Acquisition Finance 2021

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LEXOLOGY®
Getting The Deal Through

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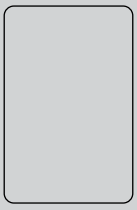

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Willkie Farr & Gallagher LLP

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Acquisition Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Denmark.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jeffrey Goldfarb, Viktor Okasmaa and David Tarr of Willkie Farr & Gallagher LLP, for their continued assistance with this volume.

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Getting The Deal Through

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GENERAL STRUCTURING OF FINANCING

Choice of law

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?

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

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

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

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

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

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

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

Restrictions on cross-border acquisitions and lending

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

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

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

Three types of investor are subject to foreign investment control: (1) foreign nationals or French nationals not domiciled in France; (2) entities governed by foreign law (a 'Foreign Entity'); and (3) entities governed by French law (a 'French Entity') and controlled by individuals or entities falling into categories (1) or (2).

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

- acquiring a controlling stake in an French Entity;
- acquiring all or part of a branch of a French Entity; or
- crossing directly or indirectly, individually or as a group, the 25 per cent of the voting rights threshold of a French Entity (for equity investments in companies whose shares are listed on a regulated market, the threshold has been temporarily reduced to 10 per cent until 31 December 2021 because of the covid-19 pandemic). This criterion does not apply to (1) nationals of an EU or EEA member state that has entered into an administrative assistance agreement with France which is aimed at combating fraud and tax evasion, nor (2) to entities whose chain of control is exclusively composed of entities governed by the laws of such a EU or EEA member state, or are nationals of and domiciled in one of these states.

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

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

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

Types of debt

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

Acquisitions in France are usually financed by a combination of equity and debt. Depending on the leverage of the transaction, the acquisition debt often consists of senior debt only, but may, in more complex or leveraged financings, include, *inter alia*, mezzanine debt (including cash interest, payment-in-kind components or a combination of both), first and second lien debt and junior debt. The senior debt is usually structured in the form of a term loan arranged by the banks, whereas the mezzanine debt is usually structured in the form of bonds with attached warrants offered by private debt lenders. It is important to note that the role of private debt lenders has significantly increased in the French acquisition debt market over recent years. They structure and provide unitranche debt (being a mix in one single instrument of senior and mezzanine debt and offering a blended margin to the borrower) to overcome complex senior/mezzanine intercreditor issues raised by the implementation of the 'double Luxco structure' in French acquisition finance transactions. Unitranche is usually provided by one single lender (as opposed to a syndicate of lenders in a senior credit facility) making negotiations, consents and waivers more straightforward for the borrower. To comply with French banking monopoly rules, private debt lending was initially structured in the form of bonds but following a recent change in EU and French legislation, some French debt funds and European alternative investment funds (AIF) are now entitled to arrange and fund term loans granted to French borrowers. The junior debt is usually structured in the form of shareholder loans or bonds convertible or redeemable into shares, and is contractually subordinated to the senior and mezzanine debt. For large cap transactions, super-senior revolving credit facility structures ranking in priority to the Term Loan B on enforcement are also available.

Certain funds

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?

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

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

Restrictions on use of proceeds

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

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

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

In addition, under French law financial assistance rules, neither the French target company nor its subsidiaries may provide any kind of financial support or assistance to the company purchasing it. As a result of such prohibition, any financing made available to the target companies may not be upstreamed to finance or refinance the acquisition debt. The use of proceeds must always comply with the borrower's corporate interest.

Licensing requirements for financing

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

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

French banking monopoly rules have territorial application. According to article 113-2 al.2 of the French Penal Code, a criminal offence will be deemed to have been committed on French territory if one of its factual components was carried out in France. However, in the absence of statutory provisions and decisive French case law, the question of whether a particular transaction is carried out in or outside France is subject to legal uncertainty and rather complex, as it is heavily reliant on factual matters requiring a case by case analysis. The French banking authorities have informally expressed the view (which is shared

by most French academics and legal practitioners) that, in determining where a credit transaction has taken place, in the absence of fraud, the most relevant test is where the funds are actually made available to the borrower, where the loan is to be reimbursed and where the proceeds are used.

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

Any breach of the French banking monopoly rules may result in up to three years imprisonment and a fine of up to €1.875 million for the offender.

Withholding tax on debt repayments

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?

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

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

The list of NCSTs is regularly updated by way of official decree. As of 6 January 2020 this list includes: Anguilla, Bahamas, British Virgin Islands, Seychelles, Vanuatu, Fiji, Guam, Oman, American Samoa, Trinidad and Tobago, Panama and the United States Virgin Islands.

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

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

Restrictions on interest

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

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

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

Indemnities

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

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

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

Assigning debt interests among lenders

10 | Can interests in debt be freely assigned among lenders?

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

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

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

Requirements to act as agent or trustee

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

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

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

Debt buy-backs

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

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

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

Exit consents

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

Outside of the context of certain types of bond issue, there are no general rules under French law restricting or prohibiting how majority, or, unanimous consents are solicited in a buy-back for the purposes of amending the covenants in the existing documentation. The agreed contractual rules for amendments and waivers would apply.

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

GUARANTEES AND COLLATERAL

Related company guarantees

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?

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

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

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

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

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

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

Assistance by the target

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?

Any French company having share capital, such as a *société anonyme*, a *société par actions simplifiée* or a *société en commandite par actions*, is prohibited from financing or granting any kind of support for the acquisition of, its own shares or the shares of its direct or indirect holding company, in particular by granting guarantees or security or providing up-stream loans to its purchaser. As a result of this financial assistance prohibition, a French target company can neither guarantee nor grant security in respect of its acquisition debt and it is required to exclude such debt from the scope of the guaranteed obligations. It is common practice to apply these rules to the direct and indirect French subsidiaries of the target company. A quick merger between the purchaser and the target company must also be considered very carefully, especially if planned before the acquisition.

There is no whitewash procedure or equivalent in France.

Types of security

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?

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

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

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

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

Requirements for perfecting a security interest

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?

As general principle, a security interest must be entered into in writing, and it becomes valid and enforceable between the parties on its signing date. Unless the security interest is taken over over real estate, there is no particular requirement as to the form of execution, it being specified that a signing in electronic form is not possible for the time being.

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

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

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

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

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

Renewing a security interest

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

Security interests filed with a French public registry need to be renewed in certain circumstances. For example, a pledge over ongoing concern (*nantissement de fonds de commerce*) is valid for a period of 10 years and must be renewed before the expiry of such period if the obligations it secures have not been discharged or released by that time. The registration of a non-possessory pledge over movable assets is valid for a period of five years and should also be renewed before its term.

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

Stakeholder consent for guarantees

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

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

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

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

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

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

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

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

Granting collateral through an agent

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?

Both options are available: security can be granted (1) directly for the benefit of all the lenders as represented by a security agent appointed by them to create, perfect and enforce the security for their account and on their behalf, or (2) for the sole benefit of a security agent acting in its own name but for the benefit of the lenders pursuant to the recently-introduced security agent regime set out in article 2488-6 of the French Civil Code. Since this security agent regime is rather new and raises accounting concerns for French banks wishing to use it, the preferred option is still to rely on security agency provisions, which would be included in the facility agreement or in the intercreditor agreement.

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

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

Creditor protection before collateral release

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

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

Fraudulent transfer

22 | Describe the fraudulent transfer laws in your jurisdiction.

The judgment opening the insolvency proceedings must mention the debtor's date of insolvency. This is the date on which the court believes that the debtor became insolvent. This date can be set with retroactive effect up to 18 months prior to such judgment.

Certain payments made and certain transactions entered into with third parties during the hardening period (being the period starting from the insolvency date determined by the court until the judgment opening the proceedings) may or must be unwound by the court.

Transactions that must be unwound include, *inter alia*, transfers of assets made for no consideration, contracts under which the debtor's obligations significantly exceed those of the other party, payment of non-payable debts, payments using methods that are not commonly employed in the relevant business sector, protective measures, security granted for pre-existing debts and transfers of assets or rights to a trust arrangement.

For transactions made for no consideration, the 18-month period can be extended for six months.

Finally, transactions may also be unwound if the counterparty had knowledge of the debtor's impending insolvency.

DEBT COMMITMENT LETTERS AND ACQUISITION AGREEMENTS

Types of documentation

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?

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

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

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

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

Level of commitment

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?

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

Conditions precedent for funding

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

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

- the signing of the finance documentation in form and substance satisfactory to the parties based on the agreed term sheet and the satisfaction of all conditions precedent to signing and first utilisation thereunder (no potential event of default or event of default, no misrepresentation, no material adverse effect, the creation and perfection of the agreed security package, final due diligence reports addressed to the finance parties with release or reliance letters, a satisfactory tax and structure memorandum…);
- the satisfaction of all conditions precedent under the acquisition documents (works council consultation, anti-trust clearance, if agreed with the purchaser, the absence of material adverse change on the business, operation, management, financial situation or assets of the borrower, the target company and the target group…);
- no disruption of the international or domestic capital markets or interbank markets that would likely impair the lender from obtaining its funding for the contemplated financing;
- no insolvency proceedings on the borrower, the target company or the target group; and
- no incomplete, false, incorrect or misleading information provided to the finance parties regarding the transaction.

Flex provisions

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

Securities demands

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.

This kind of feature is not commonly seen in France.

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

Key terms for lenders

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?

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

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

Public filing of commitment papers

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

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

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

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

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

ENFORCEMENT OF CLAIMS AND INSOLVENCY

Restrictions on lenders' enforcement

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

French law insolvency proceedings are generally regarded as debtor friendly and can have a significant impact on the ability of lenders to enforce debt claims and security interests. In particular, the opening of insolvency proceedings triggers a general stay of action against the debtor and its assets. A non-French debtor may apply for the protection of French insolvency proceedings if it can demonstrate that it has its centre of main interest (COMI) in France.

While the debtor is *in bonis*, a security interest may easily be enforced by way of public auction, judicial attribution or private foreclosure. Conversely, as from the opening of any safeguard or rehabilitation proceedings, the debtor will be precluded from paying any debt arising before the opening of the proceedings (with a few exceptions), and any pledge enforcement action (eg, by way of private foreclosure) is frozen. Creditors are prohibited from taking proceedings for the payment of a sum of money, the termination of a contract or the enforcement of security. Contractual events of default triggered by these insolvency events are not enforceable and cannot be relied upon to accelerate the debt. Creditors must file a statement of claim within a time limit of two months (four months for creditors residing outside France) from the date when the judgment opening the insolvency proceedings is published. If the claim is secured, this must be mentioned in such statement. Creditors will recover their rights in liquidation proceedings only.

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

Debtor-in-possession financing

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

French law provides for a legal concept called 'new money' privilege comparable with the US 'debtor-in-possession' concept. Creditors can lend new money to a debtor in pre-insolvency proceedings and in particular during the conciliation proceedings. By doing so, creditors ensure that they will benefit from a priority ranking over existing debt, equity or other claims in any future insolvency proceedings opened against the debtor.

Stays and adequate protection against creditors

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?

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

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

Clawbacks

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 judgment opening the insolvency proceedings must mention the debtor's date of insolvency. This is the date on which the court believes that the debtor became insolvent. This date can be set with retroactive effect up to 18 months prior to such judgment.

Certain payments made and certain transactions entered into with third parties during the hardening period (being the period starting from the insolvency date determined by the court until the judgment opening the proceedings) may or must be unwound by the court.

Transactions that must be unwound include, *inter alia*, transfers of assets made for no consideration, contracts under which the debtor's obligations significantly exceed those of the other party, payment of non-payable debts, payments using methods that are not commonly employed in the relevant business sector, protective measures, security granted for pre-existing debts and transfers of assets or rights to a trust arrangement.

For transactions made for no consideration, the 18-month period can be extended for six months.

Finally, transactions may also be unwound if the counterparty had knowledge of the debtor's impending insolvency.

Ranking of creditors and voting on reorganisation

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

Creditors are divided into secured and unsecured creditors and rank as follows:

- super-privileged claims of the employees;
- legal costs falling due after the judgment opening the proceedings (other than lawyers' fees);
- claims secured by the new money privilege granted in conciliation proceedings;
- secured creditors;
- claims that have arisen after the opening judgment and that are in relation to the business operations or proceedings; and
- unsecured creditors.

This ranking does not apply to creditors who have been granted a security vesting them with an effective retention right over assets or rights of the debtor or with ownership rights such as under a *fiducie* to the extent the assets contributed to the *fiducie* cannot be used by the debtor. These creditors are entitled to be paid first or to ask for the transfer of such asset.

In respect of the reorganisation plan, any plan submitted either by the administrator (in consultation with the debtor) or a board of creditors must be approved by a two-thirds majority in value of the claims disclosed by the attendees. Dissenting creditors are bound by the decision made by the qualified majority.

Intercreditor agreements on liens

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

Intercreditor agreements are recognised and commonly used in practice. However, they are not binding upon French courts and there is no mandatory requirement to apply them. Normally the court takes them into account when addressing lien and ranking priorities.

That being said, the transposition in France of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) may change this practice.

Discounted securities in insolvencies

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

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

Liability of secured creditors after enforcement

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

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

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

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

time as the secured creditor has been able to dispose the foreclosed assets to a third party for a consideration in cash.

In addition, disproportionate security may be set aside.

UPDATE AND TRENDS

Proposals and developments

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

A proposal to reform French security legislation is currently under review by legal practitioners. The proposal is expected to be adopted by way of *Ordonnance* not later than May 2021.

The proposal aims at modernising the current legislation (eg, any security or guarantee will be able to be entered into in electronic format) and make it more attractive in international transactions. It should also ensure a better balance between the interests of creditors, debtors and guarantors.

The draft will also create two new security interests: (1) a dedicated legal regime for the cash collateral which will be structured in the form of an assignment of cash to the secured creditor and (3) the recognition of the assignment of receivables by way of security for all creditors (and not only banks and credit institutions as is currently the case for the *Dailly* assignment) which can secure any kind of obligations (and not only credit operations as for the *Dailly* assignment).

Coronavirus

39 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programs, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The French government has enacted many emergency legislative measures to address the covid-19 pandemic. The main measures encompass the following:

- extension of payment terms for social and tax claims and direct tax rebates;
- active mobilisation of the French state through BPI France to guarantee term loans made available by banks and credit institutions to French corporates to bridge up to three months of cash shortfall; and
- extended support from the French state and the Banque de France to sponsor credit mediation.

For finance practitioners, the most important measure is the granting of state-guaranteed loans. These must comply with the following conditions:

- a grace period of one year;
- interest for the first year at a negotiated rate ranging between 1 and 2.5 per cent, including the state guarantee of 0.5 to 1 per cent;
- a discretionary right of the borrower to repay its loan on the first anniversary date or to choose that it be amortised over a period of two, three, four or five years; it being specified that the loan cannot have a duration exceeding a period of six years from the date of the first disbursement; and
- eligible loans must not be secured or guaranteed by any other security interests or guarantees.

It is important to highlight that a company acquired under a LBO transaction can also benefit from the French state-guaranteed loan scheme unless the company fell into the insolvency-law criteria and the EU criteria regarding distressed companies as at 31 December 2019.

The percentage of the loan guaranteed by the French state will vary depending on economic criteria applying to the borrower and its group:

- 90 per cent for companies with fewer than 5,000 employees and less than €1.5 billion turnover;
- 80 per cent for companies with more than 5,000 employees and less than €5 billion turnover; and
- 70 per cent, for companies with more than 5,000 employees and more than €5 billion turnover.

The French state guarantee cannot be enforced by the lenders if one of the following events of default occurs within the first two months of the loan disbursement: (1) a payment default, (2) the restructuring of the loan, or (3) the opening of insolvency proceedings against the borrower in France or abroad.

The guarantee remains attached to the loan in the following circumstances: (1) a transfer of the loan within the lender's group, (2) a sub-participation in risk or cash, or (3) a transfer or assignment to a new entity registered in France following a merger, demerger, absorption, partial contribution of assets, or other similar operation of the borrower.

Such state-guaranteed loans have seen a large take-up and have resulted in an overall increase – at low cost – of financial indebtedness among French companies and, at the same time, an increase in financial ratio breaches.

On-going discussions are taking place as to how this debt will be refinanced, one of the options being to replace the debt with quasi-equity or subordinated loans. This may cause changes in the borrower's shareholding structure.

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