Acquisition Finance

In 20 jurisdictions worldwide

Contributing editors
Ryan Bekkerus, Alexandra Kaplan and Marisa Stavenas

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GETTING THE DEAL THROUGH

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General structuring of financing

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

Leaving aside smaller transactions where French law and French language are typically used, larger deals featuring international lending syndicates use either French or English law governed loan and intercreditor agreements depending mostly on sponsor's precedents and composition of the syndicate. A number of transactions have also been financed using New York law governed high-yield bonds and more recently, term loan debt when a majority of North American investors were involved. Security documents are normally governed by the law of the jurisdiction where the assets are located.

Subject to exceptions, the French courts would uphold a choice of foreign law to govern an agreement in a suit brought before them where such foreign law is pleaded and proved, it being noted that notwithstanding the recognition of such governing law, where all other elements relevant to that agreement at the time of the choice are located in a country other than the country whose governing law has been chosen, it is possible that the choice of the law will not prejudice the application of provisions of the law of that other country that cannot be derogated from by agreement or in one or more EU member states, it is possible that the choice of the law will not prejudice the application of provisions of EU law (where appropriate, as implemented in France) that cannot be derogated from by agreement. French courts may also take into account the law of the country in which performance takes place, in relation to the manner of performance and the steps to be taken in the event of defective performance. Further, if an original action is brought in France, French courts may refuse to apply the foreign law chosen by the parties if the application of such law is deemed to contravene French international public policy.

Enforceability in France of judgments from the courts of other EU member states is usually governed by the recast Brussels Regulation (1215/2012/EU), which came into force on 10 January 2015. Pursuant to such Regulation, the recognition and enforcement by French courts of judgments obtained in other EU member states is achieved by way of application with a standard form certificate and copy judgment, rather than a requirement for the court to determine the merits of the case. The defendant has limited grounds to object, which include that conflicting judgments exist, that recognition and enforcement would be manifestly against French public policy, that the defendant was not served with proceedings in sufficient time to prepare a defence or that courts in a different jurisdiction should have had jurisdiction pursuant to the Regulation (eg, because the judgment relates to rights to immovable property in another jurisdiction). The 2007 Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters applies to the enforcement of judgments from the courts of Iceland, Norway and Switzerland and is very similar to the recast Brussels Regulation).

For other countries, in the absence of a treaty for the reciprocal recognition and enforcement of judgments, a judgment rendered by any foreign court based on civil liability and enforceable in the relevant foreign country would not directly be recognised or enforceable in France. A party in whose favour such judgment was rendered could initiate enforcement proceedings (exequatur) in France before the relevant civil court that has exclusive jurisdiction over such matter. Enforcement in France of such foreign judgment could be obtained following proper (ie, non-ex parte) proceedings if the civil court is satisfied that the following cumulative conditions have been met (which conditions do not include a review by the French court of the merits of the foreign judgment):

- such foreign judgment is enforceable in the jurisdiction of the court that rendered it;
- such foreign judgment was rendered by a court having jurisdiction over the matter because the dispute is clearly connected to the jurisdiction of such court (ie, there was no international forum-shopping), the choice of the relevant foreign court was not fraudulent and the French courts did not have exclusive jurisdiction over the matter;
- such foreign judgment does not contravene French international public policy rules, both pertaining to the merits and to the procedure of the case, which include notably the right to a fair trial;
- such foreign judgment is not tainted with fraud under French law (for example, the parties did not submit the dispute to a foreign court in order to intentionally avoid the application of French law); and
- such foreign judgment does not conflict with a French judgment or a foreign judgment that has become effective in France, and there is no risk of conflict with proceedings pending before French courts at the time enforcement of the judgment is sought, and having the same or similar subject matter as such foreign judgment.

In addition to these conditions, it is well established that only final and binding foreign judicial decisions (ie, those having a res judicata effect) can benefit from an exequatur under French law. If the French civil court is satisfied that such conditions are met, the foreign judgment is likely to benefit from the res judicata effect as of the date of the decision of the French civil court and is, thus, likely to be declared enforceable in France. However, the decision granting the exequatur can be appealed.

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

As a general rule, the acquisition of French companies by foreign entities is not restricted.

Nevertheless, certain transactions performed by foreign investors may entail one or more specific formalities, depending on several factors, such as the nature of the transaction, the industry sector, or the amount of the contemplated investment. Applicable regulations are less restrictive for EU investors than for non-EU investors, although it should be noted that it is the residences of the ultimate shareholders of the investor that are scrutinised by the French authorities. The making of a foreign investment may be subject to one or more of the following formalities:

- a prior authorisation to be obtained from the French Ministry of Economy, in the event of an investment being made in sectors considered as sensitive and strategic (such as the military sector);
- a simple declaration for administrative purposes to be filed with the French Ministry of Economy (Treasury Department); or
- a simple declaration for statistical purposes to be filed either with the Bank of France or with the French Ministry of Economy (Treasury Department), as the case may be.

In addition to the above general rules governing foreign investments in France, certain specific laws and regulations reserve to French or EU persons the right to control, or set particular conditions for non-EU investors

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to invest in, companies of particular business activities. These include insurance companies (article R322-11-1 of the French Insurance Code), financial institutions (article L511-12 and L611-1 of the French Monetary and Financial Code), press companies (article 7 of French Law No. 86-897 of 1 August 1986), entities involved in manufacturing and marketing of war materials (article 9, II-b of French Decree of 6 May 1995), publications dedicated to young people (article 4 of French Law No. 49-956 of 16 July 1949), the audio-visual sector (article 40 and 63 of French Law No. 86-1067 of 30 September 1986), the air transport sector (article R330-2 of the French Civil Aviation Code) and investments regarding ship ownership (article 3 of French Law No. 67-5 of 3 January 1967).

Cross-border lending is limited by the French banking monopoly rules as further described in question 6. However, it should be noted that those French banking monopoly rules do not apply to the subscription and transfer of bond instruments as further described in question 3.

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

The component parts of debt financing will obviously vary depending on the overall amount of financing required and the availability – or lack thereof – of liquidity in the relevant debt markets. Financing can include senior term (amortising and bullet in variable proportions) and revolving debt, mezzanine bullet debt, payment-in-kind (or PIK) bullet debt and high yield bonds. While second lien debt and vendor financing were often seen a few years ago, they are currently almost absent from French acquisition financing structures. In the past two or three years, the so-called 'unitranche' or 'unirate' facilities have developed in the French market. These facilities are typically made available by private debt funds (often mezzanine debt funds converting to 'private debt' generally speaking) and replace both the senior debt and mezzanine debt components with a single bullet (or with limited amortisation) facility. They are by nature term acquisition or refinancing debt (and more rarely capital expenditure or investments) facilities, and do not purport to serve working capital finance needs. They are generally more quickly committed and documented that traditional senior debt. Both mezzanine and unitranche facilities often comprise an element of remuneration in the form of equity warrants giving their holders a right to subscribe for shares in the issuer at a price generally equal to the face (and not actual) value of these shares. They traditionally combine a cash pay interest element with a PIK capitalised element.

While smaller transactions generally comprise senior debt only, or a mix of senior and mezzanine debt, it is common for larger financings to comprise a combination of senior and mezzanine debt or high-yield bonds and senior debt. The top end of the mid-market transactions can even be financed by all senior or unitranche debt pieces. Market conditions have for some time made it more difficult to fund acquisitions solely with traditional bank debt, except for smaller transactions.

Mezzanine debt, to the extent legally possible, is usually guaranteed by and secured on the same assets as senior debt (obviously subject to legal feasibility as outlined below). Intercreditor arrangements are put in place, pursuant to which in certain circumstances payment on the mezzanine debt is subordinated to the senior debt and the ability of the mezzanine lenders to enforce their guarantee and security package is subject to a standstill. Mezzanine debt is never structurally senior to the senior debt – it generally sits at the same level as the acquisition portion of the senior debt and is, therefore, contractually subordinated to it – and will be applied to fund the purchase price and acquisition costs of the transaction. While a significant amount of the senior debt will be borrowed by the same holding company as the mezzanine debt, some senior debt may be borrowed at a structurally senior level to refinance existing debt within the target group at closing. Senior debt that is borrowed at operating company level and which is used to refinance existing debt or to finance capital expenditure or working capital requirements will benefit from an enhanced guarantee and security package that will not be available to senior acquisition debt and mezzanine debt due in particular to corporate benefit and financial assistance restrictions, and other legal considerations.

Mezzanine facilities traditionally mature one year after the latest dated senior debt. Financing structures including second lien debt are similar to mezzanine debt, except that the second lien debt is typically an additional tranche in the same credit agreement as the senior debt but with a maturity date six months later than the other senior loans. Under the intercreditor agreement, second lien debt is contractually subordinated to the other senior bank debt in a similar manner to mezzanine debt, except that the second lien lenders may not have an independent right to enforce in some cases and are subordinated to the senior debt when it comes to sharing the enforcement of security proceeds.

PIK debt and vendor financing are the most junior pieces of debt finance in the capital structure. They may be issued by the same holding company as the one issuing the senior and mezzanine debt, in which case they would also be subject to contractual subordination via the intercreditor agreement, but are also often issued by holding companies of the senior and mezzanine debt borrowers, and in each case tend to have limited, if any, recourse to security and guarantees. They mature after all other debt in the structure. The interest on PIK facilities generally capitalises, but there may be an option for the borrower to pay part in cash, if permitted under the terms of the other debt in the structure.

As pricing and liquidity in the bond markets has been more competitive than the bank markets, acquisitions have also been financed with the issue of secured high-yield bonds combined with a revolving credit facility with priority over the realisations of security enforcement (known as a 'super senior' revolving credit facility) or term debt ranking pari passu. High-yield bond issues are generally only suitable for larger transactions where the debt will not be repaid quickly due to the cost and non-call features.

One particular feature of the French market is that, due to the 'banking monopoly' restrictions set out in question 6, private debt funds cannot make loans available to borrowers incorporated in France (or French branches of foreign companies), nor can they commit to make a loan available (regardless of whether or not that loan is eventually funded). Consequently, mezzanine debt, unitranche debt and, more generally, any debt to be underwritten or made available by such private debt funds must take the form of a bond instrument rather than that of a loan. French obligations are governed by a set of mandatory provisions enshrined In the French commercial code, which, in a number of respects, substantially differ from what a lender would expect to find in a loan facility agreement. For instance, while most contractual provisions (such as representations, undertakings and events of default) are generally similar to those found in a loan facility agreement, other provisions such as 'snooze you lose', 'yank the bank', 'debt buy-backs' and unanimous decisions are simply not compatible with bonds instruments and must be dealt with in other specific ways, such as by structuring the bond issue as an international issue where available.

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

In public-to-private transactions (and more generally all acquisitions with respect to publicly traded instruments) the sponsor bank is required by law to guarantee to the holders of targeted shares – or other securities – that they will be paid their purchase price in the event that they contribute such securities to the offer, whether voluntarily or pursuant to any mandatory squeeze-out mechanism. This would obviously apply whether or not the offeror itself has sufficient funds to pay the purchase price. Consequently, sponsor banks have historically been very careful that the terms of the financing leave very limited, if any, room for the lenders to avoid making available the corresponding facilities.

It is common practice that the offeror's lenders be asked to provide a first demand counter-guarantee in favour of the sponsor bank should the offeror not have sufficient funds to discharge the purchase price itself, or should it be legally prevented from doing so (in the event of insolvency for example). To our knowledge however, guarantees provided in the French public to private transactions market in favour of the sponsor bank only relate to the debt portion of the purchase price relating to the offer, and do not cover equity funded sources, so that the offeror and the sponsor bank enter into separate arrangements in this respect. The result of these counter-guarantee arrangements is that the offeror's lenders will end up financing their share of the purchase price for the offer, whether in the form of acquisition debt made available to the offeror or through payment to the sponsor bank. Nevertheless, offerors still pay much attention to certainty of funds language in the facilities agreements as they would obviously prefer funding of the purchase price to take place in the conventional way.

In France as in many other jurisdictions, bidders and sellers have imported certain funds provisions into the private acquisitions sector. While certainty of funds has become market practice for the larger transactions, the lower end of the market continues to see a substantial number

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of financing agreements with no certain funds language. The language of certain funds in French transactions is substantially similar to that found in the other European jurisdictions.

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

As in other jurisdictions, financing agreements usually include a purpose clause specifying how the proceeds of the loan facility or debt securities are to be used. However, such language would not result in the creation of a trust over proceeds so advanced but not so applied. Certain general French legal principles would also restrict the ability of the borrower to use facilities' proceeds, typically where such proceeds were to be applied in a manner that is illegal or contrary to the borrower's corporate benefit. Finally, 'sanctions' provisions have found their way into financing agreements relating to French transactions just as they have in other jurisdictions and, as a result, facilities and other financing agreements now customarily contain provisions that forbid the borrowers from using proceeds for purposes that would breach applicable sanctions laws.

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

Lenders must be licensed or otherwise entitled to carry out banking business in France. Pursuant to the French Monetary and Financial Code, only an institution that is licensed as a credit institution in France or recognised as such in France through the EU mutual recognition can conduct banking transactions in France on a regular basis. Banking transactions include, among others, the making of loan facilities available to French companies or individuals. When the loans have been fully funded (when you only assign a participation in an existing loan), there is no banking transaction in favour of the borrower but there may be one in favour of the assignor (the purchase of an unmatured receivable constitutes also a banking transaction). French courts have long adopted a very restrictive approach to the 'regular basis' test mentioned above, and traditionally consider that regular basis is evidenced where more than one loan has been made available by a given entity, even to two separate beneficiaries or where the second loan is provided long after the first one. However, it is unclear on the basis of recent case law whether the 'one-off' exception would be available where a banking transaction is carried out by a credit institution.

There are a number of exceptions to the banking monopoly. In particular, credit institutions licensed in a member state of the European Union or of the European Economic Area can benefit from the single passport to provide banking services in France.

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

Payments of interest and other revenues made by a borrower with respect to a facility agreement will not be subject to the withholding tax set forth under article 125 A, III of the French Tax Code unless such payments are made outside France in a non-cooperating state or territory within the meaning of article 238-0 A of the French Tax Code. If such payments under the loan are made in an non-cooperating state or territory, a 75 per cent mandatory withholding tax will be due pursuant to article 125 A, III of the French Tax Code (subject to exceptions, certain of which are set forth below, and to the more favorable provisions of any applicable double tax treaty). The 75 per cent withholding tax is applicable irrespective of the holder's residence for tax purposes or registered headquarters. The list of non-cooperating states and territories is published by a ministerial executive order, which is updated on an annual basis.

The borrower is primarily responsible for accounting to the tax authorities for any applicable withholding tax. The facility agreement will normally allocate day one and change of fact withholding tax risk to lenders, while borrowers are generally only required to gross-up if the withholding arises as a result of a change in law. Lenders will generally expect to be indemnified for any taxes that arise in connection with the loan other than by way of withholding (excluding any taxes on net income imposed by the jurisdiction in which the lender is incorporated or with respect to which it is a tax resident or (if different) from which it lends).

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

In respect of facilities to a French borrower, French law requires that the loan contract contains an indication as to the overall effective rate. In case of failure to comply with this requirement, a fine may be payable and the interest rate agreed between the parties may be replaced by the legal interest rate (which is an interest rate determined annually by French law).

The usury restrictions that used to apply to loans made to French borrowers have been substantially narrowed so that no further interest rate limitations apply to loans made to French business entities, except in the case of overdraft facilities. For that purpose, a facility by way of overdraft is usurious if it is made at an overall effective rate that exceeds a rate determined by ministerial decree on a quarterly basis.

Violation of the usury law is a criminal offence. In addition, the borrower may refuse to pay interest above the rate deemed usurious and the lender may have to refund interest paid to it in excess of the maximum permitted rate.

Further, if the financing is governed by French law, the French Civil Code provides that interest may only be capitalised and bear itself interest to the extent that it has become due for at least one year.

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

There are numerous indemnity provisions contained in a credit agreement covering various matters, including tax, stamp duty, loss arising from participating in the transaction or providing funding, the costs of translation of a payment from one currency into the currency that was due under the finance documents, increased costs protection resulting from a change in law and costs and expenses arising from the transaction, amendments to the documentation and enforcement and preservation of security.

10 Can interests in debt be freely assigned among lenders?

Assignments of commitments and participations in facilities typically fall under the French banking monopoly rules and each assignment should be analysed in light of those rules described in question 6 (which, as indicated above, do not apply to bond instruments).

From a contractual perspective, typically following syndication, lenders can transfer or assign participations after consultation with the borrower unless a default has occurred or the transfer or assignment is to another existing lender or affiliate or a related fund, when no consultation is needed. Usually no restriction applies to sub-participations. Borrowers usually want to impose some controls over syndicate members and may require that (at least prior to completion of syndication) transfers or assignments are only to lenders on an agreed 'white list' or with the consent of the borrower.

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

If the agreed role of the relevant agent (taking into account all actions that could conceivably be required during the life cycle of the transaction) includes activities that are regulated in France, it will require the proposed agent to be licensed for the conduct of the corresponding activities. Relevant regulated activities include the management of payments by way of wire transfer (for which a banking licence is required) from the borrower to a loan syndicate.

In the bond field, payments are normally made from the Issuer directly to the bondholders due to the fact that any intermediary paying agent would have to be licensed either as a bank or as a financial service provider in the management of securities accounts. Also please note restrictions applying to the bondholders' representative set out in question 20.

Note that the concept of 'trust' does not exist under French law. See question 20 with respect to the rules on recognition of trust and limitations to the trustee's prerogatives in France.

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

Buy-backs by borrowers have always been possible under French law, which provides that where a person is both the debtor and the creditor of a claim, such claim is automatically extinguished.

Buy-backs by sponsors are usually limited by the relevant agreements (including in terms of rights to receive interest) but also by the French banking monopoly rules described in question 6, for which certain

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exceptions applying to companies that are part of a same group may apply in these circumstances.

The French market has very much followed the Loan Market Association (LMA) published optional buy-back provisions issued in 2008, which are now often included in loan agreements. One option prohibits debt buy-backs by a borrower and any member of the group of which such borrower is a member. The second option permits debt purchases by a borrower subject to certain conditions (eg, notification of the facility agent, disenfranchisement of sponsor affiliates and borrowers).

As far as buy-backs of bonds are concerned, French law provides for some specific rules as follows:

- in the case of a purchase by the issuer of the bonds, such bonds will be automatically cancelled; and
- in the case of a purchase by an immediate shareholder of the issuer that holds at least 10 per cent of the share capital of the issuer, the relevant shareholder will not be entitled to vote in bondholders meetings (as per article L228-61 of the French Commercial Code).

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

There is no particular rule of law restricting the right of a borrower to offer some form of consideration as an incentive to obtain a vote from a private lender being part of a loan syndicate, and it is common practice for borrowers to offer waiver or consent fees to those lenders voting in favour of certain proposed amendments, while lenders voting against would not receive any fee. This would however remain subject to general principles of law such as the obligation to act in good faith, or abuse of majority voting rights. Typically, if the promise to pay a fee is made to some lenders representing a majority of votes, but not to all lenders, the consent request, majority vote and payment of the fee could all be challenged of the ground of fraud.

Things are different in the field of bonds, where article L245-11 al. 2 of the French Commercial Code provides that it is a criminal offence (i) for a bondholder to obtain or be promised certain advantages in consideration for voting in a particular way or not participating in a particular general meeting of the bondholders, and (ii) for the relevant person to grant, or promise to grant, such advantages. As a consequence, waiver or consent fees may not be offered only to bondholders voting in a particular way, but rather must be offered to all bondholders (regardless of their vote) in the event that a proposed amendment is approved by the bondholders in a general meeting.

Guarantees and collateral

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

French *sociétés anonymes* (SA), *sociétés par actions simplifiées* (SAS) and *sociétés à responsabilité limitée* (SARL), the three most common forms of business entities in France, may provide upstream and cross-stream guarantees for the financial obligations of other group companies, subject to compliance with the rules relating to corporate benefit, statutory object clause and the prohibition of misuse of corporate assets. Further, if a guarantee is being provided in the context of an acquisition, the specific French financial assistance prohibition would apply. See also question 33 as to situations where guaranteed claims would be voidable. The granting of a guarantee or security by a company to secure payment obligations of another company Incorporated in France may also in certain circumstances bear tax consequences on the ability of that French company to deduct interest expenses from its revenues.

Corporate benefit

The guarantor company must receive some real and adequate benefit. Note that this rule also applies in relation to the provision of any intra-group assistance, whether a guarantee or an intra-group loan. The absence of benefit renders the guarantee unenforceable and criminal sanctions may be imposed on directors for misappropriation of a company's assets. What constitutes real and adequate benefit is not defined, but examples include financial remuneration, the existence of cross guarantees in favour of the guarantor and the interest of the guarantor in the financial success of the primary debtor. The three established rules of thumb are that:

- the companies involved must form part of a genuine group operating under a common strategy aimed at a common objective;
- the risk assumed by the guarantor must be proportionate to the benefit; and
- the financial support by the guarantor should not exceed its financial capabilities.

While corporate benefit can generally be assumed where a parent company guarantees the obligations of one of its direct or indirect subsidiaries, the second and third requirements of the corporate benefit test may be slightly more difficult to meet with respect to upstream or cross-stream guarantees. As a result, current market practice is to limit upstream or cross-stream guarantee(s) to facilities that are, or that are capable of being, lent to the guarantor by way of intra-group loan and to limit the amount of the guarantee at all times to that which the guarantor and its subsidiaries have received directly or indirectly from the guaranteed borrower as a borrower by way of intra group loan. This, in essence, means that upstream and cross-stream guarantees will be limited to working capital or capital expenditure facilities, or to refinancing facilities made available to a borrower with a view to re-allocate loan proceeds from that borrower to other members of the group.

Object clause

The guarantee should be granted for a purpose within the object clause of the company, and must bear a direct relationship to the main activity of the company. Obviously, specific corporate procedures that vary depending upon the corporate form and the by-laws of the guarantor may have to be complied with.

Financial assistance

Article L 225-216 of the French Commercial Code strictly prohibits any société par actions (which include the SA, SAS and the less common société en commandite par actions), from granting guarantees and security in respect of facilities used for the acquisition or subscription of its own shares by a third party. This prohibition does not apply to SARLs or *sociétés en nom collectif*. However, if a target was transformed into one of these companies shortly prior to its acquisition and subsequently issued a guarantee or granted security in respect of facilities used for the acquisition or subscription of its own shares, there would be a substantial risk that this would be deemed a fraudulent transaction if the sole purpose was to circumvent the prohibition. In addition, corporate benefit restrictions would still apply, and It is highly unlikely that the target company guaranteeing acquisition debt would be found to pass the corporate benefit test set out above.

The restriction on financial assistance is also considered to apply to the French subsidiaries (ie, the indirect assets) of the target company, and there is no whitewash procedure available and no exceptions to the prohibition (other than in the particular case of an acquisition by an acquisition vehicle owned by the employees of the target company or group).

These prohibitions do not however prohibit either the acquisition vehicle from granting a pledge over the target's shares or the distribution of dividends (including distributable reserves) or a share capital repayment by the target to the acquirer where the corresponding proceeds serve acquisition debt service.

Foreign subsidiaries

While corporate benefit and financial assistance restrictions may not directly apply to foreign subsidiaries of a French target, one must be careful that guarantee obligations of any such foreign subsidiary, which would otherwise not be permitted in France, are not transferable to French entities within the group as a result of the operation of cross guarantee provisions. For instance, if a French target provides a guarantee for the payment obligations of its subsidiaries as borrowers and guarantors, and if any one or more of those subsidiaries is a foreign entity that provided guarantees or granted a security interest that would be illegal for a French entity to grant, then the corresponding payment obligations should be carved out from the French target's guarantee. Another approach, and the common market practice, is to limit any downstream guarantee by a French entity to payment obligations of its subsidiaries as borrowers and of its French subsidiaries only as guarantors.

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Misuse of corporate assets
The 'misuse of corporate assets' and the closely related 'misuse of power' are criminal offences that impose penalties on persons who, in the course of managing a company, knowingly use the assets of that company, or their authority or voting rights, in a way that is contrary to the corporate interest of that company; and either for their personal benefit or for the benefit of another company in which they are personally interested. It should be noted that where such use of assets or authority is attributable to a particular person, the fact that it may also serve the interest of other persons (such as potential minority shareholders) does not prevent the characterisation of a misuse of corporate assets or misuse of power. For the purpose of determining whether a particular action was contrary to the interest of the company, French courts will assess the foreseeable results of such action in the light of its economic context at the time it was taken.

The persons who may be held criminally liable on such grounds include not only the members of the board of directors or management board but also the executive officers and shadow directors.

On the non-criminal side, misuse of corporate assets or power would constitute an act of mismanagement entailing tax consequences as well as civil liability in the form of damages to compensate the company. Shareholders would also be entitled to damages provided that they establish the existence of a prejudice distinct from that suffered by the company itself (in practice, shareholders are seldom awarded specific damages in such situations).

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

See the paragraph on financial assistance in question 14.

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

There is no general concept of a floating charge under French law, and no concept of a debenture or blanket security agreement covering all or most of the assets of a company. As a consequence, separate pledges are generally required to be taken over all the assets of a company, and each type of asset is subject to a different set of statutory provisions governing the creation and perfection of security over that asset. In addition, while the French Civil Code recognises the possibility of creating security over future assets provided that they can be sufficiently identified and determined, creating security over potential future assets is not allowed. This means that for the security interest to be valid there must be a high level of certainty that the pledged asset will come into existence or be acquired by the pledgor and that the parties must be able to properly identify the asset in the relevant security document.

French law security interests that are the closest in form to a floating charge are the pledge over the ongoing business described below, which is both limited in scope and cumbersome to enforce, and the pledge over inventory.

Below is a non-exhaustive list of the most common type of security interests that may be granted over assets located in France.

Securities account pledge
This type of security interest is available only with respect to securities issued by a *société par actions*, which, in France, are in dematerialised form and take the form of entries into paper accounts (opened with the issuing company) or electronic accounts (opened with a bank or other entity licensed to operate securities accounts). The pledge is created through the execution and delivery by the pledgor of a statement of pledge, which must follow a prescribed format. However, legal practitioners generally also require that the pledge be recorded in the register of securities transfers and the register of individual securities account of the issuing company. There are no particular perfection requirements. The pledge agreement may provide that other securities held by the pledgor from time to time shall be credited to the pledged securities account whereupon they shall be deemed to have been included in the original pledge with effect from the date of the original statement of pledge without any further formalities.

Share pledge
Shares in SARLs and certain other companies are not classified as financial securities and security is taken through a pledge over the shares themselves. New pledges must be entered into to cover any new shares transferred to or subscribed by the pledgor. As regards perfection requirements, registration of the pledge with the relevant public registry is necessary to make the pledge enforceable against third parties.

Pledge over receivables
Security may be granted over any receivable through execution of a pledge agreement in writing between the pledgor and the secured creditor, indicating the secured obligations and properly identifying the relevant receivable and corresponding third-party debtor. While the pledge is valid and enforceable against third parties generally from the date of the pledge agreement, it is not enforceable against the third-party debtor unless and until it receives notice of the pledge, and the third-party debtor may continue to discharge payment obligations under the pledged receivable to the pledgor. Once the third-party debtor has received notice of the pledge, it must discharge any payment obligations under the pledged receivable to the secured creditor, regardless of whether acceleration of the secured debt has occurred.

Bank account pledge
This security interest is simply an unusual variant of a pledge over receivable, and execution requirements are the same. The pledge is not enforceable against the third-party debtor (ie, the bank with whom the pledged account is open) unless and until it receives notice of the pledge. However, the pledge will only cover monies standing to the credit of the pledged bank account as at the date of enforcement of the pledge, and subject to completion of the current transactions affecting the pledged account.

Cash collateral arrangement
Security can be obtained over cash through payment of the relevant monies into an account opened in the name of the beneficiary (which, where the beneficiary is a bank, can be an internal account within such bank), and not in the name of the pledgor. The taking of cash collateral is subject to the general regime of pledge over tangible assets. However, given the fungible nature of cash, a cash collateral arrangement has the effect of transferring title to such cash to the beneficiary, subject to an obligation of the latter to repay an equivalent amount of money on expiry or discharge of the secured debt.

Pledge over ongoing business
This security interest covers:
- leasehold rights with respect to the premises at which the business is being operated;
- some fixed assets (such as machinery, equipment and tools, subject to their not being pledged under a pledge over plant and equipment);
- trade name and goodwill; and
- future assets of the nature of those mentioned above, either not yet in existence or not yet the property of the pledgor at the time the pledge is granted.

Its scope may be extended to include intellectual property rights (which can alternatively be pledged per se as described below). Such a pledge must be registered with the tax authorities within 10 days, and with the clerk of the commercial courts having jurisdiction over the principal place of business and every branch included in the scope of the pledge within 15 days of execution of the pledge agreement. If intellectual property rights are included in the scope of the pledge, specific registration requirements with the French Trademark and Patent Office (INPI) also apply.

Pledge over intellectual property rights
Intellectual property rights can also be pledged independently from a pledge over ongoing business. Specific registration requirement with INPI apply.

Mortgage
The mortgage deed must be signed before a notary public. Mortgages are rather expensive due to the costs of registration with the French tax

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authority and the land registry and are, therefore, rarely seen in acquisition financings.

Civil law pledge over inventory

French law provides for two methods of creating a pledge over inventory. The first one, known as the civil pledge, requires that the secured creditor be effectively transferred possession and control of the items constituting the pledged inventory. This is generally achieved by the parties designating a third party service provider who will segregate the pledged items, control in and outflows and maintain a register accordingly. While difficult to implement and costly to administer, a civil pledge over inventory is a very efficient security interest, as possession by the secured creditor allows it to outrank even those creditors that would otherwise be legally privileged over enforcement proceeds. Since the introduction of the commercial law pledge over inventory described below, the French Supreme Court has held that civil pledges were no longer available to licensed credit institutions where a commercial law pledge could be created instead.

Commercial law pledge over inventory

A second method of creating a pledge over inventory was introduced in the French legal system a few years ago. Pursuant to this simplified commercial pledge, the security interest is created by the parties executing a pledge agreement that identifies the pledged items and must be registered with the clerk of the commercial court having jurisdiction over the place where the inventory is located within 15 days of execution of the pledge agreement. The pledgor may sell items comprised in the pledged inventory without the beneficiary's approval and without any particular release formalities having to be carried out, and the pledge will – within the limit of the initial description of the pledged items – extend automatically to new similar items making up the inventory. Such a pledge does however not outrank legally privileged creditors and is not as efficient as a civil pledge. In addition, there are certain statutory limitations to using such a pledge as it may only be granted by the borrower itself (and not by a guarantor), solely in favour of licensed credit institutions and only as security for its indebtedness under the loans (and not bonds or derivative instruments) made available by the relevant beneficiaries.

Assignment by way of security of business receivables

This is another quite efficient security interest whereby a company can assign outright (and thereby transfer full title to) its present (provided they are sufficiently identified) and future (provided they arise out of the performance of sufficiently identified agreements) receivables arising out of the carrying out of its business. Assignment is made effective by delivery by the assignor of a delivery form in a prescribed format and which lists the relevant receivables. Delivery of the list of receivables in electronic form is also permitted. It is market practice to have a master agreement that provides the general terms and conditions that govern the initial assignment, as well as any future assignments. Notice to the debtor is not required to perfect the assignment, but if payments are to be made directly to the secured creditor, notice must be given, otherwise payments will be made to the pledgor. Cash paid directly to the pledgor does not form part of the security and may be recovered by every other creditor of the pledgor, unless particular mechanisms (such as a pledge of the account to which payments are directed) are implemented. Similar statutory limitations as the ones described under the commercial law pledge over inventory section above apply to assignment by way of security of business receivables.

Pledge over plant and equipment

A number of strict and rather onerous requirements apply in order to create this type of security. In particular, it too may only be granted by the borrower, in favour of licensed credit institutions only, and as security for its payment obligations under loans made available to it for the purpose of acquiring (and not refinancing) identified plant or equipment and must be granted directly in the relevant loan facility agreement. The pledge must be registered with the clerk of the commercial court having jurisdiction over the place where the inventory is located within 15 days of execution of the loan agreement.

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

See question 16 for specific perfection requirements. In addition, certain security documents, such as a pledge over business or real estate mortgages, must be submitted to the tax registry and registration duties are payable per agreement. Failure to submit the instrument for registration can result in it being void. Other security documents may be voluntarily submitted for registration as this provides certainty of date to the corresponding document.

There is no general companies' security register in which French or non-French companies with security interests over assets in France have to register security. However, for the pledge over tangible assets (without dispossession) or for particular assets (eg, mortgage over real estate, pledges over certain shares (*société civile*, *SARL*, *société en nom collectif*), or a pledge over the ongoing business) registration is required either in the Commercial Registry or in specific registries in order to make such pledges enforceable.

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

For those security interests with respect to which registration is mandatory, re-registration must be made to keep the lien valid and recorded. Procedural requirements and delays vary for each type of security.

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

The provision of guarantees or security by a company carrying out business in France does not automatically require a prior consultation of the works council. However, a case-by-case analysis should be done in order to assess the content and extent of the proposed guarantee or security in order to determine whether or not a prior consultation should be undertaken. Pursuant to article L2323-6 of the French Labour Code, the works council must be informed and consulted on matters relating to the organisation, management and general business of the company. This article is usually interpreted broadly by French courts. In addition, the courts tend to consider that any decision that may have a significant impact on the company and on its employees requires a prior consultation of the works council.

In the context of any guarantee or security, the implementation of which would have an impact on the general business of the company and potentially affect its employees, the prior consultation of the works council should be considered. For example, the grant of a pledge over ongoing business (as further described in question 16) may constitute a decision requiring prior consultation. Indeed, realisation of such a pledge would lead to the sale of the going concern, which could affect, significantly, the general management or business of the company and could affect its employees. In the same manner, any security granted by the company, the implementation of which may result in a transfer of assets, may be regarded as having substantial consequences on the company's business or on its employees and could be considered to require a prior consultation of the works council.

Any security granted by shareholders over the shares of the company the implementation of which may result in a change of control or by the company over the shares of its subsidiaries will require a prior consultation of the works council pursuant to article L2323-19 of the French Labour Code.

If a prior consultation is required, the works council should provide its opinion before the guarantee or the security is granted. It should be noted that a negative opinion will not prevent the company from taking the decision to grant the relevant guarantee or security. Failure to comply with the above information and consultation obligations can give rise to criminal sanctions against the legal representative of the company. In addition, a judge could decide to suspend the decision taken by the company until the completion of the consultation process.

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

Under French law, security interests must be granted directly in favour of the creditor(s) whose claim is the subject matter of the secured liabilities, and not to a person acting on account of the secured creditor or a group of

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secured creditors (ie, a security trustee). This is because of the accessory nature of security. Another consequence of this accessory nature of security is that the assignee of a loan receivable will benefit automatically from the security granted to secure such receivable.

With respect to secured bond facilities governed by French law, the French Commercial Code provides that security may not be granted in favour of each bondholder individually. In accordance with article L228-90, the bondholders form a group with legal personality and any security taken after completion of the issue in order to secure the bonds shall be granted for the benefit of the group of bondholders, without any need to individually identify them. Therefore, any transfer of bond triggers a transfer of the benefit of security interests securing such bonds. By law, security interest granted to a group of bondholders is administered and enforced by a bondholders representative, which must be an entity incorporated in France and appointed by the bondholders in a general meeting. Scholars and certain court decisions tend to demonstrate that the bondholders representative's mandate is of a legal nature and cannot be delegated to another entity.

The French Civil Code now includes a security agent concept, set out in its article 2328-1, which provides that 'any security over an asset can be agreed upon, registered, administered and enforced on behalf of the secured creditors by a person designated by them in the agreement which creates, or records, the secured liabilities'. The Civil Code's security agent facilitates the execution, administration and (most of all) enforcement of security where there are several secured creditors, by allowing one designated entity to carry out actions on behalf of (and, one should think, in accordance with instructions received from) the secured creditors. However, it cannot be assimilated to a trust mechanism as the secured creditors themselves remain the direct and only beneficiaries of the security interest. However, the concept is not widely used and transactions involving security over French assets continue to use the traditional contractual security agent rather than Civil Code's security agent.

Note that none of the parallel debt and trust mechanism constructs have been generally recognised by French courts. Although the French Supreme Court has held, in a decision dated 13 September 2011 rendered in the context of safeguard proceedings opened in France that, subject to certain conditions being met, the concept of parallel debt governed by the laws of the State of New York was not incompatible with the French law concept of international public policy, this decision cannot be considered as a general recognition of the enforceability in France of the rights of a security agent benefiting from a parallel debt obligation and no assurance can be given that such a structure will be upheld by other French courts if tested.

The concept of 'trust' has been recognised by the French Tax Code and the French Supreme Court, which has held, in the same published decision referred to above (Cass com 13 September 2011 No. 10-25533 *Belvedere*) that a trustee validly appointed under a trust governed by the laws of the state of New York could validly be regarded as a creditor in safeguard proceedings opened in France. However, while substantial comfort may be derived from the above, France has not ratified the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition, so that the concept of 'trust' has not been generally recognised under French law.

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

There is no general legal protection for creditors in relation to the release of security. Facility agreements will, therefore, usually include contractual conditions for any release of security. Under a secured loan facility, the security agent must exercise any right vested in it in accordance with any instructions given to it by the lenders. The credit agreement usually provides that any amendment or waiver that relates to the scope or to any release of any security granted to the benefit of the lenders shall not be made without the consent of all the lenders except where such release is expressly permitted by a finance document or is the direct consequence or prerequisite of a disposal or transaction expressly permitted under the finance documents, in which case, that release will be given by the security agent acting upon instructions of the agent and the consent of the lenders will not be required.

With respect to secured bond facilities governed by French law, according to French law if security must be released before all amounts due under the facility has been redeemed, the bondholders' representative will need the prior authorisation of the majority of the bondholders (majority being set, according to the French Commercial Code, at two-thirds of the expressed votes), whereas if the release is granted as a consequence of the full redemption of the bonds, no such prior authorisation is required and the bondholders' representative may deliver a release letter.

As such, because of the accessory nature of security, a release letter is not always required for the release to be completed although such letter is almost always delivered by creditors. Release letters are however specifically required in order to proceed to the release of registered securities (such as pledge over ongoing business, pledge over IP rights or pledge over quotas).

22 Describe the fraudulent transfer laws in your jurisdiction.

See question 33 on void and voidable transactions.

Debt commitment letters and acquisition agreements

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

Except for smaller deals where specific French law and French language precedents are used, credit agreements and intercreditor agreements will generally follow the format of the latest English law LMA form for leveraged finance transactions.

For a transaction featuring bond debt governed by French law, a subscription agreement and terms and conditions to be adopted by the relevant issuer's coporate body will be used instead of a credit agreement and the intercreditor will require significant modifications, in each case to take into account the French specificities in terms of bond regulation.

When the acquisition structure involves a super senior revolving facility and a high-yield bond, the French market will also use the corresponding English law LMA forms issued in 2013 and the usual New York law governed high-yield documentation (as adapted to reflect certain of the French specificities in terms of bond regulation).

For acquisitions of private companies, a commitment letter attaching either a short form or a detailed (depending on how firm or finalised the offer shall appear) long-form term sheet is generally used. On some transactions the arrangers will also commit to enter into an 'interim facility' agreement attached to the commitment letter. The interim facility agreement includes provisions for a facility that matures within a short period of time after closing and which is available to fund the acquisition at closing. For transactions involving private equity houses, commitment papers will often follow papers for past transactions completed by that house.

For acquisitions of public companies, a fully negotiated and executed credit agreement and other ancillary financing documentation (including counter-guarantee mechanisms) as further described in question 4 are generally required by the sponsor bank to be in place before the offer is made.

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

Acquisition debt lenders are normally not parties to the acquisition agreement and their degree of commitment is solely a matter of commitment letters. Leveraged acquisition finance most generally features full underwriting commitments with a view to syndicate a portion of – or fully distribute – the debt either before or after completion. However, smaller transactions may feature club-deal arrangements with no particular syndication strategy. Best effort commitments are rarely seen in acquisition finance as they generate a high level of uncertainty or the future availability of the financing, but are more often used for refinancing transactions.

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

Conditions precedent contained in the commitment letter will generally depend on the strength of the certain fund basis of the offer and of the underlying business as well as the duration of the commitment and may (or may not), therefore, include material adverse change clauses or specific

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financial conditions, or both in addition to usual conditions precedent to funding such as:

- corporate formalities for all borrowers and guarantors (eg, board and shareholder resolutions, constitutional documents and specimen signatures and certificates certifying no breach of borrowing or grant of guarantee or security limitations);
- executed finance documents (eg, the facility agreements, security documentation, intercreditor agreement and fee letters);
- notices and any other relevant documentation under the security documentation;
- an executed acquisition agreement;
- details of insurance policies in place;
- copies of due diligence reports, including a tax structure memorandum and reliance letters in respect thereof;
- financial projections;
- financial statements;
- a closing funds flow statement;
- a group structure chart;
- 'know your customer' requirements;
- evidence that fees and expenses have been paid;
- evidence that existing debt will be refinanced and security released on closing; and
- legal opinions.

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

Market flex provisions are usually included for financing to be syndicated to other lenders in the market. Such provisions may permit arrangers to increase the margin and fees, move debt between tranches under the same agreement or create or increase the amount of a subordinated facility, remove unusual provisions or tighten others if this appears necessary or desirable to ensure that the original lenders can sell down to their targeted hold levels in the facilities. Market flex is often documented in a separate letter so it does not have to be disclosed to potential participants alongside the commitment letter and financing term sheet.

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

Securities demands are typically included in commitment letters or fee letters where lenders are providing a bridge facility that is designed to be refinanced as soon as possible thereafter with the proceeds of a bond offering. The terms of the securities demand will provide that the lenders may force the borrower to issue securities, subject to certain agreed criteria. The negotiation may centre around how often the demand may be made, whether the issuance must be for a minimum principal amount of notes (to ensure some level of efficiency for the issuer in terms of transaction costs and management time), the maximum interest rate at which the issuer can be forced to issue the notes and the terms of the notes (eg, currencies and maturity).

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

For acquisitions of private companies, lenders will wish to benefit from any business material adverse change clause that a buyer negotiates in the acquisition agreement for the target, but generally will not require these provisions to be replicated in the commitment letter or the credit agreement, which will provide instead that the conditions to the acquisition are satisfied and not waived. The lenders will require controls on the ability of the purchaser to amend or waive certain provisions of the acquisition agreement, such as the long stop date, price, conditions to closing, termination rights or, where applicable, warranty provisions.

The lenders will generally require security over the contractual rights contained in the acquisition agreement that enable the purchaser to seek recourse against the vendor and also that the acquisition agreement can be disclosed to the lenders. The 'drop dead date' for completing the acquisition should match the availability period for the financing.

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

There is no general requirement that commitment or finance documents be publicly filed in connection with acquisitions of private companies. Things are obviously different with respect to public acquisitions that are to be funded through debt arrangements, as both article 231-18 2° (g) of the General Regulations of the French Financial Markets Authority (AMF) relating to corporate takeovers and the AMF's instruction No. 2006-07 adopted by the AMF to implement the latter require that the offer document prepared by the offeror and that must be filed with the AMF must describe 'the terms of the proposed financing, and the potential impact of such terms on the assets, business and financial performance of the involved entities'. From a legal point of view, usual practice is to disclose the quantum and types of financings that are proposed in connection with the transaction, their main financial terms and the guarantee and security arrangements that are to be implemented. Where members of the target group are to become borrowers, details of the proposed terms should also encompass those financings that are proposed to be made available to them.

Bond terms and conditions are generally approved by the shareholders of the issuer and an appendix replicating the whole set of contractual and financial terms applicable to the bonds is normally attached to the minutes of the relevant shareholders' meeting. As such, the terms and conditions of the bonds will be filed with the commercial court having jurisdiction over the issuer's registered office and may be publicly available to some extent.

Enforcement of claims and insolvency

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

From the date of the court decision commencing insolvency proceedings, the debtor is prohibited from paying debts that arose prior to such date, subject to specified exceptions that essentially cover the set-off of related debts and payments authorised by the bankruptcy judge or made to recover assets for which recovery is required for the continued operation of the business. During this period, creditors are prevented from initiating any individual legal action against the debtor with respect to any claim arising prior to the court decision commencing the insolvency proceedings if the objective of such legal action is:

- to obtain an order for payment of a sum of money by the debtor to the creditor (however, the creditor, provided he or she has filed his or her claim as stated above, may require that a court determine the amount due); or
- to terminate or cancel a contract for non-payment of amounts owed by the creditor. They are also barred from taking any enforcement action against the debtor (including the enforcement of security interests), except where such enforcement is sought against assets that are located in another European Union member state, in which case the rights in rem of creditors thereon would not be affected by the insolvency proceedings, in accordance with the terms of article 5 of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

Subject to the following sentence, contractual provisions such as those customarily contained in credit facility agreements that would accelerate the payment of the debtor's obligations upon the occurrence of certain insolvency events are not enforceable under French law. The opening of judicial liquidation proceedings does generally automatically accelerate the maturity of all of the debtor's obligations. However, the court may allow the business to continue for a period of no more than three months (renewable once for another three months) if it considers that a sale of part or all of the business is possible, in which case the debtor's obligations are deemed to mature on the earlier of the day on which the court approves the sale of the business; and the end of the period during which the court had allowed the business to continue.

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

Yes. Such financing is subject to the prior approval of the supervisory judge and the lenders are entitled to a privileged ranking for the repayment of the financing.

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

See question 30 on general stay provisions. There is no concept of adequate protection under French bankruptcy law.

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

The insolvency date (*cessation des paiements)*, defined as the date when the debtor becomes unable to pay its debts as they fall due out of its available assets, is generally deemed to be the date of the court decision commencing the judicial reorganisation or judicial liquidation proceedings. However, in the decision commencing judicial reorganisation or liquidation proceedings or in a subsequent decision, a court may determine that the insolvency date is an earlier date, up to 18 months prior to the court decision commencing the proceedings. The insolvency date is important because it marks the beginning of the 'hardening period'. Certain transactions entered into by the debtor during the hardening period are, by law, void or voidable.

Void transactions include transactions or payments entered into during the hardening period that may constitute voluntary preferences for the benefit of some creditors to the detriment of other creditors. These include transfers of assets for no consideration, contracts under which the reciprocal obligations of the debtor significantly exceed those of the other party, payments of debts not due at the time of payment, payments made other than in the ordinary course of business, security granted for debts previously incurred and provisional measures (unless the right of attachment or seizure predates the insolvency date), stock-options granted or exercised during the hardening period, the transfer of any assets or rights to a French law trust arrangement (*fiducie*) (unless such transfer is made as a security for a debt incurred at the same time) and any amendment to a French *fiducie* that dedicates assets or rights to a guarantee of prior debts.

Voidable transactions include transactions entered into, payments made when due or certain provisional and final attachment measures; in each case, if such actions are taken after the debtor was in *cessation des paiements* and the party dealing with the debtor knew that the debtor was in *cessation des paiements*.

Transactions relating to the transfer of assets for no consideration are also voidable when carried out during the six-month period prior to the beginning of the hardening period.

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

Post-petition creditors with the same ranking are paid pro rata their respective receivables.

The above rankings also apply to the allocation of the proceeds of the sale of the bankrupt debtor's assets or going concern as a whole in the case of a sale plan or liquidation.

In the case of large companies (with more than 150 employees or a turnover greater than €20 million), two creditors' committees (one for credit institutions having a claim against the debtor and the other for suppliers having a claim against the debtor that represents more than 3 per cent of the total amount of the claims of all the debtor's suppliers) must be established. Such committees may also, upon request of the debtor or of the judicial administrator, be established for smaller companies that do not meet the employee number or turnover thresholds specified above. Claims must have arisen before the opening of the insolvency proceedings.

In addition, if there are any outstanding debt securities in the form of obligations (such as bonds or notes), a general meeting gathers all holders (the bondholders) of such debt securities. All bondholders will be represented in the same general meeting, whether or not there are different issuances and no matter what the applicable law governing those obligations may be.

The creditors' committees and the bondholders' general meeting will be consulted on the safeguard or reorganisation plan prepared during the observation period. The creditors may submit proposals to the debtor and the administrator.

The plan must first be approved by each of the two creditors' committees. Each committee must approve or reject the plan within a maximum period of 30 days of the date on which it is proposed by the company. Such approval requires the affirmative vote of the creditors holding at least two-thirds of the value of the claims held by members of such committee that participate in such vote.

Following the approval of the plan by the two creditors' committees, the plan will be submitted for approval to the bondholders' general meeting. This approval requires the affirmative vote of bondholders representing at least two-thirds of the claims of the bondholders voting in the meeting. Creditors for whom the plan does not provide any modification of their repayment schedule or provides for a payment of their claims in cash in full as soon as the plan is adopted or as soon as their claims are admitted, do not to take part in the vote.

The plan must, thereafter, be submitted for approval to the relevant court. In considering such approval, the court must verify that the interests of all creditors are sufficiently protected, taking into consideration the contractual subordination arrangements existing among creditors when the proceedings were opened. The plan may provide for a different treatment of creditors if their differences of situation so justify. Once approved by the court, the safeguard or reorganisation plan accepted by the committees and the bondholders' general meeting will be binding on all the members of the committees and all bondholders (including those who did not vote or voted against the adoption of the plan). A safeguard or reorganisation plan may include debt deferrals, debt write-offs and (subject to shareholder consent) debt-for-equity swaps.

With respect to creditors who are not members of the committees, or in the event no committees are established, or in the event that any of the committees or the bondholders' general meeting have not given their consent to the plan within six months of the commencement of the safeguard or judicial reorganisation proceedings, creditors will be consulted on an individual basis, and asked whether they accept debt deferrals or write-offs, or both. In those circumstances, the court may only impose uniform debt deferrals (with interest) for a maximum period of 10 years with respect to the claims of creditors that would not otherwise have accepted to grant a debt deferral or write-off (except for debts with maturity dates of more than 10 years, in which case the maturity date shall remain the same).

The liquidation of the debtor is not subject to a vote.

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

While one should assume that French courts will generally give effect to contractual subordination arrangements provided that they do not override mandatory insolvency laws, French case law is insufficient to ascertain that contractual agreements between creditors will be recognised without any restrictions.

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

In principle, French bankruptcy law freezes the accrued interest on debts apart from loans with a term of one year or more.

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

See question 30 on the general stay applied to the enforcement of collateral.

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