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Contents

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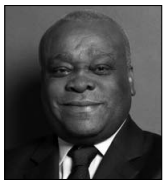

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1. Loan Market Panorama

1.1 Impact of Regulatory Environment and Economic Cycles

The French economy has faced a growth downturn since the beginning of the year, which has occurred in a tense atmosphere regarding uncertainties linked to Brexit, the trade battle between the United States and China, and the "*gilets jaunes*" (yellow jackets) protest movement. The retail and hospitality sectors have been particularly affected by this movement. Despite this, the French economy is buoyed by an increase in consumption following policies in favour of purchasing power, but this increase in purchasing power has been mainly spurred by individuals at that stage.

The French economy has benefited from historically low interest rates and the accommodative monetary policy put in place by the European Central Bank (ECB), which provides liquidity to the banking system. Such low interest rates have enabled banking institutions, companies and individuals to obtain financing solutions for relatively low costs. The French economy has benefited from an increase in the credit facility, and particularly for companies that had access to financing granted on more favourable terms. According to the Banque de France, access to credit for SMEs continued to increase in 2019 and loans mobilised by companies reached EUR1032.5 billion in June 2019, up 6.5% year-on-year, after a 6.4% increase between May 2019 and May 2018. This trend is mainly due to strong competition between banks and extremely favourable financing conditions. Driven down by the ECB policy, corporate credit rates have been at their lowest for almost two years. However, in response to this credit dynamic, French public authorities have also asked banks to increase their level of equity capital in order to readjust their ratio compared to the level of loans granted. The French HCSF (*Haut Conseil de Stabilité Financière*) has decided to increase the countercyclical capital buffers, currently set at 0.25% for 2019, to 0.5% for 2020 in accordance with Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions.

The main objective of this measure is to improve the resilience of the financial system against a cycle reversal through the early accumulation of additional capital reserves.

In the meantime, with regard to the impact of Brexit, certain financial institutions have initiated a relocation of their activities from the United Kingdom to other European countries, and notably France. This move would help the development of credit activities in France. However, the risks and uncertainties associated with the terms and conditions of Brexit remain as high as ever, although the actors have prepared themselves for a "hard Brexit" and a no-deal scenario. Indeed, successive postponements and the uncertainties looming over the effective implementation of Brexit have led to the implementation of a "wait and see" policy. As a result, a significant number of uncertainties remain, particularly with regard to access to the single-market through the European passport for entities based in the UK, including the free movement of capital.

1.2 The High-yield Market

In France, the high-yield debt sector represents a significant part of the market in terms of number of transactions and volume. High-yield is a leverage finance product, reserved for companies with a high level of debt. In particular, there are a large number of LBO companies held by private equity funds and companies that do not or no longer have access to other sources of financing for various reasons.

This type of financing can also be used to diversify the funding sources of companies that need significant financing, particularly to support their external growth.

In general, high-yield products have the particularity of being subject to terms and conditions governed by US law (usually the law of the State of New York), even if the issuer is a French, Italian or English company. However, if the issuer is a French company, the typical French law-governed security package would cover shares, inter-company loans and bank accounts.

After the 2008 crisis, there was strong interest in high-yield products in Europe in general and in France in particular, caused notably by the reluctance of banks at that time to finance operations that were considered too risky, particularly LBOs.

Issuers turned towards this product since high-yield bond covenants tend to provide greater flexibility than bank loans and also usually provide permitted baskets to be increased by reference to the increase of the issuer's EBITDA.

Issuers turned towards this product since high-yield bond covenants tend to provide greater flexibility than bank loans and also usually provide permitted baskets to be increased by reference to the increase of the issuer's EBITDA. Such covenant flexibility has influenced the leverage loan markets with the expansion of covenant-lite loans.

Investors see this product as a risky investment certainly, but above all as a high-return investment. In a very low interest rate environment, this is of course interesting for the overall performance of their portfolios.

1.3 Alternative Credit Providers

In recent years, there has been an increase in the financing of the economy by non-bank actors. The emergence of this new category of lender is one of the results of the 2008 financial crisis and recession (drying up of the interbanking market), regulatory shocks (tightening of capital ratios) and the emergence of digital technology (financial technology

or fintech). Indeed, banks at the time pulled back on their lending activities because of balance sheet concerns, so companies had to seek new sources of financing from alternative actors. This new private credit industry is booming in the world and will reach around USD1 trillion in assets under management in 2020.

France has always been much more restrictive in terms of banking monopoly than its European neighbours. However, the rules governing the principle of banking monopoly have been considerably modified, to take into account developments in the credit sector and to stimulate the credit market by allowing non-bank entities to penetrate the market and originate loans directly (alternative lenders, usually funds). Private debt players are generally more flexible and faster than banks.

From a legal point of view, two new types of lenders have emerged: the private credit industry and the crowdfunding platforms.

For the private credit industry, the main evolution came from the EU legal framework, with the entry into force of EU regulation 2015/760 of 29 April 2015 on European long-term investment funds (ELTIF) implemented under French legislation by law No. 2016-1691 of 9 December 2016 and ordinance N° 2017-1432 dated 4 October 2017, which allow certain French alternative investment funds (AIF) to operate as lenders. As a result of these significant developments and the presence of major market players, France is one of the largest private debt markets and its participants are particularly active. Fund managers have raised around 50% more capital (EUR3.5 billion) to lend to corporates in 2018, and invested EUR7 billion in private debt during the same period. This growth is mainly due to the institutional investors' willingness to diversify their portfolios.

1.4 Banking and Finance Techniques

Banking and finance techniques are evolving, particularly with the appearance of new concepts linked to the fintech industry, the blockchain system, cloud computing and the goal to integrate sustainability considerations into the financial markets.

Following the Paris agreement on climate change, France decided to strengthen transparency and reporting obligations on sustainable development for financial actors. Large insurance and credit institutions as well as financial services companies must now take environmental, social and governance objectives into account in their investment strategy, in order to promote and develop lower carbon projects. In addition, the European Investment Bank recently announced that it intends to stop financing fossil fuels by the end of 2020. For the time being, the French regulatory framework does not impose any obligations in terms of investment choices, but the trend over the past two years clearly indicates a growing questioning of the issue of environmental protection and the fight against global warming.

On another topic, the development of IT technologies is a key area of the evolution of the financial industry, particularly through the expansion of the blockchain tools. This technology participates in spreading the innovation within the financial world. Concerning financial instruments, decree No. 2018-1226 of 24 December 2018 clarifies the conditions for using "shared electronic recording devices" for the transmission of financial securities and minibons covered by Ordinance No. 2017-1674 of 8 December 2017. It is possible to register financial instruments on the blockchain but this is limited to registered securities.

Initially conceived as exchange instruments in the digital world, virtual and crypto-currencies have progressively been used throughout services, allowing the purchase or sale of legal currencies, their conservation, their use as an exchange instrument or more recently investment instrument, and financing with the appearance of Initial Coin Offering (ICO) (set out by law No 2019-486 of May 22, 2019 – "Loi PACTE").

From a legal point of view, crypto-currencies are not recognised as legal currencies, electronic currencies or means of payment, as they do not meet the standards set out in the French monetary and financial code insofar as they are not issued against the delivery of a real counterpart in legal currencies. Therefore, they offer no guarantee of security, conversion and value. For instance, Directive (EU) 2018/843 of 30 May 2018 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing defines virtual currencies as a "*digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.*"

The French regulators have tried to propose a legal definition of these new financial instruments, and practitioners are still learning and discovering the application of these new forms of financing.

For instance, in an ICO, tokens are issued by the organisation that created the ICO, and can be acquired by anyone in exchange for cryptocurrencies; this is an equivalent of a cryptocurrencies fund-raising. In a second step, these tokens can be sold and bought on trading platforms, at a rate depending on supply and demand. They are therefore very liquid. They are also intended to be usable in the project financed by the ICO.

The Banque de France and the Autorité de contrôle prudentiel et de résolution (ACPR) are calling for a strengthening of the legal framework for token-related services. Indeed, since the "Loi PACTE", token issuers wishing to carry out an ICO may apply for a visa granted by the AMF. This request is optional, and any ICO made without a visa remains valid but shall not be subject to public solicitation. For the time being, regulators identify these new tools as being highly risky, due to the lack of regulations and the fact that their holders remain largely unidentifiable. There is also a risk that users of these new means of payment may use them to finance terrorism or criminal activities, and bypass the rules against money laundering.

1.5 Legal, Tax, Regulatory or Other Developments

The current European prudential supervisory framework (CRD IV/CRR) has been updated following the adoption of a new banking package by the EU institutions at the end of May 2019 (CRD V/CRR 2). Implementing decrees regarding MiF 2 can also be anticipated in the near future.

The European authorities have decided to amend some of the requirements set by the CRD IV regulations and the Basel III standards, which defined the rules on strengthening the capital ratio requirements of credit institutions.

The new package pursues the same objective – namely, to ensure the resilience of the EU-based credit institutions.

This new banking package was adopted in May 2019, just before the change of the European Parliament's legislature, through the capital requirements regulation No 2019/876 (CRR 2) and the capital requirements directive 2019/878 (CRD V). Also, the main changes expected to occur during the coming months relate to BRRD II (Directive (EU) 2019/879) and SRMR II (Regulation (EU) 2019/877), which are both related to loss-absorbing and recapitalising the capacity of credit institutions and investment firms.

2. Authorisation

2.1 Authorisation to Provide Financing to a Company

The banking monopoly is a principle of French law that prohibits any entity other than those expressly authorised to carry out credit operations on a regular basis.

Entities that carry out credit activities on a regular basis must be either a licensed credit institution (*établissement de credit*) or a financing entity (*société de financement*), and must be an EEA-based entity that benefits from the European passport.

Indeed, any credit institution licensed in one of the EEA member states to carry out banking activities can grant loans in France, subject to the fulfilment of various conditions under the relevant EU directive and prior notification to its competent authorities, either by establishing a branch in France (right of establishment) or by operating directly from its country of origin (providing cross-border services).

There are certain exceptions for insurance companies and AIF, and for intragroup loans.

As regards AIF, in recent years such funds have been authorised under certain conditions to provide loans in order to strengthen credit offers in France.

Following decrees N° 2018-1004 and N° 2018-1008, and under the conditions set out herein, the following entities are now authorised to provide financing to French companies:

- professional specialised investment funds (*fonds professionnels spécialisés*);
- professional private equity investment funds (*fonds professionnels de capital investissement*);
- French limited partnerships (*société de libre partenariat*);
- securitisation vehicles (*organismes de titrisation*); and
- specialised financing vehicles (*organismes de financement spécialisés*).

Moreover, intragroup loans are possible under French law, whereby one company can grant loans to another company with which it has economic ties. The implementation of this exception of the French banking monopoly rules implies the meeting of a large number of legal and regulatory conditions.

Finally, the restrictions relating to credit operations should not apply to European long-term investment funds (ELTIF), which provide long-term financing to certain companies across the EU under several conditions, nor to participating loans (*prêts participatifs*), which are long-term subordinated loans that can be granted by commercial companies to another company. For credit institutions whose headquarters are in the United Kingdom, there are some uncertainties regarding Brexit; in particular, in the event of a hard Brexit, EU passporting rights will no longer be available.

3. Structuring and Documentation Considerations

3.1 Restrictions on Foreign Lenders Granting Loans

As mentioned above, foreign lenders are subject to the French rules on banking monopoly, and only EEA-based establishments are allowed to provide credit services in France, if they are eligible through the European passport or the ELTIF label.

For credit institutions whose headquarters are in a State that is not a party to the EEA, the French monetary and

financial code provides that branches established in France must obtain a banking licence from the French *Autorité de contrôle prudentiel et de résolution* (ACPR) before carrying on their activity.

3.2 Restrictions on Granting Security to Foreign Lenders

The granting of securities in France is not prohibited in itself. However, undertakings by signature (such as *cautionnement* and first demand guarantee) are banking operations that can be granted on a regular basis only by licensed or duly passported entities. Any entity willing to grant this type of guarantee for consideration on a regular basis must be a credit institution licensed or passported in France (as well as French investment firms). Besides this kind of guarantee, French law enables any entity to grant securities or guarantees to foreign lenders. Nevertheless, corporate law requires the respect of the company's corporate benefit and statutory object provisions.

There are no specific restrictions on granting security to the benefit of foreign lenders. Regarding the assignment of professional receivables by way of security (*Dailly*), the security can only be granted to the benefit of duly licensed or passported lenders in France (eg, credit institutions or financing entities), or to the new category of entities called *organisme de financement spécialisé* (specialised financing funds, or "OFS") created by French Ordinance No 2017-1432 published 4 October 2017. With securitisation funds, the OFS forms the new debt financing funds called *organisme de financement* (financing funds).

3.3 Restrictions and Controls on Foreign Currency Exchange

Foreign currency control disappeared in France about 30 years ago, so there are no exchange controls regarding foreign currency exchange. Cash can be freely transferred from abroad to France, regardless of the country of origin, without the intermediary of a banking institution. However, a customs declaration is required for amounts above EUR10,000. Apart from these declarations, credit institutions, financing and investment firms and asset management companies must make monthly statistical declarations to the Banque de France regarding payments over EUR12,500 completed in France between residents and non-residents. Monthly statistical declarations must also be made by companies or groups of companies when dealing with foreign operations, for an amount exceeding EUR30 million. Finally, residents who carry out direct operations abroad shall declare operations of this nature above EUR1 million to the Banque de France, on a monthly basis.

3.4 Restrictions on the Borrower's Use of Proceeds

The financial sector is subject to anti-money laundering and anti-terrorist financing provisions. Regarding the French Monetary and Financial Code, certain professionals, including credit institutions, are required to report any suspicions to the French service *Tracfin,* regarding any sums or transactions that they know, suspect or have reasonable grounds to suspect arise from an offence punishable by a term of imprisonment of more than one year or from participation in the financing of terrorism. Moreover, credit institutions must comply with KYC rules in order to prevent and fight against money-laundering and terrorism.

It is common practice for loan agreements to provide for the use of proceeds in a specific contractual provision. Hence, the borrower must use the loan's proceeds for the purpose expressly stated in the loan agreement.

3.5 Agent and Trust Concepts

The concept of agent is largely used in France regarding syndicated loans. It is generally based on a power of attorney granted by the lenders to a bank institution acting as agent. Ordinance No 2017-748 dated 4 May 2017 has considerably improved the agent regime created by the law of 19 February 2007. Henceforth, the use of a security agent is permitted in order to take, register, manage and enforce any security interest (including personal guarantees since 2017) securing a transaction on behalf of the secured creditors.

The concept of trust is not recognised under French law, so it is not possible to create a trust under French law. Nevertheless, French law provides for a quite similar concept known as a *fiducie,* which is an operation by which one or more settlors transfer assets, rights or security rights, or a set of assets, rights or security rights, present or future, to one or more fiduciary agents, who, keeping them separate from their own assets, act to achieve a specified goal for the benefit of one or more beneficiaries. This concept enables the temporary transfer of property of the relevant assets or rights to the fiduciary agent, and enables such assets or rights to be isolated in an autonomous entity, separate from the settlor's estate.

The *fiducie* can be divided into two main categories: the *fiducie-gestion,* which consists of the assignment by the settlor of the management of assets to the trustee; and the *fiducie-sûreté,* which consists of a security to secure the performance of a payment obligation.

Despite this description, the *fiducie* should not be confused with the concept of trust.

The 2017 reform of the agent regime has borrowed some features from the *fiducie* regime: the security agent will hold title to the security interest in an autonomous estate, separate from its own estate, being bankruptcy remote in case of the opening of insolvency proceedings against the security agent. French law now has a security agency regime that can compete with the common law trust structure.

3.6 Loan Transfer Mechanisms

Initially, the transfer of unmatured receivables was restricted to credit institutions only. However, since 2017, financing institutions or investment funds that are authorised to grant loans and hold unmatured loans or other professional receivables are able to assign them directly to French licensed or EU passported financial institutions, and to foreign institutions or entities with a similar regulatory nature, foreign financial institutions or non-banking financial investors, with the exception of receivables whose debtor is an individual acting for non-professional purposes.

It is possible under French law for a loan to be transferred. Such transfer may occur by way of assignment, novation, transfer of contract, transfer of debt or sub-participation.

The transfer by way of assignment and the transfer of contract shall be notified to the assigned debtor. Concerning the transfer of debt, the debtor may assign its debt with the agreement of the creditor; if such agreement is not obtained, such transfer shall be enforceable only upon notification to the creditor, or as soon as he has taken note of it.

According to the new French Civil Code, a simple notification to the borrower is sufficient and the transfer of agreement is no longer required to be entered into in notarised form. Whether the transfer happened by way of novation, transfer of agreement or transfer of debt, the consent of the debtor is required. The same applies to the consent of the guarantor and the security provider to enable the assignee to enforce its rights under the security interest.

A lender under a loan agreement may agree to share its participation (to a sub-participant) with one or several sub-participants without the occurrence of a loan transfer. Regarding the loan agreement, the initial credit provider remains the lender, and the sub-participants have no direct rights under this agreement as they do not become the contractor. The borrower does not have to be aware of the sub-participation so it is a way to bypass any contractual restrictions on assignment and transfer.

Within the framework of a syndicated loan, a part of or the total lender's participation might be transferred to one or several credit institutions, pursuant to the provisions of the loan agreement.

3.7 Debt Buy-back

Buy-back by the borrower is possible under French law. If the borrower is both the debtor and the creditor of a claim, said claim is automatically extinguished. Generally, contractual provisions of loan agreements may restrict the possibility for a borrower to repurchase its debt.

Buy-back by sponsors is also permitted under French law but may be limited by the French banking monopoly rules, while buy-back by the borrower may be limited by contractual provisions.

If the parties to a loan agreement have not provided for any debt buy-back provisions, they shall determine whether or not the loan agreement contains any restrictions regarding the prohibition of debt transfer.

Some specific rules apply to the buy-back of bonds:

- if the bonds are admitted to trading on a regulated market, the purchase by the issuer of the bonds is permitted up to a maximum of 15% of the securities comprising any one issue for the maximum period of one year; and
- if the purchase is made by a shareholder of the issuer directly holding at least 10% of the share capital of the issuer, then this shareholder is no longer permitted to vote in the bondholders' meetings.

3.8 Public Acquisition Finance

Several entities may intervene in public acquisition finance, such as financial advisers and legal counsels. The financial adviser can be a credit institution or an investment firm, and will manage the deal towards the market. Then the legal counsel handles the draft of the documentation as the prospectus and all required documents under the applicable process.

The French legal framework regarding takeover bids is provided in the French Monetary and Financial Code, the Commercial Code and the *Règlement General de l'AMF*. Takeover bids are governed by the rules of equality between shareholders and free competition. The *AMF* plays a central part of the process, including the crossing of the threshold declaration. An investment service provider that is authorised to carry out the underwriting activity shall act on behalf of the bidder.

Under French law, in public acquisition finance, the bidder in a takeover bid is required to guarantee to the holders of the shares or securities of the targeted company that it would fully pay their purchase price.

4. Tax

4.1 Withholding Tax

Payment of the principal is not subject to taxation.

If the Beneficiary of the Interest is a Legal Entity

Interest payments are subject to withholding tax when they are paid to non-residents, even though there are now several exemptions in domestic law.

For loans contracted by French legal entities after 1 March 2010, interest paid is exempt from withholding tax except

when the interest is paid to non-co-operative states. However, there will be an exemption of withholding tax if the company is controlled by another company established in a third country, and if the chain of participation is not intended to avoid corporation tax (anti-abuse clause).

A list of non-co-operative states or territories is published yearly by the French Ministry of Economic and Financial Affairs.

For loans concluded before 1 March 2010, specific conditions should be met in order to obtain an exemption of withholding tax – notably, the contracts should be concluded before the transfer of the funds, loans should be contracted outside of France, and the lender should be a corporate entity or French "*Fond commun de créances ou de titrisations*").

Lastly, French withholding tax could apply on income related to bonds or assimilated instruments issued before 1 January 1987, and on interests from "*bonds de caisse*" regardless of the issuance date.

In any case, careful attention should be paid to the nature of the loans, the date of conclusion and the nature of the income in order to check the above French exemptions.

If the Beneficiary of the Interest is an Individual

If the beneficiary of the interest is an individual, there is a withholding tax rate of 12.8%, subject to the provisions of international tax treaties. The individual beneficiary of the interest will be entitled to a tax credit in his country of residence, in order to eliminate double taxation.

4.2 Other Taxes, Duties, Charges or Tax Considerations

Please note that there could be VAT issues to consider for the lender if their supply of services is deemed to be localised in France.

For the fiscal year 2019, lenders established in France are liable to corporate tax, the current rate of which is 28% for all companies on the first EUR500,000 in profits, and 31% beyond this threshold. This rate will be reduced progressively to 25% for all companies in January 2022.

However, the corporate tax rate remains at 33.1/3% for companies with a turnover of at least EUR250 million or more for the financial year from 1 January 2019 to 31 December 2019.

It is common practice for a specific provision in a loan agreement to provide that the lenders would be indemnified for any tax that arises in connection with the loan other than by way of withholding.

4.3 Usury Laws

The French Consumer Code provides for usury laws. A usurious loan constitutes any conventional loan granted at a global effective rate that exceeds, at the time it is granted, by more than a third, the overall effective rate charged during the previous quarter by credit institutions or financing entities relating to operations of the same type and involving similar risks. Failing to comply with this requirement is a criminal offence.

The Banque de France publishes the usurious rate and the average effective rate charged by credit institutions and financing entities, on a quarterly basis.

The French Consumer Code and the French Monetary and Financial Code require that loan agreements must contain a provision regarding the overall effective annual rate, which is the rate that takes into account all the costs incurred when taking out a loan (ie, interest, insurance, fees, costs incurred by the credit institutions, etc).

5. Guarantees and Security

5.1 Assets and Forms of Security

French law distinguishes between (i) a security interest over movable and immovable assets that may or may not have possessory rights, and (ii) a personal guarantee (such as *cautionnement* and first demand guarantee).

Under French Law, the legal lien includes a right to retain physical possession of tangible assets as security for the underlying obligations.

A mortgage is often used in France for real estate property. A mortgage can be granted in favour of any type of creditor, and can be used to secure any type of debt. However, since the mortgage deed must be signed before a French notary (*notaire*) in order to be valid, and because the applicable registration formalities are onerous, such security interest is rarely used in acquisition financings but is very common in real estate financings.

The creditor can also require a non-possessory security interest in the forms of a pledge over:

- tools and equipment (*nantissement de l'outillage et du matériel d'équipement*);
- inventory (*gage de stock*);
- intellectual property rights (*nantissement des droits de propriété intellectuelle*);
- a securities account (*nantissement de compte titres financiers*);
- shares in limited liability companies (*SARL*) and certain other companies whose securities do not fall into the

legal category of financial securities (*nantissement de parts sociales*);
- receivables (*nantissement de créances*);
- bank accounts (*nantissement de compte bancaire*);
- ongoing business (*nantissement de fonds de commerce*); and
- *Dailly* receivables assignment (*nantissement de créances professionnelles*) and delegation (*delegation*).

In an LBO acquisition financing where the target company is French incorporated, the typical French law-governed security package would include a securities account, intercompany loans and bank accounts. According to the industry or sector of the target group, a specific security interest may be requested by creditors (such as intellectual property – trade marks/patents).

Since the transposition of the collateral directive, French law also provides for collateral guarantees, which are well used and appreciated by credit institutions, most commonly in transactions on financial instruments (ie, derivatives). The main advantages of collateral arrangements are the simplified formalities and the ability to enforce such collateral even after the opening of insolvency proceedings against the debtor.

French law provides for requirements regarding the perfection of certain security interests. For instance, the pledge over tools and equipment and the pledge over ongoing business must be registered with the clerk of the competent commercial courts (within 30 days of execution versus 15 days before). Also, the pledge over IP rights must be registered in the relevant IP register.

5.2 Floating Charges or Other Universal or Similar Security Interests

The concept of floating charges does not exist under French law. Therefore, creditors will take several separate pledges or securities over each type of the debtor's assets. However, there is a similar concept according to French law: the pledge over ongoing business (*nantissement de fonds de commerce*), although this security is more limited than the floating charge concept.

The pledge over ongoing business covers corporate and trade name, leasing rights, goodwill, custom and passing trade, commercial furniture, equipment and tools used for the operation of the business, patents, licences, trade marks, industrial drawings and designs, and in general the intellectual property rights attached thereto.

5.3 Downstream, Upstream and Cross-stream Guarantees

Under French law, *sociétés anonymes*, *sociétés par actions simplifiée* and *sociétés à responsabilité limitée* may provide upstream and cross-stream guarantees, provided that such guarantees comply with the company's corporate benefit, statutory object provisions and prohibition on using the corporate assets wrongfully.

The common forms of guarantees are *cautionnement*, first demand guarantee (*garantie à première demande*) and letter of intent (*lettre d'intention*).

A guarantee granted or given by a French company in the form of a *société anonyme* requires an approval from its board of directors.

Failure to comply with this rule may trigger the liability of the managers or directors of the company. Some French courts have even declared security interests and guarantees granted by some unlimited French companies that did not comply with this requirement to be null and void.

Guarantees or securities granted by a company in order to secure the obligations of its subsidiaries are generally considered to be in the corporate benefit of such holding company. Upstream and cross-stream guarantees granted by a company in order to secure the obligations of its holdings or sister companies are generally limited to a secured amount equal to the amount lent on to the guarantor out of the loan proceeds made available to its holding or sister company so as to justify a corporate benefit in this respect.

5.4 Restrictions on Target

A French joint stock company (a *société anonyme*, a *société par actions simplifiée* or a *société en commandite par actions*) cannot grant any financial assistance in the form of a guarantee, loan or security interest for the acquisition of its own shares by a third party. A violation of such prohibition can lead to a criminal liability charge against the executives (managers or directors), and the loan, guarantee or security interests may be null and void. It goes against the company's own benefit. Also, the prohibition is extended to financial assistance in the acquisition of shares in a company that directly or indirectly holds shares in the initial company.

5.5 Other Restrictions

Provisions of the French Commercial Code for *sociétés anonymes* with a board of directors or an executive board and supervisory board establish specific rules regarding the company's commitment. Indeed, the board of directors or the supervisory board "may within the limit of a total amount that it fixes" authorise the managing director or the management board to give securities, endorsements or guarantees on behalf of the company. It should be noted that this authorisation is given only to the chief executive officer (CEO) and cannot be granted directly to the deputy chief executive officer. Nevertheless, the CEO may then grant a delegation of authority to the deputy chief executive officer or to another proxyholder, with the option of sub-delegation.

The beneficiary of the guarantee will have every interest to verify the reality of this delegation.

Therefore, if such commitment alone does not exceed one of the two thresholds (eg, either the total amount or the nature of the commitment), the overrun cannot be prejudicial to third parties who were not informed. The case law is not fixed on the applicable sanction. Some jurisdictions of the fund consider that the commitment will be unenforceable as a whole, while others consider that the company remains held within the fixed amount. However, the commitment must not be taken beyond the authorisation, which may not be global but must be given for a specific operation.

The board of directors may, without limit of amount, authorise its CEO to give securities, endorsements or guarantees on behalf of the company. The same option is given to the supervisory board in a *société anonyme* with a management board and supervisory board.

It is necessary for the minutes of the board of directors or the supervisory board that gave the authorisation to be communicated to the beneficiary of the security who may require it.

Without authorisation, any acts subscribed by the director on behalf of the company are not enforceable against the company.

Moreover, the granting of securities or guarantees by a company does not require any prior consent from the work council (*comité social et économique*), but the work council will be informed on matters concerning the organisation, the management and the general business of the company. Therefore, if the guarantee granted by the company should have an impact on the employees, a prior consultation of the work council shall be done, but opinions expressed by the work council are not binding, so may be disregarded by the company.

5.6 Release of Typical Forms of Security

Under French law, guarantees and securities are ancillary to the secured obligations and, when the secured obligations are discharged, it automatically releases such guarantees and securities. However, it is common practice for the debtor to request a formal release of the security to the creditor. In general, creditors issue a release letter, particularly when the securities are registered.

5.7 Rules Governing the Priority of Competing Security Interests

Under French law, any creditor is entitled to a general lien on all debtor assets. However, it is only related to the assets that are in the debtor's patrimony at the time the obligation arises, provided that the debtor is the beneficial owner of the assets.

The creditor can require a security to the debtor, and such security confers a privilege to the creditor.

Creditors can enter into competition and therefore a ranking is in place. If the security is registered, the ranking of the security interest is determined by the date of registration. If not, the ranking is determined by the date on which the relevant perfection requirements of the security are completed. Also, loan agreements may provide for a negative pledge or a pari passu provision, so that the lender must obtain a waiver before granting another security.

This may vary depending on whether or not the debtor is subject to insolvency proceedings. In the event of liquidation proceedings, certain creditors are preferred in the payment order. The proceeds (*boni*) shall be allocated to the creditors following the order of priority ranking as set out in **7.3 The Order Creditors Are Paid on Insolvency**.

The privilege is a right that allows a creditor to be paid from the sale proceeds of the property of a debtor in preference to other creditors. This right of preference confers to the holder of the preferential claim a more or less advantageous classification according to the rank accorded by law to his claim.

Being derogatory to the principle of equality of creditors, a strict interpretation is made by French courts, and no privilege can be created by will.

In general, disputes between creditors regarding the distribution of proceeds are settled by the order of privilege.

Moreover, under French law it is possible for creditors to enter into a subordination agreement or an inter-creditor agreement, which provides that junior creditors shall not be paid until the senior creditors have been fully paid, and also subordinates junior creditors to all other creditors that have the same ranking as the senior creditors. Upon the occurrence of an insolvency proceeding, the subordination agreement remains effective, provided that the *pari passu* principle is respected.

6. Enforcement

6.1 Enforcement of Collateral by Secured Lenders

Enforcement by a secured lender will occur when the debtor is in default (ie, acceleration and failure to repay any amounts due under the facility provided, such as interest, fees, principal, etc).

The enforcement methods vary according to the security in force.

Pledges may be enforced by judicial allocation, by public sale before the court or by automatic transfer to the benefi-

ciary of the pledge. Also, a private foreclosure (*pacte commissoire*) is permitted under French law for most securities, but is prohibited during certain pre-insolvency and insolvency proceedings.

The time the enforcement may take varies depending on the proceedings engaged against the insolvent debtor, and such proceeding shall have a great impact on the creditors' rights. The rules of the insolvency proceeding have to be followed, with it being specified that an insolvency proceeding must provide for a moratorium of enforcement with respect to the creditor claim. So, creditors may never be totally reimbursed if the assets of the debtor are not sufficient to satisfy all the creditors.

6.2 Foreign Law and Jurisdiction

The choice of a foreign law to govern a contract will be upheld as a valid choice of law by French courts, according and subject to the provisions of the European Parliament and Council Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

The submission to a foreign jurisdiction is binding, according and subject to the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

As mentioned above, French law gives the parties to a contract freedom to choose or select a jurisdiction for their disputes, except for disputes regarding a real property matter, which must be tried by the court at the place where the property is located. The choice of a foreign jurisdiction is valid as long as the dispute is international, with it being specified that French courts do not require the dispute to have a material link to the foreign jurisdiction elected by the parties, the jurisdiction choice clause does not preclude the mandatory exclusive jurisdiction of a French court in relation to certain aspects (eg, employment contracts) and the clause is not a unilateral dispute resolution clause giving only one party the choice between several jurisdictions while the other party is bound to bring actions before one jurisdiction only.

Also, it is possible to waive immunity under certain conditions, and this waiver of immunity is legally binding and enforceable under French laws.

6.3 A Judgment Given by a Foreign Court

A final and conclusive judgment rendered by a foreign court that is enforceable in such jurisdiction shall be recognised and enforceable by French courts without review of its merits, according and subject to the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.

Pursuant to the Brussels I Bis Regulation, the recognition of a foreign judgment shall be refused in the following circumstances:

- if such recognition is manifestly contrary to French international public policy;
- if the judgment was given in default of appearance – ie, the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- if the judgment is irreconcilable with a judgment rendered in a dispute between the same parties in France; and
- if the judgment is irreconcilable with an earlier judgment rendered in another Member State or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the necessary conditions for its recognition in France.

The submission to arbitration is binding, and a binding arbitral award rendered by arbitrators shall be recognised and enforceable in France, according and subject to the provisions of article 1514 et seq. of the French Code of Civil Procedure.

An international arbitral award rendered outside France shall be recognised in France, provided such recognition is not manifestly contrary to French international public policy. The original arbitral award shall be requested by the French court as evidence, together with the arbitration agreement or a copy of those documents. The requesting party shall produce a translation of the documents and, if the court so requires, a translation certified by a sworn translator.

In order for an international arbitral award rendered outside France to be enforced in France, an order for enforceability (*ordonnance d'exequatur*) must be issued by the Paris High Court (*Tribunal de Grande Instance de Paris*), upon the request of the interested party, filed with the registry of the court.

The decision of a French court on a recognition request or an order for enforceability of an arbitral award rendered abroad may be subject to appeal. A French court of appeal may refuse the recognition or the exequatur of an arbitral award on the five grounds mentioned in article 1520 of the French Civil Procedure Code.

Service (*signification*) is a key element of the enforcement process, although it is not a prerequisite to enforcing an arbitral award in France. The creditor notifies the opposing party about the award, together with the enforcement order once the court grants it.

6.4 A Foreign Lender's Ability to Enforce Its Rights

There are no other matters that might have an impact on a foreign lender's ability to enforce its rights under a loan or security agreement.

7. Bankruptcy and Insolvency

7.1 Company Rescue or Reorganisation Procedures Outside of Insolvency

There is a specific insolvency procedure for credit institutions, regarding total prohibition of activity and liquidation. Such procedure is monitored by the ACPR and, if the relevant entity is a systemic credit institution, in co-operation with the ECB. This specific regime is not examined in the following development.

French law offers various tools and work-out processes to address distressed situations outside of formal insolvency proceedings, as follows:

- at the request of a debtor company, a court may grant a grace period of up to two years by deferring or rescheduling the payment terms of the debtor's obligations, and ordering that the amount corresponding to the rescheduled payment plan bears interest at a reduced rate no lower than the legal rate, or that the payments made by the debtor would first be allocated to the payments of principal;
- a debtor company may request the opening of *mandat ad hoc* or *conciliation*, which are both confidential. These two amicable proceedings aim to find a negotiated solution with creditors and other relevant stakeholders under the supervision of a court-appointed official; and
- a debtor company may also file for public court-based proceedings – safeguard proceedings (*sauvegarde judiciaire)* and fast track proceedings (*sauvegarde financière accélérée* et *sauvegarde accélérée*).

With regard to *mandat ad hoc*, a company that experiences difficulties (whether financial, commercial or other) but is not cash flow insolvent (ie, is able to pay its debts when due out of its current assets) may request the presiding judge of the commercial court to appoint a *mandataire ad hoc* in order to facilitate through confidential negotiations the entering into of an agreement resolving the debtor's difficulties (eg, through debt forgiveness, debt rescheduling and/or new loans) between the debtor and one or more of its willing creditors. The *mandataire ad hoc* has no coercive powers and there is no automatic stay of proceedings or stay of payments during the *mandat ad hoc*.

Similarly to the *mandat ad hoc*, the purpose of the conciliation proceeding is to facilitate an agreement between the company and its creditors to put an end to the financial difficulties of the debtor. The company's managing director(s) may therefore petition the presiding judge of the court for the commencement of conciliation, provided that the company is not cash flow insolvent or has not been insolvent for more than 45 days, and is experiencing existing or foreseeable difficulties of a legal, economic or financial nature.

The court will appoint a conciliator (*conciliateur*) – whose name may be suggested by the company's managing director(s) – for an initial period of up to four months (renewable once, without exceeding five months in total). The precise mission of the conciliator (*conciliateur*) and the purpose of conciliation will be determined in the order appointing the conciliator.

Following an agreement of stakeholders on the terms of the restructuring reached in conciliation, two options are possible:

- the presiding judge of the court may record the agreement (*constatation*) at the request of all parties, thereby giving it the enforceability of a judgment whilst keeping it confidential; or
- the court may formally approve (*homologation*) the conciliation agreement at the company's request. The conciliation then enters the public record.

The recording (*constatation*) and the formal approval (*homologation*) of the conciliation agreement entail the following consequences:

- any enforcement against the company in respect of the participating creditors' claims falling within the scope of the conciliation agreement is stayed for the duration of the agreement (unless the debtor is in default);
- any enforcement against the company in respect of the non-participating creditors' claims (except public creditors' claims) may be rescheduled by the judge for a portion of its debts, for up to two years pursuant to Article 1343-5 et seq. of the French Civil Code; and
- any debt forgiveness and rescheduling granted to the debtor also benefit its guarantors.

In addition, the formal approval (*homologation*) of the conciliation agreement entails the following specific consequences:

- new money made available to the company during the conciliation (other than through subscribing to a share capital increase) will benefit from a lien, taking priority over most other claims in the event of subsequent safeguard (*sauvegarde*), reorganisation (*redressement judiciaire*) or liquidation proceedings (*liquidation judiciaire*);
- in the event of subsequent insolvency proceedings, the conciliation agreement will not be void or voidable on the grounds of claw-back rules; and

- if the company fails to perform its obligations under the conciliation agreement, any party to the conciliation agreement may request the court to terminate the agreement.

If the company experiences difficulties (whether financial, economic or otherwise) that cannot be overcome without resorting to a formal restructuring process – and provided that it is not insolvent – the company's managing director(s) may apply for the opening of a safeguard, which allows debtors to pursue a restructuring under the umbrella of a payment and enforcement moratorium. The statutory objective of the safeguard is to preserve employment, settle liabilities and ensure the continued operations of the business. In addition to the general safeguard, there are two types of fast track safeguard proceedings specifically designed to accelerate the approval of a restructuring plan.

The judgment opening safeguard proceedings initiate an observation period (*période d'observation*) of up to six months (renewable for another six months if needed, and for a further six months in exceptional circumstances), which entails the main following consequences:

- a payment moratorium in respect of debts that came into existence before the safeguard order and of debts that come into existence after the safeguard order but not for the purposes of the proceedings or the observation period, or in consideration of services provided to the company during this period;
- a moratorium on the acceleration of pre-safeguard claims, whether based on a payment default or the opening of the safeguard proceedings;
- a prohibition on secured creditors enforcing their security interests during the observation period. In addition, no further security interests or liens can be registered vis-à-vis the company or on its assets in relation to pre-safeguard claims; and
- the prohibition or suspension of actions and proceedings against the company either relating to the payment of pre-safeguard claims or involving the termination of any contract by reason of a payment default of pre-safeguard claims, as well as actions relating to the enforcement of prior judgments (*voies d'exécution*) for those ongoing at the date of the opening judgment.

Once approved by the court, the Safeguard Plan puts an end to the observation period.

The law of 22 October 2010 on banking and financial regulations, effective as of 1 March 2011, has created a type of fast track financial safeguard procedure (*sauvegarde financière accélérée*) specifically designed for financial restructurings, subject to the debtor company securing the consent of at least two-thirds (in value) of its financial creditors and, as the case may be, its bondholders. In 2014, this fast track process was extended to non-financial restructurings.

To be eligible to the fast track safeguard, a company must be engaged in a conciliation, and reach an agreement with a sufficiently large group of the relevant creditors to make it likely that it will be adopted by the creditors' committees by a 66.66% majority and approved by the court within three months of the opening of the fast track safeguard (or one month in the case of a financial fast track). In practice, this means that the court will look at the proposed plan and the history of the restructuring negotiations before deciding to open the proceedings.

The effects of the fast track safeguard, which are the same as those attached to the opening judgment of a "classic" safeguard procedure (see above), apply only to:

- pre-safeguard creditors and contracting parties of the company in the fast track safeguard; and
- creditors that qualify to be members of the committee of holders of bank debt and the general meeting of bondholders in the financial fast track safeguard.

The debtor must prove before the court that their draft plant ensures the sustainability of the business and is likely to garner sufficient support from bank creditors.

An accelerated timetable applies for the approval of the Safeguard Plan by the court:

- in the fast track safeguard, the court must approve the Safeguard Plan within three months from the opening judgment; and
- in the financial fast track safeguard, this period is reduced to one month, with a possible extension of one additional month.

7.2 Impact of Insolvency Processes

Under French law, debtors who are insolvent are required to file for either judicial reorganisation proceedings (*redressement judiciaire*) or compulsory liquidation (*liquidation judiciaire*), subject to the opening of conciliation within the first 45 days of the occurrence of insolvency.

Reorganisation, compulsory liquidation and safeguard qualify as insolvency proceedings within the meaning of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

The opening of these proceedings will have the following consequences on creditors' rights:

- the payment of debts incurred prior to the opening judgment is prohibited, except in very specific and limited cases;

- interest on loans made for less than one year will no longer accrue from the date of the judgment opening the proceedings. Interest on loans extended for one year or more will continue to accrue, but will be paid only as provided in the restructuring plan, to be approved by the court.
- the commencement of insolvency proceedings freezes the enforcement of security in most cases, with only limited exceptions;
- contractual clauses providing for the automatic termination or acceleration of the contract in the event of insolvency proceedings are ineffective, and contracts cannot be terminated for reasons originating prior to the opening judgment;
- creditors must file a statement of their claims (*declaration de créance*) against the debtor within two months (four months for creditors residing outside France) of the date of the publication of the opening judgment in a legal gazette. Failure to file such a statement of claim within the time limit does not extinguish the claim, but the creditor will not be allowed to participate in the distribution of proceeds; and
- the right to set off reciprocal debts with the debtor is limited to connected debts (*créances connexes*) – ie, debts that arose as part of the same contract (and also, to a certain extent, the same group of contracts).

At the end of the observation period, the court may:

- approve a reorganisation plan (*plan de sauvegarde* or *plan de redressement*) if the court-appointed administrator determines that there should be a reorganisation of the company's business;
- approve a sale of the whole or part of the debtor's business to a third party, through a sale plan (*plan de cession*), which is, in essence, an asset transaction; or
- order the commencement of liquidation proceedings.

In safeguard and reorganisation proceedings, subject to certain thresholds, creditors' committees may be formed to review and approve the debtor company proposals. If creditors' committees are set up, one committee will gather all holders of bank debts and one meeting will be convened with all bondholders. Approval of the plan presented to creditors' committees will require the approval of the plan by each creditors' committee by a two thirds majority (in value of claims of those who vote). If approved by the court, the plan will be binding on all creditors, including minority dissenting creditors who were crammed down in the committees.

Lenders in safeguard or reorganisation proceedings will be repaid as provided in the restructuring plan approved by the court (and by the creditors' committees if applicable), with no enforcement of security interests being possible while the plan is being performed.

In compulsory liquidation or in the sale of the company's business by way of a sale plan, lenders will be repaid by the court-appointed officials out of existing proceedings, subject to a mandatory waterfall of priorities.

Subject to certain conditions and limitations, creditors whose claims are secured by pledges may exercise certain of their rights under the pledges and request the transfer of title to the pledged asset.

7.3 The Order Creditors Are Paid on Insolvency

In compulsory liquidation, creditors are repaid according to a complex waterfall of priorities, the first categories of which are as follows:

- the super-privileged claims of employees in relation to any amount owed to them for the last 60 days worked before the opening of insolvency proceedings;
- legal fees and expenses of the insolvency proceedings;
- claims that came into existence during the conciliation proceeding and are secured by new money privilege (for new financing, providing new goods or services, granted under a formally approved conciliation agreement);
- claims secured through security interests over immovable property;
- claims that arose after the opening judgment and are necessary for the conduct of the proceedings (eg, rental payments to maintain the lease of the premises where assets are located until such assets are sold by the liquidator);
- other claims arising after the opening judgment; and
- all other unsecured claims (*créances chirographaires*).

7.4 Concept of Equitable Subordination

There is no concept of equity subordination under French law.

7.5 Risk Areas for Lenders

As mentioned above, the main risk for lenders if the borrower, security provider or guarantor were to become insolvent is the opening of proceedings regarding the economic and financial position of the insolvent entity, as the lenders would then be subject to those proceedings and would not be certain to be repaid. As creditors, lenders would have to follow the order of priority ranking.

8. Project Finance

8.1 Introduction to Project Finance

Project finance can be described as a technique for financing the construction, development and operation of large-scale infrastructure. The sponsors involved in the project shall create a dedicated company (special purpose vehicle or SPV) that will support the fund-raising and implementation of the project, and the management of the infrastructure. This kind of operation generally has a high proportion of debt (rather

than equity) and the repayment scheme is almost exclusively based on the cash flows generated by the exploitation of the assets. Indeed, the decision to grant the loan is mainly based on the future performance of the project and the underlying activity or assets. The financing is self-liquidating as the income expected each year during the operating phase must be sufficient to repay the debt.

The timescale of a project financing depends on the type of asset: brownfield or greenfield. For brownfield investments, the timescale for the acquisition or disposal of an existing asset is quite short – five to seven years. Conversely, the timeframe for a greenfield investment is longer – around 15 years – although, of course, this differs according to the type of asset.

8.2 Overview of Public-Private Partnership Transactions

In France, during the last 20 years, project financing has often involved public-private partnerships (PPP). A PPP is a public contract by which a public entity entrusts to a private company the global mission of designing, building (or rehabilitating), financing and operating public infrastructure that provides a public service. Through this type of process, which has been part of a precise legal framework in France since 2008, the public entity transfers the risks associated with the construction and operation of the project to the private sponsors, as well as the major investments required for the construction of a public structure without affecting its debt.

However, several studies have shown that the choice to operate through project financing would sometimes imply a higher financial cost for the public sector insofar as the French State and its public entities often borrow at preferential rates compared to the private sector.

On another hand, at the end of the operating period set out in the framework contract, one of the main difficulties is the determination of the rules that apply to the transfer of return goods to the public entity.

Indeed, in order to award a PPP contract, it is necessary to identify and negotiate all aspects of project implementation: financing, operation and maintenance, and even performance indicators and evaluation systems, which are usually not part of the traditional procurement procedure for public projects. This need to plan so many legal and financial elements in advance has led to additional delays in the implementation of projects.

In France, there are two types of PPP that are mainly used: Concession agreements and Partnership contracts. They are both administrative contracts under French law but the main difference is that, under a Partnership contract, the grantor will pay rent to the private partner in exchange for the performance of the mission, while under a Concession agreement the compensation of the concessionaire will mainly arise from payments made by users of the service.

Ordinance No. 2004-559 of 17 June 2004 regulated the use of Partnership contracts by establishing specific rules within the General Code of Local Authorities (*code général des collectivités territoriales*). Relatively quickly, a law of 28 July 2008 extended the possibilities for using the Partnership contract.

The legislative and regulatory framework has since been reshaped by Ordinance No. 2015-899 of 23 July 2015 relating to public procurement and Partnership agreements and its implementing Decree of 25 March 2016, which mainly intended to transpose the European directive on public procurement adopted on 26 February 2014 into French law. Ordinance No. 2016-65 of 29 January 2016 relating to concession agreements and its implementing Decree of 1 February 2016 also clarify the legal rules governing concession agreements.

8.3 Government Approvals, Taxes, Fees or Other Charges

In France, it is not necessary to pay any taxes, fees or other charges in a project finance transaction. However, there is a specific procedure in PPPs, called a public tender, in which the bidder is requested to submit a financial and technical plan in its proposal, and the contracting authority will select its preferred bidder on the basis of this proposal.

In addition, different administrative authorisations, building permits, licences and approvals must be obtained from the relevant administrative entities.

However, if the financing documents are built according to a capital market scheme, they must be approved by the French *Autorité des Marchés Financiers,* and the security packages must be notified to the debtor in order to be enforceable against the debtor. Securities such as mortgages must also be registered at the relevant registry (land registry).

Partnership contracts signed by the state or a state public institution have to be approved by decree of the Minister of the Economy and Minister of the Budget. In Partnership contracts signed by public bodies that are established by the state, project documents have to be approved by the minister in charge of its supervision. For local authorities, there is no need for such authorisations, according to the principle of free administration of local entities.

The award notifications of project agreements must be made publicly available as official material in order to enable challenge periods, and usually lapse after a period of two months.

8.4 The Responsible Government Body

The main governmental body with authority over project finance is FinInfra (formerly called 'MaPPP' – Mission d'appui aux PPP), which is a dedicated unit within the Ministry of the Economy that oversees the financing of complex public projects and assists in their implementation.

In France, only governmental bodies can grant mining titles for the exploration and production of hydrocarbons. These responsibilities are shared between the Ministry of Energy and the Ministry of Economy. The departments of the competent ministries and, at the regional and departmental level, the prefects and the DREALs (*Direction Régionale de l'Environnement, de l'Aménagement et du Logement*) participate in the allocation process of mining titles and control of the companies' activity, ensuring the implementation of the mining policy that regulates the exploitation of mining substances. The DREALs also intervene to enforce environmental and safety regulations in the context of hydrocarbon exploitation and production.

The mining code regulates activity relating to hydrocarbon research and exploitation, on land or at sea, by issuing two mining titles: the exclusive exploration licence for the exploration phase and the concession for the operating phase. The regulation applicable to the issue and management of mining titles is Decree No. 2006-648 of 2 June 2006.

The exclusive research permit is issued by ministerial decree; it confers to its holder an exclusive right to carry out exploration works in order to discover hydrocarbon deposits within the demarcated perimeter, as well as the possibility of obtaining a concession to exploit the discovered deposit. The company files its application for a permit with the Minister in charge of mines, who forwards it to the prefecture concerned, which first examines the admissibility of the file. Competition is organised at a national and European level to allow other companies interested in the area to come forward. From the applications that meet all the criteria for an award, the administration retains the company(ies) with the best capacity and the best project for the area.

The processing of applications for new research permits is the subject of a public participation phase organised by the Ministry. The main elements of the file (the letter of application, the impact notice and the cartographic documents) are made available to the public, who can express their opinion. The administration is required to take the opinions expressed on this occasion into account.

The exclusive research permit is awarded for a maximum of five years and may be extended twice, with each period not exceeding five years. The size of the permit is reduced with each extension, with the company targeting more specifically the areas to be explored. It should be noted that the exclusive research permit grants exclusivity and does not authorise any right to do field work – this is subject to a "work permit".

Mining concessions are issued by a decree in the Council of State, and confer upon the holder the exclusive right to exploit a delimited area. Such concession is granted after a competitive bidding phase (unless the application follows an exclusive research licence), for an initial period not exceeding 50 years, and may be renewed for one or more successive periods, each not exceeding 25 years. Each grant application or renewal application is subject to a public inquiry lasting no fewer than 30 days.

8.5 The Main Issues When Structuring Deals

The main issue that the project sponsors will face in project finance is how they finance a particular project, how to invest in it and how to fund the project. They can choose to enter into a joint venture or consortium (unincorporated association), a partnership, a limited partnership, or an incorporated entity like a limited company (*société par action simplifiée*).

After having set up the project vehicle, the sponsors must have an agreement in place on some matters related to their roles in the project. Prior to entering the sponsor group, it is highly important for sponsor to know precisely what its tasks are.

Due to the absence of recourse, the capitalisation of the project or the project company must be looked at carefully. Some lenders require the sponsor's capital to be considered at the outset, prior to any bank funding. They might not request such condition if they are satisfied of the credit standing of the sponsors or the security (bank guarantee or letter of credit) to ensure the sponsor's capital commitment.

The sponsors and lenders might be concerned about the sale of shares and pre-emption rights, and the lenders will want to know if the initial sponsor group will be still in place until the loan is paid in full.

8.6 Typical Financing Sources and Structures for Project Financings

The sponsors may choose to raise finance directly themselves for financing a project, or indirectly through a project vehicle. If they choose the latter option, the financing may be raised on balance sheet terms or on limited recourse terms. Projects are often debt financed using loans as opposed to other forms of finance. All projects cannot share the same structure, although they might have similarities.

Multilateral agencies such as the Asian Development Bank, EBRD, EIB or IFC are able to boost the bankability of a project by providing protection to banks against a wide range of risks.

Export credit agencies (ECAs) also play a very important role in the financing of infrastructure and other projects in emerging markets, providing subsidised finance to direct exporters or to importers. ECAs are to assist in the export of goods or services sourced from that country. They also can be used to assist developing countries by financing the export of goods or services to those countries. The use of ECAs is to provide political risk insurance, commercial risk insurance, interest rate support and direct lending to the importer or buyer.

In France, bonds are not commonly used. The main disadvantage of the bond financing is that the consent and waivers often sought by the lenders are practically impossible to obtain because it is impossible to identify the bondholders. Also, bonds are made on the basis that payment is made by one large sum, which is not very compatible with project finance. Because of the anonymity of the bondholders, loans have more onerous warranties, covenants and events of default.

8.7 The Acquisition and Export of Natural Resources

The owner of the surface is different from the holder of the mineral title, who holds the rights to the mineral resources. The French Monetary and Financial Code submits any foreign investor who seeks to acquire control or a branch of activity in a French company in matters deemed to be essential to the national interest to the prior authorisation of the Minister of the Economy.

Property taxes are due to the local authorities from holders of mining titles for the occupation of the land (the local authorities are entitled to a tax on each tonne of product extracted).

Holders of a mining concession are supposed to fulfil their obligation to pay an annual royalty annually to the State, based on their production.

Also, if seabed minerals are considered part of the public domain, the title holder must pay a royalty.

As far as exports go, a commodity classification tool is applied, which was created to meet the requirements of the Common Customs Tariff and EU external statistics, and is called the Combined Nomenclature.

8.8 Environmental, Health and Safety Laws

The assets held and/or managed by the SPV can meet the criteria of a classified installation for the protection of the environment, in which case a declaration, registration and authorisation process must be followed, in compliance with the Environmental Laws.

The installations and activities are to be controlled and monitored by the State services in charge of the protection of the environment (*Directions régionales de l'environnement, de l'aménagement et du logement*). These services may impose additional prescriptions to be followed, apply financial penalties, and modify or withdraw granted authorisations.

Moreover, in order to be granted a project agreement by the State or an administrative authority, the successful bidder must prove its compliance with tax and labour law and regulations, and must prove such compliance every six months after the award of the contract. More generally, under the French Labour Code, every company signing a contract above a certain threshold must regularly check that its contractor meets certain labour law obligations.

Finally, construction sites are carefully monitored by inspectors attached to the Ministry of Labour in order to check the measures taken by the construction company regarding the health and safety of employees and subcontractors, and in order to check that the construction companies meet all their health, safety and labour law obligations regarding their employees or subcontractors.

9. Islamic Finance

9.1 The Development of Islamic Finance

The development of Islamic finance in France is quite recent, having started about 20 years ago. The French government notified its intention to make Paris a better market for Islamic finance when it realised the potential of such market. France has the largest Muslim population in Europe, which represents a high level of potential for Islamic finance. Therefore, the main objective is to incorporate Islamic financing and its religious principles into the French legal system in order to promote this financing and attract Muslim capital from abroad. It seems that French law does not need to be deeply amended in order to be compliant with the concepts of Islamic finance; the principal French law provisions set forth in the French Civil Code have common values with Islamic rules. Also, according to Rome I Regulation, it is possible for an international agreement to refer to any law, including non-state law.

Actually, there is no specific set of rules under French law regarding Islamic finance, with it being specified that Islamic financing shall comply with the provisions of any relevant French Code. The French *Autorité des Marchés Financiers* has published some reports relating to (i) "Extra financial requirements for the selection of securities: situation of UCITS declaring themselves Sharia-compliant", (ii) "Relevant criteria for sharing UCIs", (iii) "admission to trading of Islamic notes (sukuk) on the French regulated market" and (iv) "Q&A pertaining to the articulation of sukuk prospec-

tuses and practical procedures for securing approval for the admission to trading on a regulated market".

Certain banks, such as Crédit Agricole, Société Générale and BNP Paribas, have already developed Islamic finance by creating Shari'a-compliant products. However, Islamic finance is still in a development stage and it needs to be utilised more in order to become a common financing.

9.2 Regulatory and Tax Framework

As mentioned above, Islamic finance concerns investors who wish to invest in financial instruments that respect the principles of Shari'a, and in particular the prohibition of interest. The development of Islamic finance in France is intended to allow these investors to benefit from the services of the French financial place, and will attract a part of these investments to France. It means a legal and fiscal framework must be put in place to provide the necessary security and predictability for investors.

In 2010, the French *Direction Générale des Finances Publiques* issued instructions (4 FE/S1/10, 4 FE/S2/10, 4 FE/S3/10 and 4 FE/S4/10) to clarify the tax regime applicable to sukuk.

A sukuk is an Islamic finance certificate, similar to a bond, which complies with the laws of Shari'a. They are marketable hybrid financial securities whose remuneration and, where applicable, principal is indexed to the performance of one or more subjacents held directly or indirectly by the issuer. Their holders shall enjoy a right assimilated to a right of direct or indirect co-ownership over this or these assets. The asset or assets concerned are services, goods or rights, or the usufruct of those goods or rights.

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9.3 Main Shari'a-compliant Products

Under French law, there are several Shari'a-compliant products, such as sukuk. There is also the murabaha, which is a financing based on the cost-plus principle that allows the customer to make a purchase without having to take on an interest-bearing loan; the bank buys an asset and then sells it to the customer off-line. The ijara is an operation fairly similar to the French leasing (*credit-bail*), and the istisna is a sale of a property delivered at maturity close to the sale before completion (the French *VEFA*).

All of these Shari'a-compliant products or operations are described in the 2010 instructions mentioned above (see **9.2 Regulatory and Tax Framework**).

9.4 Claims of Sukuk Holders in Insolvency or Restructuring Proceedings

Under French tax law, sukuk instruments would be treated as debt instruments.

Sukuk holders shall be disinterested before the shareholders of the issuer or the borrower, irrespective of the nature of the equity instruments issued. They shall not enjoy the rights accorded to shareholders – in particular, the right to vote in the issuer or borrowing entity or the right to a liquidation *boni* on the liquidation proceeding, except where appropriate after their securities or loans have been converted into equity instruments.

9.5 Recent Notable Cases

As far as is known, no court decisions or notable cases relating to the applicability of Shari'a or the conflict of Shari'a and local law relevant to the banking and finance sector have been rendered in France.