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France

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in France.

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FRANCE
LENDING & SECURED FINANCE

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

Lending

Pursuant to Articles L. 313-1 and L. 511-5 of the French Monetary and Financial Code (Code monétaire et financier), subject to certain limited exceptions, only the following institutions are entitled to lend into France for consideration on a habitual basis:

- domestic French credit institutions licensed by the French banking authorities (*Autorité de Contrôle Prudentiel et de Résolution*) (**ACPR**) or by the European Central Bank on the basis of an official recommendation of the ACPR or domestic financing companies licensed by the ACPR;
- "passported" EU/EEA credit institutions, i.e. credit institutions having their registered head office (*siège social*) in a member state of the EU or the EEA which are acknowledged by the ACPR as being entitled either to open a branch (*succursale*) in France for the provision of banking services under the conditions of its home state authorisation under the freedom of establishment (*libre établissement*), or to provide banking services in France from their home jurisdiction under the freedom to provide services (*libre prestation de services*); or
- non-EU/EEA credit institutions authorised by the ACPR to open a branch in France (subject to any limitations of scope of the license of such branch)

Certain financing companies meeting similar requirements are also entitled to provide credit into France for consideration on a habitual basis.

"Lending on a habitual basis" is typically considered to occur once more than a single isolated credit transaction has occurred. However, under the decisions (*jurisprudence*) of the French *Cour de Cassation* (the highest French court for civil, commercial and penal matters), a foreign lender which already provides credit in its home jurisdiction is already engaged in the "habitual" business of providing credit and therefore even a single isolated credit transaction into France falls within the prohibition.

The *Cour de Cassation* has held that a credit agreement concluded by a foreign credit institution in France will not be considered to be null and void as a result thereof (*Cour de Cassation, chambre commerciale*, 3 July 2007 no. 06-17.963). However, violation of the relevant provisions are sanctioned by three years' imprisonment and a fine of EUR 375,000 (which may be increased to EUR 1,875,000 for legal entities, in application of the provisions of Article 131-38 of the French Criminal Code (*Code Pénal*); as a result, foreign lenders may consider that the risk of reputational damage is significant enough to deter them from lending into France.

Under recent changes to law (Article L. 511-6 4° of the French Monetary and Financial Code (Code monétaire et financier), a lender that is not licensed or passported to lend into France may in certain circumstances nevertheless be entitled to acquire from a French credit institution, finance company, securitization vehicle or certain other limited types of French credit providers receivables held by such French entity against a French borrower resulting from loans made by such French credit institution to such French borrower as long as the foreign lender has a similar purpose or activity to such French entities.

Security

Foreign lenders do not require a license or regulatory approval to take the benefit of security over assets located in France, although security assignments of receivables effected pursuant to the *Loi Dailly* may be granted only to licensed or passported credit institutions or finance companies. In certain limited cases, obtaining ownership (including following the enforcement of a

share pledge) of companies engaged in sensitive areas of the French economy may require administrative authorisation.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

There are no laws or regulations limiting the amount of interest that can be charged by lenders to legal entities unless such entities have no economic or business activity. Conversely, loans to physical persons (except loans granted to finance professional activities of such physical persons) are subject to usury limitations under the French Consumer Code (*Code de la Consommation*) (Article L. 314-6 of the French Consumer Code (*Code de la Consommation*)). Loans are considered usurious if their *taux effectif global* (i.e., a "global" interest rate taking into account not only contractual interest per se but also all other costs, commissions and charges that are borne by the borrower) exceed by more than one-third the average interest rate charged by credit institutions and finance companies during the most recent quarter for transactions of the same nature and will analogous risks. These rates are published in French Official Journal (*Journal Officiel*) every quarter.

Note that, even if a loan is not subject to the usury rules, any loan agreement must state (or be accompanied by a separate written instrument which states) the *taux effectif global*. Failure by the lender to provide such *taux effectif global* may result in reduction of the contractual interest rate and/or criminal penalties.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Generally speaking, there are no exchange controls currently in force in France restricting to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from France. Sanctions imposed by the European Union (and, in many cases, as a matter of contract, sanctions imposed by other jurisdictions or international or supranational institutions) may impact the ability to grant loans to borrowers, or to repay interest, principal or fees to lenders, based in certain jurisdictions.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

It is not recommended to use a foreign law governed document to take security over assets located in France because the manner of creation, perfection and enforcement of security depends, as a matter of French law, on the asset class to which such assets belongs.

The statutory framework relating to security over most classes of assets was significantly modified pursuant to government order (Ordonnance) n° 2021-1192 of 15 September 2021 (the **Security Reform Ordonnance**), which modified provisions of several French legislative codes and statutes. The following is a summary the manner by which security is created, perfected, ranked and enforced over different asset classes following promulgation of the Security Reform Ordonnance.

Real property

Article 517 of the French Civil Code (Code civil) makes a distinction between real property by nature (*immeubles par nature*) and immoveable by destination (*immeubles par destination*). Land and buildings (*les fonds de terre et les bâtiments*) are real property by nature, as are structures fixed on pillars and part of a building, unharvested crops, trees and water conduits. Objects placed by the owner of a business and used for the service and operation of the business can under certain circumstances be considered immoveables by destination, as are moveables that are sealed to the floor or cannot be detached without being fractured or deteriorated.

Security over both real property by nature and immoveable by destination is usually effected pursuant to real property mortgage (*hypothèque immobilière*); however, as explained below, it is also possible to take security over immoveables by destination by a pledge over tangible moveables. It is also possible to obtain a pledge over real property by nature (*gage immobilier*) if the pledgor is physically dispossessed of and loses control over the real property, but this is unusual and will not be discussed here.

Real property mortgages must be signed before a French notary (*notaire*) and entail costs calculated as a percentage of the amount secured. Most of these costs

are actually taxes and registration fees collected by the notary and then paid over to the tax or registration authorities, but some are actual notarial fees (which are fixed according to a stated schedule). Where the security is granted in order to secure payments of purchase price of the real property or loans made to finance the same, the security takes the form of a special legal mortgage (*hypothèque légale spéciale*) which also triggers similar costs and fees, although in a reduced amount.

Relevant statutory provisions

French Civil Code (Code civil), articles 2385 to 2474.

Creation

The real property mortgage is created by written instrument and must be signed before a French notary (*notaire*). The mortgage may be taken over one or several present or future *immeubles* and the written instrument must designate each one. The mortgage may be granted as security for one or several debts, present of future, but if future, such debts must be determinable. Rechargeable mortgages are possible. The amount secured by the mortgage must be mentioned but the instrument may mention that the amount is subject to revaluation. If the mortgage is granted for one or several future debts and for an unlimited period, the mortgagor is entitled to terminate the mortgage at any time upon three months' notice, at which point the mortgage remains in force for the debts which came into existence prior to the termination.

Perfection

Perfection occurs by filing the mortgage instrument with the local land registry.

Ranking

The date of filing of the mortgage with the local land registry determines ranking. If several mortgages are filed the same day, then the mortgage relating to the mortgage instrument with the earliest date has the higher rank. If the mortgage instruments also all have the same date, then they rank equally. If an immoveable by destination was the subject of a pledge of tangible moveables (see below) which was perfected by filing and is then incorporated into real property which is also subject to a real property mortgage, then the security which was filed first will have prior ranking.

Enforcement

Where the mortgage agreement provides that the mortgagee may, in the event of enforcement, obtain ownership of the real property without court order (*pacte commissoire*), this is permitted provided that an evaluation of the mortgaged assets is made by an independent evaluator; in such case any surplus of the value of the assets over the amount of the mortgaged debt is returned by the mortgagee to the pledgor. Otherwise (or as an alternative), enforcement is sale at public auction and satisfaction of the secured debt out of the proceeds of the sale.

Tangible moveables (including equipment and inventory (see explanation below)

Relevant statutory provisions

French Civil Code (Code civil), articles 2333 to 2350 ;Decree n° 2021-1888 of 29 December 2021.

Creation

A pledge over tangible moveables (*gage de meubles corporels*), which may also include immoveables by destination (*immeubles par destination*) is created pursuant to written agreement between the pledgor and the pledgee setting forth the secured debt, the quantity of the assets pledged and their nature. The secured debt pledged may be either existing debt or future debt as long as it is determinable. The assets pledged may be present or future.

Perfection

Perfection may be accomplished in two manners:

- Where the pledgor retains possession and control of the pledged assets (*gage sans dépossession*), perfection is effected by filing the pledge with the Register of security interests over moveable property and other related transactions (*registre des sûretés mobilières et autres opérations connexes*) (managed by the commercial court with jurisdiction over the security provider (or, in the case of foreign security providers, Paris).
- Where the pledgor does not retain possession and control of the pledged assets (*gage avec dépossession*), perfection is accomplished by physical dispossession and loss of control over the secured assets in favour of the pledgee or a third party (*tiers convenu*) designated by the pledgee.

Ranking

In the case of *gage sans dépossession*, the date of perfection by filing determines the priority of the pledges. If a new pledge is subsequently created in which the security provider transfers possession and

control over the secured assets to the pledgee or a third party acting on the pledgee's behalf, the original pledge has priority over the subsequent one as long as the filing has been effected before such transfer.

Enforcement

Where the pledge agreement provides that the pledgee may, in the event of enforcement, obtain ownership of the assets without court order (*pacte commissoire*), this is permitted provided that an evaluation of the pledged assets is made by an independent evaluator; in such case any surplus of the value of the assets over the amount of the pledged debt is returned by the pledgee to the pledgor. Otherwise (or as an alternative), enforcement is either by court-ordered attribution (same rules apply as to evaluation and return of surplus value) or sale at public auction and satisfaction of the secured debt out of the proceeds of the sale.

Inventory

Prior to the promulgation of the Security Reform Ordonnance, a distinction was made between pledges of inventory and pledges of other tangible moveables. Pledges of inventory were covered by separate provisions of the French Commercial Code (*code de commerce*) rather than by the Civil Code (*Code civil*), were permitted solely to secure loans made by credit institutions and finance companies, and enforcement by means of contractual self-attribution (*pacte commissoire*) was not permitted.

This gave rise to a complex legal question as to whether the Commercial Code (*Code de commerce*) pledge of inventory (*nantissement de stock*) was the only means by which inventory could be secured or whether it constituted simply an optional alternative to an ordinary pledge over tangible moveables. Ultimately, the *Cour de Cassation* (the highest French court for civil, commercial, penal and labour law matters) determined that the Commercial Code (*Code de commerce*) pledge was the only manner in which inventory could be pledged, in a decision that was widely criticised by both the banking and legal communities and in turn gave rise to new legislation making either procedure optional and also permitting enforcement of pledges of inventory by way of *pacte commissoire*. Finally, the Security Reform Ordonnance did away entirely with the separate pledge of inventory and the ordinary pledge of tangible moveables is henceforth the only means by which inventory can be pledged.

Equipment

Prior to the promulgation of the Security Reform Ordonnance, a special regime existed for the creation of pledges over business equipment and machine tools (*nantissement d'outillage et d'équipement*), which was limited to security granted for payment either of the purchase price of such equipment and tools or for financing granted for such purchase price.

This special security interest was abolished by the Security Reform Ordonnance, the reason being that at the time the legislation adopted to create such special security interest was promulgated, it was impossible under French law to create and perfect a pledge over tangible moveables without the security provider being dispossessed of such moveables. Now that pledges over tangible moveables can be perfected by filing as an alternative to physical dispossession, pledges over equipment can take the form of "ordinary" pledges over tangible moveables, as mentioned above. Alternatively, equipment can be pledged as a component of a pledge of going concern (*nantissement du fonds de commerce*), as explained in the following paragraph.

As mentioned above, the Security Reform Ordonnance provides that immoveables by destination (immeubles par destination) can be pledged as tangible moveables. This is important as it provides a means of creating security over immoveables by destination independent of real property mortgages, providing an improved means of creating security over certain costly equipment such as turbines, transformers, solar panels, or other equipment used in wind farms, solar farms or other industrial or mining installations. In the event that immoveables by destination over which a tangible moveables pledge have been created are subsequently incorporated into real property, the earlier to register the security on a public register has prior ranking.

Please also note that security over certain forms of transportation equipment are subject to special rules that are beyond the scope of this summary. This is the case of:

- Oceangoing ships, which are the subject of ship mortgages (*hypothèques maritimes*).
- Freshwater vessels, which are the subject of freshwater mortgages (*hypothèques fluviales*).
- Aircraft, which are the subject of aircraft mortgages (*hypothèques aériennes*).

Going concern (fonds de commerce)

Relevant statutory provisions

French Commercial Code (Code de commerce), articles L. 142-1 et seq; R. 143-1 et seq.

Creation

A going concern (*fonds de commerce*) consists of the "bundle" of tangible and intangible assets (other than real property, inventory, receivables and shareholder participations) used by a business in order to operate. Under the relevant statutory provisions, the following components of such "bundle" may be the subject of a pledge: logo and trade names (*l'enseigne et le nom*), leaseholder rights (*droit au bail*), client lists and goodwill (*clientèle et l'achalandage*), business furniture (*mobilier commercial*), business equipment and machine tools (*matériel et outillage*) and any intellectual property rights (*droits de propriété intellectuelle*)

A pledge over going concern (*nantissement du fonds de commerce*) is created pursuant to written agreement between the pledgor and the pledgee setting forth the secured debt and a description of the components of the going concern being pledged. If no description of the components being pledged is given, then the pledge covers only logo and trade name, leaseholder rights and goodwill.

Perfection

Perfection is accomplished by filing the pledge with the Register of commerce and companies of the commercial court with jurisdiction over the place where the pledgor operates the going concern that is being pledged. Prior statutory provisions requiring separate filings with the commercial court of each branch operation have been repealed by the Security Reform Law.

Ranking

In the case of *nantissement du fonds de commerce*, the date of perfection by filing determines the priority of the pledges.

Enforcement

Unlike the pledge of tangible moveables, neither judicial attribution nor contractual attribution by means of a *pacte commissoire* is possible in the event of enforcement of a pledge over going concern. Enforcement is effected solely by sale of the going concern and satisfaction of the secured creditor out of the proceeds of the sale.

Receivables

Three different means of creating security over receivables are possible following the promulgation of the Security Reform Ordonnance and each one will be discussed separately below.

Security assignment of professional receivables

Relevant statutory provisions

French Monetary and Finance Code (Code monétaire et financier), articles L. 313-23 et seq and R. 313-15 et seq (codifying statutory provisions previously contained in the "Dailly Law" (*Loi Dailly*) (Law n° 81-1 of 2 January 1981). Note that this method applies only to "professional receivables" (receivables generated by a legal entity or a physical person in the exercise of a professional activity and held against a similar entity or person) which are assigned by way of security for credit granted to the security assignor by a credit institution, a finance company or certain investment vehicles.

Until the promulgation of the Security Reform Ordonnance created the Civil Code (*Code Civil*) security assignment of receivables, these provisions were the only way in which a security assignment could be effected (other than in a securitisation scenario). The Loi Dailly assignment continues to have certain advantages over the Civil Code (*Code civil*) assignment in the event of the opening of insolvency proceedings against the assignor, as explained in our responses to questions 5, 17 and 18 below.

Creation

The security assignment is created by listing the receivables on a special listing document (*bordereau*) containing certain statutory language, signed by the assignor and dated by the assignee. Liquid and due receivables may be assigned, as can receivables resulting from an instrument either already concluded or which will be concluded afterwards the amount or the due date of which are not yet determined.

In practice, the assignor and the assignee often sign a global agreement requiring the assignor to submit such *bordereaux* to the assignee for such dating on a monthly basis (or with some other agreed-upon frequency).

Perfection

The assignment is effective as against third parties (other than the debtor of the assigned receivable) upon the date being apposed on the bordereau by the assignee.

Two-step perfection as against the debtor of the assigned receivable is available.

First, the assignee may send a notice of assignment to the debtor of the underlying receivable prohibiting that debtor from paying the receivable to the assignor. In that case, if the assigned debtor pays the receivable to the assignor rather than the assignee, it does so at its own risk. Second, the assignee may request the

assigned debtor to agree that it will pay the assigned receivable directly to the assignee. If the assignee so agrees, it may not oppose as against the assignee any defences to payment based on its relationship with the assignor, unless the assignee that acquired or received the receivable knowingly acted to the debtor's detriment.

Ranking

Conflicts between successive assignees of the same receivable are resolved in favour of the earlier assignment.

Enforcement

As the assignee is the new owner of the assigned receivable, sums paid under the assigned receivable are applied to the secured debt (however, the assignor and the assignee may agree that the assignor continues to collect the assigned receivables as the agent of the assignee unless and until an event of default occurs under the credit secured by the security assignment). If the secured debt is fully repaid, the assignor recovers ownership of the assigned receivable.

Civil Code security assignment of receivables

The constraints imposed on the granting of *Loi Dailly* security assignments of receivables (limited to "professional" receivables, possible only in favour of credit institutions, finance companies and certain investment vehicles and then only to secure direct borrowings made by such assignees to the assignor) acted as a brake to other security assignments of receivables, and such attempts were routinely requalified by the French courts as pledges, rather than security assignments, of the relevant receivables.

One of the significant effects of the Security Reform Law was to permit security assignments of receivables under the French Civil Code (*Code civil*), free of such constraints (but, as explained in our responses to questions 5, 17 and 18 below, there are still some advantages to using *Loi Dailly* security where the relevant conditions are met).

Relevant statutory provisions

Articles 1321 to 1326 and 2373 to 2373-3 of the French Civil Code (Code civil).

Creation

A written agreement providing a description of both the receivables assigned and the secured obligations is necessary. Future receivables may be so assigned as long as the written agreement permits their individualisation or contains elements permitting them to be identified such as an indication of the debtor, the place of payment, the amount of the receivables or an evaluation thereof and if relevant, their due date. All receivables (not only "professional" receivables) may be so assigned.

Perfection

The assignment is perfected as against all third parties other than the debtor of the assigned receivable by signature of the written agreement by the assignor and the assignee. Perfection as against the assigned debtor is either by notice to or acknowledgment by such assigned debtor, or by its prior consent to such assignment.

Ranking

Conflicts between successive assignees of the same receivable are resolved in favour of the earlier assignment.

Enforcement

As the assignee is the new owner of the assigned receivable, sums paid under the assigned receivable are applied to the secured debt (however, the assignor and the assignee may agree that the assignor continues to collect the assigned receivables as the agent of the assignee unless and until an event of default occurs under the credit secured by the security assignment). If the secured debt is fully repaid, the assignor recovers ownership of the assigned receivable.

Civil Code pledge of receivables

In some situations the debtor will not agree to permit ownership of the receivables to be assigned, even by way of security. In such cases, the lender may agree to accept a pledge (*nantissement*) of the receivables instead.

Relevant statutory provisions

Articles 2356 to 2366 of the French Civil Code (*Code civil*).

Creation

A written agreement providing a description of both the receivables pledged and the secured obligations is necessary. Future receivables may be so pledged as long as the written agreement permits their individualization or contains elements permitting them to be identified such as an indication of the debtor, the place of payment, the amount of the receivables or an evaluation

thereof and if relevant, their due date. All receivables (not only "professional" receivables) may be so pledged.

Perfection

The pledge is perfected as against all third parties other than the debtor of the pledged receivable by signature of the written agreement by the pledgor and the pledgee. Perfection as against the pledged debtor is either by notice to or acknowledgment by such pledged debtor, or by the pledged debtor being a party to the pledge agreement.

Ranking

Conflicts between successive assignees of the same receivable are resolved in favour of the earlier assignment.

Enforcement

After notification of the pledge is effected, the secured creditor benefits from retention rights over the pledged receivable and is the only party entitled to payment thereof both in principal and interest. Sums paid under the assigned receivable are applied to the secured debt where the secured debt is due; otherwise, the secured creditor retains them as security in a specially dedicated account opened for such purpose with a credit institution and must return them if the secured obligation is performed. If the secured obligation is not performed and eight days following a notice to perform without effect, the secured creditor applies the funds to reimbursement of the secured debt up to the unpaid amounts. In the event of failure of the debtor, the secured creditor may obtain attribution of the entire secured receivable either as decided by a judge or as specified in the pledge agreement. If the amount so received by the secured creditor is greater than the amount of the secured debt, the difference must be returned to the pledgor.

Pledge of bank account balance

Relevant statutory provisions

Article 2360 of the French Civil Code (Code civil).

A pledge of bank account balance (*nantissement du solde de compte bancaire*) is considered under the French Civil Code (*Code civil*) to be a form of receivables pledge and the rules above are therefore applicable to it; in other words, the pledge is over the pledgor/depositor's rights to reimbursement of the amount standing to the balance of the account on the date that the pledge is enforced, subject to the regularisation of transactions already under way.

Therefore, the rules relating to creation, perfection, ranking and enforcement of the pledge over receivables enumerated above are also applicable to the pledge of bank account balance.

Cash collateral

NB: this is different from the pledge of account balance referred to above.

A pledge of bank account balance is security over the pledgor's right to receive reimbursement from the bank in which it makes deposits and the amount so secured can therefore change over time with the amount on deposit with the bank.

Cash collateral refers to security over a fixed sum of cash (possibly increased by interest) deposited with a bank, either in favour of the bank itself or in an account held by the beneficiary with a bank. While security of this sort has been practiced for some time in France, there was considerable doubt as to the legal underpinning of such security: was it simply a pledge (*nantissement*) of the cash in question, or did it constitute a genuine transfer of title to such cash in favour of the beneficiary?

The Security Reform Ordonnance has resolved the issue and states that such security constitutes an actual transfer of title to the cash in favour of the beneficiary of the security ("*la propriété d'une somme d'argent, soit en euro soit en une autre monnaie, peut être cédée à titre de garantie d'une ou plusieurs créances, présentes ou futures*").

Relevant statutory provisions

Articles 2374 to 2374-6 of the French Civil Code (Code civil).

Creation

A written agreement providing a description of the secured obligations is necessary. Future receivables may be so secured as long as the written agreement permits their individualisation or contains elements permitting them to be identified such as an indication of the debtor, the place of payment, the amount of the receivables or an evaluation thereof and if relevant, their due date.

Perfection

Delivery of the sum of money to the secured party (in practice, deposit of the cash in a bank account of the secured party) constitutes perfection as against third parties.

Ranking

As the transferee of the cash becomes the owner of title thereto, there is no priority mechanism.

Enforcement

The transferee may freely dispose of the sum transferred unless the written agreement specifies the manner in which the sum is to be applied. If the transferee does not have the free disposition of the transferred sum, interest and other revenues increase the basis of the security unless there is a clause to the contrary. Where the transferee does have free disposition of the sum transferred, the contract may provide for payment of interest to the security provider.

Upon failure of the security provider to pay, the transferee may impute the amount of the transferred sum, increased by interest, to the secured amount. If there is any surplus, it is returned to the security provider. If the secured amount is fully paid, then the transferee must return the transferred amount to the security provider, increased by interest if any.

Shares in commercial companies.

Generally speaking, French law distinguishes between two categories of commercial companies:

- In some commercial companies, shares in such companies consists of “fractional interests” (*parts sociales*), which are not freely transferable. Transfer of such fractional interests typically requires, as a matter of law, prior approval either by all or by a qualified majority of the other holders of parts sociales. In some, but not all cases, such prior approval may be granted by approval of a draft of an agreement for the pledge of such shares, which such approval is deemed to constitute approval of the subsequent transfer of such shares in the event of enforcement of the pledge. This is the case of general partnerships (*sociétés en nom collectif*), limited partnerships (*sociétés en commandite simple*) and private limited liability companies (*sociétés à responsabilité limitée*).
- In other commercial companies, shares in such companies constitute financial instruments, which are freely transferable as a matter of law unless the articles of association (*statuts*) of the relevant company either require prior approval by a corporate body or restrict transfer entirely for a certain time period. Where prior approval is required, such approval may in some cases be granted by approval of a draft of an agreement for the pledge of such shares, which such approval is deemed to constitute approval of the subsequent transfer of such shares in the event of enforcement of the pledge. Where transfers are restricted entirely during a predetermined time period, transfer of shares as a result of enforcement of a pledge may require modification of the company’s statuts. This is the case of corporations (*sociétés anonymes*), limited corporations (*sociétés en commandite par actions*) and simplified share companies (*sociétés par actions simplifiées*).

For this reason, pledges over shares in the two kinds of companies will be discussed separately below

Pledges of fractional interests (parts sociales)

Relevant statutory provisions

General: French Civil Code (Code civil), article 2355 (which specifies that pledges of intangible moveables (*nantissement de meubles incorporels*) other than receivables (*créances*) is governed by the same rules as those relating to tangible moveables (*gage de biens meubles corporels*) with one exception).

Regarding ability to pre-approve draft pledge of fractional interests in an SARL resulting in deemed approval of transfer of fractional interests following enforcement of pledge: French Commercial Code (Code de commerce), article L. 223-14

Creation

The pledge over fractional interests is created by written agreement signed by the pledgor and the pledgee.

Perfection

The pledge over fractional interests is perfected by filing with Registry of Commerce and Companies with jurisdiction over the registered office of the company the shares of which are pledged.

Ranking

Date of perfection by filing determines priority of security interests.

Enforcement

The general rule is that where the pledge agreement provides that the pledgee may, in the event of enforcement, obtain ownership of the shares without court order (*pacte commissoire*), this is permitted provided that an evaluation of the pledged shares is made by an independent evaluator; in such case any surplus of the value of the shares over the amount of

then pledged debt is returned by the pledgee to the pledgor. Otherwise (or as an alternative), enforcement is either by court-ordered foreclosure (same rules apply as to evaluation and return of surplus value) or sale at public auction and satisfaction of the secured debt out of the proceeds of the sale.

However, it is important to note that transfer of fractional interests due to enforcement may be subject to certain restrictions:

- In the case of a private limited liability company (SARL), transfers of fractional interests to a person who is not already a holder of fractional interests requires approval by a majority of the holders holding at least one-half (or such higher percentage as is set forth in the SARL's *statuts*) of the fractional interests. If such approval is not obtained then the holders of the fractional interests must acquire or cause to be acquired the shares at a price determined by an external expert. However, where the draft of a pledge agreement has been approved by the same majority, then this is deemed to constitute approval of the transfer resulting from the enforcement of the pledge.
- In the case of a general partnership (SNC), fractional interests may be transferred solely with the approval of the holders of all fractional interests. There is no statutory provision equivalent to that relating to SARL that authorises the holders of fractional interests to "pre-approve" a draft pledge agreement and therefore approve in advance the transfer of shares that would result from enforcement of the pledge; however, in practice such approval is often sought.
- In the case of a limited partnership (SCS), the same rules apply as for SNC, but the law permits the *statuts* to apply such rules only to fractional interests held by general partners (*commandites*) and/or to permit fractional interest held by limited partners (*commanditaires*) to be transferred with the approval of all general partners and a majority in number and fractional interests of the limited partner and/or to permit general partners to transfer fractional interests to limited partners with the same percentage of approval. Again, there is no statutory provision equivalent to that relating to SARL that authorises the holders of fractional interests to "pre-approve" a draft pledge agreement and therefore approve in advance the transfer of shares that would result from enforcement of the pledge; however, in practice such approval is often sought.

Pledges of negotiable shares (actions) (and more generally, all financial interests)

Relevant statutory provisions

General: French Monetary and Finance Code (Code Monétaire et Financier), articles L. 211-20 and D. 211-10 to D. 211-14.

Regarding ability to pre-approve draft pledge of shares in an SA having statuts with a *clause d'agrément* resulting in deemed approval of transfer of fractional interests following enforcement of pledge: French Commercial Code (*Code de commerce*), article L.228-24.

It is important to note at the outset that under French law, shares (actions) and other financial instruments (instruments financiers) are not directly the subject of a pledge: instead it is the securities account (compte titres) in which they are deposited that is pledged (as a matter of French law, all financial instruments of French issuers are dematerialised). In the case of shares traded on a platform, the relevant account will be opened with the trading platform; in other cases, the account will be opened with a registrar (teneur de compte), which is often the issuing company itself.

Creation

Under the relevant statutory provisions, the creation of the pledge of financial instruments is accomplished by delivery by the pledgor of a declaration of pledge (déclaration de nantissement) over the securities account in which the shares are registered. Unless the issuer is itself entitled to receive funds on deposit (see response to question 1 above), this can be supplemented optionally by a similar declaration of pledge over the cash account (held by the depositor with a bank or other financial institution authorised to accept cash accounts) into which dividends and other revenues thrown off by the shares are registered.

Perfection

Strictly speaking, under the jurisprudence of the French *Cour de Cassation,* the signature of the déclaration de nantissement is sufficient to create the pledge and no other action is required. However, the registrar (*teneur de compte*) is legally obligated to register (*inscrire*) the pledge on the securities transfer ledger (*registre des mouvements de titres*) and the individual securities account (*compte-titres*) maintained by the registrar, and if a separate associated cash account is also pledged, a similar inscription by the financial institution in which the

cash account is opened is effected. The pledgee is entitled to receive a certification of pledge (*attestation de nantissement*) of the relevant account from the registrar.

Please note that as a matter of practice, the pledgor and the pledgee often sign a pledge agreement containing as annexes thereto the forms of déclaration de nantissement and attestation de nantissement and require the delivery of both (as well as certified copies of the inscriptions made on the shareholder ledger and the relevant individual shareholder account) to be provided to the pledgee as a condition precedent to funding.

Ranking

Ranking is determined by the date of the *déclaration de nantissement.*

Enforcement

Where shares are traded on a trading platform, the pledgee may enforce the pledge eight days (or any shorter period previously agreed with the pledgor) following formal demand to pay (*mise en demeure*), by sale of shares on the platform and payment out of the proceeds thereof or self-attribution of the shares (value determined by most recent closing value on the trading platform).

Where shares are not so traded, the pledgee may enforce the pledge eight days (or any shorter period previously agreed with the pledgor) following formal demand to pay (*mise en demeure*), by sale at auction and satisfaction of the secured debt out of the proceeds thereof, or court-ordered attribution or, where the parties have so agreed in advance, self-attribution and independent evaluation of the value of the shares (any surplus over the secured debt being remitted to the pledgor).

Unlike the case of companies with fractional interests, there are no statutory restrictions on transfer of shares that constitute financial instruments. However, the *statuts* of such companies may include provisions restricting transfer of shares.

- In the case of a corporation (*société anonyme*), the *statuts* may contain a *clause d'agrément* requiring approval of the company for a transfer of shares. If such approval is not obtained, then the company must have the shares acquired either by a shareholder or a third party at a price determined by an external expert. However, where the draft of a pledge agreement has been approved by the same majority, then this is deemed to constitute approval of the transfer resulting from the enforcement of the
- In the case of a *société par actions simplifiée*, the *statuts* may contain a provision restricting any transfer of shares for a period of up to ten years. As this would include transfers resulting from enforcement of a pledge over such shares, it is advisable for pledgees of shares to require modification of the *statuts* to permit such transfers.

Fiduciary transfers (*fiducies*)

As an alternative to any of the foregoing security interests, it is also possible under French law to transfer title to any asset, whether tangible or intangible and whether moveable or immoveable, to a fiduciary (fiduciaire) to hold such asset for the benefit of one or more beneficiaries.

Relevant statutory provisions

Articles 2011 to 2030, 2372-1 to 2372-5 and 2488-1 to 2488-5 of the French Civil Code (Code civil)

Article 2011 of the French Civil Code (*Code civil*), added by a law of 2007, defines a *fiducie* as "the transaction by which one or more settlors transfer assets, rights or security interests, or an ensemble of assets, rights or security interests, present or future, to one or more fiduciaries who, holding them separate from their own property, act for a determined purpose for the benefit of one or several beneficiaries."

Only credit institutions and certain related entities, investment companies, portfolio managers, insurance companies and lawyers (*avocats*) may act as fiduciaries.

Creation

The *fiducie* is created by a written instrument between the settlor (*constituant*), the fiduciary (*fiduciaire*) and the beneficiar(y)(ies) (*bénéficiaire*(s)) which mentions:

- the assets, rights or security interests transferred (if they are future, they must be determinable);
- the duration of the transfer, which cannot be greater than 99 years from signature;
- the identity of the settlor(s) constituting the fiducie;
- the identity of the fiduciary(ies);
- the identity of the beneficiary(ies) or the rules permitting the designation thereof; and the mission of the fiduciary(ies) and the scope of their powers of administration and disposition.

The settlor or the fiduciary may also be the beneficiary or one of the beneficiaries of the *fiducie.*

Many *fiducie* arrangements are entered into for purposes of managing assets (*fiducie-gestion*) but it is also possible to use the *fiducie* as a means of transferring title to assets by way of security (*fiducie-sûreté*). In such case the *fiducie* agreement must also include a description of the secured debt, which may be present or future (but if future, must be determinable).

Perfection

An assignment of receivables effected in the context of a *fiducie* is perfected as against third parties other than the debtor of the underlying receivable upon signature of the *fiducie* or any amendment which includes it. It is perfected as against such underlying debtor only by notification of the assignment to it by either the assignor or the *fiduciaire.*

Fiducie agreements must be registered with the tax authorities and there is a national register of *fiducies,* but these are not available to the public.

Ranking

Not specified by statute and since filing is on a nonpublic register, is likely to follow the date of the *fiducie* contract.

Enforcement

In the event that the secured obligation is not paid, and unless the *fiducie* agreement specifies otherwise, the fiduciary, if it is also the creditor, acquires the free disposition of the asset or right transferred by way of security.

Where the fiduciary is not the creditor, the creditor may require the fiduciary to hand over the asset to the creditor and may then freely dispose of it, or, if the *fiducie* agreement so specifies, the creditor may require the fiduciary to sell the transferred asset or right and the delivery of all or part of the price.

The value of the transferred asset or right is determined by an expert designated by mutual agreement or by a court, unless such value is the result of an official listing on a negotiation platform or is a sum of cash (any clause to the contrary is deemed not to have existed).

If the fiduciary does not find an acquirer at the price fixed by such an expert, it can sell the asset or right at the price it estimates constitutes the value thereof (but is liable if the price it estimates does not correspond to the true value).

Surplus value over the secured debt is returned to the person or entity constituting the *fiducie.*

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

The general rule is that security can be granted over future assets and for future obligations, provided in each instance that they are “determinable”, i.e., that although they may not have come into existence at the time that the instrument creating the security interest is signed, they can be identified when they come into existence by application of the criteria set forth in such instrument. The actual requirement varies slightly with regard to each class of assets and is summarised in our response to question 4 above.

It should be noted, however, that in the event that the security provider is the subject of an insolvency proceeding, then under an amendment to the French Commercial Code (*Code de commerce*) promulgated at the same time as the Security Reform Ordonnance (Article L. 622-21(IV)), the opening of such proceedings results automatically in the prohibition of any increase in the scope of contractually-granted security by addition or increase in assets or rights, including by any transfer or assets or rights of the debtor. Any provision to the contrary contained in any agreement, relating to a transfer of assets or rights which have not yet come into existence on the date at which the judgment opening the insolvency proceedings is issued, is inapplicable as from such date.

The only exception to this prohibition is that an increase in the scope of security is valid if it results from a *Loi Dailly* (see paragraph 4 above) assignment of receivables effected pursuant to a framework agreement concluded prior to the opening of the insolvency proceeding. In other words, the delivery, following the opening of an insolvency proceeding, of a new *bordereau* assigning receivables pursuant to a requirement in a framework agreement calling from such deliveries on a pre-agreed frequency, validly results in the assignment of the new receivables covered in such *bordereau.*

6. Can a single security agreement be used to take security over all of a company’s assets or are separate agreements required in relation to each type of asset?

Separate agreements are required in the case of each class of asset. Please see our response to question 4.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

The only security interests that must be signed before a French notary (*notaire*) are those relating to mortgages over real property (*hypothèques immobilières*). All other written instruments creating security interests may be signed by private instrument (*acte sous seing privé*).

8. Are there any security registration requirements in your jurisdiction?

All security over tangible moveables and real property (other than those perfected by physical dispossession of and loss of control by the pledgor of the pledged asset), as well as pledges over fractional interests and over financial instruments (including shares) must be registered with the relevant register in order for the security to be perfected as against third parties (see detailed discussion in paragraph 4 above).

Conversely, security over receivables (whether *Loi Dailly* or Civil Code (*Code civil*) security assignments or pledges), including pledges over bank account balances, is perfected by notice to the obligor of the underlying receivables, and cash collateral is perfected by delivery of the cash (in practice, deposit of the cash in the beneficiary's bank account) and requires no registration.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

- Any document may be submitted to voluntary tax registration at a cost of EUR 25.00. Such registration confers a *date certaine* upon the document, i.e., a date that is presumed as a matter of law to be the correct date in the absence of fraud.
- Registration of security over moveables with the required registry (see response to previous question) general requires payment of nominal fees to the relevant registry.
- Enforcement of certain security may give rise to payment of special registration costs (e.g., transfer of shares or of a *fonds de commerce*), but the mere execution of the relevant security document itself does not require such registration.
- Real property mortgages (*hypothèques immobilières*) and special legal mortgages *(hypothèques légales spéciales)* must be signed before a French notary and give rise to the payment of land registration taxes, registrar's fees and notary's fees (often misleadingly lumped together under the expression "*frais de notaire*" (notary's costs) because the various taxes are collected by he notary and paid over to the relevant authorities).

These amounts vary as a function of the amount secured under the mortgage but can be significant when compared with costs of other security. In our experience it is not usual to use up stamping as a means of reducing these amounts due to the risk that other security will be taken in the interval with ranking superior to that of the up stamped amount. Instead, lenders either agree to obtain real property security for an amount less than the full amount lent (in exchange for other elements in the security package) or obtain limited rebates of actual notary's fees if the amount secured in is the higher ranges.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

It is a basic principle of French law that a company must be managed in its corporate interest (*intérêt social*). There is *jurisprudence* to the effect that the granting of "upstream security" by a subsidiary for the obligations of its parent company with the subsidiary receiving no counterpart in return was contrary to the subsidiary's *intérêt social* and therefore should be invalidated. Conversely, however, it is generally admitted that the granting of such security is permitted (and is not contrary to the security provider's *intérêt social*) as long as the company granting the security receives in return a valid and effective counterpart (*contrepartie effective et suffisante*), which can consist of the granting by the other group company of equivalent security for the first company's own obligations.

Under Article L. 241-3 of the Commercial Code (*Code de commerce*), it a penal offence for the general manager (*gérant*) of an SARL (private limited company) or the president (*président*) of an SA (joint stock company) or an SAS (simplified share company) to "make use, in bad

faith, of the assets or the credit of the company which they know is contrary to the interests of such company, for personal reasons or in order to favour another company or enterprise in which they are directly or indirectly interested" ("*qui, de mauvaise foi, auront fait des biens ou du crédit de la société un usage qu'ils savaient contraire à l'intérêt de celle-ci, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils étaient intéressés directement ou indirectement*"). Violation of this provision is subject to imprisonment of up to five years and a fine of EUR 375,000.

However, under a strong line of *jurisprudence*, intragroup advances (to which the market typically assimilates the granting of security by one company in a group to secure the obligations of another company in the group) do not violate the prohibition on *abus de biens sociaux* if they are "dictated by a mutual economic, social or financial interest, appreciated with respect to a policy elaborated for the group as a whole, and are neither without a counterpart or breach the equilibrium between the respective undertakings of the various companies concerned, nor exceed the financial possibilities of the company which bears the burden thereof."

Satisfaction of these criteria requires that the following conditions be fulfilled:

- There must be a genuine "group" of companies with a common business strategy, and the planned transaction must be in furtherance of such strategy. The mere fact that one or more companies with disparate business activities and strategies are majority-owned by the same shareholder (e.g., a conglomerate) will not be sufficient if there is no common business strategy and if the planned transaction benefits only one of the companies in the "group".
- The financial concession made by one or several companies in the group must not be without counterpart (i.e., the guarantor must receive some actual financial consideration for the issuing of the guarantee) and must not result in a breach of the equilibrium between the respective undertakings of the companies in the group.
- The financial burden imposed on a company as a consequence of the proposed transaction must not exceed the financial capabilities of the company bearing such burden.

The general market practice at the present time with respect to lending to a group of companies is to permit without limitation guarantees granted by a parent company for the obligations of its subsidiaries, but to permit upstream or cross-stream guarantees by only up to a maximum amount constituted by the amount of loans disbursed under the relevant facility either directly to the relevant guarantee provider or to other group companies and then on-lent to such guarantee provider (and, in either case, to subsidiaries of such guarantee provider).

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Article L. 225-216 of the Commercial Code (*Code de commerce*) provides as follows:

"A company may not advance funds, grant loans or give guarantees or security for the subscription for or purchase of its own shares by a third party.

The provisions of this article do not apply either to current operations of credit companies or to transactions undertaken with a view to the acquisition by employees of shares of the corporation or one of its subsidiaries."

It is clear from the placement of this provision in the Commercial Code (*Code de commerce*) that only companies organised as joint stock companies (*sociétés anonymes, sociétés par actions simplifiée* and *sociétés en commandite par actions*) are subject to the restriction, while general partnerships (*sociétés en nom collectif*), limited partnerships (*sociétés en commandite simple*) and private limited liability companies (*sociétés à responsabilité limitée*) are not concerned.

The language represents transposition into French law of the provisions of EU company law directives prohibiting "financial assistance" but, unlike the legislation of some other European jurisdictions, the text is very sparse and contains no language providing a procedure for "whitewashing" in certain cases.

There is little clarification either in the jurisprudence or in learned legal commentary (doctrine) as to whether the prohibition applies only to guarantees and security granted for the acquisition of the company itself or also to acquisitions of other companies directly or indirectly owning shares in the grantor company or of shares in related companies.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes. Under Articles 2488-6 to 2488-12 of the French Civil Code (Code civil), added by government order (Ordonnance) n° 2017-748 of 4 May 2017 (ratified by Law n° 2019-486 of 22 May 2019, any guarantee or security interest may be obtained, registered, administered and enforced by a security agent (*agent des sûretés*), who acts in its own name for the benefit of the creditors of the guaranteed or secured obligation. The security agent is the title owner (*titulaire*) of such guarantees and security interests, and the rights and assets acquired by the security agent in carrying out such functions form separate property allocated thereto, distinct from the security agent's own property.

- The agreement designating the security agent must mention the capacity in which the security agent is designated, the purpose and the term of such designation and the scope of the security agent's powers. The security agent must identify itself as such when acting in such capacity. The security agent may exercise any action necessary in order to defend the interests of the secured creditors, including filing claims in insolvency proceedings.
- Any assets and rights acquired by the security agent in the exercise of its functions may not, except in the case of fraud, be attached except by creditors whose claims result from the holding or administration of such assets and rights. The opening of insolvency or resolution proceedings against the security agent has no effect on the property allocated to the exercise of such functions.
- Even if there are no specific contractual provisions relating to its replacement, in the event that the security agent fails to comply with its obligations, jeopardises the interests confided in it or is the subject of insolvency or resolution proceedings, any of the creditors benefiting from the relevant guarantees or security interests may bring an action before a court requesting the designation of a temporary security agent or the replacement of the security agent. Any replacement of the security agent, whether by contract or by such action, results automatically in the transmission of the relevant property to the new security agent.
- The security agent is liable, on its own property, for any fault committed in the exercise of its functions. There are no special requirements which must be met in order to be designated as an *agent des sûretés*. The *agent des sûretés* is not required to be one of the lenders in the syndicate, nor is it required to be a licensed credit institution or finance company or even a legal entity (physical persons can act as *agent des sûretés*). Please note that distribution of proceeds of enforcement of security must be made through authorised banks or payment institutions.
- An *agent des sûretés* can be designated not only where the underlying credit documentation is governed by French law, but also where the credit documentation is governed by English or New York law and security is to be taken over assets located in France and/or over receivables or rights governed by French law.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

As explained in the response to question 12, France does, by statute, recognise the role of a security agent (*agent des sûretés*). Prior to the adoption of such statute, the French Cour de Cassation had already recognised, in the celebrated Belvedere decision (Cass. com., 13 sept. 2011, n° 10-25.533) the validity of "parallel debt" structures under which French law security over assets located in France was granted to a security trustee/agent designated under a foreign law (i.e., by providing, in the credit facility agreement, that each debt to the lenders arising under the facility gave rise simultaneously to "parallel debt" directly in favour of the security trustee/agent, with payment of the direct debt to the lenders also being deemed payment of the corresponding parallel debt owed to the security trustee/agent). Note that this decision only legitimized the use of "parallel debt" where such debt is created under the law of a jurisdiction other than the law of France and it is undisputed that "parallel debt" is a valid source of obligations under the law of that jurisdiction. "Parallel debt" cannot be used as a source of obligations in a credit agreement governed by French law. It should only be considered as a means of creating French law security over assets located in France or over rights

governed by French law in favour of a security trustee/agent designated in an instrument governed by the laws of a jurisdiction other than France where such law indisputably authorises the use of "parallel debt" as a source of obligations.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

As a member state of the European Union, France is subject to the Rome I Regulation on the law applicable to contractual obligations, which provides (subject to exceptions concerning certain kinds of contracts not applicable here) that a contract shall be governed by the law chosen by the parties. Such law is applied whether or not it is the law of an EU Member State; hence, the choice of English law in a loan or credit facility to which a company incorporated in France is a party should normally be given effect, subject, in accordance with such Rome I Regulation, to the following exceptions:

- Where all other elements relevant to the situation at the time of the choice are located in one or more EU Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
- Overriding mandatory provisions (i.e., provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law chosen by the parties) of the forum may be applied by the French courts; and overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.
- The application of a provision of the law chosen by the parties may be refused if such application is manifestly incompatible with the public policy (ordre public) of the forum.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

As a member state of the European Union, France is subject to the Brussels Regulation (Recast) on jurisdiction and enforcement of judgments in civil and commercial matters of 12 December 2012, which would therefore apply to recognition and enforcement in France of judgments **obtained in a court of another member state of the European Union** and provides for expedited enforcement of such judgments subject to exceptions:

- in the event that the judgment is manifestly contrary to public policy in the member state of the court in which enforcement is sought;
- if the judgment was given in default of appearance if the defendant did not receive proper notice;
- lis pendens;
- if the judgment was given by a court in one member state when the courts of another member state had **exclusive jurisdiction**.

In the case of a judgment of a court in the United Kingdom, such a judgment given in an international case in a civil or commercial matter in respect of an agreement under which the courts of the United Kingdom were granted exclusive jurisdiction to decide disputes arising out of such agreement may qualify for expedited recognition and enforcement before the French courts pursuant to the Hague Convention on Choice of Court Agreements. However, there is a currently a difference in opinion as to whether such Hague Convention applies as from the date it originally entered into force for the European Union (i.e., 1 October 2015, at which time the United Kingdom was still a member state of the European Union) or only upon the United Kingdom becoming a party in its own right (i.e., in effect from 1 January 2021, as a consequence of Brexit), in which case agreements providing for exclusive jurisdiction but which were entered into prior to such date may need to be re-executed or amended in order to fall within the Hague Convention.

In all other cases (including judgments of US courts and judgments of English courts if the Hague Convention does not apply), a final and conclusive judgment (of civil or commercial nature) which is not capable of appeal

obtained in a foreign court of competent jurisdiction and in respect of which enforcement has not been stayed by any such court (a Foreign Judgment) under an agreement governed by the law of such jurisdiction, for debt or a definite sum of money, would, subject to the rules governing international lis alibi pendens under French private international law, be recognised and enforced by the French courts without a review of the merits, provided in particular that (a) the procedure followed by the relevant court of the foreign jurisdiction does not conflict with principles of due process applied in France or with French public ordre international and (b) the Foreign Judgment does not conflict with French International Public Policy, is not tainted with fraud and is not incompatible with an earlier judgment rendered by a French court in the same matter.

France is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e., the New York Arbitration Convention).

16. What (briefly) is the insolvency process in your jurisdiction?

In addition to two pre-insolvency procedures that involve voluntary out-of-court amicable discussions between a debtor in financial difficulty and its creditors (the designation of a *mandataire ad hoc* and the conducting of conciliation proceedings), the French Commercial Code (Code de commerce) provides principally for three more formal proceedings for resolving issues of companies experiencing financial difficulties:

- safeguard (*sauvegarde*) (including a more expedited proceeding referred to as accelerated safeguard (*sauvegarde accélérée*) if the debtor has already opened conciliation proceedings and proposed a safeguard plan which is likely to succeed);
- judicial reorganisation (redressement judiciaire); and
- judicial liquidation (liquidation judiciaire)

Safeguard proceedings are open to companies which are not insolvent but which are experiencing difficulties which cannot be overcome. "Insolvency" for this purpose refers to "*cessation des paiements*", i.e., inability to meet current liabilities with currently available assets (*l'impossibilité de faire face au passif exigible avec son actif disponible*). Upon opening of the safeguard proceedings, an "observation period" is opened, which may last up to 12 months. During this period, the goal for the debtor is to propose and obtain creditor approval for a recovery plan (which may involve write-offs or rescheduling of debt, sale of part of the business or sale of assets or capitalisation of debt (i.e., debt-for-equity swap); for such purpose, if certain thresholds are met, creditors are organised into different classes (the debtor may also voluntarily request such creditors' classes to be formed if the thresholds are not met), and each class then votes on the proposed plan (approval requires a 2/3 vote of each of the members of the creditor's class actually voting); otherwise voting is on an individual basis. In some cases, where there are creditors' classes, those classes which approve the plan can override resistance by other groups refusing to accept the plan ("cross-class cram down"). Such cram-down may however only be ordered if repayment conditions are not worse than what they would have been in a liquidation for any affected classes of creditors (which notably protects secured creditors).

Judicial reorganisation *proceedings are similar, but may be opened only after a debtor is already insolvent, and the observation period may last up to 18 months* (renewable for an additional six months if so requested by the public prosecutor). The rules for the adoption of a recovery plan (possible vote in classes of creditors and cram-down possibility) are similar to those in safeguard. However, unlike the case of safeguard proceedings, creditors are entitled to submit their own proposed plan in response to the debtor's proposed plan. In the case of judicial reorganisation, the court may order, if a recovery plan cannot be attained, a total or partial sale of the debtor's business or assets to a third party and payment to creditors out of the proceeds of such sale. If neither a continuation plan nor a sale is possible or is not successful, the proceedings are converted into judicial liquidation.

Judicial liquidation is opened either after an unsuccessful judicial reorganisation or, if the debtor is insolvent and it appears manifestly clear that no reorganisation is possible. In such case, the purpose of the proceeding is simply to wind up the company, dispose of its assets and pay off its creditors.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

The opening of *sauvegarde* or *redressement judiciaire* proceedings results in a stay of proceedings opened against the debtor and consequently an inability to enforce security interests in respect of debts arising prior to the opening of the proceedings and lasting through the relevant observation period.

However, receivables which have been assigned by way

of security under the *Loi Dailly* (see paragraph 4 above) prior to the opening of the insolvency proceedings are already owned by the assignee, who is therefore entitled to recover such receivables even following the opening of such proceedings. This is true as well for assets transferred to a fiduciaire pursuant to a fiducie as long as the fiducie agreement did not provide that the assets would remain in the debtor's possession.

Moreover, as explained in paragraph 5 above, security assignment of new receivables following the opening of such proceedings pursuant to a *Loi Dailly* framework agreement are also valid.

Ultimately, in the event liquidation proceedings are opened; secured creditors benefit from their security subject to the following:

- *pacte commissoire* clauses entitling the secured creditor to self-appropriate assets may not be enforced; and
- in the case of secured creditors benefiting from pledges (but not mortgages), court-ordered appropriation of assets is permitted;
- in all other cases, secured creditors enjoy their priority ranking in respect of the proceeds of sale of the assets carried out by the liquidator.

18. Please comment on transactions voidable upon insolvency.

As is the case for many jurisdictions, the French Commercial Code (*Code de commerce*) provides for a "hardening period" (i.e., a period counting backwards from the date of the formal opening of insolvency proceedings in respect of which a court may determine that a debtor was in fact insolvent and during which period certain transactions either must or may be determined to be voidable. This period is referred to in French legal literature as the "suspect period" (*période suspecte*) and may go up to eighteen months prior to the opening of the insolvency period (or up to 24 months in the case of assets transferred without consideration). "Insolvency" for this purpose refers to "*cessation des paiements*", i.e., inability to meet current liabilities with currently available assets (*l'impossibilité de faire face au passif exigible avec son actif disponible*). Note that since safeguard proceedings may be opened only if the debtor is not yet insolvent, voidability of transactions concluded during the suspect period only applies to judicial reorganisation and judicial liquidation proceedings.

Transactions effected during the "hardening period" which **must** be set aside are the following:

- Transfers of assets (whether moveables or real property) without consideration.
- Bilateral agreements in which the obligations of the insolvent debtor significantly exceed those of the other party.
- Any payment made for debts that are unmatured at the time on the date they were paid.
- Any payment made for matured debts where the payment is made otherwise than in cash, negotiable instruments, deposits, Loi Dailly bordereaux or any other means of payment commonly accepted in business relations.
- Deposits and consignations made in the course of ongoing litigation other than because of a final court judgement.
- Any contractual security or contractual retention rights granted over assets or rights of the debtor for prior debts, unless they replace security previously granted of a nature and a scope at least equivalent to the new security, and except for Loi Dailly security assignments granted pursuant to a framework agreement concluded prior to the date that the debtor is found to have been insolvent.
- Any mortgage granted as a matter of law (*hypothèque légale*) as a result of a judgement and constituted on the assets of the debtor for previous debts.
- Any conservation measure unless the registration or the seizure order was prior to the date that the debtor is found to have been insolvent.
- Exercise of certain stock options.
- Any transfer of assets or rights into a *fiducie* unless the transfer was by way of security for a debt contracted concomitantly.
- Any amendment to an existing *fiducie* affecting rights or assets already transferred into the *fiducie* as security for debts contracted prior to such amendment.
- Any affectation or change in affectation of an asset other than payment of revenues that the entrepreneur determined, which results in a decrease of the value of property affected by the insolvency proceeding in favour of another property held by the entrepreneur.
- A declaration of unseizability.

In addition, the court **may** set aside payment for matured debts and more generally any transaction for consideration effected during the hardening period if it determines that the party dealing with the insolvency debtor was aware that the debtor was insolvent (*cession des paiements*).

Note that a request to the court to have a transaction declared void under these provisions may not be brought by individual creditors: only certain officials named by the court to supervise the insolvency proceedings, or the public prosecutor, may bring such an action.

19. Is set off recognised on insolvency?

Set-off is permitted in the case of "connected claims" (*créances connexes*), i.e., reciprocal claims arising out of the same contractual relationship or out of distinct and different contracts, but which stem from a global economic relationship. This principle is now enshrined in the relevant statutory provision (Commercial Code (*Code de commerce*), article L. 622-7) which in turn incorporated the jurisprudence of the French courts.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Claims against the insolvent debtor secured by way of a transfer or retention of ownership to an asset will confer to the creditor an exclusive right over such asset to obtain repayment. Consequently, clause under a contract in which the debtor is the purchaser of the asset in question and has not paid the full purchase price (and over which the seller is therefore still the title holder) do in effect take priority over a secured lender's security in the event of an insolvency. In addition, a creditor may retain physical possession over the asset owned by an insolvent debtor until full repayment of its claim against the debtor, such retention right being opposable to creditors having a security over the assets.

A number of statutory liens will also take priority, including (but not limited to):

- Court costs associated with the insolvency proceedings.
- Employee's "*superprivilège*", i.e., a lien for two months of unpaid employees' salary (typically paid by a salary insurance body who is then subrogated to the claims of the affected employees).
- "New money" privilege for creditors who have agreed to make payments to the debtor following the opening of the insolvency proceedings (or who did so during conciliation proceedings prior to the opening of redressement judiciaire proceedings).
- Claims of French tax and social security authorities.
- As mentioned above, claims of creditors to whom title to assets was validly transferred by way of security prior to the opening of insolvency proceedings through the use of *Loi Dailly* security assignees of receivables or to *fiduciaires* to which assets have been transferred as security for the beneficiaries of the relevant *fiducie*.
- Amounts due under contracts which have been continued following the opening of insolvency proceedings, where the counterparty agrees to deferred payment.
- Set-off and close-out netting of financial obligations arising under certain financial contracts pursuant to Articles L. 211-36 et seq. of the french Monetary and Finance Code (Code Monétaire et Financier)).

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

As of 1st January 2023, several registrable security interests are recorded on a unified national securities register, which will make security searches easier.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

There is no data publically available on this point but in the recent years we can note that companies are looking to diversify their sources of funding.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

Various factors have recently impacted the drafting of secured lending transaction such as Brexit, discontinuation of LIBOR, sanctions or social.

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