bodies may join a prevention group recognized by order of the representative of the State in the region. This group has as its purpose the supply to its members, in a confidential manner, of an analysis of economic, accounting and financial information that these promise to transmit regularly to it. When the group notices any indicia of difficulties, it informs the entrepreneur of these and may suggest to him the intervention of an expert.[7]

[3] Articles L. 2341-1, L. 234-2, L. 611-2 of the commercial code
[4] Article L. 2313-14 and 2323-78 of the labor code
[5] Articles L. 223-36, L. 225-32 and L. 226-1 of the commercial code
[6] Article L. 611-2-I of the commercial code
[7] Article L. 611-1 of the commercial code

Besides these rules, several public bodies might help distressed companies to reach out-of court workouts. **(Please refer to section 1.2.4.)**

1.1.2. Pre-insolvency procedures:

(a) Does the law provide any formal pre-insolvency procedure in addition to the main formal insolvency procedures that can be used to achieve a business rescue for a debtor in difficulties or anticipation of such difficulties?

Safeguard proceedings[8] The safeguard proceedings (*procédure de sauvegarde*) is a voluntary proceedings and only available to the management of the company. The debtor may not apply for Sauvegarde if it is insolvent. Sauvegarde proceedings are public. The safeguard proceedings can only lead to a "continuation" plan for the company. It does not allow the transfer of the whole of the company to a third party (except as a spin-off of parts of the company's business, with the management's consent). The purpose of these proceedings is to facilitate the reorganisation of the business in order to allow the continuation of the economic activity, the maintenance of employment and the settlement of liabilities.

Accelerated safeguard procedure[9] – A new "accelerated *sauvegarde*" (AS) was introduced by the 2014 reform, as a specific type of *sauvegarde* proceeding intended to be implemented on an accelerated basis. This proceeding is available only to companies which have first been through a conciliation proceeding and failed to reach a unanimous restructuring agreement with their creditors. The court will open an AS proceeding if the outcome of the conciliation suggests that the restructuring plan negotiated during the conciliation has sufficient support from the creditors such that it is reasonably likely to be adopted on an expedited basis (3 months maximum). In other words, if there is a consensus among creditors on the plan proposed by the debtor in out-of-court negotiations, the AS proceeding is just a tool to cram down dissenting creditors.

Accelerated financial safeguard[10] **–** This procedure is very similar to the AS and is intended for situations where the restructuring only involves the financial debt. As a result, the AFS only affects financial creditors (and shareholders, to the extent there is a debt-to-equity swap) and does not entail any automatic stay of trade payables and other non-financial liabilities of the debtor, in order to limit the disruption to the business. It is meant to provide a quick reorganization plan for the company with a limited impact to its commercial partners and is viewed as a middle ground between an out-of-Court proceeding (*procedure de conciliation*) and a judicial one (*procédure de sauvegarde*)

[8] Articles L. 6201-1 et seq. of the commercial code
[9] Articles L. 628-1 et seq. of the commercial code
[10] Articles L. 628-9 et seq. of the commercial code

because it allows for a restructuring of the company's debt without freezing all the creditors' claims.

In practice, some restructuring cases are first handled via pre-insolvency procedures, then implemented through a SFA, SA or *sauvegarde*.

(b) What are the general conditions for the opening/commencement of these pre- insolvency proceedings?

For instance: are they to be initiated by debtor only or also by creditors (and if the latter, is there a minimum number of creditors or a minimum value of claims required)? If initiated by the debtor, is notice required to be given to creditors? Are other parties allowed to initiate, such as a government agency or the public prosecutor? Can the debtor or (certain) creditors be banned from requesting such proceedings (e.g. on the basis of an abuse of right principle)?

As amicable procedures, *(*mandat ad hoc and conciliation proceedings), pre-insolvency formal proceedings (*sauvegarde,* AS and AFS) may only be started by the debtor.

The *sauvegarde*, AS and AFS, can only be opened as long as the debtor remains solvent (i.e., when the debtor is still able to pay its debts as they fall due out of its available assets (taking into account any waiver or moratorium its creditors may have consented to)) or, with respect to AS and AFS proceedings, provided it has not been insolvent for more than 45 days.

To start a safeguard proceeding, the debtor must additionally prove the existence of legal, economic or social difficulties which the debtor is not able to overcome. Both the insolvency and the difficulties faced by the debtor are assessed on the day of the opening of the proceeding.[11]

In safeguard proceedings, the court shall issue an order on the commencement of the proceedings after having heard in or duly summoned to the judge's chambers, the debtor, and representatives of the works council or, in the absence of a works council, the employee delegates. The court may hear any other person whose testimony it deems useful. The court may, before making a ruling, appoint a judge who will gather information regarding the business's financial, economic and employment situation. He may be advised by any expert of his choice.

The hearing for the commencement of proceedings with respect to a debtor who benefits or has benefited from a mandat ad hoc or from conciliation proceedings during the preceding eighteen months must be held in the presence of the Public prosecutor.

[11] Article L. 620-1 et seq. of the commercial code

(c) Where the debtor is a corporate entity: which organs are entitled to decide whether the entity should request the opening of these pre-insolvency proceedings?

For instance: is prior approval of the general meeting of shareholders required? Are minority shareholders protected from being squeezed out in the course of such proceedings initiated by major shareholders? Is prior consultation or approval of a Works Council, or any other form of employee consultation, required?

The legal representative of the corporate entity can decide at his sole discretion to file for bankruptcy proceedings. The approval of the general meeting of shareholders is not required. The works council must be informed of the decision to file for bankruptcy.[12]

(d) What publicity rules apply to filing for, and the opening of, these insolvency proceedings (excluding any requirements imposed by securities law for listed entities)?

For instance: is a request for the opening of the proceedings published? Are creditors actively informed of such a filing? If so, are they alerted by an individual notice or by a message containing general information to all creditors? Form of publicity: Official Gazette, newspapers, court register, trade register, online? Are there any special rules for foreign domiciled creditors?

The filing for these insolvency proceedings is not published. The opening of the proceedings is published in the official gazette and the trade register. Once the proceedings is open, the creditor's representative will notice all identified creditors and require them to confirm the amount of debt.

1.1.3. Formal insolvency procedures in general:

(a) What formal insolvency procedures are available for business debtors, and what (if anything) are their stated purposes?

Judicial reorganization[13] Judicial reorganisation proceedings apply to insolvent debtors (i.e., that cannot pay their due debts out of their available assets). Most of the rules applicable to *sauvegarde* proceedings also apply to judicial reorganisation proceedings: pre-filing claims are automatically stayed, the reorganisation plan must be adopted by the

[12] Article L 2323-44 of the labor code
[13] Articles L. 631-1 et seq. of the commercial code

creditors' committees and can provide for reschedulings, debt write-offs and debt-for-equity swaps, and the partial sale of the business.

The court may also order a total or partial sale of the business at the request of the court-appointed administrator.

The purpose of the reorganisation procedure is to allow the continuation of the business's operations, the maintenance of employment and the settlement of its liabilities.

Judicial liquidation[14] The aim of these proceedings is to liquidate a company by selling its business when there is no prospect of recovery, as a whole or per branch of activity, or each of its assets individually.

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

(b) Does the law prescribe any hierarchy or order of priority regarding the purpose and/or outcome of insolvency proceedings?

For instance: does the law require a business rescue to be pursued before a piecemeal sale of the debtor's assets, and (if so) does it require a reorganisation to be pursued before a sale of the business on a going concern basis?

French law sets the preservation of the business and the safeguard of employment as the primary goal of a restructuring over the payment of the creditors (while the payment of the creditors becomes the primary goal only in a judicial liquidation, where all prospects to pursue the business have vanished

During safeguard proceedings, it is not possible to trigger a sale of the business on a going concern basis. During reorganization proceedings, the Court is likely to favour a reorganization instead of a sale of the business on a going concern basis. The piecemeal liquidation is the last option.

[14] Articles L. 640-1 et seq. of the commercial code

1.1.4. Formal insolvency procedures that can be used to achieve a business rescue outcome:

(a) Which of the insolvency procedures identified in 1.1.3 above can be used to achieve a business rescue?

The reorganization proceedings and even the liquidation proceedings under specific circumstances can achieve a business rescue.

During liquidation proceedings, the assignment of the business involving all or some of the assets of the debtor is aimed at maintaining those activities capable of being operated autonomously, maintaining all or part of the related employment contracts and settling the liabilities.

(b) What are the general conditions for the making of the request to commence these insolvency proceedings?

For instance: are they to be initiated by debtor only or also by creditors (and if the latter, is there a minimum number of creditors or a minimum volume of claims?). Are other parties allowed to initiate, such as a government agency or the public prosecutor? Can the debtor or (certain) creditors be banned from requesting such proceedings (e.g. on the basis of an abuse of right principle)?

Starting formal insolvency procedures Judicial reorganisations and judicial liquidations may be initiated by the debtors themselves, creditors or the state prosecutor.

The debtor is required to petition for insolvency proceedings within 45 days of becoming insolvent unless it has initiated a conciliation proceeding within the same period. If it does not, directors and, as the case may be, de facto managers, may be subject to personal liability.

Any unpaid creditor may file an application for the commencement of reorganisation proceedings against the debtor. The creditor must show that it has already tried to obtain payment of its debt, and that the debtor is insolvent.

(c) Where the debtor is a corporate entity and is entitled to request the opening of these insolvency proceedings, which organs of the entity are entitled to decide whether the entity should make the request?

For instance: is prior approval of the general meeting of shareholders required? Are minority shareholders protected from being squeezed out in the course of such proceedings initiated by major shareholders? Is prior consultation or approval of a Works Council, or any other form of employee consultation, required?

The legal representative of the corporate entity can decide at his sole discretion to file for bankruptcy proceedings. The approval of the general meeting of shareholders is not required.

The court shall issue an order on the commencement of the proceedings after having heard in or duly summoned to the judge's chambers, the debtor, and representatives of the works council or, in the absence of a works council, the employee delegates.

(d) If there is a period of time between filing and the opening decision, does a court have the power to order protective interim measures regarding the estate?

For instance: may a court order a preliminary stay or designate a preliminary administrator in order to protect the estate while investigating the conditions for the opening?

The period of time between filing and the opening decision is usually very short and may not exceed 15 days. During this period, a court has no power to order protective interim measures regarding the estate.

(e) What are the general conditions for the opening/commencement of these insolvency proceedings?

For instance: what are the relevant conditions/triggers that must be satisfied to open the proceedings? Are they always relevant or can they be overturned in order to promote a business rescue (e.g. by court order or creditors' vote)? May the court investigate all relevant facts ex officio? If not, what information and documents must the applicant submit with their request (e.g. financial ratios, plan proposal, expert testimony about the feasibility of a proposed business rescue, prior consent of creditors)? Does the law provide for adversarial procedure including a hearing and the full body of evidence? What is the evidentiary standard and who bears the burden of proof? Which stakeholders are to be heard? Is the decision to open made by an independent impartial court (compare Article 6 European Convention on Human Rights)? Does the law provide any stakeholder with a right to appeal? If so, does any appeal delay the commencement?

The reorganization proceedings are available to the debtor which i.e. unable to pay its due debts with its immediately available assets, taking into account available credit lines and moratoria (*cessation des paiements*)

The court shall issue an order on the commencement of the proceedings after having heard in or duly summoned to the judge's chambers, the debtor, and representatives of the

works council or, in the absence of a works council, the employee delegates. The court may hear any other person whose testimony it deems useful.

The court may, before making a ruling, appoint a judge who will gather information regarding the business's financial, economic and employment situation. He may be advised by any expert of his choice.

The hearing for the commencement of proceedings with respect to a debtor who benefits or has benefited from a mandat ad hoc or from conciliation proceedings during the preceding eighteen months must be held in the presence of the Public prosecutor.

The law does not provide for adversarial procedure as the creditors are not heard. The creditors can appeal the decisions but it does not delay the commencement.

(f) Does the law exclude the use of these insolvency proceedings by debtors whose business is unviable (i.e. economically - rather than merely financially - distressed debtors), and if so how?

The law does not so.

(g) What publicity rules apply to filing for, and the opening of, these insolvency proceedings (excluding any requirements imposed by securities law for listed entities)?

For instance: is a request for the opening of the proceedings published? Are creditors actively informed of such a filing? If so, are they alerted by individual notice or by a message containing general information to all creditors? Are there specific publicity requirements for opening insolvency proceedings? If so, are they designed to make proceedings visible in another Member State? Form of publicity: Official Gazette, newspapers, court register, trade register, online? Notification of foreign domiciled creditors?

The opening of the proceedings must be published in the official gazette and the trade register. There are no procedures designed to make proceedings visible in another Member State.

1.2. Role of a court, a supervisory judge or other state agency

1.2.1. Who supervises pre-/insolvency procedures?

For instance: if supervision is not within the primary control of a court, is there another form of supervision, and if yes, by whom (committee of creditors; an agency; an insolvency practitioner, and/or supervision of those practitioners by a body that licenses

insolvency practitioners)? In such a case, is there any role for a court?

Both Mandat ad hoc and conciliation proceedings are conducted under the supervision of a court-appointed practitioner (*mandataire* ad hoc or conciliator) to help the debtor reach an agreement with its creditors, typically to reduce or reschedule its indebtedness.

The formal procedures are supervised by the Court, but the involvement of the court appointed practitioner in running the business depend on the procedure. The *sauvegarde*, AS and AFS are debtor-in-possession proceedings. In a judicial reorganisation proceeding, the court has discretion to decide whether to set aside the managers. The role of management is particularly reduced in a judicial liquidation proceeding because the debtor generally ceases to conduct any business. Nevertheless, the court can decide that the business will continue under the supervision of a liquidator in charge of liquidating the debtor's assets to pay its creditors.

1.2.2. Where a court has a supervisory function in relation to pre-/insolvency procedures:

(a) What is the nature and scope of the court's role?

For instance: is a court involved in certain (substantial) decisions made by the debtor or the insolvency practitioner, and if so which ones? Can the court give binding instructions to the debtor or the insolvency practitioner, as applicable (for instance on request by particular parties or of its own motion)?

Most of the key decisions are made or authorised by the court.

In formal proceedings, an insolvency judge ("*juge-commissaire*") is appointed by the court in the judgment opening the proceedings. He is in charge of taking certain decisions (e.g. admitting claims against the insolvency estate) and authorising certain transactions (e.g. authorising entry into agreements that are not within the ordinary course of business; authorizing the sale of assets).

However, the court itself retains jurisdiction over key decisions in the proceedings, in particular (i) the adoption of a Safeguard Plan or a Reorganization Plan, (ii) the sale of the business as a going concern pursuant to a Sale-of-Business Plan, (iii) the termination of the Insolvency Proceedings, (iv) claims against the debtor (e.g. for mismanagement) and against third parties.

The public prosecutor is consulted by the court before it takes such key decisions, but the court is not obliged to adopt his position. The public prosecutor is also entitled to initiate certain legal actions.

(b) Is this role carried out by a specialist insolvency court, or by a specialist insolvency division within a court, or by a specialist insolvency judge?

There is now specialist courts dedicated to insolvency matters.

The courts having jurisdiction over insolvency proceedings will differ depending on whether the debtor conducts a civil or commercial activity. In theory, for commercial debtors, the relevant court will be the commercial court located where the debtor has its registered office. For civil debtors (companies of a civil nature and farmers), the relevant court of first instance will be the civil court. The same principles apply to the location of this court as for the commercial court above.

Insolvency cases will be dealt by the insolvency divisions of the court. The judges that may hear of insolvency cases (or may be appointed insolvency judge) are not necessarily specialised in insolvency matters and may hear other types of cases as well, such as commercial disputes.

(c) Are the actions of the court reviewable, and if so by whom and on what basis?

Appeal or appeal in cassation may be filed against: 1) decisions ruling upon the commencement of safeguard, reorganization and liquidation proceedings by the debtor, the petitioning creditor as well as the Public prosecutor even if he did not act as the principal party; 2) decisions ruling upon the liquidation proceedings, confirming or rejecting the safeguard plan or the reorganization plan by the debtor, the administrator, the court nominee, the works council or, in the absence of a works council, the employee delegates as well as by the Public prosecutor even if he did not act as the principal party;
3) decisions modifying the safeguard plan or the reorganization plan by the debtor, the plan performance supervisor, the works council or, in the absence of a works council, by the employee delegates as well as the Public Persecutor even if he did not act as the principal party.[15] The appeal by the Public prosecutor has a suspensive effect, except with respect to decisions ruling upon the commencement of safeguard or reorganization proceedings. The decisions ruling upon the commencement of proceedings shall be subject to third-party proceedings. The judgement ruling upon third-party proceedings shall be subject to appeal and appeal in cassation by the third party.[16]

Appeals against decisions made by the insolvency judge are usually made to the commercial (or civil) court,[17] except in certain specific instances where they are made directly to the Court of Appeal.

[15] Article L. 661-1 of the commercial code
[16] Article L. 661-2 of the commercial code
[17] Article R. 621-21 of the commercial code

1.2.3.Who is responsible for devising the rules of practice and procedure that apply to those pre-/insolvency procedures that involve a court?

Only the legislator can set out the rules of procedure that apply to those pre-/insolvency procedures that involve a court.

1.2.4.Which (if any) government agencies are involved in a business rescue, and for what purpose?

For instance: are certain governmental regulators empowered to promulgate regulations or set (non-binding) guidelines in insolvency matters, such as Insolvency Councils, or an Insolvency Service? Which exact tasks are assigned to them? Are the persons appointed to act independently? Are some agencies tasked with intervention on behalf of government in the rescue of strategically important companies?

There are no governmental regulators empowered to promulgate regulations or set non biding guidelines in insolvency matters. Public subsidies are various and will generally consist of tax cuts, tax and social debt repayment plan, sometimes of direct investments or subsidies. They can be granted ether by the state or by local authorities. They are however strictly controlled by the European Commission. Such subsidies are granted through several public bodies which can facilitate out of court workouts.

1) *Codefi* (*Comité départemental d'examen des problems de financement des entreprise)* are responsible for anticipating and preventing difficulties of companies with less than 400 employees at the local level (*département*). They can grant loan from the resources of the Social and Economic Development Fund (*Fonds de développement économique et social –FDES*) or to finance a strategic audit (

2) *CCSF* (Commission des chefs de services financiers et des représentants) gather all the heads of public financing bodies at the département level. They can accept a debt repayment plan of tax and social liabilities.

3) *CIRI (Comité interministériel de restructuration industrielle*) The CIRI, with national jurisdiction, is under the authority of the Ministry of Economy and Finance. It has jurisdiction over distressed companies of the industrial or construction sectors employing more than 400 employees. It aims to find a lasting solution for the company or a conversion solution. It takes the form of loans.

1.3. Status, powers and supervision of insolvency practitioners; duties and liabilities of directors

1.3.1. Do pre-/insolvency procedures involve insolvency practitioners?

In the context of formal proceedings (either pre-insolvency or insolvency) the court may appoint a *administrateurs judiciaire* (administrator) or a *mandataire judiciaire (creditor's reprensentative)*.

The administrator is required to support the director of the company in difficulty but his precise role will be defined by the court. An administrator is not systematically appointed. The presence of an administrator is only compulsory when the company meets one of two thresholds: 20 employees or 3 million Euros in turnover before tax. If just one of these threshold figures is met, an administrator must be appointed. If the company does not meet either of the two thresholds, the court has discretion whether to appoint an administrator or not.

The creditor's representative's role is to represent creditors. He is selected from the list of registered *mandataires judicaires* He is in charge of (i) receiving and verifying the proofs of claims, (ii) initiating legal actions on behalf of the creditors as a whole (e.g. claims against the directors of the insolvent company), and (iii) more generally, defending the general interest of creditors

If the collective insolvency proceedings do not result in an effective recovery of the company in difficulty, in practice, he will be appointed liquidator.

In Judicial Liquidation, a judicial liquidator (selected from the list of registered *mandataires judiciaires*) is appointed by the court. He represents the debtor and he is also entitled to initiate legal actions" on behalf of the creditors as a whole. He also receives and verifies the proofs of claims.

1.3.2. In any pre-/insolvency procedure where insolvency practitioners are involved:

(a) Who may be appointed to act as an insolvency practitioner?

For instance: Is the insolvency practitioner required to have a licence or to be registered in an official list or otherwise hold a formal authorisation? Do specific qualification requirements apply to insolvency practitioners (e.g. general experience in business and/or in insolvency law, mandatory (postgraduate) professional training and any continuing training requirements, mandatory membership of a professional association, evidence of a clean criminal record)?

Administrators or *mandataires judiciaires* are members of a regulated profession requiring a specific degree and appropriate qualifications, and who are dedicated exclusively to the assistance or representation of debtors subject to pre-insolvency or insolvency proceedings.

Only those whose name appears in a register drawn up by a national committee created for that purpose may be appointed by a court to perform the functions of a court-appointed administrator. All persons registered by the committee must (i) be French nationals or citizens of a European Community member state or a European Economic Area member, (ii) not have been the perpetrator of facts giving rise to a criminal conviction for dishonourable conduct or lack of integrity; (iii) not have been the perpetrator of facts of the same kind giving rise to a disciplinary or administrative sanction, dismissal, striking off, removal from office, withdrawal of approval or withdrawal of authorisation; (iv) not have been declared personally bankrupt or made subject to one of the prohibition or forfeiture measures relating to judicial reorganization and liquidation of companies (v) have passed the entrance examination for the vocational development programme, completed that programme and passed the aptitude examination.[18]

By way of exception, however, the court may, after seeking the advice of the public prosecutor, appoint as a court-appointed administrator a person who can provide proof of experience or qualifications particularly relevant to the nature of the case.[19]

When the court appoints a legal entity, it designates one or more natural persons within it to represent it.

(b) How are they appointed?

For instance: what is the appointment procedure? Is it court driven? Can it be influenced or determined by creditors? Can an appointment be challenged, and if so by whom and on what basis?

They are appointed by the Court. The name of the administrator can be suggested by the debtor in safeguard proceedings.

On its own motion, or as proposed by the insolvency judge or by request of the prosecutor, the court can replace an insolvency practitioner or appoint one or more additional insolvency practitioners.

The public prosecutor may propose the name of the creditors' representative to be appointed. If the public prosecutor's proposal is rejected, the court must give specific reasons. When proceedings are commenced in connection with a debtor subject to, or who has been subject to, '*mandat ad hoc*' or conciliation proceedings at any time within the preceding 18 months, the public prosecutor is entitled to object to the ad hoc representative or conciliator being appointed as administrator or creditors' representative, although the court remains free to choose the insolvency practitioner.

[18] Article L. 811-5 of the commercial code
[19] Article L. 812-2 of the commercial code

(c) What powers do they have in each relevant procedure?

For instance: does the insolvency practitioner have the power to manage the debtor's business, enter into new contracts on its behalf, and sell its assets? Does the insolvency practitioner have the power to compel the production of documents by the debtor or its management or other third parties? Does the insolvency practitioner need prior authorisation (e.g. court or creditor committee approval) for the exercise of his powers, and if so in what circumstances? What sanctions apply if the insolvency practitioner acts without authorisation or outside the remit of his/her powers? If the debtor's assets include shares in a company, can the insolvency practitioner invoke all the company law rights of a shareholder?

Ad hoc proceedings and conciliation proceedings The mandataire ad hoc or the conciliator do not have any management responsibilities in these types of proceedings. There are no restrictions on the company's business activities.

Safeguard proceedings The company can continue to operate the business and prepare a safeguard plan. The administrator is in charge of monitoring or assisting the management, but cannot take over any management responsibility. Any decision that does not fall within the scope of day-to-day management must be approved by the insolvency judge.

Reorganization proceedings The scope of the administrator's responsibilities is determined by court order. The administrator can simply assist the management to make decisions or can be appointed to take control of the company's management in whole or in part. As in safeguard proceedings, any decision that does not fall within the scope of day-to-day management must be approved by the insolvency judge.

Liquidation proceedings The liquidator has sole authority to bind the company and assumes all management responsibilities.

(d) What duties do they owe, and to whom? What sanctions apply for breach of duty, and do they include any risk of personal liability?

Any breach of the laws and regulations, any violation of professional ethics, and any failure of integrity or honour, even relating to facts unconnected with professional practice, results in disciplinary proceedings being brought against the receiver responsible[20]

[20] Article L811-12 A of the commercial code

The national registration committee sits as a disciplinary committee. It may impose the disciplinary penalties from a mere warning to a removal from the national register.[21]

A fund having legal personality and managed by its contributors has been established to guarantee repayment of the funds received or managed by insolvency practitioners who must compulsory be members of these fund and pay an annual subscription. In the event of the fund's resources proving insufficient to meet its obligations, it shall issue a supplementary call for funds to the registered professionals. [22]

An insolvency practitioner may be held liable pursuant to common civil liability principles[23] and may incur criminal liability as well.[24]

(e) What reporting obligations do they come under?

For instance: what information needs to be given to creditors or shareholders? What information must be made publicly available (e.g. inventories, public reports, etc.)? How is such information published (e.g. online, at a court) and how often?

Insolvency practitioners are appointed by the Court and must as a consequence primarily report to the court through formal reports prepared at various stages of the proceedings.

Such reports are transmitted to a limited number of people (judges, prosecutor, debtor, counsels of the debtor, employees' representative) and shall not become public.

[21] Article L811-12 of the commercial code. The disciplinary action is brought by the Minister of Justice, the Public Prosecutor of the court of appeal in whose jurisdiction the facts were committed, the government representative or the chairman of the National Council of administrators and creditor's representative. When it imposes a disciplinary penalty, the committee may decide, in view of the seriousness of the facts committed, to require the receiver to pay some or all of the costs incurred through having an auditor or an expert present at the audits or inspections which enabled those facts to be determined

[22] Article L814-3 of the commercial code

[23] Article 1382 of the civil code

[24] Article L. 654-12 of the commercial code : if he voluntarily harms the interests of the creditors or of the debtor by either using to s profit sums received while accomplishing his mission or attributing to himself any advantage which he knows he is not due; aking use, in his own interest, of powers he has at his disposal for a purpose he knows to be contrary to the interests of the creditors or of the debtor or acquires for his own account, directly or indirectly, the debtor's assets or uses them for his own profit, whatever his participation in proceedings.

(f) How are they remunerated?

For instance: is the remuneration based on an hourly rate, a fixed rate, a percentage of realisations from the debtor's estate or a combination of the foregoing? Is this a general rate or can it be adjusted based on, for example, the experience of the insolvency practitioner and the complexity of the case? Is remuneration affected by the outcome of the procedure (for example, through payment of a 'bonus' for maximisation of recoveries or rescue of the debtor's business)? Does a tariff system exist limiting the maximum amount of remuneration that can be charged by an insolvency practitioner?

Amicable proceedings In the context of amicable proceedings (mandat ad hoc and conciliation) the remuneration of the insolvency practitioners is freely agreed with the debtor.

Formal proceedings In the context of formal proceedings, the remuneration of practitioners is determined pursuant to a statutory scale depending on various factors. The civil or the commercial court decides about remuneration by observing this statutory scale, but they have complete authority when the application of the statutory scale results in fees exceeding 100 K€.

Administrators are entitled to several rights calculated based on the turnover of the company, the number of employees, the number of creditors included in creditor's committees, and the proceeds from the sale of assets and or activities in case of an asset plan. Although he is not entitled to a success fee, his remuneration will be higher when a reorganization or safeguard plan is submitted, or when the proceeds from the asset plan are higher.[25]

Creditor's representatives are entitled to a fixed right of 2 500 € per case, as well other fixed rights related to the number of debts to register and verify as well as proportionate rights calculated based on the results of various operations such as disposal of assets and payment of creditors.[26] As a consequence, he will also have interest to maximize the proceeds of realisation of the assets and the repayment of creditors. However, when the proceeds from realisation of the company's assets are insufficient to enable the liquidator or the creditors' representative to receive a sum at least equal to 1 500 €, a decision of the court declares that case to be impecunious and grants to the creditor's representative / liquidator up to 1 500 €.[27] This guaranteed remuneration is paid from the interests served by the CDC on all the sums deposited by the insolvency practitioners in its books in the context of pre/insolvency proceedings.

[25] Article R. 663-3 et seq. of the commercial code
[26] Article R. 663-3 et seq. of the commercial code
[27] Article L814-7 of the commercial code

1.3.3 Does the law impose any special obligations on the directors of distressed companies, and (if so) what are the consequences of breach?

For instance: is there a legal obligation for directors to file a request for the opening of insolvency proceedings or pre-insolvency proceedings, or are there other important incentives for them to do so (e.g. the application of protective measures, or to prevent personal liability of directors for insolvent trading, etc.)? What are the consequences of delayed or premature filings by directors of distressed companies (civil and/or criminal liability)?

Liability for excess of liabilities over assets[28] Directors must file for reorganization proceedings within 45 days after the company is in a state of cessation of payment. If they fail to do so, they may incur their liability for excess of liabilities over assets. Rules on liability for excess of liabilities over assets shall apply to the managers of private law entities submitted to insolvency proceedings as well as to individuals who serve as permanent representatives of managing legal entities. Where the liquidation of a legal entity reveals an excess of liabilities over assets, the liquidator, the Public prosecutor or a majority of creditors appointed as controllers may apply to the court in the collective interest of creditors.

Then, the court may, in instances where management fault has contributed to the excess of liabilities over assets, decide that the amount of the excess of liabilities over assets will be borne, in whole or in part, by all or some of the de jure or de facto managers, who have contributed to the management fault. If there are several managers, the court may, by way of a reasoned ruling, declare them jointly and severally liable. The right of action shall be barred after three years from the date of issuance of the order pronouncing the liquidation proceedings. Sums paid by the managers shall form part of the debtor's assets. These sums shall be distributed to all creditors on a pro rata basis. Managers can't take part in the apportionment to the amount of sums which they have been ordered to pay.

Personal disqualification and other prohibitions[29] A court may pronounce the personal disqualification of de facto or de jure managers of legal entities against whom some misconducts have been proved

[28] Articles L. 651-1 et seq of the commercial code

[29] Articles L. 653-1 et seq of the commercial code :
1°. running a commercial, craftsman's or agricultural activity or holding a management or administrative position in a legal entity in violation of a prohibition provided for by law;
2°. purchasing goods for services for resale at below market prices or using ruinous means to procure funds, with the intention of avoiding or delaying the commencement of reorganisation or liquidation proceedings.
3°. entering into, on behalf of another, without consideration, commitments deemed to be disproportionate when they were entered into, given the situation of the business or the legal entity;
4°. paying or causing someone else to pay a creditor, after cessation of payments and while being aware of this, to the prejudice of other creditors;
5°. hampering the good progress of the insolvency proceedings by voluntarily abstaining

Criminal liability[30] Where a procedure of judicial administration or judicial liquidation is opened, a director or representative may be found guilty of criminal bankruptcy where some misconducts have been established against him[31] Criminal bankruptcy is punishable by five years imprisonment and a fine of €75,000.

Other grounds of criminal liability of directors are provided by articles L. 654-8[32] and L. 654-14[33] of the commercial code

1.3.4 Where the debtor is a corporate entity, once pre-/insolvency proceedings are commenced:

(a) does the law permit debtors to remain in possession, and if so in what circumstances and under which pre-/insolvency procedures? Are there any limitations to their management powers?

Although French law, may permit debotrs to remain in possession in pre-insolvency proceedings, management powers will be limited by the authorization required to perform acts exceeding day to day activities. **Please refer to sections 1.2.2. and 1.3.2. c)**

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from co-operating with the persons (authorities) in charge of the proceedings;
6°. destroying accounting documents, not keeping accounts where applicable texts made this an obligation or keeping accounts that are fictitious, manifestly incomplete or irregular with respect to the applicable provisions.

[30] Articles L. 654-1 et seq of the commercial code

[31] Are punishable by 1. To have made, with the intention of avoiding or delaying the opening of judicial administration proceedings, purchases with view to a resale at below market prices or used ruinous means to procure funds;
2. To have diverted or dissimulated all or part of the debtor's assets;
3. To have fraudulently increased the debtor's debts;
4. To have kept fictitious accounts or made accounting documents belonging to the business or corporate body disappear or failed to keep any accounts where the applicable texts impose an obligation;
5. To have kept manifestly incomplete or irregular accounts in light of legal provisions.

[32] Two years imprisonment and a fine of €75,000 will apply to the following facts:
1. Where any person mentioned in Article L. 654-1 agrees during the observation period to a mortgage or a legal charge or makes an act disposing [of assets] without the authorisation set out in the second paragraph of Article L. 622-7 or who pays, in whole or in part, a debt in breach of the prohibition mentioned in the first paragraph of that article;
2. Where any person mentioned in Article L. 654-1 makes a payment in breach of the method by which the settlement of debts is to be carried out according to the preservation plan or rescue plan, who makes an act disposing [of assets] without the authorisation set out in the second paragraph of Article L. 626-14 or who proceeds to sell an asset subject to a prohibition on disposal within the context of a sales plan to which Article L. 642-10 applies;
3. Where any person, during the observation period or while the preservation plan or rescue plan is being implemented, with knowledge of the debtor's situation, concludes with the [debtor] one of the acts mentioned in 1 and 2 or receives an irregular payment.

[33] The fact, for any person, of exercising a professional activity or function in violation of any prohibition, destitution [of rights] or incapacity set out in Articles L. 653-2 (bankruptcy) and L. 653-8, is punishable by two years imprisonment and a fine of €375,000.

(b) are there special sources of liability for directors who act for a debtor-in-possession?

There are no special sources of liability for directors who act for a debtor in possession.

(c) does the law allow individual directors of a debtor-in-possession to be replaced by creditors, special advisors and/or the insolvency practitioner, and if so in what circumstances?

The law does not allow the replacement of individual directors by creditors, special advisors. The scope of the assignment of the insolvency practitioner may be extended by the court from a mere assistance to an actual takeover of the management.

(d) where debtors do not remain in possession, what (if any) residual powers are enjoyed by directors in each relevant pre-/insolvency procedure, and is their exercise subject to any special approval requirements?

For instance: do directors need the consent of an insolvency practitioner, creditors, shareholders or a court to exercise any residual powers?

Please refer to sections 1.2.2. and 1.3.2. c)

1.4 How are unsuccessful rescue attempts in pre-/insolvency procedures terminated or converted into other procedures?

1.4.1 Does the law limit the time for which pre-/insolvency procedures can be used to effect a business rescue e.g. the time for the preparation and presentation of a safeguard plan?

Mandat ad hoc and conciliation : there is no statutory time limit within which the mandataire ad hoc must complete his tasks whereas the conciliation may last up to five months.

Safeguard and reorganization proceedings begin with an observation period of up to six months to assess the company's financial position. This period can be extended once for six months, and in exceptional circumstances, can be extended further at the Public Prosecutor's request for an additional six months.[34]

[34] Article L 621-3 of the commercial code

The AFS procedure must be completed within one month, renewable once for one month maximum. The AS proceeding must be completed within a maximum of three months from the date of the opening judgment.

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

1.4.2 More generally, in what circumstances would these pre-/insolvency procedures: (a) be terminated; (b) converted into another form of procedure, such as (in the case of a corporate debtor) liquidation?

Mandat Ad Hoc and Conciliation procedures can terminate once an agreement has been reached (potentially upon certification / approval of the judge), at the end of the maximum five-month period for the conciliation, or upon request of the debtor or the insolvency practitioner, whereas an agreement is not possible by decision of the President of the commercial court.

Safeguard proceedings At any time during the observation period of the safeguard proceedings or if no safeguard plan is approved by the court by the end of the observation period, the debtor, a creditor or the public prosecutor may request the opening of reorganisation or liquidation proceedings, subject to the debtor company being insolvent, and in the case of liquidation proceedings, the absence of any prospects of recovery. During the observation period, the debtor company may also request the conversion into reorganisation proceedings if the approval of a safeguard plan is manifestly impossible and if the termination of the proceedings would lead to insolvency in the short term. If the court approves a safeguard plan and the debtor defaults on its obligations, the court may, after having consulted the public prosecutor, terminate the plan and, if the debtor is insolvent, order the opening of reorganization proceedings or (if there are no prospects of recovery) liquidation proceedings.

Reorganisation proceedings At any time during the observation period of the reorganisation proceedings or if no reorganisation plan is approved by the court by the end of the observation period, the debtor, a creditor or the public prosecutor may request the opening of liquidation proceedings. If the court approves a reorganisation plan and the debtor defaults on its obligations, the court may, after having consulted the public prosecutor, terminate the plan and, if the debtor is insolvent and if there are no prospects of recovery, order the opening of liquidation proceedings. In the case of a sale plan, the court terminates the plan if the third-party purchaser defaults on its obligations.

1.4.3 Where any form of insolvency procedure results in the liquidation and dissolution of a debtor (as in the case where the debtor's business is sold on a going concern basis, and the residual entity is wound up) what rules apply where additional assets of the debtor are subsequently discovered?

For instance: can an application be made to restore the company to the register, so that the asset can be recovered and distributed to creditors?

Where the closing of the liquidation proceedings is pronounced due to an excess of liabilities over assets and it appears that assets have not been sold or that litigation in the interest of creditors has not been initiated during the proceedings, the latter may be resumed.

The liquidator previously appointed, the Public prosecutor or any interested creditor may apply to the court. The court may also initiate a case of its own motion. If the action is filed by a creditor, he must show that he has deposited the funds necessary for the procedural expenses with the court clerk's office. This amount deposited for legal fees will be reimbursed as a priority claim out of sums recovered following the resumption of the proceedings.[35]

[35] Article L. 643-13 of the commercial code

2. Financing a rescue, including critical vendors and other pressures on liquidity; the stay

2.1. Direct costs and their reimbursement

2.1.1. What direct costs are incurred during pre-/insolvency proceedings?

For instance: fee for any IP, court; or legal/ financial advisor involved in proceedings

Direct costs of pre-/insolvency proceedings. – A company bankruptcy implies direct costs involving primarily expenses related to the proceedings, i.e. court costs (administrator, *mandataire*, court's clerk), fees of independent professionals (lawyers, certified accountants, consultants) and internal costs that are more difficult to evaluate, linked to the time spent by corporate executives and staff. Based on research, these costs are estimated at around 3% of the company's market value.

Most of finance documentation provide for the creditors' legal fees to be borne by the debtor. Such provision usually raises issues when the debtor encounters financial difficulties. A specific provision of French law (entered into force on July 1st 2014) provides that any clause imposing on the debtor the charge of the creditors' advisors fees that would be implied by any pre-insolvency proceedings is deemed not written, for the portion exceeding 75% of such fees.

2.1.2. How are these direct costs met?

For instance: are direct costs discharged from the debtor's assets, and if so in what order of priority? How are direct costs discharged where the debtor's assets are insufficient to meet them?

Pre-insolvency proceedings – Corporates can subscribe to specific insurance policies covering some of the potential fees and costs implied by pre-insolvency proceedings (fees of the insolvency practitioner, lawyer, accountant...). In this case, such fees can be borne by the insurance company. Otherwise, they fully remain payable by the debtor on its own assets, under usual conditions.

Preferential rank of court costs in the legal priority ranking. – In the context of safeguard (*sauvegarde*[36]), reorganization (*redressement judiciaire*[37]) and liquidation (*liquidation judiciaire*[38]) proceedings, the court costs arising legally after the opening judgment for the purpose of the proceedings (e.g. inventory or publicity expenses,

[36] Article L. 622-17 II of the commercial code
[37] Article L. 631-14 referring to L. 622-17 of the commercial code
[38] Article L 641-13 II of the commercial code

remuneration of the *mandataires* and other entities involved in the procedure – bailiffs, auctioneers, experts, etc.) benefit from a preferential ranking and are paid by the debtor in priority immediately after the super-preferential wage claims.

Advance payment of procedural expenses by the Treasury. – The Public Treasury must provide advance payments for some expenses related to the pre-/insolvency proceedings opened against the debtor, provided that the *juge-commissaire* or the President of the court has previously confirmed a cash shortfall and ordered the Treasury to advance the payment of said costs via a substantiated decision[39]. The reimbursement of these advances is guaranteed to the Public Treasury by the preferential rank assigned to court costs (*privilège*). The Treasury will therefore be repaid preferentially before any other creditors, with the exception of employees benefitting from a super-preferential rank on their claims, out of the proceeds from the sale of the debtor's assets in the context of safeguard, reorganization or liquidation proceedings.

2.2. Rescue finance

2.2.1. Does the law make special provision for the extension of finance to a debtor after the commencement of pre-/insolvency proceedings?

For instance: can a petitioning party be ordered to make a down-payment on the costs of the proceedings (e.g. the insolvency practitioner's salary)? Which requirements apply to 'post-commencement' finance arrangements, e.g. approval of insolvency practitioner or court of such arrangements or limitation as to amount and/or scope of such finance? Does the law allow a priority or special security (e.g. super-priority) to the provider of post-commencement finance? Are lenders offering new finance in support of a safeguard plan confirmed by a court exempted from any civil and criminal liability that may be associated with the continuation of the debtor's business or claw-back risk in any subsequent insolvency?

Pre-insolvency proceedings – In a *conciliation* procedure post-commencement finance can be granted the "conciliation privilege" – provided by Article L. 611-11 of the French Commercial Code –, under a court-ratified (*homologué*) conciliation agreement. In this case, such finance may benefit from a priority rank (*privilège*) in any distribution of the debtor's assets organized in any subsequent liquidation proceedings. However, such privilege does not apply to equity finance.

In case of a court-ratification (*homologation*) of a conciliation agreement, no subsequent insolvency opening judgment can set the insolvency date, from which runs the time period name "*suspect period*", where most of deeds may be cancelled, earlier than the court-ratification (*homologation*) date. This rule aims to limit the risks for the parties offering new finance in support of the debtor's rescue from civil and criminal liability or claw-back risk in any subsequent insolvency proceedings.

[39] Article L. 663-1 of the commercial code

Remuneration of entities involved in the proceedings – *Immediate payment to the court-appointed administrator*. – As of the opening of the procedure, the debtor must pay immediately to the administrator the fees due for the procedures related to the diagnosis of the company in the context of safeguard and reorganization proceedings [40] . Administrator's fees are calculated under a specific scale provided by law.

- *Provisional payment to entities involved in the proceedings* – The court-appointed administrator may request the payment of a provisional fee as retainer against proportional future entitlements relative to the preparation of the economic, social and environmental review and assistance to the debtor in preparing the rescue or reorganization plan[41]. The President of the court sets the amount of this retainer fee upon proposal from the *juge-commissaire* further to referral by the administrator. The court-appointed *mandataire* and the liquidator[42] also have the possibility of requesting the payment of such provisional fees.

Regime applicable to credit facilities granted prior to the opening judgment and continued thereafter. – *Option of the administrator*. – Similarly to other agreements, any credit facilities outstanding on the opening date of the safeguard or reorganization proceedings continue ipso jure, in spite of any execution default by the debtor prior to the opening judgment[43]. The decision to continue such contracts falls under the remit of the administrator (or the debtor, in the absence of an administrator). When filing the contract enforcement petition, the administrator shall ensure that the funds necessary to enforce the contract are available.

- *Initiative of the financial creditor*. – The outstanding contract will be terminated ipso jure if the debtor's co-contractor serves notice on the administrator to rule on the continuance of the contract and the administrator fails to reply within the next month. Furthermore, the banker can avail himself of Article L. 313-12 of the [French] Monetary and Financial Code allowing for the termination of the contract (i) for any determined- or indeterminate term contract: at any time without prior notice by delivering evidence that the debtor's situation is irremediably damaged or proof of a wrongful behaviour[44]; or (ii) for indeterminate term contracts: by complying with the agreed prior notice and after sending a prior notice in writing to the debtor[45].

Lastly, in the event of a failure by the debtor or the administrator to ensure the continuance, the contract will be terminated automatically ipso jure.

Regime applicable to credit facilities granted after the opening judgment. – *Payment at maturity dates*. – Creditors granting credit facilities after the opening of proceedings are paid as their debts become due and payable[46] and may take individual action to secure

[40] D. n°85-1390, 27 décembre 1985, article 2, para. D. latest rev. 23 December 2006
[41] D. 27 December 2006, article 4 / P-.M. LE CORRE, Dalloz action, 2014-2015, p. 643, n°352-16.
[42] *Ibid*.
[43] Article L. 622-13 of the commercial code
[44] Com 08/12/1987
[45] Com. 01/10/1991, n° 89-13.127
[46] Article L. 622-17 of the commercial code

the collection of their debt.[47] Furthermore, the interests on their loans will continue to accrue.

- *Priority rank* (*Privilèg*e). – Any creditors who grant credit facilities after the opening of proceedings benefit from a priority ranking (*privilège*[48]) in the event of non-payment on the due dates, giving them a right to be reimbursed preferentially before other secured and unsecured creditors from the proceeds of the sale of the debtor's assets, but after (i) the super-preferential wage claims, the court costs, and any debt claims guaranteed by the conciliation *privilège* if the conciliation agreement is ratified (*homologué*) by the court under safeguard and reorganization proceedings, and also after (ii) prior debt claims guaranteed by real property collaterals under liquidation proceedings.

2.2.2. **Where the debtor is a corporate entity:**

a) Does company law or insolvency law contain specific rules for shareholders and/or related companies to financially assist (directly or indirectly) a distressed debtor?

Shareholders' liability. – No system specific to pre-/insolvency proceedings provides any obligation for shareholders to financially assist (directly or indirectly) a distressed debtor. However, shareholders who provide financial assistance to a distressed company may be convicted of wrongdoing on several legal grounds.

- *Liability for insufficient assets.* – Firstly, the shareholders may be held legally liable for insufficient assets under a court-ordered liquidation, in the event that they managed the company *de facto*. Article L. 651-2 of the Commercial Code holds liable an executive manager who contributed to the emergence of an asset shortfall, for all or part of such asset insufficiency.

- *Extension of the pre-/insolvency procedure*. – Furthermore, shareholders who finance a distressed company may be held liable for the payment of all or part of the distressed company's debts due to the effect of a decision to extend the proceedings, on the grounds of assets commingling or fictitious claims.

- *Recognition of the status of co-employer.* – Shareholders further expose themselves to the risk of a co-employer status being determined or of being requalified as an employer. As such, they would be held responsible for the wage liabilities.

- *Conventional civil liability*. – Lastly, shareholders who finance a distressed company may be held criminally liable under ordinary law on the grounds of Article 1382 of the Civil Code.

[47] Com 25/06/1996, n°94-20.851
[48] Article L. 622-17 of the commercial code

b) Are shareholder loans subordinated in any subsequent liquidation and distribution of the debtor's assets in insolvency proceedings?

No specific subordination is provided by law regarding shareholder loans.

Besides, any potential subordination agreement that may have been entered into by the debtor, its creditors and shareholders, is no longer applied in liquidation and distribution proceedings. Such agreements can only be taken into account when a safeguard (or reorganization) plan is approved by credit committees, ie when the debtor meets specific conditions regarding revenues (over 20 m€) or staff (over 150 employees) or when specifically authorized by the judge (*juge-commissaire*).

Shareholders loans are then treated, while distributing the debtor's assets, like any other claims bearing the same priority rank (unsecured claims for example).

However, the considered liquidation proceedings may have been preceded by any *conciliation* procedure (one of the two pre-insolvency proceedings provided by French law, with *mandat ad hoc* proceedings) where a shareholder loan were granted under a court-ratified (*homologué*) conciliation agreement. If the "conciliation privilege" – provided by Article L. 611-11 of the French Commercial Code – were granted by the Court to such shareholder loan, then this loan may benefit from a priority rank (*privilège*) in the subsequent distribution of the debtor's assets organized by the liquidation proceedings.

2.3. The stay/moratorium

2.3.1. Where pre-insolvency or insolvency proceedings are used to effect a business rescue, what stay/ moratorium (if any) is provided by the law to protect the debtor's assets, and when and how does it arise?

For instance: does the law provide rules for sealing of the insolvent estate or guarding/security of certain assets. Does the stay arise automatically or only by court order? At what point does it arise? Is there any provisional or interim stay that arises on filing for pre-/insolvency proceedings, prior to the formal commencement?

Period preceding the opening judgment. – No system specific to pre-/insolvency proceedings exists to freeze prosecution by creditors during the period preceding the opening judgment of a judicial procedure. However, any deeds entered into during the time period ranging from the insolvency date up to the date of the opening judgment, the so-called "*suspect period*", may be cancelled.

The distressed debtor may however petition the judge for a postponement or rescheduling of the payment of sums due to a creditor, within the limit of two years, apart from any pre-/insolvency proceedings (Article 1244-1 of Civil Code). The resulting judgment will enable a stay of any prosecution actions initiated by the creditor, and of any enforcement proceedings that may have been initiated by the creditor, and a standstill on any increased interests or penalties incurred due to late payments (Article 1244-2 of the Civil Code). This freeze will however be restricted to the debt owed to the creditor against which the petition has been filed, as Article 1244-1 of the Civil Code specifies that the judge must take into consideration both the situation of the debtor and the needs of the creditor. Furthermore, this action does not generate any collective effects. Such mechanism can be specifically used in conciliation proceedings.

Effects generated by the opening judgment on judicial proceedings. – *Prohibition of payments*. – The judgment opening the proceedings implies ipso jure a prohibition to pay any debt that arose prior to the opening judgment date, with the exception of set-off payments of connected claims[49]. It further implies a moratorium on any claims arising after the opening judgment for the needs of the proceedings or the observation period or as consideration for a service provided to the debtor during this period prior to their due date [50]. In addition, the only contractors to be paid on the due dates are those whose claims arise from the performance of continued contracts, and creditors whose claims arise for the needs of the proceedings or the observation period or as consideration for a service provided to the debtor during this period.

- *Stay and prohibition of prosecution.* – The opening judgment stays or prohibits any court proceedings by all creditors (with the exception of the above-mentioned creditors paid on their claims' due dates) and any action seeking to obtain (i) an order against the debtor to pay a sum of money, or (ii) the termination of a contract on the grounds of non-payment of a sum of money[51].

- *Stay and prohibition of enforcement proceedings*. – The opening judgment also stays or prohibits any proceedings for enforcement by these creditors on both movable and immovable property assets, in addition to any distribution procedure that did not result in a distribution prior to the opening judgment (Article L. 622-21).

- *Stay on accrued interests*. – The opening judgment stays the legal and contractual interests, as well as any late penalty interests and surcharges, except for interests arising from loan contracts entered for a period of at least one year or contracts with payments deferred for at least one year (Article L. 622-28).

2.3.2. What is the impact of any such stay/moratorium on:

[49] Article L. 622-21 of the commercial code
[50] Article L. 622-17 of the commercial code
[51] Article L. 622-21 of the commercial code

a) Secured creditors (including the exercise of out-of-court enforcement rights, if any)?

For instance: is the insolvency practitioner entitled to use, consume or dispose of secured assets during the stay/moratorium? If so: is the prejudiced creditor entitled to reimbursement for damages and/or can he demand substitute security? Can a secured creditor submit an application to the court for leave to enforce their rights as if the stay did not apply?

Stay of filings. – No mortgages, liens, pledges or privileges may be registered after the opening judgment is issued.[52] There are however two exceptions to this principle. Firstly, the Public Treasury keeps its privilege on claims that it was not required to register on the date of the opening judgment and for claims to be collected after this date if these claims are duly filed. Secondly, the seller of a business may register his privilege.

Granting of sureties. - In principle, the debtor is prohibited from entering into any disposal transactions that are not part of the ordinary management of the company, and the granting of sureties falls in this category. The supervisory judge (*juge-commissaire*) may however authorise the debtor to grant a mortgage, lien or pledge after the opening judgment.[53] Nevertheless, if the granting of such sureties is liable to have a decisive impact on the outcome of the proceedings, the *juge-commissaire* may only rule on the subject after consulting the Public Prosecutor.

Prohibition of prosecution and enforcement proceedings. – The law makes no distinction regarding the creditors subject to a prohibition of prosecution and enforcement proceedings [54]. This rule is one of the consequences of the principle of equality among creditors, a principle based on both public and international standards. Consequently, all creditors, whether secured or unsecured, are subject to the rule of prohibition of prosecution and enforcement proceedings.

Sale of an encumbered asset. – During the observation period, nothing prohibits the debtor from selling encumbered movable or immovable property assets provided it constitutes an act of ordinary business management. A similar freedom for the debtor to dispose of his assets is recognized further to the adoption of a rescue or turnaround plan, subject to its related inalienability clauses and to the control of the plan commissioner (*commissaire à l'exécution du plan*) to ensure compliance with the commitments contained in the plan. The sale may sometimes be required for the performance of the plan, regardless of the debtor's control, i.e. in the event that the encumbered asset is part of a partial asset disposal related to the plan[55].

Sale of an encumbered asset. – During the observation period or the plan performance phase, it may sometimes be necessary to sell assets. In the event of the disposal of an asset encumbered with a special privilege, lien, pledge or mortgage, the law provides that the portion of sale proceeds corresponding to such secured debts will be placed in a

[52] Article L. 622-30 of the commercial code
[53] Article L. 622-7 of the commercial code
[54] Article L. 622-7 of the commercial code
[55] Article. L. 626-23 of the commercial code

deposit account held in escrow by the Caisse des Dépôts et Consignations. The creditors secured by these sureties or by a general privilege will be paid out of the proceeds after payment of the super-preferential wage claims (Articles L. 622-8 and L. 626-22). They receive immediate payment, and dividends falling due pursuant to the early repayment plan according to their respective priority ranking.

b) Pending lawsuits, and unexecuted judgments?

Pending proceedings. – The opening judgment stays or prohibits legal proceedings initiated by all creditors[56]. Thus, any pending proceedings seeking the payment of sums of money are stayed until the prosecuting creditor has filed his claim. Such proceedings will then resume ipso jure, but for the sole purpose of verifying the claims and determining their amount, after having duly summoned the court-appointed *mandataire,* and, as the case may be, the administrator or the plan commissioner [57].

By way of exception, any proceedings pending before the Prud'hommes labour courts on the date of the opening judgment are continued in the presence of the court-appointed *mandataire* or of the administrator if assigned to provide assistance, or after having been duly summoned. The court-appointed *mandataire* informs the court hearing the case and the employees party thereto of the opening of the proceedings within ten days.[58]

Non-enforced judgments. – The opening judgment stays or prohibits any enforcement proceedings by the creditors on both movable and immovable property assets, in addition to any distribution procedure that did not result in a distribution prior to the opening judgment[59]. Consequently, if the enforcement of a judgment rendered *res judicata* prior to the opening judgment requires an enforcement procedure, said judgment cannot be enforced.

c) in the case of corporate debtors, petitions for their liquidation?

Opening of judicial liquidation proceedings. – The rule on the prohibition of prosecution does not preclude the opening of court-ordered liquidation proceedings. Whenever the debtor is in a state of insolvency and any turnaround is manifestly impossible, judicial liquidation proceedings should be opened[60]. The judicial liquidation may commence immediately without any observation period, or following an observation period. Entities entitled to petition for court-ordered liquidation include the debtor himself[61], a creditor or the Public Prosecutor's Office (Article L. 640-5). Save for the option of converting safeguard or reorganization proceedings into a liquidation procedure (Articles L. 622-10 & L. 631-15), the court may not officially decide the opening of liquidation proceedings on its own.

[56] Article L. 622-21 of the commercial code
[57] Article L. 622-22 of the commercial code
[58] Article L. 625-3 of the commercial code
[59] Article L. 622-21 of the commercial code
[60] Article L. 640-1 of the commercial code
[61] Article L. 640-4 of the commercial code

2.3.3. Are there any exclusions from the stay?

Limitation of the prohibition of proceedings seeking the payment of monies. – The stay concerns only proceedings intended to recover the payment of monies or to resolve a payment default. Accordingly, any judicial actions based on any grounds other than payment default are admissible.

2.3.4. Is the stay subject to any time limit?

Duration of the prohibition/stay of prosecution. - The debtor protected under a rescue or reorganization plan regains the control over his assets and the responsibility for management, as the judicial administrator terminates his/her assignment. The creditors recover their right to prosecute within the limits defined under the plan which is binding on everyone, including the time-barred creditors who had failed to file their debt claim in due time.

However, any claims not properly submitted are not enforceable against the debtor during the execution of the plan nor after its completion provided that the commitments stated in the plan or decided by the court have been met (Article L. 622-26). Thus, creditors affected by the stay of individual proceedings will only regain their right to prosecute provided that their claims have been duly filed in the list of liabilities.

2.3.5. Does the law provide any form of stay protection for safeguard plan negotiations that are conducted outside formal procedures?

For instance: is a stay available in a case where the debtor is in the course of negotiations leading to a restructuring plan? How does such a stay arise (e.g. court order) and subject to what conditions? e.g. demonstration of the potential benefits of the restructuring; demonstration of certain percentage of creditors interested in further negotiations? What is the maximum duration of such a stay?

Judicial proceedings preceded by a preventive procedure. – Judicial proceedings may be preceded by preventive procedures, namely the *mandat ad hoc* or the *conciliation*. These procedures rely on the principle of contractual freedom, which implies that neither the debtor nor the *conciliateur* has the power to force the creditors parties to the negotiations to grant any standstills or moratoriums.

Standstill period. (see 2.3.1. above) – A distressed debtor may petition the judge to request the postponement or rescheduling of payments due to a creditor within the limit of two years, apart from any pre-/insolvency proceedings[62]. The resulting judgment will enable a stay of any prosecution initiated by the creditor, and of any enforcement proceedings that may have been initiated by the creditor, and a standstill on any increased interests or penalties incurred due to late payments (Article 1244-2 of the Civil Code).

[62] Article 1244-1 of the Civil Code

This freeze will however be restricted to the debt owed to the creditor against which the petition has been filed, as Article 1244-1 of the Civil Code specifies that the judge must take into consideration both the situation of the debtor and the needs of the creditor. Furthermore, this action does not generate any collective effects.

3. Executory contracts, including leases, IP-licensing contracts; termination and modification of contracts; transfer of contracts

3.1. Executory contracts

3.1.1. How are executory contracts affected in general by the commencement of pre-/insolvency proceedings?

For instance: who has the power to terminate or continue such contracts, and subject to what conditions?

Preventive proceedings (ad hoc and conciliation proceedings) – Pursuant to French bankruptcy law[63], any contractual provisions increasing the debtor's obligations (or reducing its rights) by the sole reason of the opening of a preventive proceedings (ad hoc proceedings and conciliation proceedings) shall be deemed null and void. It obviously prohibits debtor's contracting party to terminate an ongoing contract, accelerate a loan or increase the remuneration.

Apart from such provision, there are no specific rules as to the continuation of executory contract, unlike what is provided for in case of reorganization proceedings (safeguard and reorganization proceedings).

Reorganization proceedings (safeguard and reorganization proceedings) – As a general rule, French law provides for protective measures as to executory contracts entered into by a debtor who is the subject of reorganization proceedings (safeguard or reorganization proceedings).

These rules apply to all executory contracts that are into force at the time of the opening of the insolvency proceedings (or safeguard proceedings), including contracts of an *intuitu personae* nature but to the exclusion however of a limited number of contracts (i.e. employment contracts, *fiducie* agreements, workout agreement court-approved in a conciliation procedure, financial guarantee agreements and transactions on financial instruments).

Continuation. Pursuant to French bankruptcy law, executory contracts in force cannot be terminated by the sole reason of the opening of reorganization proceedings notwithstanding any legal or contractual provisions to the contrary.[64]

The executory contracts are automatically maintained into force and the debtor's contracting party must perform its contractual obligations despite non-performance by the debtor of its own obligations prior to the opening of the reorganization proceedings.[65] However, case law decides that protective measures shall only apply to breach of financial obligations (payment default) so that contracting party could be entitled to ask

[63] Article L.611-16 of the commercial code
[64] Article L.622-13 I. of the commercial code
[65] Article L.622-13 I. of the commercial code

for termination of executory contracts on the ground of a non-performance by the debtor of any obligation other than of a financial nature.

The court-appointed administrator can require the debtor's contracting party to perform ongoing contracts in exchange for the performance of the debtor's post-petition obligations. When requiring the performance of executory contract the court-appointed administrator shall ensure on the basis of forecasted documents that the debtor will have sufficient funds to perform its own obligations.[66]

The continuation of the executory contract can also result in a notice sent by the debtor's contracting party to the court-appointed administrator. Pursuant to article L.622-13 III 1° of the French commercial code, the debtor's contracting party can require the administrator to give his position on the continuation of an executory contract (which will be automatically terminated once a formal notice is sent to the administrator and has remained unanswered after a month).

The post-petition claims resulting from executory contract that has been continued:

- shall be paid when they fall due. In reorganization proceedings (*redressement judiciaire*), the debtor shall not benefit from contractual payment terms anymore (unlike safeguard proceedings). Payment in cash (*paiement comptant*) becomes the rule.
- if not paid, they shall benefit from a statutory privilege. They will rank ahead of both secured and unsecured pre-petition claims. Post-petition claims will however rank after arrears of wages, post-filing court costs and new money facilities extended in a court-approved conciliation workout agreement.

Termination. There are several ways for an executory contract to be terminated.

Pursuant to article L.622-13 II §2 of the French commercial code, the administrator can (must!) require termination of an executory contract that has been continued if he/she anticipates that the debtor will have no sufficient fund to pay the next term/instalment. Damages resulting from such early termination shall not be qualified as post-petition claims but will be deemed to constitute pre-petition claims.

In case of payment default of a post-petition claim of an ongoing contract that has been continued, article L.622-13, III, 2° of the French commercial code provides for automatic termination of the concerned contract failing agreement of the debtor's contracting party to continue such contract.

As mentioned above, termination of an executory contract can also result in a notice sent by the debtor's contracting party to the court-appointed administrator to obtain his/her position on the continuation of such contract. Failing any answered within a month, the executory contract shall be automatically terminated.

At last, the administrator can request the supervisory judge (*juge-commissaire*) to terminate an executory contract. Since such termination could result in causing significant damages to the debtor's contracting party, it is strictly circumscribed by law

[66] Article L. 622-13 II of the commercial code

which provides two conditions to be met.[67] Firstly, such termination shall be necessary for the safeguard/reorganization of the debtor. Secondly, such termination shall not have an excessive adverse impact on the interest of the debtor's contracting party. It shall be pointed out that damages resulting from such early termination shall not be qualified as post-petition claims but will be deemed to constitute pre-petition claims.

3.1.2. Are there any specific rules regarding the treatment of hire-purchase and lease contracts (including any lease contracts related to business premises)?

French case law decides that a contract may only be ongoing provided that the debtor is still entitled to require the performance of a contractual obligation from its contracting party on the opening date of the reorganization proceedings. As long as there is no obligation to be performed by such contracting party anymore, the contract cannot be deemed "ongoing".

Therefore, so long as in a hire-purchase, the ownership of the asset (in case of reorganization of the purchaser) or payment of the last instalment (in case of reorganization of the seller) has not occurred, the contract shall be considered as an ongoing/executory contract.

This being said, there are not specific rules regarding hire-purchase contracts (*vente à tempérament*). The legal regime described under paragraph 3.1.1 above shall apply.

As far as lease contracts are concerned, specific rules are provided for termination of leases pertaining to property assets rented by the debtor for the purpose of its business (excluding any other leases).

Termination Should provisions regarding continuation of ongoing contracts (see 3.1.1 above) still apply to such lease agreement (i.e. termination provisions on the sole reason of the opening of reorganization proceedings shall be deemed null and void; possibility for the court-appointed administrator to require continuation of the ongoing agreement), specific provisions are designed for termination of lease agreement pertaining to assets used by the debtor for its business.

Indeed the termination of such lease agreement should occur:

- if the administrator anticipates that the debtor will have no sufficient fund to pay the next term[68]; or
- on the date when the lessor is informed by the administrator of its decision to terminate the lease agreement[69]; or
- when the lessor requires termination of such lease agreement on the basis of a default payment of post-petition claims[70], it being however specified that the lessor cannot request for such termination before expiry of a three-month period starting

[67] Article L.622-13 IV of the commercial code
[68] Article L.622-13, II of the commercial code
[69] Article L.622-14, 1° of the commercial code
[70] Article L.622-14, 2° of the commercial code

from the opening of the reorganization proceedings (safeguard or reorganization proceedings); or

- following any lessor's request on the basis of a non-performance by the debtor of its obligations (excluding default payment of pre-petition claims), it being specified that the absence of activity during the observation period in one or more of the rented properties shall not give rise to termination of the lease, notwithstanding any contractual provision to the contrary.[71]

3.1.3. Are there any specific rules regarding the treatment of utility contracts?

For example: does the law restrain utility suppliers from demanding 'ransom' payments from the debtor in exchange for the continuing supply of utilities?

There are no specific rules regarding the treatment of utility contracts. As mentioned under paragraph 3.1.1 above, executory contracts are automatically maintained into force and the debtor's contracting party must perform its contractual obligations despite non-performance by the debtor of its own obligations prior to the opening of the reorganization proceedings.[72]

However, case law decides that protective measures shall only apply to breach of financial obligations (payment default) so that contracting party could be entitled to ask for termination of executory contracts on the ground of a non-performance by the debtor of any obligation other than of a financial nature.

Therefore, French bankruptcy law would not prevent a debtor's contractor party from asking for termination of an ongoing contract based on a non-performance of one of the debtor's obligations occurred prior to the opening of the reorganization proceedings as long as it does not deal with a financial (payment) obligation.

3.1.4. Are there specific rules regarding IP, domain name and licensing contracts?

There are no specific rules regarding the treatment of IP, domain name and licensing contracts. Provisions detailed under paragraph 3.1.1 shall apply to such contracts.

[71] Article L.622-14 of the commercial code
[72] Article L.622-13 I. of the commercial code

3.2. Termination and modification of contract rights

3.2.1. Does the law address the validity of contractual clauses that purport to entitle the counterparty to terminate or modify contract rights in the event of the debtor's insolvency or its entry into pre-/insolvency procedures, and if so how?

Please refer to answer to question 3.1.1.

3.3. Transfer of contracts

3.3.1. Can contracts to which the debtor is a party be transferred to a purchaser of the debtor's business, and if so how and in what circumstances?

Transfer of contracts The court shall order the transfer of all the contracts necessary for the continuation of the business to the benefit of the purchaser of the debtor's business.[73]

Such transfer is therefore the result of a court decision to which the relevant contractor cannot oppose. Such provision shall apply to any kind of contract (so long as it is necessary for the continuation of the business) to the exclusion however of employment, insurance or publishing agreements which are automatically transferred by law to the purchaser (no need for a judicial decision).In addition, it shall be noted that case law usually decides that contracts of an *intuitu personae* nature are excluded from the scope of judicial transfer of article L.642-7 of the French commercial code.

The type of contract falling within the scope of article L.642-7 of the French commercial code is therefore particularly broad.

The transfer is subject to having:

- the contract listed both in the offer issued by the purchaser and in the court decision; and
- a contract which is ongoing (see § 3.1.1 above).

The transfer will be effective at the earliest of the date of execution of the purchase agreement of the debtor's business or the commencement date of the operation of the business by the purchaser (*prise de jouissance*). In any case, the terms and conditions of contracts transferred by court decision shall remain unchanged.

[73] Article L.642-7 of the commercial code

4. Ranking of creditor claims; governance role of creditors

4.1. Pre-commencement creditors:

4.1.1. How are pre-commencement creditors ranked for the purpose of a distribution of the debtor's assets? Please list in order of priority.

Legal priority ranking. In the context of a distribution of the proceeds from the sale of the debtor's assets, the creditors whose claim arose prior to the opening judgment are paid after all other categories of creditors, apart from some exceptions.

Safeguard and Reorganization (Sauvegarde & Redressement judiciaire). – In the context of safeguard (*Sauvegarde*)[74] and reorganization (*Redressement judiciaire*)[75] proceedings, the priority ranking for payments to creditors is as follows:

- 1) Super-preferential wage claims (generally corresponding to wages dating back to the past 60 working days prior to the opening judgment, hence an exception since these claims are pre-dated);
- 2) Court and legal costs engendered after the opening judgment for the needs of the proceedings (expenses inherent to the procedure, e.g. (e.g. inventory or publicity expenses, remuneration of the *mandataires* and other entities involved in the procedure – bailiffs, auctioneers, experts, etc.);
- 3) Claims secured under the "conciliation privilege" if the conciliation agreement was ratified (*homologué*) by the court[76];
- 4) Claims properly engendered after the opening judgment for the needs of the proceedings or of the observation period, or as consideration for a service provided to the debtor during this period;
- 5) Other claims based on their priority rank, taking into account preferential clauses under ordinary law.

Judicial liquidation. – The order of payments differs in the case of a court-ordered liquidation[77], but as a rule creditors with prior pre-opening claims are always paid last from the proceeds of the sale of the debtor's assets, in the following order:

- 1) Super-preferential wage claims;
- 2) Court and legal costs engendered after the opening judgment for the needs of the proceedings;
- 3) Claims secured under the "conciliation privilege" if the conciliation agreement was ratified by the court;

[74] Article L 622-17 II of the commercial code
[75] Article L. 631-14 referring to L. 622-17
[76] Article L. 611-11 of the commercial code
[77] Article L 641-13 II of the commercial code

- 4) Prior claims secured by real property collaterals (mortgages and property liens);
- 5) Claims properly engendered after the judgment opening or pronouncing the judicial liquidation provided that (i) they arose for the needs of the proceedings or the temporary continuation of the business as authorised under Article L. 641-10; or (ii) arose as consideration for a service provided to the debtor during this ongoing-concern period or from the performance of an ongoing contract as decided by the liquidator; or (iii) or arose from the needs of the day-to-day life of a debtor who is a natural entity;
- 6) Other claims based on their priority rank, taking into account preferential clauses under ordinary law.

4.1.2. How are these creditor claims verified prior to a distribution?

Declaration of claims. – As of the date of publication of the judgment, all creditors whose claims arose prior to the date of the opening judgment, with the exception of employees, file a declaration of their claims to the *mandataire judiciaire*[78] within two months after the publication of the judgment[79]. Creditors who hold a published surety or who are bound to the debtor by a published contract are notified in person or, where appropriate, at their elected domicile. The time limit for filing claims with respect to these creditors runs from the date of this information notice. The claims may be submitted by the creditor or by any employee or proxy of his choice.

Verification of claims. – Once the creditors have filed a declaration of their claims, with the exception of those referring to another procedure previously initiated before another court, the insolvency professionals in charge of the reorganization proceedings are responsible for deciding on the merit of the declared claims. To this purpose, the claims are verified for subsequent approval or rejection. Verification of the claims by the *mandataire judiciaire*[80] is the ordinary prerequisite prior to the ruling of acceptance or rejection by the supervisory judge (*juge-commissaire*)[81] .

Calendar of proceedings. – The procedural steps to determine the fate of declared claims are the following chronologically:

- Filing of the claims;
- Deadline of two months as of the date of publication of the opening judgment;
- In the event this deadline is exceeded, submittal of a petition to order a waiver of the time debarment on the claim (*relevé de forclusion*): six-months deadline as of the date of publication of the opening judgment ;

[78] Article L. 622-24 of the commercial code
[79] Article L. 622-24 of the commercial code
[80] Article L. 624-1 of the commercial code
[81] Article L. 624-2 of the commercial code

- Verification of claims by the *mandataire judiciaire* who draws up a list of admissible claims;
- Deadline set by the court;
- Submittal of the claims list to the *juge-commissaire*;
- Decision of the *juge-commissaire* on the claim;
- Court's approval or rejection, or declaration of lack of jurisdiction;
- Statement of claims filed at the court clerk's office and published in the BODACC official bulletin.

4.1.3. Which (if any) of these creditor claims enjoy preferential status, and to what extent?

Preferential treatment of secured creditors. – Prior creditors are paid in the context of the execution of the reorganization plan and in accordance with the terms and conditions in said plan. Among the prior creditors, the secured creditors benefit from preferential treatment.

If the secured creditors have been paid off on the due dates as provided in the plan, they no longer have any reason to enforce their preferential right. However, two situations may occur where they may invoke this prerogative: firstly, in the event of the sale of an asset encumbered by a real surety – during the performance of the plan – where, as a waiver to the rules of payment equality provided in the plan, the law provides for an immediate payment of secured creditors[82]; and secondly, in an event of default by the debtor not followed by a rescission of the plan.[83]

4.1.4. Which (if any) of these creditor claims are subordinated, and to what extent?

None of these creditor claims are subordinated.

4.1.5. Can these creditor claims be traded during the course of pre-/insolvency proceedings?

Trading of claims. – The debt claims held by prior (pre-opening) creditors may be traded during the course of pre-/insolvency proceedings. However, a number of rules will need to be adjusted due to the change of debt owners.

[82] Article L. 626-22 of the commercial code
[83] Article L. 626-27 of the commercial code

As an example, it is the responsibility of the debt buyer to declare the claim in the debtor's proceedings, and not of the seller who would have lost his capacity to do so[84].

Similarly, a creditor whose debt is assigned loses his capacity as member of a creditors committee, as several successive holders of a single debt claim may not sit simultaneously on a creditors committee. In order to ensure that the debt assignee is informed about the debtor's proposals and is admitted to cast a vote, the administrator must be informed of the debt sale via certified mail with acknowledgment of receipt, in accordance with Article R. 626-57-1 of the Commercial Code.

4.2. Post-commencement creditors:

4.2.1. Does the law make any special provision for the treatment of debts incurred by a debtor in possession or insolvency practitioner after the commencement of pre-/insolvency proceedings, and if so what does the law provide?

Payment of post-opening creditors on due dates. – *Principe.* – Some creditors whose claim arose after the opening judgment may benefit from preferential treatment. This is the case of creditors whose claims arose properly after the opening judgment for the needs of the proceedings or of the observation period, or as consideration for a service provided to the debtor during this period, and who are paid on the due dates[85]; at the exclusion of other pre-opening prior creditors.

- *Payment on due dates* – Preferential post-opening creditors are released from the principle of payment prohibition/stay specified in Article L. 622-21, applicable only to prior claims and to non-preferential subsequent claims. Thus, the relevant post-opening creditors are the only ones who may be paid, without suffering any competition from pre-opening prior and related creditors. They must be paid by the administrator or by the debtor in due time on the dates when their claims become due and payable, and may take individual prosecution actions to ensure the collection of their debt[86]. Furthermore, they are not affected by the stay on accruing interests. They are also not subject to the procedure of declaration and verification of claims. They must however keep the court-appointed administrator or *mandataire* informed of their claims.

- *Privilege*. – If not paid on the due date, the creditors whose claims arose properly after the opening judgment for the needs of the proceedings or of the observation period, or as consideration for a service provided to the debtor during this period, benefit from a preferential rank (*privilège*) based on which they are paid preferentially before any other creditors.

[84] Com. 1er mars 2005, n° 03-15.862
[85] Article L. 622-17 , I of the commercial code
[86] Com 25/06/1996, n°94-20.851

4.2.2. If not, how are such claims treated?

Not applicable

4.3. Governance by creditors:

4.3.1. Creditors' committee:

a) Does the law provide for a creditors' committee in pre-/insolvency procedures?

Preventive/pre-insolvency proceedings. – Only the main creditors of the debtor participate in the conciliation procedure[87]. In practice, while the main creditors are most frequently the credit institutions involved in the debtor's financial difficulties, they are not regrouped in a "Committee of Financial & Related Credit Institutions" (CECA, *Comité des établissements de crédit et assimilés*). Using the system of creditors committees provides a way to overcome any opposition from a minority of creditors in the context of a qualified majority vote. However, the conciliation procedure relies on the principle of contractual freedom, which implies that neither the debtor nor the *conciliateur* has any power to compel any decision from the creditors who are parties to the negotiations. In the absence of a unanimous consensus among creditors, no restructuring agreement can be adopted. For the same reasons, no creditors committee is organised in the context of a *mandat ad hoc*.

Insolvency proceedings. – Proposals for the settlement of liabilities must be submitted to the relevant creditors. Whenever the proceedings involve a debtor whose accounts have been certified by statutory auditors or established by a chartered accountant, and whose headcount exceeds 150 employees or whose sales revenue exceeds 20 million euros, it is mandatory to establish a creditors committee.[88] However, the *juge-commissaire* may, at the debtor's or administrator's request, authorise the creation of creditors committees below these thresholds.

Whenever the procedure involving the establishment of a creditors committee is not applicable, the court-appointed *mandataire* collects the individual or collective consents of all creditors who have filed their claims, regarding the proposed time extensions and debt reductions[89].

[87] Article L. 611-7: "The conciliator's duty is to promote the conclusion of an amicable agreement between the debtor and its main creditors as well as, if applicable, its usual contracting partners, which is intended to put an end to the difficulties faced by the business. *(translation by Legifrance)*
[88] Article L. 626-29 of the commercial code
[89] Article L. 626-5 of the commercial code

b) How is such a committee constituted?

Dual committees. – Two separate creditors committees are established respectively for the credits institutions and the main suppliers of goods and services. The dual committees are warranted by the difference of interests between the company's financial partners and business partners, since the company's financial vision does not necessarily match its industrial or business vision.

Committee of Financial & Related Credit Institutions (*Comité des établissements de crédit et assimilés*). – Firstly, any credit institution holding a prior pre-opening claim is a de jure member of this committee.[90]

Secondly, in accordance with Article R. 626-55 of the Commercial Code, the institutions covered under Article L. 518-1 of the Monetary & Financial Code are regarded as credit institutions: i.e. the Public Treasury, Banque de France, La Poste, the *Institut d'émission des départements d'outre-mer*, the *Institut d'émission d'outre-mer* and the *Caisse des dépôts et consignation* who are authorised to conduct banking transactions, although not subject to accreditation by the Prudential Control Authority (*Autorité de contrôle prudentiel*). Accordingly, the accreditation as a credit institution as such is not a prerequisite to sit on this first creditors committee.

Thirdly, this includes the institutions covered under Book V Title II Chapter II Section 2 of the Monetary & Financial Code[91] as related to "*Freedom of establishment and freedom to provide services in the States party to the European Economic Area Agreement*".

Lastly, "*any other entities with whom the debtor has entered into a credit transaction*" are regarded as "related credit institutions".

Suppliers Committee. – Unlike the Committee of Financial & Related Credit Institutions whose membership focuses on the notion of credit transactions, the committee of suppliers of goods and services refers to a notion of diverse legal business transactions. Suppliers of goods are bound to the debtor by more or less elaborate sales or distribution contracts. Suppliers of services may have a variety of relationships with the company, resulting in particular from corporate contracts, mandates, commissions, or brokerage, etc. The prerequisite is that said contract does not fall under the category of credit transactions that would entitle to membership on the first committee (CECA).

The *de jure* membership on the suppliers committee depends on the scope of the debt claims. Only those suppliers holding more than 3% of the total amount of suppliers' claims are *de jure* members of the suppliers committee[92]. Other suppliers may only be member of the suppliers committee upon request from the administrator; in the absence of legal criterion, the administrator will have freedom of choice.

[90] Article L. 626-30 of the commercial code
[91] Article R. 626-55 of the commercial code
[92] Article L. 626-30 of the commercial code

General Assembly of Bondholders – If cases where bondholders exist, a general assembly of all holders of bonds issued in France or abroad is established and convened for the purpose of deliberating on the draft restructuring plan adopted by the creditors committees (Article L. 626-32).

c) What is the role and powers of such a committee?

Vote on the draft plan. – *Committee of Financial & Related Credit Institutions and Committee of main suppliers.* – The committees are asked to vote on the draft restructuring plan developed by the debtor with assistance from the administrator. Any creditor member of a committee may also submit a draft plan to be reported by the administrator.[93]

- *Bondholders General Assembly.* – Once the draft plan has been adopted by each of the committees, it is then submitted for approval to the bondholders general assembly.

d) Are such committee members exposed to personal liability by virtue of acting as members, and if so on what basis?

French Law does not provide for such specific case of personal liability.

e) Are such committee members remunerated, and if so how and on what basis?

Committee members are note remunerated.

f) To the extent that the law does not provide for a creditors' committee, is there any alternative form of creditor representation?

Contrôleurs – Creditors are primarily represented by the creditor's representative whose role is to represent creditors. A creditor will not be entitled to initiate any proceedings on behalf of the other creditors.

Any creditor can ask to the supervisory judge to be appointed controller (*Contrôleur).* The supervisory judge may appoint one to five controller amongst the creditors who asked so, but he is free to appoint only one of them. Should more than 2 controllers be appointeed, at lease of them is selected among unsecured creditor and one of them among secured ones. A relative of the debtor cannot be appointed controller.[94] If the debtor is a registered professional, one of the controller is necessarily the professional association / council.

[93] Article L. 626-30-2 of the commercial code
[94] Article L. 621-10 of the commercial code

Controllers may defend the collective interests of the creditors where the creditor's representative fails to do so.[95] They are also entitled to request the conversion of the proceedings into liquidation.[96]

Controllers are subject to a duty of professional secrecy and are prohibited from buying up the assets of his debtor.[97] In addition they may be held liable in case of gross misconduct.

4.3.2. General meetings of creditors:

a) Does the law require general meetings of creditors in pre-/insolvency proceedings, and if so when?

Preventive pre-insolvency proceedings. In the context of pre-insolvency proceedings, no meeting is organised to secure the agreement of creditors on the draft restructuring plan. Such agreement is not materialised in the form of a vote, but by simple approval of the restructuring protocol. Conversely, several meetings, combining the debtor (and his counsel as appropriate), the administrator and the creditors are organised to discuss the debt rescheduling and the company's reorganisation for the purpose of reaching an agreement on the restructuring protocol. Such meetings are not expressly required by law, but contribute to the task of the *conciliateur* as specified in Article L. 611-7 of the Commercial Code.

Insolvency proceedings. In the context of judicial insolvency proceedings, the law requires that the Committee of Financial & Related Credit Institutions, the committee of main suppliers and the bondholders general assembly be convened in order to vote on the draft restructuring plan[98].

b) What voting rules apply in such meetings?

Committee of Financial & Related Credit Institutions and Committee of main suppliers. The decision to adopt the draft plan is taken by each committee via a majority vote of its members representing two thirds of the claims held by the voting members. However, creditors for whom the draft plan does not provide for any changes in the payment terms or provides for a full cash payment immediately after the approval of the plan or after the admission of their claims do not take part in the vote[99].

[95] Article L. 622-20 of the commercial code
[96] Article L. 622-10 of the commercial code
[97] Article L. 642-3 and L. 642-20 of the commercial code
[98] Articles L. 626-30-2 and L. 626-32 of the commercial code
[99] Article L. 626-30 of the commercial code

General Assembly of Bondholders. The decision is taken by a majority vote of two thirds of the amount of the bond claims held by the bearers who have cast a vote, notwithstanding any clause to the contrary and independently of the law applicable to the bond issue contract. For bondholders who are beneficiaries of a trust created as guarantee by the debtor, only the amount of their bond claims not secured by such a surety are taken into account. Bondholders for whom the draft plan does not provide for any changes in the payment terms or provides for full cash payment immediately after the approval of the plan or after the admission of their claims do not take part in the vote[100].

[100] Article L. 626-32 of the commercial code

5. Labour, benefit and pension issues

5.1. Employment contracts

5.1.1. Are there any special insolvency, contract, company or labour law provisions regarding the treatment of employment contracts or collective agreements where the employer is in distress or in pre-/insolvency proceedings?

For instance: are there specific rules on the termination of these contracts, e.g. requiring prior court approval, or some notice period? Under which circumstances can an employee sue the insolvent debtor or (where applicable) an insolvency practitioner for wrongful termination?

Pre-insolvency proceedings Pre-insolvency proceedings do not affect employment contracts. These proceedings are confidential, even to employees. In safeguard proceedings, the procedure to terminate employment contracts is the same as outside insolvency proceedings.

Insolvency proceedings In reorganisation proceedings, employees may be made redundant during the observation period if the redundancies are urgent, unavoidable and necessary.[101] The judicial administrator must consult the employees' representatives or works council and inform the labour authorities before submitting a list of positions that the judicial administrator would like to have removed. The insolvency judge must then authorise the dismissals based on such list. The judicial administrator can then make employees redundant in accordance with the list of positions to be removed.

In liquidation proceedings, the liquidator must terminate all employment contracts within 15 days of the date of the judgment ordering the liquidation or at the end of the temporary continuation of the debtor's operations, where applicable. Termination must be preceded by the consultation of the employees' representatives or the works council and the information of the labour authorities.

If the business is sold by way of a sale plan (whether approved in reorganisation or in liquidation proceedings), employment contracts included in the plan approved by the court automatically transfer to the purchaser. Non-transferred employment contracts are terminated by the judicial administrator or liquidator.

It should be noted that non-compliance with redundancy procedures during insolvency proceedings or at closing in the case of liquidation proceedings is a source of numerous litigation cases in France. Challenges against the economic grounds for redundancy are rarely recognized since the order issued by the supervisory judge (*juge commissaire*) authorising the redundancies, or the judgment ruling on the disposal plan or the judicial

[101] Article L 631-17 of the commercial code

liquidation substantiate the economic grounds for redundancy. Conversely, many litigation cases address essentially the failure to propose internal redeployments within the companies of a group, and the resources allocated to the *PSE* redundancy plan. The difficulty for insolvency professionals in charge of implementing redundancies – and who may be challenged in this capacity – is to obtain information regarding the scope of a group of companies. The concept of "group" under French labour law is very broad and different from the concept of group under corporate law.

5.1.2. Does insolvency law provide any special or additional tools for restructuring employment contracts or collective agreements?

For instance: does the law make provision for the employment obligations of the debtor to be transferred to a third party if it buys the debtor's business on a going concern basis?

There is no specific tool. The modifications to employment contracts or collective agreements have to be discussed as in the context of a solvent company.

The DIRECCTE administration recently agreed to grant temporary lay-off measures to companies undergoing safeguard or reorganization proceedings, as well as to business buyers, pending either a subsequent restructuring or a turnaround of the business further to the sale.

Once a disposal plan is agreed, collective bargaining agreements are automatically denounced and the buyer has twelve months to renegotiate the agreements. In practice, there are very few renegotiations due to bargaining difficulties, and a majority of the existing collective agreements are retained most of the time.

In the context of an asset plan, the buyer can choose how many employment contracts he will include in his plan. If the court approves the offer made by the candidate, the court will also decide that the employment contracts included in the candidate's plan will be automatically transferred to the purchaser. On the contrary, the non-transferred employment contracts will be terminated by the judicial administrator, within a month of the court's judgment. L 642-5

5.1.3. How are claims regarding unpaid salary entitlements (and any associated benefits e.g. holidays) of employees are treated/protected in pre-/insolvency proceedings?

For instance: do unpaid salary entitlements receive any preferential status in the distribution of the proceeds of the sale of the debtor's assets (see also Question 4.1.1

above)? Does the state provide for another mechanism by which such accrued sums are repaid?

Employee claims encompass all unpaid salaries and benefits. Employees are exempt from filing a statement of their claims.

Employees' claims are guaranteed by a national insurance fund called the AGS, funded by employers. The AGS guarantees the payment of the employees' claims up to certain caps in safeguard, reorganisation and liquidation proceedings. For all sums paid to employees, the AGS is then subrogated to the rights of the employees against the debtor company. The AGS will therefore be reimbursed, as the case may be, according to the ranking of the employees' claims (e.g., the AGS will be ranked first regarding unpaid wages for the 60 days of work preceding the opening of reorganisation or liquidation proceedings).

5.2. Pensions

5.2.1. Does insolvency law, company law, labour law or social security law provide special protection for the pension entitlements of employees of distressed or insolvent debtors?

For instance: what rules apply to the recovery of pension entitlements accrued by employees of the debtor prior to the commencement of insolvency proceedings but unpaid (see also Question 4.1.1 above)? Does the debtor or insolvency practitioner have any obligation to continue payments that accrue after the commencement of pre-/insolvency proceedings (see also Question 4.2 above)? Do employees enjoy protection through recourse to a state fund where pension entitlements are unpaid?

Usually in France, most employees are only entitled to State pensions. Those pensions' entitlements are not affected by the fact that pension entitlements are unpaid before the opening of the proceedings, as long as the employee can prove, when he retires that he was employed during this period.

On the top of state pensions, some companies also propose to their employees pensions schemes that are usually externalised. In that case, it is an independent entity that will pay the extra pension to the employees when he retires. The pension scheme is therefore not affected by the insolvency proceeding. During the observation period, payment to the pension scheme must be continued, as long as they are part of a collective agreement or employees' contracts.

5.2.2. Can pre-commencement pension entitlements be restructured in a business rescue, and if so how?

Not applicable

6. Avoidance powers, including safe harbour for failed rescue efforts in a later bankruptcy, and avoidance powers in pre-insolvency procedures and out-of-court workouts

6.1. Avoidance in insolvency procedures

6.1.1. Does the law provide for the avoidance of transactions entered into by the debtor prior to the commencement of insolvency proceedings, and if so on what basis?

For instance: does law provide for the avoidance of preference payments to creditors in the lead-up to insolvency? Does law provide for the avoidance of asset transfers at undervalue or in fraud of creditors? Who is empowered to avoid such transactions, and in what circumstances? What is the effect of avoidance?

Nullity in the "suspect period" (hardening period). – *Principle*. – Acts entered into during a period ranging from the date of insolvency ("payment default") until the date of the opening judgment, the so-called "suspect period" (or hardening period) may be declared null and void.

- *De jure nullity.* – Certain acts entered into during this period must mandatorily be annulled by the court, and said annulment is then qualified as "de jure nullity". The related acts are in limited number and listed in Article L. 632-1 of the Commercial Code. This penalty is warranted by the nature of the act perpetrated which is presumed to be fraudulently harmful to the rights of creditors and of the company.

- *Optional nullity.* – Conversely, cases of so-called "optional nullity" are left to the sovereign discretion of the court who may formally recognise them or not. Such cases of annulment are governed by Article L. 632-2 of the Commercial Code, and presuppose that the parties who dealt with the debtor had prior knowledge of the insolvency. They may affect all acts carried out for a consideration and all payments, notices of attachment, garnishments or oppositions.

- *Effects of nullity. – 1) Between the parties.* – The annulment challenges the validity of the services provided in performance of an illegal act by the debtor and co-contractors. Accordingly, a reciprocal restitution of the previously delivered services must take place between the parties to the business relation.

- *2) Toward third parties*. – In pursuance of ordinary law, the annulment generates *erga omnes* effects, independently of the third party's good or bad faith. Consequently, the annulment of the wrongful act will affect relations with third parties who may suffer the consequences or avail themselves of them, as the case may be.

6.1.2. In which of the insolvency procedures identified in Question 1.1.3 are such avoidance actions available?

Proceedings opened in cases of insolvency. – Considering that the "suspect period" ranges from the date of insolvency ("payment default") up to the date of the opening judgment, any actions for annulment during this period may be carried out only in the context of proceedings that presuppose the prior characterisation of a state of insolvency. Accordingly, such proceedings would include reorganization or court-ordered liquidation procedures.

6.1.3. How is litigation to pursue an avoidance action financed?

For instance: are state funds or funds from the debtor's estate available to finance particular actions of the insolvency practitioner (e.g. to combat wrongful trading and fraudulent transactions)?

Funding of nullity actions during the "suspect period". There are no specific provisions relative to the funding of annulment (avoidance) actions during the "suspect period".

6.1.4. Who has standing to make an application for avoidance of transactions? Can creditors also apply directly to court for a transaction entered into by the debtor to be set aside?

Capacity to act. – An annulment ruling, whether optional or *de jure*, presupposes a prior petition to the court. To this purpose, the following entities have capacity to act: the administrator, the court-appointed *mandataire*, the plan commissioner (*commissaire à l'exécution du plan*) or the Public Prosecutor's Office[102].

No nullity procedure initiated by an individual creditor is admissible, notwithstanding any interest he may invoke. The creditor may however file for an *actio pauliana* suit (for fraudulent conveyance) on the grounds of Article 1167 of the Civil Code to seek an annulment of the fraudulent acts carried out by the debtor. The Court of Cassation has however subordinated the admissibility of such action to the prerequisite that the creditor has properly declared his claim[103].

6.2. Pre-insolvency procedures and out-of-court workouts

[102] Article L. 632-4 of the commercial code
[103] Com. 10 juin 2008, n° 06-21.112

6.2.1. Are any avoidance powers available in the pre-insolvency proceedings identified in Question 1.1.2 above or in the out-of-court workout procedures identified in Question 1.1.1 above?

For instance: are there avoidance powers that enable some transactions to be set side (for example, fraudulent conveyances) whether or not the debtor is in formal insolvency proceedings?

***Actio pauliana* in fraudulent conveyance.** – Apart from any proceedings, whether preventive or insolvency, the creditors always have the freedom to initiate an *actio pauliana* suit on the grounds of fraudulent conveyance under Article 1167 of the Civil Code to seek an annulment of the fraudulent acts carried out by the debtor. They may also avail themselves of this remedy in the context of a *mandat ad hoc* or *conciliation* procedure, as well as in safeguard proceedings.

The *actio pauliana* for fraudulent conveyance is not subject to the stay on individual prosecution actions. The rule on stays is circumscribed to judicial actions intended to demand the payment of monies due or the cancellation of a contract due to a payment default, neither of which are grounds for an *actio pauliana* suit. This remedy is an "*action in revocation*" falling outside the scope of Article L. 622-21 of the Commercial Code and as such it may be initiated after the opening judgment.

6.2.2. Does the law provide any special protection from avoidance for agreements achieved in an out-of-court workout or pre-insolvency proceedings?

For instance: if new finance is agreed (by individual arrangement or as part of a safeguard plan) are these arrangements exempted from avoidance actions (see also Question 2.2.1 above)?

Security resulting from a court ratification (*homologation*) of the *Conciliation* agreement. – In the context of a *conciliation* procedure, the creditors frequently subordinate their agreement to an number of guarantees to be granted, whether or not accompanying partial payments. In the event of a non-performance of the amicable agreement and subsequent opening of reorganization proceedings (*redressement judiciaire*), the court is in charge of setting the formal date of insolvency (*cessation de paiement*) a posteriori, thereby determining the start of the "suspect period" authorising the annulment of a number of acts carried out during said period. However, Article 631-8 Paragraph 2 of the Commercial Code provides that the date of insolvency may not be postponed, stating that "*except in cases of fraud, [...] it may not be moved to a date prior to the final decision ratifying an amicable agreement in compliance with Article L. 611-8*". In other words, in the event that the conciliation procedure fails, the "suspect period"

can only start before agreement is ratified (*homologué*) by the court, and the guarantees undertaken in the agreement cannot be challenged.

This protection is restricted to *conciliation* agreements that are formally ratified (*homologué*) by the court. It is therefore not applicable to *conciliation* agreements that are merely recorded (*constaté*) by the President of the court, nor to any agreements that may be entered into in the context of a *mandat ad hoc* procedure.

7. Sales of substantially all of the debtor's assets on a going-concern basis

7.1. Is such a sale possible in pre-/insolvency proceedings?

Pre-insolvency proceedings Except for the new conciliation prepackaged plan (Please refer to section 7.3) there is no specific provision on the sale of substantially all of the debtor's assets on a going-concern basis in the context of pre-insolvency proceedings.

Insolvency proceedings In reorganization or liquidation proceedings, a sale plan, meaning an asset deal is one of the possible outcome of the proceedings. The sale plan must achieve three objectives: the continued operations of the transferred business, the preservation of jobs and the repayment of creditors.[104]

In a safeguard proceeding, a sale plan can only concern part of the activity of the company and can only occur with the consent of the debtor [105]

7.2. Who prepares/negotiates such a sale and who needs to authorise it? What conditions need to be met?

For instance: if assets are realised by the insolvency practitioner, do they need to be sold by public auction or can they be realised via a private sale? Does a private sale need to be authorised by the court and/or a creditors' committee? How are creditors protected (e.g. independent valuation of the business, information, authorisation)?

Process The sale plan process is an open bidding process. All offers are submitted to the judicial administrator or liquidator at a date fixed by the latter / the Court. Offers will then be examined by the insolvency practitioner and will be presented to the court with the insolvency practitioner's recommendation as to which offer to approve. The insolvency court will, after having consulted the creditor's representative, the debtor and the workers' council, select the offer most likely to ensure the continued operations of the business, the highest level of employment and the payment of creditors. The court may also order that the purchaser will not be authorised to sell the business during a certain period.

Conditions A sale plan offer must contain specific provisions :[106]
- business plan and cash flow forecast,
- description of the assets, rights and contracts to be assigned to the purchaser;
- the sale price and terms and conditions of payment;
- the date of completion of the sale;

[104] Article L 642-1 of the commercial code
[105] Article L 626-1 of the commercial code
[106] Article L 642-2 of the commercial code

- the number of jobs transferred and employment prospects;
- the guarantees provided for completion of the purchase;
- anticipated sales of assets during two years after the transfer.

Creditors Creditors have no say on the choice of the purchaser, which is made by the court when approving the sale plan. The debts of the debtor do not transfer to the purchaser of the business. The main exception is that financings which were granted to the debtor to acquire assets and which are secured by security interests (pledge or else) over those same assets automatically transfer to the purchaser of the business.[107]

7.3. Is it possible for a 'pre-packaged' sale to be achieved? (One in which the contract for sale is negotiated confidentially prior to the commencement of an insolvency procedure, without consultation with all creditors, which takes effect immediately on the commencement of the formal proceedings).

Conciliation "pre-packaged sale plan" The March 12 2014 Order has introduced an option for the conciliator, upon request by the debtor and after consultation with the creditors, to arrange a partial or total sale of the business which could be subsequently implemented in the context of further safeguard, reorganisation or liquidation proceedings.[108]

The contract for the sale plan is therefore negotiated during the conciliation, and when ready, the redressement judiciaire is opened so that the sales plan can be adopted by the court.

It enables the conciliator to directly submit to the court once the redressement or liquidation is opened the offer made by the identified buyer. It is subject to the supervision of the public prosecutor whose opinion needs to be requested.

[107] Article L 642-12 of the commercial code
[108] Article L 611-7 of the commercial code

8. Safeguard plan issues: procedure and structure; distributional issues

8.1. Tools for achieving a plan

8.1.1. What formal tools are provided by law for the negotiation and sanction of a safeguard plan that is capable of binding dissenting stakeholders?

Cram down: the 2/3 majority rule in creditors' committees Indirect tools are available in case of creation of creditors' committees with the "2/3 majority rule" applying. Indeed, provided that the company satisfies legal criteria[109], its main creditors are included in two creditors' committees (one of financial creditors and the other of main trade creditors) and, where applicable, a bondholders' committee to which the debtor submits proposals to reach an agreement on a recovery plan. Each committee must accept the propose plan by a majority representing 2/3 of the total debt held by the voting committee members. This decision will bind all members of the relevant committee and all parties (including dissenting committee members and shareholders).

Eviction of the majority shareholder (no, but)
The mandatory squeeze-out initially contemplated by the project of executive order dated March 12, 2014 had eventually been dropped. A new tool is now provided consisting in the context of a reorganization proceeding and if the draft restructuring plan includes a modification to the capital of the company which cannot be adopted in time because of a dissenting shareholder, the appointment of an agent by the court entrusted to convene the shareholder meeting and vote on behalf of the dissenting shareholder which can result in the eviction of the majority shareholder.

Sanction of non-performance: In the event of non-performance by the company of a pre-insolvency agreement: the president of the court may terminate the agreement[110]. In the event of non-performance by creditors, they remain contractually bound vis a vis the company which can obtain the court enforcement of the agreement. In the event of non-performance of the plan adopted by the court: the court may eventually resolute the plan if not fully executed (in the absence of cessation of payment) and has to do so if the cessation of payment occurred during the execution of the plan[111].

8.1.2. Are these formal tools available in all pre-/insolvency procedures?

[109] The debtor produces financial statements of which have been certified by statutory auditors or drafted by a certified public accountant and which have reached one of the following thresholds in terms of employees (20), turnover (EUR 3,000,000 tax excluded) and aggregate amount of balance sheet (EUR 1,500,000); or which have filed consolidated financial statements - Articles L. 628-1 and L. 628-3 of the commercial code
[110] Article L. 611-10-3 of the commercial code
[111] Article L. 626-27 of the commercial code

No cram-down in *mandat ad hoc* procedures: Negotiations are conducted in an amicable context, which implies that the *mandataire ad hoc* shall not use of coercive means. Besides, the *mandataire ad hoc* cannot force the creditors to accept a restructuring plan. In addition, considering that the judge does not intervene in the conclusion of the agreement to be reached, this agreement does not benefit from the legal security attached to a conciliation agreement. In the absence of a unanimous consent, and unlike in a conciliation proceeding, there is no possibility to convert the *mandat ad hoc* into an accelerated safeguard or a financial accelerated safeguard so as to implement a restructuring plan supported by a majority of creditors and override the refusal of dissenting creditors.

Indirect tools available in *conciliation* procedures: Even if negotiations are conducted in an amicable context, which implied that the *conciliateur* shall not use of coercive means, he can indirectly force the creditors to sign an agreement in the absence of unanimous agreement. Indeed, the company may request to implement a prepackaged plan provided that the restructuring plan benefits from sufficient support from the creditors such that is likely to be adopted (which implies the support of 2/3), the agreement can be implemented through an accelerated safeguard or an accelerated financial safeguard in the framework of which committees will be created. Otherwise, the court may impose a rescheduling of debt repayments over a maximum period of 10 years but cannot impose a write-off of claim.

Pursuant to order dated on 12 March 2014, the conciliation allows to prepare a pre-pack disposal: *at the request of the debtor and after the consultation of the participating creditors*, the *conciliateur* could be tasked to organize a partial or total sale of the company that could be implemented as appropriate within a subsequent proceeding of safeguard, reorganization or liquidation procedure.

8.1.3. Are these formal tools available outside pre-/insolvency procedures?

No, these measures are authorised in derogation of ordinary law, and constitute levers specific to the law applicable to distressed companies.

8.2. Scope of plan:

8.2.1. Creditors:

a) Which classes of creditor claim can be affected by such safeguard plans?

For instance: can secured or preferential creditors be bound by a plan; can prospective or contingent creditors (such as potential tort creditors) be bound by a plan; can fiscal claims owed to the State (e.g. tax) be part of the plan?

Classes of creditors affected by the safeguard plan. Non-secured, secured or preferential, prospective or contingent creditors can be bound by a plan since their claim is mentioned in the filing made by the debtor itself or if the creditor went through that process.

Even social or fiscal claims owed to the State (e.g. tax) can be part of the plan, within the limits of EU principles dictated by competition law. Public administration creditors may thus agree to cancel all or part of the debtor's debts under terms similar to those that would be granted to the debtor at arm's length market conditions by a private economic operator in the same situation[112]. Tax debt cancellations may apply among other to any direct taxes, including on the principal amount. As regards indirect taxes, "only late payment penalties, surcharges, penalties or fines may be cancelled", excluding the principal amount (paid by a third party). These creditors may also consent to assign their preferential rank, or even to relinquish their privileges or liens.

b) Does the law prescribe the number and types of classes of creditors?

For instance: does the number of classes of creditors depend on the individual case or are the classes fixed by law (e.g. secured and unsecured; financial and trade)?

Number and types of classes of creditors The number of classes of creditors does not depend on the individual case: (i) all individual creditor has the right to participate and, as the case may be, (ii) the classes are fixed by law (financial, trade and bondholders' committee).

Indeed, where debtor meets certain legal conditions, committees of creditors are created: financial creditors are classified within one class, trade creditors within as second class and Bondholders within a third class. All condition for the creation of committees are fixed by French law.

Within each of these classes, French law does not distinguish between creditors. Each class of creditors will vote collectively on the plan (except unimpaired creditor). The plan is approved by a committee if it is accepted by a 2/3rd majority in amount of claims held by voting creditors of that class, provided that weight of a creditor within a class only depends on the nominal value of its claim.

[112] Article L. 626-6 of the commercial code

The method of calculation takes into account the rank of subordination, the existence of a credit default swap or the existence of any other agreement which would alter the vote of the creditor[113].

c) Where secured or preferential creditors can be affected by such safeguard plans, does the law afford them any special protection in the negotiation and/or sanction of the plan?

Treatment of preferential creditors when drafting the plans. By virtue of principle, the preferential creditors are consulted under the same conditions for the establishment of the plan (individually or in creditors committees, as appropriate). The following entities are however excluded from the committees: (i) public creditors (beneficiary of a general preferential rank (*privilege*)[114], and (ii) claims specifically secured by a "trust by way of security" (*fiducie-sûreté*) that are excluded from the restructured liabilities in the context of the committees[115].

Rescue and reorganization plans: Preferential claims may be treated specifically. In the context of a safeguard plan decided jointly with the committees, the law expressly authorises a differentiated treatment between creditors, provided it is warranted by differences in their situations, which may be the case when specific guarantees exist. The law further requires that the draft plan must take into consideration any subordination agreements[116].

In the context of a safeguard plan decided outside of committees: the law does not expressly prohibit the debtor from proposing distinct treatments per category of creditors (in particular to take into account the situation of preferential creditors), but in practice the efficacy of such proposals is conditioned to the individual consent of the creditors. Failing such consent, the court can only dictate uniform payment terms applicable to all creditors who rejected the proposed repayment terms, but no uniform terms per category of creditors[117].

Preferential creditors benefitting from special situations. A creditor beneficiary of a *fiducie-sûreté* trust without dispossession may not dispose of the assets held in trust during the performance of the rescue or reorganization plan[118]. Individuals who have injected new money contributions in cash or supplied new goods or services to a debtor subjected to a *conciliation* procedure where the agreement was ratified by the court (*homologué*) (during the proceedings or during the performance of the agreement), in order to ensure the sustained continuation of the business, are not affected by the

[113] Article L. 626-30-2 of the commercial code
[114] Article L. 626-30 Paragraph 3 of the commercial code
[115] Article L. 626-30 Paragraph 4 of the commercial code
[116] Articles L. 626-30-2 & L. 626-32 of the commercial code
[117] Article L. 626-18, Paragraph 4 of the commercial code
[118] Article L. 622-23-1 applicable to administrative reorganization, with reference to Article L. 631-14 Para. 1

deadlines prescribed in the rescue or reorganization plan adopted subsequent to the relevant *conciliation* procedure. Such contributors benefit from a legal privilege [119] conferring them a priority payment rank concurrently with the adoption of the plan, immediately after payment of the super-preferential wage claims held by the AGS (*Agence de garanties salariales,* or wage guarantee state fund) and after court and legal costs (so-called "*créances indépassables*" or "impassable claims").

Assets disposal plan. When the disposal includes assets encumbered with a special security, the judgment ruling on the disposal plan must allocate the sale proceeds among the various encumbered assets sold, while respecting the ratio between the asset value and the total value of assets sold[120]. The preferential right is therefore automatically limited by the offered selling price and the preferential creditor has no recourse even if the amount of his allocated portion seems derisory. Furthermore, the approval of an assets disposal plan entails the release of all charges encumbering the assets included in the sale, hence extinguishing any rights to sue by the preferential creditors [121].

The sureties (special privilege, lien, pledge or mortgage) granted as collateral to a loan obtained to finance an asset included in the scope of the disposal are then automatically transferred ipso jure to the buyer; the buyer is also liable for the loan repayment[122].

In the event of a disposal of movable or real property assets held in retention, such sale may only take place after the creditor retaining the assets and having filed his claim, is fully paid off effectively and prior to the adoption of the disposal plan, unless agreed otherwise by said creditor[123]. Case law has consistently applied such provisions to the "effective retention right", and the majority doctrine considers that this solution also applies to the "fictitious retention right".

A creditor beneficiary of a *fiducie-sûreté* trust without dispossession is afforded a special treatment: The trust agreement under which the trust-constituting debtor retains the use of the assets held in trust as collateral may not be transferred or assigned by the court, unless agreed otherwise by the beneficiary, in the context of the approval of the disposal plan[124].

Protection of secured creditors in the event of optional cancellation of a safeguard plan for non-performance of commitments in the absence of insolvency. Prior pre-opening secured creditors who could not enforce their sureties during the performance of the plan, regain their rights against the debtor as long as he remains *in bonis* on the balance of their debt claims [125]; conversely the majority doctrine considers that the sureties set up as collateral for the performance of the plan will survive its court-ordered cancellation.

[119] Article L. 611-11 of the commercial code
[120] Article L. 642-12 Paragraph 1 of the commercial code
[121] Article L. 642-12 Paragraph 3 of the commercial code
[122] Article L. 642-12 Paragraph 4 of the commercial code
[123] Article L. 642-12 Paragraph 5 of the commercial code
[124] Article L. 642-7 Paragraph 5 of the commercial code
[125] Article L. 622-27 I Paragraph 4 of the commercial code

The "fictitious retention right"[126] that a creditor affected by the plan may hold, regains its effectiveness[127]. If the cancellation of the safeguard plan results in a payment default (insolvency), the preferential creditors will benefit from an exemption to the obligation of filing their claims in the subsequently opened proceedings (*see below*).

Protection of secured creditors in the event of mandatory cancellation of a safeguard plan due to insolvency (payment default) or of a reorganization plan. Prior pre-opening secured creditors who could not enforce their sureties during the performance of the plan, regain their rights against the debtor. They will not however be allowed to enforce them since subsequent judicial proceedings will be opened[128]. The creditors in the first proceedings are exempted from the obligation of filing their claims in the second proceedings[129]:

- Creditors covered under the cancelled plan or creditors treated off-plan but whose claims were accepted as liabilities in the previous proceedings (e.g. AGS for wage claims, or new money providers) are exempted from the obligation of declaring their claims and sureties as liabilities in the new proceedings;
- Post-opening preferential creditors under the first observation period (privilege under Article L. 622-17 III) are exempted from the obligation of declaring their claims in the subsequently opened proceedings, to ensure that they will not be trapped by the failure of the first plan which they had supported themselves by keeping their business relations with the debtor.

Exposure of secured creditors in the event of cancellation of the disposal plan. The court may annul or terminate any acts entered into for the performance of a cancelled plan, or at the very least the disposal transactions[130], resulting in the annulment of the property ownership transfer. A preferential creditor who may have benefitted from the assignment of his collateral to the buyer on the grounds of Article L. 642-12 Paragraph 4 would then be affected since the assignment of his collateral to the buyer would be annulled and the annulment would lead to the reimbursement of the purchasing price to the buyer.

d) Are all creditors potentially affected by a proposed safeguard plan entitled to notice of it, and to participate in negotiations over its content?

Please refer to section 8.2.1. a) & b)

[126] Article 2286 4° of the Civil Code
[127] Article L. 622-7 I Paragraph 2 of the Commercial Code
[128] Article L. 622-27 I Paragraph 4 of the commercial code
[129] Article L. 626-27 III of the commercial code
[130] Article L. 642-11 Paragraph 3 of the commercial code

e) May creditors propose a safeguard plan, and if so may they do so in competition with a plan proposed by the debtor?

Pursuant to the executive order dated 12 March 2014, each member of creditors' committee has now the possibility to challenge the plan drafted by the debtor by proposing an alternative one[131] which will be voted and submitted to the court under the same condition as the debtor's project.

8.2.2. Shareholders:

a) May shareholders' rights be affected by a safeguard plan?

Please refer to section 8.2.2. b)

b) If so, in what circumstances?

The court who approves the rescue or reorganization plan may not (i) substitute for the business partners or shareholders, nor (ii) compel them expressly to adopt any particular decision, nor (iii) increase their commitments[132].

However, and by way of exception, a business partner who is also a creditor and member of a creditors committee, may have his commitments increased by a measure which he may oppose but which may be adopted by a majority vote of the creditors committees, such as a forced conversion of debt into equity.

Furthermore, and indirectly, the court may compel the company's partners/shareholders to adopt changes in the bylaws as deemed necessary for the company's reorganisation, and if not previously adopted in the preparation of the plan[133]. As needed, the court may assign to the administrator the power to convene the assembly who has competence to implement such changes[134].

In practice, although the partners/shareholders remain free to respond or not to the administrator's notice to convene a general partners/shareholders meeting, the court may technically bypass any inertia from the partners/shareholders by deciding to substitute to the normally applicable rules of quorum and majority the rules specified under Article L. 626-16-1 of the Commercial Code providing for a vote by "*a majority of the voting rights held by partners or shareholders present or represented, provided they own at least one half of the shares entitling to voting rights*". Furthermore, while the shareholders meeting retains full freedom for its decision, it should be remembered that the court may decide to

[131] Article L. 626-30-2 of the commercial code
[132] Article L. 626-10 of the commercial code
[133] Article L. 626-15 of the commercial code
[134] Article L. 626-16 of the commercial code

cancel the plan in the event of non-compliance with the commitments taken under this plan[135].

In addition, if the approved plan provides for cash injections, the court will set the deadline by which the partners or shareholders have the obligation to release their new money contributions. The law further provides for the possibility of offsetting their contribution commitment up to the amount of the reduction of their debt claim agreed under the plan, as the case may be[136].

Upon approval of the plan, the court may also order a reconstitution of the share capital if the company's shareholders equity has fallen to less than half of the authorised capital, up to an amount set by the court-appointed administrator[137].

No legal measure to expropriate partners exists under French law (apart from a system of forced sale of shares held by management executives). A single measure is provided in administrative reorganization proceedings, although it cannot really lead to any forced takeover[138]. It provides that, in the specific event where (i) the draft plan provides for changes in the share capital in favour of one or several individuals who commit to implementing the plan, and if (ii) the shareholders equity of the debtor company has not been reconstituted because of one or several dissenting partners/shareholders, then the administrator may request the court to appoint a proxy agent in charge of convening the competent assembly for the purpose of voting on equity reconstitution up to the amount set by the administrator – where the agent will vote in lieu of the dissenting partner(s)/shareholder(s). This system can lead to the dismissal of a partner, particularly since approval clauses are deemed to be "unwritten" in case of a change in the share capital provided under a draft rescue or reorganization plan[139]. From that point on, the approval of a newcomer as shareholder, in particular via a debt-to-equity conversion, would be entrusted to the creditors.

8.2.3. Content of plan:

a) Are there any statutory limitations as to content and/or scope of the plan?

For instance: are there any restrictions on reducing the principal amount of debt owed to creditors in the plan or modifying any secured interest?

The plan submitted to the committees may include debt rescheduling, debt write-offs and debt-for-equity swaps and may also provide for a partial sale of the business. In addition to the approval of the committees at a two-thirds majority, debt-to-equity swaps require the approval of shareholders. There is no maximal duration, as long as the committees approved the plan.

[135] Article L. 626-27 I Paragraph 2 of the commercial code
[136] Article L. 626-17 of the commercial code
[137] Article L. 626-3 Paragraph 2 of the commercial code
[138] Article L. 626-3 Paragraph 2 *in fine* of the commercial code
[139] Article L. 631-19 II of the commercial code

Provided that the plan is approved by the committees and – for debt-to-equity swaps – the shareholders, and that creditors' interests are adequately preserved, the court approves the plan, which becomes binding also on dissenting committee members.

In a context of individual consultation of the creditors, the proposal of repayments may only include debt reschedulings, debt writeoffs and debt-for-equity swaps.

If the proposal / plan is not approved by a creditor/committee, the court can only impose a rescheduling of debt repayments over a maximum period of 10 years, but cannot impose a write-off of claim.

In a judicial reorganization, the court may also order a total or partial sale of the business ("asset-deal") at the request of the court-appointed administrator, if a serious reorganization plan cannot be submitted to the court[140].

8.3. Negotiation of the plan

8.3.1. Who is responsible for proposing a plan and negotiating its terms?

In safeguard proceedings: the company with the assistance of the court-appointed judicial administrator.

In reorganization proceedings: the court-appointed judicial administrator with the assistance of the company.

8.3.2. What rights do stakeholders have to notice of the proposed plan, and to participate in negotiations over its content?

As previously mentioned, the plan submitted to the committees include debt-for-equity swaps which require the approval of shareholders. (Please refer to section 8.2.2. b))

8.4. Voting:

8.4.1. Who is entitled to vote on a plan, and who determines this?

Outside of a committee context, the creditors must vote on the proposals for debt settlement presented by the debtor[141] under the following conditions:

[140] Article L. 631-22 of the commercial code

- Proposal on payment terms and debt forgiveness: individual or collective consultation intended to obtain the consent of each creditor who filed a claim; failure to reply within thirty days is deemed to constitute consent to the proposal.
- Proposal on a debt-to-equity conversion: individual consultation in writing intended to obtain the consent of each creditor who filed a claim; failure to reply within thirty days is deemed to constitute rejection of the proposal.
- Claims unmodified by the payment terms offered or planned for full cash payment: no consultation of the relevant creditors.

In the context of creditors committees: the creditors vote collectively on the draft plan as a whole. The law provides that the vote of creditors members of the committees is proportional to the amount of their respective claims (all taxes included) on the date of the opening judgment, and that creditors whose claim (i) is not affected by the draft plan, or (ii) whose payment terms are not modified, or (iii) for which a full cash payment is planned, are excluded from the vote[142].

The committee members must inform the administrator of the existence of any prior agreements:

- subjecting their vote to prerequisites,
- on full or partial payment of their claim by a third party, or
- constituting subordination agreements.

In such cases, the administrator must submit to these creditors the method for calculating the votes corresponding to the claims that entitle them to cast a vote, within eight days prior to the voting date[143].

8.4.2. How are disputes over voting entitlements resolved?

In the event of a disagreement on the calculation method for creditors' voting entitlements in a particular situation (see above):

- The creditor's disagreement must be expressed at the latest within 48 hours prior to the voting date;
- The creditor or the administrator may refer the disagreement to the President of the court who will rule in chambers on the dispute[144] to set the amount of the claim used to calculate voting entitlements;
- Right to appeal the order issued by the President of the court.

8.4.3. What modes of voting are permissible?

[141] Article L. 626-5 of the commercial code
[142] Article L. 626-30-2 of the commercial code
[143] Article L. 626-30-2 of the commercial code
[144] Article R. 626.58 al. 2 of the commercial code

For instance: are creditors allowed to vote on a restructuring plan via distance means of communication (e.g. on-line)?

The administrator has sole competence to decide on the conditions of the voting procedure (distance vote, secret ballot, etc.) of the committees and of the bondholders assembly.

The required two-third majority vote corresponding to the amount of claims held by the committee members is calculated on the basis of the votes cast and according to the conditions authorised by the administrator.

8.4.4. Do trading claims ban new creditors from voting?

No. The law provides that the obligation or the capacity, as the case may be, to belong to a creditors committee is accessory to the claim that arose prior to the proceedings opening judgment, and can be transferred ipso jure to the claim's successive holders, notwithstanding any clause to the contrary[145].

8.5. Confirmation and cram-down:

8.5.1. What quorum rules apply to a meeting to vote on a plan?

There are no prerequisites on a quorum[146]. Abstention from a creditor member of a committee cannot impede the adoption of the plan, nor shield the creditor from the plan's effects.

8.5.2. By what majority (in value or number) does a plan have to be approved?

For instance: are stakeholders divided into classes, and is each class required to approve the plan by a particular majority?

The vote in each committee is adopted by a two-third majority, proportionately to the amount of claims (all taxes included) held by the committee members who have cast a vote (hence the absence of any quorum rules, see above).

[145] Article L. 626-30-1 of the commercial code
[146] Article L. 626-30-2 of the commercial code

8.5.3. Where the debtor is a corporate entity, do shareholders have to approve of the plan?

When the draft plan provides for a change in the share capital, the commitments made are subordinated to approval by the extraordinary shareholders meeting or by the partners general meeting, or by special assemblies (combining holders of preferential shares or of securities entitling to access to the share capital), as relevant[147]. However if the company's shareholders equity has fallen to less than half of the authorised capital, the general meeting will be convened in priority in order to reconstitute the shareholders' equity up to the amount proposed by the administrator, which may not be less than half of the authorised share capital.

Approval clauses remain effective during a safeguard plan, in order to foster internal takeovers, but are neutralised in the context of a reorganization plan in reorganization proceedings[148], thereby exposing the existing partners or shareholders to a forced external takeover further to a vote adopting a draft plan that provides for share subscription by a third party.

Furthermore, if the general meeting's vote fails to approve the reconstitution of the shareholders equity, any dissenting shareholder might be forced to vote in favour of new equity capital underwritten by a third party, either on his own behalf or by proxy of an agent appointed by the court upon petition from the court-appointed administrator[149].

In any circumstances, the implementation of commitments made the shareholders or partners or by new equity underwriters remains subordinated to the court's approval of the plan[150].

8.5.4. If the requisite majority of stakeholders or classes of stakeholder approve a plan, is there any further requirement for confirmation of the plan - and if so, what?

For instance: are there requirements for court confirmation, and if so what factors will influence the court to confirm the plan? (e.g. (i) procedural requirements for the notification of affected creditors and for the adoption of the plan are fulfilled, (ii) that the plan does not reduce the rights of dissenting and unknown creditors below what they would reasonably receive if the company went into liquidation, and/or (iii) that the plan does not change the order of priority which would be afforded to creditors in the event of liquidation?).

[147] Articles L. 626-3 et L. 631-19 I Paragraph 3 of the commercial code
[148] Articles L. 626-3 et L. 631-19 II of the commercial code
[149] Article L. 626-3 Paragraph 2 *in fine* cf. §8.2.2.2 b) of the commercial code
[150] Article L. 626-3 Paragraph 3 of the commercial code

The consent of creditors is not sufficient, whether the proceedings involve or not the creation of committees, and the decision to approve the safeguard plan falls under the remit of the competent court.

8.5.5. Does the court examine the overall fairness of the plan including the constitution of classes of creditors for voting purposes?

Proceedings without committees. The decision to approve a rescue or reorganization plan developed outside of any committee ultimately falls under the remit of the competent court who must rule on its adoption based on the purposes assigned by law to the safeguard or reorganization procedures. Accordingly, the plan must enable the continuation of the business activity, the retention of jobs and the settlement of liabilities[151].

The law gives the court sovereign discretion to assess the conformity of the plan submitted for its approval with the objectives of the proceedings, as well as its reliability and feasibility.

Proceedings with committees. The draft plan adopted by a favourable vote of the committees, along with any other draft plans if several plans have been presented by one or several other creditors, are submitted for approval to the court who will compare them and rule on a plan after verifying that it is reliable, that the interests of all creditors are duly protected and, as appropriate, that approval by partners/shareholders meetings (see 8.5.3 above) was duly obtained under the requirements specified by law (although the court can only ratify effectively the draft plan approved by a favourable vote of the committees).

The court reviews more specifically the consequences of the plan for minority creditors and off-committee creditors.

The court hearing can be held only 15 days at least after the committees' and general meetings' votes, to ensure that the vote contesting deadline has ended (i.e. 10 days as of the date of the vote by the last committee or general meeting[152]). If any objections are received, the same judgment will rule on this subject at the ratification (*homologation*) hearing.

Thus, apart from any contestations, the court's power of discretion is limited if the draft plan submitted by all committees has been approved.

If the draft plan cannot be adopted due to the absence of a vote within the time requirements, or of a proper vote, or of a ratification (*homologation*) by the court, then the establishment of a revised plan will resume with individual consultations of all creditors[153], or else in the context of administrative reorganization proceedings opened

[151] Articles L. 620-1, L. 626-1, L. 631-1 et L. 631-14 of the commercial code
[152] Article L. 626-34-1 of the commercial code
[153] Article L. 626-34 of the commercial code

subsequently by the debtor (or possibly forced on the debtor!) if the termination of safeguard proceedings were to lead to certain insolvency within a short time[154].

8.5.6. Can a confirmation order be appealed? Does an appeal delay the implementation of a confirmed plan?

The court order ruling on the approval of the safeguard plan is open to opposition by third parties, i.e. appeal lodged by the debtor, the administrator, the court-ordered *mandataire*, works councils or personnel representatives, the Public Prosecutor, or by a creditor member of a committee or of the bondholders assembly objecting to the collective decision[155].

The appeal, apart from an appeal lodged by the Public Prosecutor[156], does not have the power to stay the enforcement of the court's decision, and the plan can therefore be implemented despite such appeal.

8.5.7. Once confirmed, who does the safeguard plan bind?

The court's ruling makes the agreed proposals applicable to and binding on all committee members, and as appropriate the bondholders assembly. The court can only take due note of and record the time extensions and debt reductions as approved by the committees, without any possibility to modify the terms as voted.

This is the case as well for all minority creditors who may have voted against the ratified plan. Conversely, creditors whose claim is secured via a trust by way of security (*fiducie-sûreté*) are not affected, up to the amount of the relevant claim[157].

[154] Article L. 622-10 of the commercial code
[155] Article L. 661-1, I, 6° of the commercial code
[156] Article L. 661-1 II of the commercial code
[157] Article L. 626-31 of the commercial code

9. Multiple enterprise/corporate group issues

9.1. Does insolvency law make special provision for insolvent groups of companies in a domestic context? If not, how are such cases handled?

For instance: does the law make special provision for cooperation between insolvency practitioners or courts at domestic level in insolvent group cases?

Principle. – The French insolvency regime does not include specific rules tailored for corporate groups. Under French law, a company is deemed to be autonomous and independent (*Principe de l'autonomie de la personne morale)* and there is no statutory or regulatory provisions on joint procedure.

As a consequence, (i) a separate insolvency proceeding must be opened with respect to each distressed company of the group, (ii) a company's assets may not be affected by a proceedings commenced against another company of the same group, (iii) companies of a same group may be subject to various types of proceedings.

9.2. Does insolvency law allow for procedural consolidation of domestic insolvency proceedings concerning companies in a corporate group?

For instance: does insolvency law allow for any kind of joint administration (i.e. the consistent procedural joint treatment of the insolvency proceedings), for example through a single court rather than through different courts within the jurisdiction? Can the insolvency practitioner consolidate his or her remuneration over the joint insolvent estates?

Procedural consolidation. – Pursuant to article R. 600-1 of the French Commercial Code, the court having territorial jurisdiction to hear insolvency matters with respect to companies incorporated in France is the court where the company's head office is located.

However, where interest at stake requires so, the Court of Appeal may at the request of the Public Prosecutor or of the President of the Commercial Court, decide to transfer an insolvency case to another Commercial Court within the jurisdiction of the Court of Appeal.[158] The French Supreme Court may refer the case to another court within the jurisdiction of another Court of Appeal.[159]

[158] Since the Order dated March 2014, this procedure enables to gather before a single court proceeding related to both civil and commercial companies.
[159] Article L. 622-2 of the Commercial Code

Such transfer of proceeding can be decided based on various criteria among which, the existence of complementary activities, common management teams, significant intercompany claims. Practitioners have attempted to avoid such conflicts and centralise all proceedings of the group companies before the same court using the concept 'centre of main interests' (COMI)[160] (stemming from the EC Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EU Insolvency Regulation), which was sometimes applied by French court in pure domestic matters as well.

Unless the court orders a consolidation of proceedings, an administrator, and creditor's representative (or a liquidator in liquidation proceedings) are appointed in each proceeding. However in practice, the same insolvency practitioner will be appointed by the court.

The Order dated March 2014, introduced a new article L. 622-8 pursuant to which, the Court that opened a proceeding on the most significant company of the Group may appoint an administrator and a creditor's representative common to all the proceedings in addition to those insolvency practitioners appointed in ach single proceeding. They might be assigned mission of coordination. [161]

9.3. Does insolvency law allow for substantive consolidation of domestic insolvency proceedings across a corporate group into a single procedure, and if so how and subject to what limitations?

For instance: if consolidation takes place to the detriment of individual creditors, are such creditors entitled to compensation out the consolidated estates?

Substantive consolidation – Article L. 621-2 of the Commercial Code provides that a consolidation of insolvency proceedings may be ordered by the court either in the cas of commingling of estates or fictitious corporate entity.

1) Commingling of assets and liabilities (*confusion de Patrimoine*) Such commingling will be demonstrated two alternative (but sometimes cumulated) criteria : commingled accounts (i.e. where it is impossible to distinguish the assets and liabilities of a company from another) and the the existence of abnormal financial flows between the two entities.

2) Fiction: The company is found to be a fictitious corporate entity, without an independent management running a real business.

Status of creditors – Such consolidation can be initiated at the request of the company, the administrator, the creditor's representative, the liquidator, the public prosecutor or

[160] A company's COMI is rebuttably presumed to be the place of its registered office.
[161] Article R. 622-18 et seq. of the commercial code

directly by the court on its own initiative.[162] French Court denied the right to creditors to ask for such consolidation.[163]

Appeals on such order can only be made by the companies subject to the consolidation of the proceedings, the creditor's representative, the liquidator, the administrator and the prosecutor.[164] However, all creditors might appeal on a consolidation order based on a third party proceedings.[165]

Article L. 621-2 al. 4 allows the President of the Commercial court to order any protective measure useful to the estate of the company subject to a consolidation of proceedings.

Where a consolidation of proceedings is ordered by the court, the creditors of all consolidated companies are subject to the same joint procedure including proof of claims verification process. The combined list of creditors provides for a unique ranking of all creditors.

[162] Article L. 621-2 al 2 of the commercial code
[163] Cass. Com. 19 02 2002, Dr. Soc. 2022, n°134 n. LEGROS
[164] Article L. 661-1, I, 3° of the commercial code
[165] Article L. 661-2 of the commercial code

10. Special arrangements for small and medium-sized enterprises (SMEs) including natural persons (but not consumers)

10.1. Does the law make any special provision for resolving distress in SMEs, and if so what (if anything) is the stated purpose of such provisions?

For instance: does the law provide for a simple safeguard plan for use by SMEs, or a simplified insolvency procedure?

The *Loi de Sauvegarde* does not specify any provisions specific to SMEs. The procedures provided under the Safeguard Law apply to businesses of any size. It should however be noted that two specific procedures similar to business liquidation are intended in priority for small-size enterprises.

Simplified Judicial Liquidation (*Liquidation judiciaire simplifiée, or LJS)*. – A simplified court-ordered liquidation procedure exists for small-size enterprises.

- *Mandatory simplified regime* (*Régime simplifié obligatoire)*. – The simplified liquidation procedure is mandatory whenever two prerequisites are met[166]: (i) the debtor's assets do not include any real property; and (ii) the debtor meets two cumulative thresholds: the business does not have more than one employee (making the simplified regime eligible to very small businesses whose manager holds an employment contract) and ex-VAT revenue equal to or lower than €300,000.[167]

- *Optional simplified regime (Régime simplifié facultatif)*. – The simplified procedure is possible optionally where two prerequisites are met: (i) absence of any real property assets, and (ii) two cumulative thresholds exist: 5 employees at most and ex-VAT revenue not exceeding €750,000.[168]

- *Purpose of the simplified liquidation procedure (LJS)*. The purpose of the LJS procedure is to accelerate the proceedings and enable the debtor to close the procedure at the lowest possible cost. Article L. 644-5 provides for a maximum deadline of six months in a mandatory LJS or one year in an optional LJS, as of the date of the court decision ordering or deciding the application of the simplified procedure, for the court to pronounce the judicial liquidation proceedings closed, after hearing or duly summoning the debtor. By way of exception, the court may rule to extend the proceedings for a period not exceeding three months via a specially substantiated order. Within the same deadlines, the court may also decide to terminate the simplified procedure and convert it into an ordinary procedure.

[166] Article L. 641-2 of the commercial code
[167] Article D. 641-10 of the commercial code
[168] Article D. 641-10 Para. 2 of the commercial code

Personal reinstatement (*Rétablissement personnel*). – *Conditions of procedure opening*. – The law provides for a procedure of business reinstatement without liquidation applicable only to a natural entity entrepreneur not incorporated as an EIRL company. This procedure is subordinated to several prerequisites[169]: (i) the debtor must not be engaged in any insolvency proceedings, nor have engaged in any court-ordered liquidation proceedings closed due to insufficient assets or in any business reinstatement procedure for at least five years; (ii) the debtor must not own any real property assets; (iii) the debtor has not had any employee for the past six months (nor be engaged in any proceedings pending before the Prud'hommes labour courts); and (iv) the debtor's assets value must be less than 5,000 euros.[170] Lastly, the (voluntary) petition to open a personal reinstatement procedure presupposes the concurrent opening of judicial liquidation proceedings.

- *Comparison with the simplified judicial liquidation*. – The simplified judicial liquidation procedure produces all the effects of a normal liquidation procedure as regards assets and liabilities, while the business reinstatement procedure does not account either for the assets, nor the ongoing contracts, not any temporary continuation of the business, since its single purpose is to release the debtor of his liabilities. Thus, the business reinstatement procedure is better suited to a debtor who is ceasing or has already ceased his business activity. Effects at closing are different: debts are extinguished in one case, individual prosecutions are not resumed in the other case.

10.2. In practice, what is the dominant strategy in an SME insolvency? (Winding up or selling the assets on a piecemeal basis? Reorganisation? Going concern sale?).

The purpose of the Law is to establish a rescue/reorganization plan with or without restructuring, but with full or partial settlement of liabilities, and possibly, as appropriate, with a partial assets disposal plan. In the absence of a reorganization plan, a full assets disposal plan will be sought. In the absence of a reorganization plan and of a disposal plan, a court-ordered liquidation will follow.

10.3. In cases where the SME debtor has no realisable assets, are any of the insolvency procedures identified in Question 1.1.3 available? Is a discharge available for the entrepreneur?

Even if the company does not own any disposable assets, it may be subject to the procedures provided under the *Loi de Sauvegarde*: pre-insolvency "safeguard" procedure (*sauvegarde*), administrative reorganization (*redressement judiciaire*) or court-ordered liquidation (*liquidation judiciaire*), depending on its ability to submit a rescue or

[169] Articles L. 645-1 & L. 645.2 of the commercial code
[170] Article R. 645-1 of the commercial code

reorganization plan. If liquidation is the only conceivable outcome, then the company may be eligible for a simplified liquidation procedure (LJS) or a business reinstatement procedure.

Simplified judicial liquidation and business reinstatement. – See 7.1. above