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GLOBAL FORUM ON LAW, JUSTICE AND DEVELOPMENT (GFLJD)

COMMUNITY OF PRACTICE

QUESTIONNAIRE ON INSOLVENCY LAW AND COMPANY LAW

This questionnaire addresses the issues affecting the interface between insolvency law and company law, and should be answered providing a) references to the statutes and provisions quoted; b) relevant cases, if any; c) any other supporting information, such as references to books or articles.

As an introduction to the questionnaire, consider the following examples of interaction and conflicts between insolvency law and company law (the examples, that assume certain characteristics of some legal systems, should be understood as having only illustrative purposes):

1) A company is under a reorganization procedure. Its directors have prepared a reorganization plan that, inter alia, provides for the conversion of creditors' claims into equity of the company. In more detail, the plan would provide for the cancellation of the existing shares and the issuance of new shares to be allotted according to the plan, exclusively to the company's creditors, except if the shareholders make a new contribution into the company.

The plan also provides for the transfer of a substantial part of the business to a third party. The shareholders oppose the plan. However, the creditors and the board, with the support of a due diligence analysis, have reason to believe that the opposition is unreasonable, as the value of the company's liabilities clearly exceeds the value of the assets, and in a liquidation the shareholders would not receive any proceeds.

See questions 19, 34, 37

2) In a company under a reorganization procedure, the plan foresees the issuance of new shares to be allotted to the company's creditors, diluting the existing shares but without cancelling them. The new shares would have prevailing voting and governance rights over the existing shares. The shareholders oppose the plan.

See questions 13, 34

3) A reorganization plan foresees, inter alia, a capital increase structured in such a way to ensure that a substantial share in the company would be acquired by an external investor, whose resources/business strategies would help save the long-term operation of the company. However, the shareholders opposing the plan decide to exercise their pre-emption rights in the capital increase, thereby defeating the plan's strategy based on the stepping-in of the significant investor.

See questions 18, 20

4) A company is under a reorganization procedure and the board of directors is designing a plan that, while ensuring the viability of the business, would adversely affect the rights of the shareholders. A minority shareholder requests that a general meeting of the company be held, seeking the approval of several proposals by the meeting, including the removal of the directors of the company in reorganization.

See questions 10, 31

5) A reorganization plan is approved with the decisive support of intra-group (insider) creditors, with the result that unsecured creditors suffer a loss, whereas shareholders retain value in the reorganized company.

See questions 21,22,25,26

These stylized examples, drawn from a number of real cases in different jurisdictions around the world, illustrate the tension between the shareholders, the creditors and, in general, company law and insolvency law.

The purpose of the following questionnaire is to identify how shareholder rights are affected by the insolvency of the company (including in cases of imminent insolvency), and the interaction between shareholder rights and the normal operations in an insolvency process (either a liquidation or a reorganization process). Although some general questions are also relevant for insolvency procedures applicable to special regulated companies (*i.e.*, for example, financial institutions), the questionnaire is designed to analyse the conflicts between insolvency law and company law, and therefore, reference should be made to the ordinary insolvency procedures as applied to the corporate forms which are generally used in your jurisdiction for both “close” and “open” companies¹.

The main issues can be summarized as follows:

- The respective powers of the board and the shareholders’ meeting in insolvency proceedings;
- The substantive and procedural rights of shareholders in a company subject to insolvency proceedings;
- The possibility of using the old/same corporate entity as a vehicle for the reorganization of the company;
- The possibility of the shareholders to retain a participation in the reorganized company, and, if they are allowed to retain a participation, the allocation of value

¹For instance, the questionnaire for the UK will include references to both limited liability companies (LLCs) and public limited companies (PLCs); the questionnaire for Germany will cover both AGs and GmbHs; and the questionnaire for Italy will cover SAs and SRLs.

between creditors and shareholders.

All of these issues are structured around two principal areas of conflict between company law and insolvency law: the individual rights of shareholders and the role of the shareholders' meeting in an insolvent company.

Dealing with the preceding issues implies, *inter alia*, addressing the question of the legal position of the shareholders in companies, e.g. the question of whether and to what extent the law considers shareholders as owners of the company in a legal sense. The effects on the legal position of shareholders of an insolvent company may in fact create a conflict with special -even constitutional- safeguards for the protection of property rights. These safeguards, in turn, may be less or more stringent, depending on whether the company is insolvent in the balance-sheet sense (i.e., whether the value of its liabilities exceeds the value of its assets) or not, and whether a liquidation or a reorganization procedure is used.

In addition, the preceding issues may present further variables according to the characteristics of the company involved. Outcomes could be different depending on the fact that the company is closely held or is a listed company, or is a specially regulated company, such as a financial intermediary.

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FRANCE

Responses to the questionnaire: (Rules for Growth)

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

French insolvency law is governed by the **French Commercial Code** and is articulated around two public policy objectives the anticipation and prevention of economic distress (before any insolvency proceedings) and the remediation of economic distress through cure mechanisms provided by insolvency proceedings

Several new types of reorganization procedures have been introduced since 2005 . While these procedures illustrate a growing concern to prevent companies from experiencing financial difficulties before a liquidity shortage occurs, (known as a "*cessation des paiements*"), they have negatively affected the overall legibility of French insolvency law.

In contrast to US law, French law does not view reorganization procedures and liquidation as the two sides of the same coin. The various rights of the shareholders and of the creditors may differ in great extent, depending on whether the company has filed for *procédure de sauvegarde* (safeguard proceedings), *procédure de redressement judiciaire* (reorganize proceedings) or liquidation proceedings as for instance there is no creditor worse off principle,

nor any absolute priority rule.

Below is a short presentation of the various procedures available under French Law.

The conciliation procedure (*procédure de conciliation*) It is governed by statute. This procedure is available to any company at any time. As a purely amicable and voluntary procedure, it is not strictly speaking an insolvency procedure, but it allows debtors to negotiate an agreement on a reorganisation plan with its creditors on a voluntary basis.

The safeguard procedure (*procédure de sauvegarde*) and its various forms: This procedure is voluntary and only available to the management of the company. It is governed by statute. It can be triggered at any time as long as the company has not reached the point of insolvency (*cessation de paiements*). The procedure is regulated in part by the French Commercial Code which provides for both preventive and remediation mechanisms by placing all of the company's creditors under the control of a collective discipline.

The safeguard procedure can only lead to a "continuation" plan for the company. It does not allow the transfer of the whole of the company to a third party (except as a spin-off of parts of the company's business, with the management's consent).

The safeguard regime is designed to provide an incentive to the management to take action, granting them broad discretionary powers over creditors who are subject to a collective discipline, essentially freezing all their existing and future claims.

The accelerated financial safeguard procedure (*procédure de sauvegarde financière accélérée*): Inspired by the US 'pre-pack' this procedure is governed by statute. It is available to the management of the company, under the following conditions:

- (i) the company must be of an important size²;
- (ii) the company has tried to reach an agreement with its creditors during a conciliation procedure;
- (iii) the company is not insolvent (no *cessation de paiements* has occurred);
- (iv) the management have reached an agreement with enough financial creditors (2/3);

This procedure is relatively expeditious (one month). It is meant to provide a quick reorganization plan for the company with a limited impact to its commercial partners and is viewed as a middle ground between an out-of-Court proceeding (*conciliation*) and a judicial one (*sauvegarde*) because it allows for a restructuring of the company's debt without freezing all the creditors' claims.

The accelerated safeguard procedure (*procédure de sauvegarde accélérée*): This procedure is designed as an extension of the *conciliation* procedure even if the debtor has become insolvent (a *cessation de paiements* has occurred). The procedure is governed by statute. It is available to the management once the

² Companies must have over 150 employees or a turnover exceeding 20 million euros and have financial statements certified by an independent auditor.

company is insolvent, under the following conditions:

- (i) the company must be of an important size³;
- (ii) the company was before in conciliation procedure;
- (iii) the management has reached an agreement with enough creditors and other stakeholders (i.e. not only financial creditors) to ensure that they will approve a reorganisation plan;

The parties have three months to reach an agreement before the Court closes the proceedings.

The reorganization procedure (*procédure de redressement judiciaire*):

This procedure is similar to the safeguard procedure but the power to approve the reorganisation plan is transferred from the management to the Court appointed “administrator” whose role is no longer limited to monitoring and assisting the management, but extends to implementing a reorganisation plan which can include a transfer of the whole business rather than imply parts of it to a third party.

The liquidation procedure (*procédure de liquidation judiciaire*): This is a special procedure governed by statute to provide a collective and universal debt enforcement mechanism to pay off creditors. The procedure is triggered by the management or the creditors when reorganization of the company is clearly impossible.

The fate of the company as a group of assets is distinguished from that of the company as a legal entity. While the assets may be transferred the activity of the legal entity is necessarily terminated by the liquidation procedure (sometimes the company may be allowed to continue in operation for a limited period of time), it is therefore a “piece-meal liquidation”.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

French law provides a special regime of insolvency for credit institutions. The regime was recently complemented by a new Act⁴, introducing international standards in this area, (**law n° 2013-672 of 26th July, 2013**)

The same insolvency procedure under French law applies to all types of companies whether they are private such as a *société par actions simplifiée* or a *société à responsabilité limitée* or public such as a *société anonyme*. In practice, there are no substantial differences in the contents of the rights of shareholders when the company becomes insolvent.

3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

French law provides specific provisions regarding the restructuring of debts without a full formal insolvency process and minimal Court intervention.

³ Companies must have over 150 employees or a turnover exceeding 20 million euros and have financial statements certified by an independent auditor.

⁴ law n° 2013-672 of 26th July, 2013

The “Ad hoc” mandate: Available at the company’s request, the President of the Commercial Court can appoint an “ad hoc” agent and determine his duties. This procedure is governed by the French Commercial Code (art. L. 611-3).

In practice, the role of “ad hoc” agent is to assist the management of the company in their discussions with the creditors, to obtain a moratorium or prepare plans for subsequent insolvency proceedings, if necessary.

The conciliation: As described above, this procedure is available to companies experiencing “foreseeable or predictable” legal, economic or financial difficulties but which are not yet insolvent (or which are insolvent for no longer than 45 days) . It is governed by statute and should not last more than 4 months . The Court appoints an “administrator”, paid by the company to assist the management and negotiate an agreement between the company and its creditors who are willing to negotiate and accept to reschedule or write off their claims. Creditors are indeed not subject to a collective discipline. There is no suspension of individual lawsuits and of existing enforcement procedures.

The conciliation is a non-contentious procedure to find a simple and fast solution. The agreement must remain realistic in the light of the company’s expected cash flows.

While neither the company nor the Court appointed administrator can force a creditor to participate in the agreement, the Court can offer an incentive taking the form of a “*new money*” legal privilege . The “*new money*” privilege is specific to French law. The creditors are granted precedence over debts incurred before the opening of insolvency proceedings.

Although the “*new money*” privilege is available with minimal Court intervention, it is important to bear in mind that its efficiency is linked to that of the formal insolvency process as the parties always negotiate in the shadow of the bankruptcy proceedings.

While creditors cannot be forced by the Court to participate to a conciliation procedure, under the French Civil Code , the Court has the power to order an extension of the term of the debts as well as the suspension of pending proceedings against the company for a maximum period of two years. This ability may convince creditors to participate to a conciliation procedure.

4. What are the commencement criteria for insolvency procedures?

- i. The commencement criteria of the **safeguard** procedure are:
 - a. the existence of legal, economic or social difficulties which the company is not able to overcome, and
 - b. no insolvency (*cessation de paiements*).

These conditions are assessed on the day of the opening of the proceeding based on the financial capacities of the company (not that of its corporate parents and affiliates).

- ii. The commencement criteria for both the **reorganization** and the **liquidation**

procedures is insolvency (*cessation de paiements*).

The insolvency test (*cessation de paiements*) is a *cash flow* test, triggered by the inability of the company to pay its debts as they fall due. The company must be experiencing enduring rather than temporary insolvency.

Under French law, a company unable to settle its current liabilities with its available assets shall file a declaration of insolvency "*cessation of paiements*".

"Current liabilities" includes debts of a fixed amount and debts which are past due, regardless whether the clients have or not specifically requested their payment.

"Available assets" includes current assets and assets which can be monetized in the short term. This includes cash, listed securities but does not include the equity in a subsidiary, real estate, stocks or intangible assets.

This state of insolvency triggers the mandatory opening of collective proceedings.

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

Under the **safeguard** procedure, a reorganisation plan may be submitted by the company, represented by its legal representative (the management or the board of directors for this purpose), or by the creditor's committees (which includes financial creditors but not bondholders)⁵.

The plan must be submitted to the Court appointed "administrator" for his review and reporting.

Under the **reorganization** procedure, a reorganisation plan may be submitted by roughly the same entities as under the safeguard procedure⁶. That is:

1. The court appointed "administrator";
2. The company, if
 - a. no administrator is appointed; or
 - b. the administrator fails to submit a plan
3. Any member of the creditors' committee.

6. Please describe whether and to what extent shareholders' rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

I. Shareholders' rights in companies which are not subject to insolvency proceedings

⁵ C. com., art. L. 626-30-2, as amended by the executive order of 12 March 2014.

⁶ C. com. L. 631-19, referring to the provisions applicable to the safeguard procedure.

Under French law, fiduciary duties extend only to directors of the company, who are placed under a regime of strict liability should they fail to react promptly in an insolvency situation and file for bankruptcy proceedings.

French company law prohibits long term undercapitalization by requiring the recapitalization of a company as soon as the shareholders' equity has fallen below half of the share capital for a period of two years (this obligation applies to private and public companies including SARL, SA, SCA and SAS). This test is a balance sheet assessment using French GAAP rather than IFRS standards. Such recapitalization cannot be imposed by the Court, and must be approved by shareholders.

If the company fails to recapitalize, anyone can request a Court to wind up the company, although in practice there is no recent precedent.

French law also has a general codified doctrine of "abuse of right" which could be invoked to stop shareholders from abusively exercising some of their rights.

According to some authors⁷, the risk that a shareholder be held liable for refusing to approve a reorganisation plan on which the success of the company's recovery depends is theoretical because of the difficulty to prove that such a vote would be contrary to the corporate interest. However, some authors have considered that a Court may transfer the voting rights of a shareholder to a Court appointed officer.

II. Shareholders' rights in companies which are subject to insolvency proceedings

The rights of shareholders are generally not affected by the insolvency process, unless there is a specific rule which expressly provides to the contrary.

A few provisions of French insolvency affect such rights of shareholders.

Two provisions of a new Executive Order⁸ amend the rights of shareholders in order to facilitate the recapitalization of companies.

1. If the Court gives a mandate to the administrator to convene a shareholder meeting to adopt measures required by a safeguard plan, the Court may order that upon the first convening of the shareholders, the decisions will be adopted by a majority of the shareholders present or represented at the meeting as long as such shareholders own at least half of the shares with voting rights.
2. If the draft restructuring plan includes a modification of the capital of the company in order to restore the shareholders' equity when the shareholders' equity has fallen below half of the share capital, the administrator may request the designation of a court-appointed officer (*mandataire judiciaire*) tasked with convening a shareholders' meeting and voting on the plan in the place of dissenting shareholders.

7. Are shareholders notified of the initiation of an insolvency process? If notification is

⁷ J.-F. BARBIERI, « Associés et obligataires d'une société faillie », RPC 1991, p. 163 et s.

⁸ Executive Order n° 2014-326 of 12 March 2014 reforming French insolvency proceedings.

individualized, what are the mechanisms used to identify shareholders?

Shareholders of a private company are not individually notified of the initiation of an insolvency process.

In the case of a listed company, insolvency proceedings (i.e. safeguard, reorganisation or liquidation proceedings) are considered relevant information that may influence the market price of the issuer's financial instrument and would therefore have to be disclosed to the market.

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

In principle, shareholders are not considered as claimants in an insolvency procedure. Shareholders have a fundamental property right to receive their residual interest in proportion to their shareholding, but that interest is conceptually different from a credit claim. However, shareholders do not have the right to challenge the admission of creditors' claims that will impact or eliminate the value of their residual interest.

A shareholder may act in its capacity as a creditor⁹. To the extent that the shareholder provides the company with new money, whether cash - with the exception of a recapitalization - or goods or services in order to guarantee the continuation of activities, the shareholder is deemed to participate in the insolvency process not only as shareholder but in this particular circumstances as a creditor. Therefore, the shareholder will have to fill their claim in such circumstances. Shareholders may also act as creditors when they have subscribed to intra-group loan transactions.

There is no principle of equitable subordination under French law whereby loans extended by shareholders are accounted for as equity.

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

Shareholders may trade in and transfer shares of the company after the opening of the insolvency procedure. However, if they are also *de jure* or *de facto* managers of the company any transfer must be approved by the Court.

In principle, listed companies can continue to exchange their shares after a short period of suspension imposed by the French Market Authority (AMF);

10. Do shareholders have the right to request that a shareholders' meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In principle, corporate rules continue to apply during an insolvency proceedings. In particular, the shareholder's voting rights remain despite the opening of insolvency proceedings.

⁹ CA Versailles, 3 November 1994, n°049415

In practice, it is the management's responsibility to ensure the proper functioning of corporate bodies and to convene general meetings of shareholders.

If the competent body fails to convene a shareholder's meeting in due course, shareholders have a limited right to request a meeting.

In a *société anonyme*, this right is reserved to shareholder(s) representing 5% of the share capital, or to any interested party in case of an emergency¹⁰. The request is addressed to the President of the Commercial court, who assesses if it is in the interest of the company, and if so, appoints a third party to call the meeting. These rules also apply to *sociétés en commandites par actions*.

In a *société à responsabilité limitée*, shareholders representing half of the shares, or representing one-tenth of the shareholders and one-tenth of the shares, can address this request directly to the competent body, or to the auditor if the competent body refuses to convene the meeting.

If a safeguard procedure or a reorganization procedure is initiated, the rules governing management and shareholders' meetings are maintained.

If the corporation is subject to a reorganization procedure, and if a mandatory shareholders' meeting is not held in due course, the convening procedure for the said meeting depends on the powers assigned to the Court appointed administrator. If the Court appointed administrator is in charge of the full administration of the company, he shall convene the meeting himself¹¹. If, on the other hand, his appointment is limited to a surveillance mission, the administrator shall make a request to the company's statutory auditor or to the President of the Commercial Court. The statutory auditor or a Court appointed third party shall then call for the meeting.

Furthermore, the administrator must convene a shareholder's meeting in respect of some specific decisions. That is, in case of a reorganization proceedings, if the proposed plan provides for a change of the share capital.

If the corporation is subject to a liquidation procedure, the liquidator has the right to convene a shareholders' meeting¹².

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company -if they remain in charge of the company-or vis-à-vis the insolvency representative?

Under French company law, the right to company information is a fundamental right of shareholders, which continues to apply during insolvency proceedings (Please see also responses to question 15).

¹⁰ C. com., L. 225-103, II-2° : In *sociétés anonymes*, shareholders representing at least 5% of the share capital of the company, when the share capital is below 750 000€ and a shareholding representing a decreasing percentage when the share capital exceeds 750 000€, have the right to request that new items are added to the agenda of the meeting. Similarly, in the *sociétés de personnes, sociétés par actions simplifiée*, shareholders cannot be deprived of their right to participate to collective decisions.

¹¹ Cass. crim. 21 June 2000, n°99-85.778

¹² C. com., L. 225-103, II-3°.

French law does not provide for a specific right of communication in case of the opening of an insolvency procedure. Until the end of liquidation proceedings, there is a right to the communication of corporate documents under the same conditions as before the dissolution of the company. Shareholders may request the President of the Commercial Court to order the Court appointed liquidator to communicate corporate documents or appoint an agent to do so.

With respect to public companies, which are under a specific obligation to communicate "privileged information" to the public, the French Market Authority (AMF) has ruled that information regarding the financial situation of the company are subject to mandatory communication. That is, for instance, if the company is insolvent (has reached a *cessation of paiements*), or if an insolvency procedure has been opened. Plans discussed for the company's recovery, however, may remain confidential under the insolvency proceedings.

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

Under French insolvency law, the general rule is that the managers and directors of the company to remain in office. Their respective powers depend on those granted to the Court appointed administrator.

In a **safeguard** procedure, the Court appointed administrator may be appointed in a supervisory capacity with no management powers or in an advisory capacity where the management shall obtain her approval for certain types of decisions.

In a **reorganization** procedure, the Court appointed administrator is appointed with either an advisory or management capacity over the company's businesses. While directors remain in office, in practice, the Court appointed administrator takes over the management of the company.

In addition, when the survival of the company requires it, the Court, upon request of the administrator or the prosecutor may approve a reorganization plan providing that one or more managers are replaced. However, the decision to remove the manager can be taken by the shareholders only. An important point that needs to be highlighted is that, even in the case that the Court appointed administrator is appointed with a managing function, the directors of the company continue to be directors. While the law removes management powers from directors, they continue to perform their role as a corporate body. Directors continue to represent the company and may challenge numerous decisions taken by the Court during the insolvency process. Even in liquidation proceedings, the management remains in office in order to exercise specific prerogatives, such as the right to file appeals against certain decisions of the Court appointed administrator (e.g. the opening procedure or the postponing of the date of cessation of payments).

The Court may appoint a third party to replace a manager who has resigned or was prohibited from managing a company is incapacitated for health reasons or has a conflict of interest.

Except in this last specific case, the law is silent on the process whereby the

shareholders' meeting decides on the appointment of directors, especially on the issue of the proposals for appointment. In application of the general rules, it is the board, in preparing the agenda of the shareholders meeting who introduces the names of the persons who are formally proposed to be appointed. Shareholders may be entitled to introduce names under specific circumstances.

13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Under French corporate law, it is possible to attach special or additional governance rights to shares or stakes (i.e. shares with double voting rights, preference shares).

The opening of an insolvency procedure does not affect such rights.

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

See also question 28. The shareholders' meeting remains active even if the company is declared insolvent and a formal insolvency process is initiated.

Shareholders have the right to exercise any legal actions available in defending their personal rights against corporate bodies (administrators, CEO, COO, member of the executive or supervisory board, president or other managers in SAS, CAC, liquidators) or even against the company (an invalidity action or for damage).

There are no specific rules in the French Commercial Code that would indicate that shareholders lose their rights to challenge the decisions of the shareholders' meeting or the board of directors. It can be concluded that shareholders preserve their rights to challenge decisions in the insolvency of the company, notwithstanding the change in functions and status of the corporate bodies. There are numerous decisions of French Courts admitting that shareholders have the power to challenge decisions of corporate bodies, despite the fact that the company is insolvent.

The general grounds to challenge a decision of the shareholders' meeting are the following:

- The decision is contrary to the law;
- The decision is contrary to the company's articles of association; or
- The decision is detrimental to the interests of the company, and benefits the interests of some shareholders or members, or of third parties.

If there is a decision of the shareholders' meeting of the insolvent company where these grounds can be validly asserted, shareholders may challenge the

decision in the same way as they would when the company was solvent.

Under general company law, shareholders also have the possibility of suing directors for damages. However, actions for liability of directors are subject to a special regime if liquidation proceedings have been initiated.

Before the filing for liquidation proceedings, shareholders may initiate legal proceedings against the management for mismanagement, infringement of statutes or the law.

With respect to the actions and decisions of the Court appointed administrator, the response is different. The French Commercial Code does not provide for a specific procedure designed to challenge the actions and decisions of the Court appointed administrator who remains liable under ordinary civil law.

In addition, a person who disagrees with the decisions of the Court appointed administrator may file for his removal. The Court can, *proprio muto*, at the request of the prosecutor, on a proposal of a *juge-commissaire* (official receiver), at the request of the company or any creditor, replace the administrator, expert or legal agent, or appoint another director already appointed¹³.

Similarly, a Court appointed liquidator will incur civil liability to shareholders for acts causing them losses and criminal penalties if the liquidator has, in bad faith, used the assets or credit of the company under liquidation for personal use or to promote any company or business in which he is interested directly or indirectly. Any shareholder may also file for the removal of a liquidator, but this request is only admissible in the case of fault by the liquidator in his capacity as liquidator of the company.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

Under French law, shareholders have no special rights to call for a special investigation into the affairs of the insolvent company. Their right is limited their fundamental right to corporate information.

In theory, general company law provisions or specific insolvency law procedures could be used to investigate the affairs of the insolvent company.

- i. Written questions: In a *société anonyme*, prior to a shareholders' assembly, any shareholder may submit a written question which the board shall address during the meeting; more generally, any shareholder or group of shareholders holding at least 5% of the share capital has the right twice a year to ask written questions to the management about any event likely to undermine the continuity of the company.
- ii. Management expertise: One or more shareholders representing at least 5% of the share capital in a *société anonyme* may ask written questions to the management about any executive action with respect to the company. If there is a failure to respond or communicate elements of a satisfactory answer within a month of the request these shareholders may request, in summary proceedings, the appointment of an expert to report on management

¹³C. com., art. L 621-7

operations. This action is not subject to a stay of proceedings. The shareholders can also ask written questions to managers about the company's social management.

- iii. Expertise under Article 145 of the Code of Civil Procedure: Shareholders may request the President of the Commercial Court to appoint an expert in order to provide any relevant evidence to a future dispute resolution.
- iv. Emergency expertise procedure under Article 800 and 872 of the Code of Civil Procedure: Shareholders may request the appointment of an expert when there is evidence that the existence of an emergency and imminent danger justifies the appointment of an expert.
- v. Diagnostic expertise: Failing legal clarification on the identity of the applicant, shareholders could apply to the Court for the appointment of an expert to assist the administrator and the company.

The examination of management actions is controversial. The question frequently arises as to whether expertise could be applied to operations which have occurred prior and subsequent to the company's insolvency (*cessation of paiements*).

A judgment of the Court of Appeal answered this question in the negative, confining this right of examination to acts taken before the cessation of payments. However, the fact that this solution has not been confirmed by the French Supreme Court has prompted some authors¹⁴ to infer that there may be the possibility of a large use of expertise by shareholders relating to the period before or after the cessation of payments, in accordance with their right to information. Others¹⁵ argue the contrary, based on the lack of legitimate interest of shareholders for ordering such a measure when it focuses on operations following the cessation of payments.

16. Does the law provide for the establishment of a shareholders' committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

There is no provision in the French Commercial Code for the creation of a shareholders' committee. During insolvency proceedings, shareholders are only represented by the company executive.

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

In principle, restrictions on the transfer of shares and participations in limited liability companies continue to apply during insolvency. Therefore, shareholders and members are bound by these restrictions, and can only effect transfers according to the law and provisions of the articles of association.

However, if the company files for reorganization proceedings, approval clauses contained in the company's articles of association are not applicable if the share

¹⁴ **J.-F. BARBIERI**, « Associés et obligataires d'une société faillie », RPC 1991, p. 164 et s.

¹⁵ **F.-X. LUCAS**, « Les associés et la procédure collective », LPA 9 janvier 2002, p. 19 et s.

capital increases or share transfers are provided in the draft reorganization plan.

However, it is controversial whether this last provision also neutralizes the prior consent that the law (and not the articles) requires in the case of the transfer of stakes in an SARL¹⁶ and the *sociétés de personnes*.

Some authors deem it inapplicable since L. 631-19 of the French Commercial Code only refers to "*clauses*" (contractual provisions) in the context of reorganization proceedings. For other authors, the purpose of the law is to make the corporate interest prevail over the shareholders' interests and therefore should be understood as also applying to any transfer of interests in an insolvent company.¹⁷

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

Under general company and insolvency law, shareholders cannot be expropriated: their shares cannot be cancelled or transferred without their consent. Shares are the property of their holders and a cancellation or expropriation would amount to an illicit taking of property.

See response 6. However, it is possible to undertake a capital reduction to adjust for losses, which can reduce capital to zero, immediately followed by a capital increase (also known as "*coup d'accordéon*"). Reductions of capital for losses must comply with the principle of equality of shareholders. The interests of existing shareholders may be wiped out if the company is insolvent in a balance-sheet sense. However, it is important to bear in mind that under such circumstances, a balance-sheet test is carried out by reference to French GAAPs which are not IFRS. Without IFRS standards and the principle of fair value, the expropriation of shareholders can sometimes be unfair. While, it must be noted that capital reduction requires the agreement of a majority of shareholders, the French Supreme Court has ruled that shareholders may not retain their pre-emption rights if it can be shown that they have not been made worse off had a liquidation proceedings been filed.

Furthermore, also since the executive order of 12 March 2014, during a reorganization procedure, if the draft restructuring plan includes a modification of the capital of the company, and in the absence of the restoration of the level of shareholder's equity, the Court appointed administrator may request the designation of a judicial representative (*mandataire judiciaire*) charged with the task of convening a shareholders' meeting and voting on the restoration of shareholder's equity in place of dissenting shareholders.

¹⁶ C. com., art. L. 223-14

¹⁷ Viandier, Dalloz, Entreprises en difficultés, Redressement judiciaire ; personnes morales et dirigeants, n°262

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguard are provided? (e.g. does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

It is not possible under French law to cram down the shareholders unless the cancellation of the shares is approved by the shareholders themselves, convened at a shareholder meeting.

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares?¹⁸ Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?) ?

Under French law, shareholders enjoy legal pre-emption rights over new issues of shares.

In principle, the French Commercial Code does not provide any further provisions in this respect in the case of insolvency. Consequently, shareholders retain their pre-emption rights over new issues of shares irrespective of the fact that the company is undergoing an insolvency process. The suppression of such pre-emption rights remain subject to the legal framework applicable to solvent (*in bonis*) companies. First, the shareholders' meeting continues to have the power to suppress pre-emption rights. Such a suppression of pre-emptive rights requires the agreement of the majority of 2/3 of the shareholders, following the implementation of a specific procedure provided under French company law.

In brief, the manager/directors must draft a report specifying the value of shares or stakes in the company and justifying the proposal in detail, including the price to be paid for the new shares to be issued and the persons who will acquire them. An auditor must prepare a second report on the "fair value" of the shares, the theoretical value of the pre-emption rights to be suppressed, and the reliability of the data submitted in the directors' report.

In the event of a capital increase in favor of a third party provided in the continuation or reorganization plan, it is up to the shareholders to decide on the waiver of their preferential subscription rights and the Court cannot compel them to do so. Without an express waiver of these rights, the plan will be cancelled. However, since the executive order of 12 March 2014, if the Court gives a mandate to the administrator to convene any shareholder meeting to adopt any modifications required by the safeguard plan, the Court can order that upon the first convening of the shareholders, the decisions will be adopted by a majority of the shareholders present or represented at the meeting as long as such shareholders own at least half of the shares with voting rights.

Furthermore, as mentioned above, the French Supreme Court has ruled in the past that in the event of a capital reduction to zero followed by a capital increase,

¹⁸ Please, note that the power to decide new issues or conversions of shares, as well as the power to decide operations that affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form) are dealt with in Questions 33 and 34 below.

the shareholders may lose their pre-emption rights if it can be shown that they would not have been made worse off, had the company filed for liquidation proceedings.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company's assets have been transferred) even if the company was insolvent according to a balance-sheet test? (*i.e.*, where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Shareholders can retain an interest in the company only under certain circumstances. If the company is liquidated, either as part of a liquidation procedure or following an asset sale ("*plan de cession*") during a reorganization procedure, shareholders can only receive a payment after all claims have been satisfied. It is therefore highly unlikely that the shareholders will receive a payment in liquidation proceedings of an insolvent company. It is all the more unlikely since during an asset sale ("*plan de cession*"), the Court may allocate the assets to a bidder who is not the highest bidder but has, for instance, made commitments regarding the preservation of jobs.

Shareholders can also retain an interest in the company if a reorganization plan is approved. The reorganization plan provides a solution to the insolvency process that allows the company to be preserved. Once - and if - the company fulfils the payments established in the insolvency plan, the company will survive and the shareholders will retain whatever value is left in the reorganized company. This "pure payment plan" assumes, of course, that the company will be able to generate future income in a sufficient amount to make significant payments to creditors. In many cases, however, the plan can be a mixture of payment through the generation of future income and the sale of some strategic assets, or any other combination of operations to provide for payment. In these other cases, the division of value between creditors and shareholders is not consistent with the division of value that would apply in the event that the company is liquidated (bearing in mind that in the event that there is an asset sale, the Court may allocate the assets to a bidder who is not the highest bidder). Wealth transfers are thus common between creditors and shareholders.

The question mentions the possibility that a new company, to which the assets of the original company are transferred, can be created. This "hive-down" scheme which requires a separation of the profitable assets and lines of business, and the transfer, to a different legal person, of those assets, isolated from liabilities is rarely implemented in France. While such "hive-down" scheme is legal under insolvency law, managements usually do not implement such type of schemes as they are likely to trigger legal proceedings initiated by employees. Please note that unlike in other countries, creditors cannot deny shareholders the right to preserve a participation in the company by rejecting all proposals for an insolvency plan. If such scenario occurs, they will not be able to force the company into liquidation as it is possible for Courts to automatically reschedule the claims of the company up to ten years forward and apply the contractual interest rate. It is possible therefore to have a proposal in which the shareholders retain value while still imposing a rescheduling of the debt at the same time. The law

mentions explicitly than an insolvency plan must take into consideration the subordination agreements of the company's debts but this provision does not mean that an insolvency plan cannot alter the ranking of claims. Furthermore, an insolvency plan that would contemplate advantages for shareholders cannot be challenged by any creditor.

22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The ranking of share classes, if applicable, is not formally affected by the insolvency process. The insolvency process does not rank shares, but only claims by creditors. Claims are ranked according to the provisions of the French Commercial Code. Regarding shares, the legal rules governing payment apply: once all claims have been fully satisfied, after reimbursement to shareholders of the nominal amount not amortized of their shares, the net proceeds of the liquidation shall be distributed among the shareholders, in proportion to their share in the capital.

However, economically, the ranking of classes of shares and the preferential rights of classes of shares are affected since there is no "cram down" procedure under French law. Thus, there is no equivalent to the absolute priority rule which comes into play during the Chapter 11 plan confirmation process. The preference on a liquidation basis for preferred shares is not assured.

- 23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?**

Shareholders can supply goods, services, or financial resources to their company undergoing an insolvency process. The underlying commercial contracts are subject to the rules applicable to all contracts concluded by the company in case of insolvency. There is no specific treatment based on the identity of the contracting party.

Consequently, in French insolvency law, the principle of outstanding contract with the administrator's right to choose applies (**C. com., art. L. 621-28**).

Thus:

(i) The Court appointed administrator or the company may require the contract to continue with no right for the contractual party to oppose any exception based on the non-payment of claims filed prior to the opening judgment¹⁹.

(ii) The Court appointed administrator may unilaterally decide not to pursue a contract giving the other party a right to damages.

There are no rules subjecting the company or the Court appointed administrator to stricter controls regarding the identity of the counterpart, if they contract for

¹⁹ Exception can be successful if its the basis is not financial non-compliance.

the delivery of goods or services with a shareholders of the company.

Preferential treatment is:

(i) The right to the payment due: The creditor may demand full payment of the debt that the Court appointed administrator or the company must perform if he has the necessary funds. It is not subject to the prohibition on prosecution.

(ii) A general privilege: This privilege is based on the company's real and personal property. When claims are not paid, those are paid by privilege above all other claims with privileges and security interests.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

Shareholders, like any other contractual parties, are subject to the general principle of the continuation of existing contracts throughout insolvency proceedings. Consequently, they must comply with their contractual obligations and, if they do not perform their contractual obligations, they will incur civil liability in respect of the insolvent company. For further details, please see the previous question.

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors' meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Under the safeguard and reorganization procedures, the constitution of creditors' committees is mandatory when:

- i. the company employs more than 150 employees and its turnover exceeds 20 million euros; and
- ii. the company's financial statements are audited by a statutory auditor or issued by a certified accountant.

If these two conditions are not met, the Court may establish them upon request of the company or the Court appointed administrator.

One committee includes financial institutions. The second committee includes the main suppliers of goods and services representing more than 3 % of the company's receivables as well as any other supplier the Court appointed administrator may invite. For the creditors satisfying the previous criteria, participation in such committees is mandatory. Public entities (social administrations, tax administrations) are not included in these committees.

The establishment of each committee requires a minimum number of 2 creditors, whose claims pre-exist the opening of the relevant insolvency procedure. The bondholders' assembly is not considered a creditor's committee and therefore does not enjoy its prerogatives (including the right to propose a continuation/reorganization plan).

There are no specific provisions regarding shareholders acting as creditors. In

accordance with general insolvency law, shareholders holding either a financial or a commercial creditor's claim are entitled to participate in the creditors' meeting. As explained above (cf. **response 8**), to the extent that a shareholder may also act as creditor when having subscribed to intra-group loan transactions, there may be a conflict of interest if he participates in a creditor committee.

There is no principle of equitable subordination under French law.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors' meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Shareholders who do not hold credit claims in consideration of their residual interests or their participation in a share capital increase have neither a duty nor a right to attend the creditors' meeting.

27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

Shareholders have no specific information rights with respect to the filing of insolvency proceedings by the parent or other related companies, but of course they can exercise their right to request information (see response to **question 15 above**):

III. The Role of the Shareholders' Meeting in Companies Subject to Insolvency Proceedings

28. Does the shareholders' meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

French insolvency law does not explicitly address this question but there is no question that the shareholders' meeting continues to exist. As a matter of fact, the continuity of the shareholders' meeting is taken for granted in numerous legal rules as the insolvency procedure does not affect the core competencies of this corporate body (except in a few rare provisions).

Shareholders meet according to the requirements of generally applicable company law. This means that shareholders' meetings are convened at least once a year to approve the financial statements and for any transaction which falls within the scope of its competences (i.e., a merger, a share capital increase and more generally any amendment to the by-laws).

In the case of a safeguard or a reorganization procedure, the procedures for convening and meeting of the assembly are the same as those applicable outside insolvency proceedings, except under specific circumstances when the shareholders meeting is supposed to approve the reorganization plan (please see above).

A Liquidation gives rise to the legal disestablishment of the company, passing its rights and powers onto the liquidator unless otherwise specified. The meeting of shareholders preserves the company's internal functioning rules during this procedure.

In a liquidation, the shareholders' meeting is maintained and will continue until the total disappearance of the corporation to make decisions consistent with its powers and the rights attached to the shares of its members. However, note that a shareholder might be forbidden to take part in decisions in the general meeting due to a voting ban arising from a measure of personal bankruptcy or a prohibition to manage²⁰. In rare circumstances, the corporate bodies may be required to appoint a Court appointed agent (*mandataire judiciaire*) to exercise the voting right of an absent shareholder.

However, insofar as the judgment declaring the liquidation automatically causes the dissolution of the company with its legal personality existing only for the purposes of winding up, the role of the shareholders' meeting is limited.

29. Does the shareholders' meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The shareholders' meeting has generally the following competencies:

- a) Approval of accounts, distribution of earnings and approval of management;
- b) Appointment and dismissal of directors, liquidators, and, where necessary, auditors, and the exercise of liability actions against them;
- c) Amending the articles of association;
- d) Increases and reductions of capital;
- e) Suppression or limitation of pre-emption rights;
- f) Transformation, merger, scission or global cession of assets and liabilities, and transfer of the registered office to a location abroad;
- g) Dissolving the company;
- h) Approval of the final liquidation balance;
- i) Any other matters stipulated by law or by the by-laws.

In the case of companies in insolvency, the principle is that the shareholders' meeting will retain all of these prerogatives²¹ and, more generally preserve its authority. There is a judgment confirming the application of corporate law during insolvency proceedings. This indicates, in fact, that capital changes, mentioned in the plan, are not imposed on shareholders. Hence, they must be voted in accordance with corporate law by the general meeting, which remains the competent authority.

²⁰ C. com., art. L. 653-11

²¹ A possible exception is the competence to approve the final balance of the liquidation. Arguably, this competence only applies to liquidation of solvent companies, and not to the liquidation of a company subject to an insolvency process, where there are other control mechanisms in place.

The amendments introduced by the Order of 12th March 2014 on the reform of bankruptcy law reaffirm the essential role of the shareholder without calling into question these fundamental principles:

- The date such unpaid capital is due following the initiation of the procedure does not increase the commitments of partners/shareholders;
- Article 38 of the Order of 12th March 2014 allows the Court to modify the rules of majority or quorum of the meeting called to deliberate on the change of share capital within the limits imposed by 2012/30/UE Directive of 25th October 2012 on protection of the shareholders' interests and third parties regarding the formation of the *société anonyme* and the maintenance and change of their capital.
- In reorganization procedures (but not in safeguard procedures), if the reorganisation plan induces a change in capital but the reconstitution of equity capital provided approved by the shareholders the Court may appoint an *ad hoc* agent who can vote in the place of shareholders who do not approve the restoration of the shareholders' equity imposed by law. It is well established among commentators that this kind of recapitalization does not constitute a noticeable prejudice to shareholders' commitments.

30. Does the shareholders' meeting need to approve the accounts of the distressed/insolvent company?

Approval of the accounts of the distressed/insolvent company is a traditional and core competency of the shareholders' meeting. The opening of an insolvency procedure does not strip the existing corporate bodies of their powers.

The shareholders' meeting remains sovereign and retains its competencies. The shareholders' meeting shall be convened, in accordance with the law or the company's bylaws, to approve the annual financial statements. The Courts have made it clear that the shareholders' meeting of the insolvent company is competent to approve the financial statements.

Under safeguard and reorganization proceedings, the regime for the approval of the accounts applicable prior to insolvency remains valid. The management - or the Court appointed administrator when he is appointed to substitute the management - should draw up the annual financial statements and convene the shareholders' assembly to approve them. Failure of the managers and/or the administrator to convene the shareholders' committee triggers their civil and criminal liability (punishable by 6-month imprisonment and a 9.000 € fine).

31. Does the shareholders' meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders' meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In principle, the managers remain in office despite the opening of insolvency proceedings regardless of the type of legal entity managed as long as the managers are not in a state of personal bankruptcy or prohibited from serving as a manager. The general power to dismiss directors at any moment remains an

essential competence of the shareholders' meeting. There is no obstacle in the law for the shareholders' meeting to remove the directors, even if those directors are managing the company under the supervision and control of a Court appointed administrator.

Shareholders may therefore dismiss the managers in office, but in practice, they would have little interest to do so: what is the point in naming a new management team in a time of distress? In all cases, without a manager, the general meeting of shareholders shall make the necessary appointments because the Court appointed administrator does not have all the powers to take over the management. As long as the shareholders have not appointed a new manager, the Court appointed administrator may request the Court to appoint an interim officer to represent the company.

Please note that the manager of a company placed under reorganisation proceedings can also be dismissed by the Court. The dismissal can also be a condition for the Court's approval of the reorganization plan. This provision²² is intended to facilitate the rescue of the company when the manager refuses the injection of new cash by new investors and to eliminate the influence of dishonest or incompetent managers²³.

The insolvency representative

The management of the company can request the court to dismiss the Court appointed administrator during a safeguard proceedings or a reorganization proceedings. Therefore, the shareholders can, indirectly, request the dismissal of the Court appointed administrator. The management of the company cannot request the dismissal of the representative of the creditors.

32. Is a shareholders' meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The persons or organs who can file for insolvency and start the insolvency proceedings are designated by law. The company, represented by its legal representative, may initiate any type of procedures. Any creditor or the public prosecutor (*ministère public*) are also entitled to initiate reorganization and liquidation proceedings. The Court however no longer enjoys the capacity to open these proceedings on its own

The shareholders' meeting does not have the power to initiate these procedures, and does not even have the power to ratify the directors' decision in this respect.

33. Does the shareholders' meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

In safeguard and reorganization proceedings, the insolvency plan is submitted to the creditors, consulted either collectively within the creditors' committees

²² Article L. 631-19-I of the Commercial Code

²³ R. HOUIN, « Permanence de l'entreprise à travers la faillite », dans *Liber amicorum Baron Frédéricq*, 1965, t. II, p. 609 s.

when they are established or individually when the creditors' committee is not established or when the creditors are not members of such committees, and the bondholders' assembly.

The shareholders' meeting approves the provisions of the insolvency plan which fall within the scope of their powers: a share capital increase, a transfer, a merger, and more generally any amendment to the company's bylaws. The shareholders' meeting can refuse to approve the contemplated measures. In accordance with the fundamental principle of the supremacy of the shareholders' meeting (exposed above), such measures cannot be imposed on the shareholders.

By way of exception, as mentioned above if the restructuring plan provides for a share capital increase which is necessary in order to recapitalize the company when shareholders' equity falls below half of the share capital, the Court may appoint an officer who will vote in place of the dissenting shareholders.

Even if the economic value of existing rights and interests is worthless or equal to zero, shareholders exercise their voting rights. Thus, the loss of the shares' financial value doesn't impinge shareholders' political powers (votes).

The refusal of shareholders will result in the termination of the restructuring plan.

The shareholders are not listed among the parties entitled to challenge an insolvency or reorganization plan.

34. Is a shareholders' meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? ⁽²⁴⁾ If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

The fact that a company is undergoing an insolvency process does not alter the distribution of powers between its corporate organs. A share capital increase, as any amendment to the bylaws, requires the collective decision of shareholders, subject to a reinforced majority vote.

The shareholders' meeting may delegate to the directors the implementation of the share capital increase prior to the opening of the insolvency proceedings. However the decision of the shareholders' meeting remains absolutely necessary to increase the share capital of the company; the board is only empowered to proceed with the practical realization of the share capital increase in strict compliance with the detailed decision of the shareholders' meeting.

After the opening of the proceedings and during the observation period, the convening of an extraordinary general meeting and the implementation of any delegation of authority to increase the share capital is a decision falling outside of the ordinary course of business and requiring the Court's approval.

⁽²⁴⁾ These questions are aimed at understanding whether the fact that the company is subject to insolvency proceedings allows or causes deviations from the company law rules determining the body competent to take decisions on the issue of new shares of the company and/or establishing the criteria and purposes with which such decisions must comply.

If the insolvency representative substitutes the company's directors, the French Commercial Code does not indicate whether the insolvency representative would be entitled to use the delegation of authority. It is expressly mentioned that the shareholders' meeting can only delegate its authorities to the board of directors (or to the executive board). Any decision to increase the capital taken under a delegation of authority to another body is automatically void. Although the insolvency representative has the power to manage the assets of the insolvency estate, his appointment does not give him a position within the internal organization of the company. He can only perform the duties assigned to him by law or the Court, without becoming a director of the company. Therefore, it can be assumed that it would not be possible to delegate the power to issue shares to the insolvency representative, even in the case of the suspension of the powers of the company's directors.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders' meeting authorization required for this?

An insolvency / reorganization plan may affect the structure of the corporate entity, but it would necessarily follow the specific regime applicable to each of the contemplated structural changes (regarding share capital increases, mergers, etc.).

In practice, the Court establishes the reorganisation plan following consultation and approval by the creditors' committees and the bondholders' assembly. Then, the shareholders' meeting, making a resolution on this plan, has the right to refuse to adopt the necessary decisions to implement the structural changes contemplated in the plan. In such case, the company is deemed to have defaulted on the insolvency plan and the continuation/reorganization plan is terminated.

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?). Is a shareholders' meeting authorisation required?

The general rule is that the company continues its activities despite the opening of a safeguard or reorganization procedure²⁵. If a liquidation procedure is open, the general rule is that the company's activities are discontinued. The liquidator cannot continue or create pending/new businesses for the purpose of winding up if he has not been authorized by either shareholders or the President of the Commercial Court ruling on the request when he was appointed by the Court²⁶. The liquidator may, therefore, perform all acts necessary to achieve liquidation.

In principle, liquidation causes the immediate cessation of the company's activity. This is necessary because the company must disappear – the aim is to realize the assets in order to pay off creditors, not to risk worsening its financial situation. Thus, the liquidator must sell goods and dismiss employees. But the Court may authorize the temporary preservation of the activity for 3 months if the total or partial transfer of the company is possible or if the public interest or the

²⁵ C. com., art. L. 622-9 - L 631-14

²⁶ C. Com., art. L 237-24, al. 3 et R. 237-15, al. 1

creditor's interests so requires²⁷. The administrator or liquidator shall inform the official receiver (*juge-commissaire*) and the prosecutor (*ministère public*) of the results of the activity pursued²⁸.

In any event a shareholders' meeting is not required.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders' meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Deed of cession: Disposal decisions by the company outside the ordinary course of business are prohibited after the opening of the safeguard and/or reorganization proceedings, but the official receiver may authorize them²⁹.

Disposal decisions providing for the sale of the business as a going concern can be adopted in reorganization or liquidation proceedings. The same rules apply. The Court is entitled to choose the acquirer. The Court may do so even if the acquirer is not the highest bidder. The Court shall "*select the offer that allows the best conditions to ensure more sustainable employment attached to all transferred, the payment of creditors and has the better work performance guarantees*"³⁰. In addition, a disposal plan can be adopted even if the price offered by the buyer is insufficient (or even less than the production of a liquidation could generate dividends) to ensure the full payment of creditors. The fate of the company is exclusively subject to the discretion of judges to select the offer that provides "best conditions" and not the highest prices for the acquisition of the company's own resources.

The procedure for the allocation of the assets is not based on an objective criteria that would maximize the value in use of assets by ensuring that the assets go to the most cost-effective offer. The authorisation of the shareholders is not required.

A safeguard plan cannot provide for the sale of the business as a going concern.

The sale of specific assets is possible whether the company files for safeguard proceedings or for reorganization proceedings. The authorisation of the shareholders is not required.

Please note that under French company law, the authorization of the shareholders' meeting is not required to sell corporate assets. However, if a sale of assets amounts to a de facto structural alteration of the company, it will, in practice, require the authorization of the shareholders.

38. Does the shareholders' meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are

²⁷ C. com., art. L. 641-10

²⁸ C. com., art. R. 641-20

²⁹C. com., art. L. 622-7-II)

³⁰ C. com. art. L. 642-5

separate reorganization and liquidation procedures, does this affect the response?).

The shareholders' meeting has no power regarding the continuation or rejection of contracts during an insolvency procedure.

The decision to continue the implementation of existing contracts exclusively belongs to the company or the Court appointed administrator when appointed. For further developments, please see above.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders' meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings' decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

French law does not contemplate group-wide insolvency plans.

Under French law, the rules governing insolvency procedure are inadequate for groups of companies. In principle, a company's difficulties are assessed taking into account its own financial situation, independently of its affiliation to a group. The insolvency and *cessation of paiements* is assessed taking into account a company's own capacities, irrespective of its parent's intervention. In a safeguard proceeding, the situation of the company is assessed without taking into account the financial capacity of the group to which it belongs³¹.

Insolvency proceedings affecting a member company of a group can be extended to other group companies. This happens when companies are fictitious³² or intermingled. This confusion between companies subject to a collective procedure can trigger the opening of a procedure for the whole unit.

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders' meetings of the relevant companies involved in the coordination mechanisms, if any?

There are no coordination mechanisms applicable to the insolvency of corporate groups. In exceptional cases of substantive consolidation (where there is an intermingling of assets or fictitious entities), there will be a unique procedure comprising of the concerned companies with a joint inventory and a joint list of liabilities. The shareholders' meetings of the relevant companies are not involved in any coordination mechanisms.

IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or experience, may interfere with the insolvency procedure of a company in your

³¹Com., 26th June 2007

³² C. com., art. L. 621-2, al. 2, L 631-7 et L 641-1, I.

jurisdiction.

There are no specific rules applicable to listed companies subject to insolvency proceedings but insolvency provisions imposing the confidentiality of out-of-court proceedings are in direct contradiction with the principle of transparency applicable to regulated markets and stock exchange law³³.

While market regulations are intended to protect investors and shareholders, insolvency law is interested in the company, its employees and its creditors, and does not make shareholder interests a priority.

The French Financial Markets Authority (AMF) has ruled that the opening of insolvency proceedings and the period of its execution do not suspend a company of its information obligations imposed by stock market regulations. A distinction must be made: if periodic financial reporting (annual, half-yearly and quarterly) remains due to the market, the publication of privileged information (which may have a significant influence on the issuer's financial instrument) is more complex. This information continues to be fully disclosed, regardless of the position of the listed company and any issuer must disseminate privileged information as soon as possible. In light of this position it appears the markets must be informed of the opening of an insolvency procedure.

The markets do not have to be informed however of the initiation of a pre-insolvency procedure (ad hoc mandate, conciliation) because French insolvency law specifically provides that this type of procedure should remain confidential.

³³ Articles 223-1 and seq. of the General Regulations of the French Financial Markets Authority (AMF)