Navigating Insolvency Issues in the EU:
German, French, UK, and American Perspectives

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I. Introduction

A. The insolvency of a company has a significant impact on the insolvent company’s customers, vendors, suppliers, lenders, landlords, tenants, and other parties to the company’s contracts. A creditor of an insolvent company has enough problems when the bankruptcy or insolvency proceeding has been filed in the same country in which the creditor operates. When the bankruptcy or insolvency proceeding is pending in another country, the creditor’s problems are multiplied.

B. The increasing level of international trade has led to greater use of cross-border insolvency proceedings in the European Union. Recent developments in international law may have made the use of insolvency proceedings as a business tool more common. Currently, the laws for dealing with insolvency vary from country to country within the EU and, indeed, from country to country around the world.

II. Insolvency law not unified in EU

A. The United Nations Commission on International Trade Law (UNCITRAL) adopted its Model Law on Cross-Border Insolvency

In 1997, the United Nations Commission on International Trade Law (UNCITRAL) adopted its Model Law on Cross-Border Insolvency to help national legislatures draft

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1 Materials prepared by John Roberts of the ALFA Baltimore, Maryland firm Semmes, Bowen, and Semmes, PC, and John Sykes of the ALFA London, England firm of Charles Russell, LLP.
their insolvency laws within a modern, harmonized framework that might address more effectively instances of cross-border insolvency. Each country is free to omit or modify provisions of the Model Law in their own statutes.

The UNICITRAL Model Law is beyond the scope of this paper, inasmuch as only a few EU member countries have conformed their insolvency statutes to the Model Law. Thus, the insolvency statutes within the EU remain quite different. Such differences make it more attractive for a business to open insolvency proceedings in a country whose insolvency laws are more favorable to that company’s circumstances. To address such “forum shopping,” the European Union promulgated an Insolvency Regulation mandating the insolvency proceedings to be opened in the EU member country where the “centre of main interests” – or COMI – of the insolvent person or company is located.

B. European Union Insolvency Regulation

1. Introduction

The European Union Insolvency Regulation applies to all countries that are members of the European Union. The Regulation is designed primarily to help determine whether a particular EU member country has jurisdiction to open insolvency proceedings. The Regulation also outlines a uniform approach to determining the choice of substantive law that will govern, once the insolvency proceedings are opened.


4 Except Denmark, which negotiated an exemption from this and certain other EU Regulations. Citation.
When the proper forum and governing law have been determined, the procedural rules of the country in which the proceeding has been opened will generally apply to the proceeding. In addition, the rulings and orders entered in the insolvency proceeding by the EU member country’s insolvency Court will be recognized by the Courts of other EU member countries.

2. Application of the EU Insolvency Regulation

EU Insolvency Regulation applies only to a company that has its “centre of main interests” (explained below) in an EU member country. This includes a company that was not incorporated in an EU member country, but whose centre of main interests is within a member country.

The Regulation does not apply to the insolvency of a company that has its centre of main interests outside of the European Union. The insolvency of a company with its centre of main interests in a jurisdiction other than a member country of the EU will be treated in accordance with the local laws and procedures of the member country in which the proceeding is opened.

The Regulation covers both individuals and businesses, including corporations, trading companies, special purpose vehicles and group treasury companies. However, the Regulation does not apply to banks, credit institutions, insurance companies, investment undertakings holding funds or securities for third parties, or collective investment schemes.
3. Centre of main interests (COMI)

The Regulation does not define COMI. An explanatory note\(^5\) to the Regulation is only somewhat helpful:

The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The absence of an adequate definition of COMI in the Regulation has allowed Courts in several EU countries to take inconsistent approaches to determining the COMI of each company that seeks relief under the insolvency laws of the particular country.

a. Centre of main interests for individuals

In most cases, the COMI of an individual will be the country in which the individual primarily conducts his or her trade or profession. If the individual does not trade or carry on a profession, the country in which he or she primarily resides is considered to be the COMI. If the individual resides in one country but does business in another, the country in which the individual primarily conducts business is the COMI.

Where a person’s only connection with a country is that he or she is employed there by another person or company (that is, the individual is not self-employed), then the COMI will generally be in the country in which the debtor lives. Presumably, this is where the individual operates a household and keeps assets.

b. Centre of main interests for companies

The place of a company’s registered office is presumed to be the COMI. This presumption may be rebutted by proof to the contrary. The Regulation contains little further guidance to help identify the COMI of a company. Local Courts are thus free

\(^{5}\) The Regulation calls the explanatory notes Recitals.
to decide this important issue. The local Courts have not been consistent in their application of the Regulation’s guidance on determining the COMI.

The COMI is determined at the date the insolvency petition is filed. The Courts should not consider where the company has historically carried out its business. The location of creditors and the country in which debts were incurred are not material issues in determining a COMI.

4. Officer in charge of insolvency proceedings

Once an insolvency order is entered, a Court will often appoint one or more officers to administer the insolvent company’s assets and business. This person might be called a receiver, a trustee, or something similar. In this paper, the officer is often called the insolvency administrator.

The insolvency administrator may be required to consider whether the COMI of the insolvent company is in the Court’s jurisdiction. The insolvency administrator is empowered to seek further information needed to assess whether investigation of the COMI is warranted. If the insolvency administrator determines that proceedings opened in one member country of the EU should have been opened in another country, the insolvency administrator may seek a review of the insolvency order.

Once the insolvency administrator is satisfied that insolvency proceedings have been opened in the proper jurisdiction, the insolvency administrator must administer the estate in accordance with the laws of the country in which the proceedings are pending. The insolvency administrator is under a duty to notify known creditors that have their registered offices in EU member countries of the procedures for filing claims against the insolvency estate.
The Regulation does not mandate advertisement of the opening of proceedings in EU member counties, other than the country in which the proceedings are opened. The insolvency administrator should, however, determine whether the bankruptcy order will be published in a local newspaper in accordance with the publication procedures provided for in the country in which the insolvency proceedings are pending. Any member country in which the insolvent company has an establishment may require publication. If this is the case, the insolvency administrator is required to arrange for such publication.

5. Proceedings opened in a country other than the country in which the insolvent company has its COMI

A proceeding opened in the country where the insolvent company has its COMI is known as the “main insolvency proceeding.” Only the main insolvency proceeding can generate rulings that must be recognized by the Courts in other EU member countries. Only one main insolvency proceeding is allowed under the Regulation.

If the insolvent company has a place of business in an EU member country other than the country where the COMI is located, a creditor based in the country of the establishment may open proceedings against the insolvent company in that country to administer assets of the insolvent company in that country. A proceeding of this type that is opened before the main insolvency proceedings is called a “territorial proceeding.” One that is opened after the main insolvency proceeding is known as a “secondary proceeding.”

In an effort to forum shop, an insolvent company (or its creditors) might attempt to open a main proceeding in more than one EU member country, or in the wrong country. When this occurs, the Court in each involved country may decide that the insolvent company’s COMI is in each Court’s respective jurisdiction. Such conflicting
6. Potential changes to the Insolvency Regulation

On February 5, 2014, Members of the European Parliament voted to update the European Regulation on Insolvency. Most legislators, attorneys, and commentators agree that changes are required to ensure that the Regulation reflects the economic times, and lessons learned since the enactment of the Regulation in May of 2002 can be implemented in the amendments.

III. Comparison of European Insolvency Laws

A. Overview on German, French and English insolvency law

1. Bankruptcy by many other names
   a. Germany

Under German insolvency law, there exists no “bankruptcy” as a technical term. German law recognizes only the “insolvency” of a company.

Final insolvency proceedings\(^6\) will be opened if the Court finds that (i) the debtor is illiquid – that is, unable to pay its debts when they fall due,\(^7\) (ii) if the debtor is over-indebted – that is, the fair value of the debtor’s assets is less than its liabilities.\(^8\)


\(^7\) A company is presumed to be illiquid if it is unable to pay more than 10% of its debts as they come due for a period three weeks.

\(^8\) Commercial debtors only. This does not apply to natural persons.
Occasionally, a company’s management will determine that, in all likelihood, the company will become unable to meet its payment obligations when they fall due in the near future. In such a case, the company itself can voluntarily file a petition on the grounds of its pending illiquidity.

b. France

Under French law, a company must file for insolvency proceedings within 45 days following the date on which it has become insolvent. A company is deemed insolvent when the amount of its cash and similar resources available is lower than its current liabilities.

The insolvency proceedings available are the *redressement judiciaire*\(^9\) (when there is a possibility that all or part of the company will recover) or liquidation proceedings\(^10\) (when the possibility of recovery does not exist).

c. England and Wales

Under English law (and Welsh law – hereafter simply referred to as “English” law for brevity)\(^11\) the term “bankruptcy” refers only to the insolvency of individuals. There is no specific insolvency term for corporate entities.

Corporate insolvency proceedings are usually commenced in one of three ways: by order of the Court (following a petition for compulsory liquidation by a creditor), by the holder of a Qualifying Floating Charge\(^12\) (allowing an “out of Court” appointment

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\(^11\) Although they are also part of the United Kingdom of Great Britain and Northern Ireland, both Scotland and Northern Ireland have their own insolvency laws.

\(^12\) A “floating charge” is a security interest in, or charge over, all of the assets – or class of assets – owned by a company or limited liability partnership. The floating charge is granted by the company or LLP to secure indebtedness. The floating charge does not fix on any particular assets until the occurrence of an event of default, at which time it “crystallizes” – that is, becomes a “fixed charge”
of an administrator by the charge holder), or by the company itself (if the company is insolvent, or the directors are concerned about becoming personally liable for wrongful trading).

The primary English insolvency proceedings are:

- liquidation (compulsory by the Court or voluntarily by the company),
- voluntary arrangement (a statutory scheme of debt compromise approved by the majority of creditors in value), or
- administration (a procedure aimed at rescuing the company with the aid of a moratorium).

2. Initiating the insolvency proceedings

a. Germany

The insolvent company itself or, under certain conditions, any creditor of the insolvent company is entitled to file an insolvency proceeding with the Insolvency Court.13

b. France

The insolvency proceeding (redressement judiciaire or liquidation judiciaire) may be opened upon request of the company itself, a creditor, or the public prosecutor.

The pre-insolvency proceeding (mandat ad hoc, conciliation, sauvegarde) may only be opened upon request of the company.

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c. England and Wales

Proceedings can be commenced by a Court application for administration or compulsory liquidation (usually at the instigation of a creditor), by a meeting of the company’s board/shareholders/creditors, or by a chargeholder.

3. Preliminary and final proceedings

a. Germany

The insolvency proceeding can be divided into the preliminary insolvency proceeding\(^\text{14}\) and the final insolvency proceeding\(^\text{15}\). Both stages are supervised by the Insolvency Court.

The preliminary insolvency proceeding is that period of time after the insolvency filing during which the Insolvency Court decides whether an insolvency ground exists. During the preliminary insolvency period, the Court will appoint a preliminary creditors’ committee. The Court will generally appoint a creditors’s committee, unless the debtor is a small company and does not reach certain economic thresholds, or where its business operations have been discontinued. The Court is required to appoint a creditors’ committee if two of the following three criteria exist:

- The company has more than 50 employees;
- The company has annual revenues of more than € 9,680,000.
- The company has total assets of more than € 4,480,000.\(^\text{16}\)

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\(^{15}\) Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 27.

\(^{16}\) Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 22 a.
During the preliminary insolvency period, the creditors’ committee may nominate a preliminary insolvency administrator (or in case of self administration, a preliminary insolvency trustee) to be appointed by the Court. The Court must approve this nomination if the decision but the committee is unanimous and the candidate is suitable. The Insolvency Courts will usually appoint lawyers as preliminary administrators or preliminary insolvency trustees.

When the Court appoints the preliminary insolvency administrator, it will usually enter an order mandating that some or all of the debtor’s transactions be subject to the preliminary administrator’s consent. The debtor’s legal representatives remain in charge of conducting the debtor’s business. However, the Court has discretion to grant further powers to the preliminary administrator. The Court may go so far as to transfer to the preliminary administrator the power to run the debtor’s business. The Court usually grants the debtor protection from creditors’ collection attempts.

Even if the Insolvency Court determines that grounds exist for the company to be in an insolvency proceeding, it will open final insolvency proceedings only if the Court concludes that the debtor’s estate has enough assets to cover the costs of the insolvency proceedings. If the estate does not have sufficient assets to pay for the insolvency proceedings, the Court will not open final insolvency proceedings.

b. France

France does not recognize the concept of a preliminary insolvency. When reviewing a petition for opening insolvency proceedings, the Court will determine whether the company is insolvent based on the information and documents provided with the insolvency petition either by the company or by the other petitioning party.

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17 The Insolvency Court will often consult with the preliminary insolvency administrator to determine whether insolvency grounds exist, and whether the estate has sufficient assets to pay for the proceedings.
In its order opening the insolvency proceeding, the Court will appoint officers to take over all or part of the management responsibilities of the company and to administer the proceedings (as described in Paragraph III. A. 5. b., infra).

c. England and Wales

As with France, there is no English equivalent of preliminary proceedings. However, it should be noted that both administrations and (failed) voluntary arrangements can transition into a liquidation.

4. Appointment of officers in the Insolvency proceedings

a. Germany

The Insolvency Court usually appoints a final insolvency administrator when the final insolvency proceeding is initiated. The Court will dismiss the preliminary administrator, unless the same person is appointed as the final administrator. The former management of the company is stripped of power. The insolvency administrator takes control of the debtor’s assets and business.

Until the first creditors’ meeting is held, the administrator may choose to continue to operate the business. With the Court’s approval, the administrator may choose to shut down all or part of the company’s business.

At the first creditors’ meeting, the administrator will report on the state of the insolvent company. Based on this report, the creditors will decide whether the company should be liquidated or provisionally continued and restructured. If an

\[\text{18 Or, in case of self administration, a final trustee.}\]

\[\text{19 The first creditors’ meeting is to be held no more than three months after the final proceedings are opened.}\]
insolvency plan has not been submitted before the first creditors’ meeting, the creditors may ask the administrator to prepare such a plan.

b. France:

If a *redressement judiciaire* (receivership) is open, the Court will appoint:

- an *administrateur judiciaire* (a receiver) who will draft a report regarding the current situation of the company and assist (or replace) the company’s management during the reorganization;

- A *mandataire judiciaire*, who will make sure the employees are paid, and will establish the exact amount and nature of the company’s liabilities; and

- A *juge-commissaire*, a member of the Court who will closely monitor the proceedings and approve certain transactions.

If a *liquidation judiciaire* is open, the Court will appoint:

- A liquidator, who will manage the company in lieu of the current directors and CEO, and who will act as a representative of the creditors;

- A *juge-commissaire*, a member of the Court who will closely monitor the proceedings and approve certain transactions; and

- If the company is allowed to continue operating its business during liquidation, the Court may also appoint an *administrateur judiciaire*, who will manage the company, prepare the company’s liquidation sale (*plan de cession*), and undertake any action necessary for its implementation.  

20 For companies with more than 20 employees and annual revenue of more than € 3,000,000.
All the officers appointed in the insolvency proceeding are specific registered professionals. No private entity, such as an accounting firm or a lawyer, may have an official appointment in a French insolvency proceeding.

The filing for redressement judiciaire leads to the opening of a 6 month observation period (renewable once) during which:

- Generally, no debt existing prior to the date of opening of the proceedings may be paid;

- No claim for payment of a debt existing prior to the date of opening of the proceedings may be initiated or continued;

- All interest due with regard to debt existing prior to the date of opening of the proceedings is frozen. This is effective from the date of opening of the procedure.

If, during the observation period, there appears no reasonable likelihood of recovery, the redressement judiciaire may at any time be converted into a liquidation proceeding.

If a liquidation proceeding is opened, there will be no observation period. The Court opening the liquidation proceedings will appoint a liquidateur, who will sell the assets of the company subject to liquidation proceedings. The sale of the assets can be made either by auction or by private contract. The Court will decide, in the order opening the liquidation proceedings, whether to cease the business of the Company immediately, or allow it to continue temporarily during liquidation. The officers of the Company will be relieved of all their management powers. The liquidateur will dismiss the employees and pay the creditors of the Company according to the priority of competing creditors.
The opening of liquidation proceedings will trigger the same creditor rights as the opening of a *redressement judiciaire*.

c. **England and Wales**

An administrator, liquidator or Supervisor of a voluntary arrangement (collectively, “office holders”) must be a “licensed insolvency practitioner” who holds an insolvency licence obtained after passing specialist examinations. The administrator, liquidator or Supervisor is regulated by a recognized professional body. There are currently four such bodies, which have the power to discipline the insolvency practitioner, impose conditions on the practitioner, or ultimately remove the practitioner’s licence.

Unlike certain other jurisdictions, English insolvency procedures are not supervised directly by the Court, although creditors and certain other parties have the right to challenge the office holder’s conduct in Court and seek orders (by way of injunction or an application for directions) that the office holder do (or refrain from doing) a certain act or pursue a cause of action.
5. **Role of Creditors**

a. **Germany**

Creditors act both independently (at the creditors’ meeting) and as a group through the (preliminary or final) creditors’ committee.\(^{21}\) For example, the creditors have the authority to replace the final insolvency administrator at the initial creditors’ meeting.\(^{22}\) In addition, at the initial creditors’ meeting the creditors get to decide whether to affirm the Court’s appointment of the preliminary creditors’ committee. If no preliminary creditors’ committee has been appointed, the creditors must decide whether to form a creditors’ committee.

The administrator must submit certain major decisions to a vote of the creditors at the creditors’ meeting.\(^{23}\) Decisions are made by the creditors that hold the majority of the value of the claims against the insolvent company. As a result, creditors holding the largest claims can force their will upon the creditors holding smaller claims. To counterbalance the power of the creditors holding the largest claims, the other creditors may seek the intervention of the Court to overturn a vote that that is contrary to the common interests of the creditor body as a whole.

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\(^{22}\) Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.), 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 56 a.

b. France

i. Creditors’ Committees

If certain threshold conditions are met,24 or at the debtor’s or administrateur’s request, creditors will be represented by two committees. One committee will consist of financial creditors, including banks and other institutional lenders. The other committee will be made up of trade creditors. The committees are formed to discuss the possible terms of the restructuring of the insolvent company’s debts, which may include a rescheduling of the debt, a reduction of its amount, or a conversion of all or part of the debt into equity or convertible securities.25

Each committee will deliberate over the proposals made by the administrateur judiciaire. A proposal may be approved by the affirmative vote of creditors holding claims valued at two-thirds of the total amount of claims of the class represented by the committee. Any bondholders affected by the proposals will hold a meeting to approve the proposals, in accordance with applicable rules of French commercial law.

If the creditors and the bondholders approve the proposals, the Court will ratify them if the interests of the creditors are appropriately protected. Upon Court approval, the proposals will become enforceable against all the members of the two committees.

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24 The insolvent company has financial records certified by a statutory auditor or issued by a chartered accountant, and either employs more than 150 employees or had revenue (VAT excluded) exceeding €20,000,000 the previous fiscal year. Code de commerce [C. com] art. L.626-29 and R. 626-52.

25 Where the conditions are not met for the appointment of creditors’ committees, the administrateur judiciaire will consult with creditors either individually or collectively.
ii. Liquidation

If the creditors and Court decide that the insolvent company will not continue, the assets of the business will be liquidated and the proceeds distributed to the creditors (see Paragraph III. A. 8. b., infra, for a more detailed description of the distribution). After the proceeds have been distributed, the company is dissolved, and any residual claims of the creditors are essentially of no value.

iii. Plan de Cession

In the alternative, the Court may decide that the interests of creditors are better served by the sale (plan de cession) of the insolvent company’s business to one or more purchasers. In the sale proceeding, the Court will assess the merits of the offers based upon the following criteria, which are listed in order of importance:

- Sustainability of the jobs attached to the business sold;
- Payment of the creditors; and
- Reliability in complying with the covenants made in the offer.  

Under the plan de cession, the bidders selected by the Court will acquire some or all of the insolvent company’s assets. In addition, the successful bidders may take aboard a limited number of the insolvent company’s employees. All other liabilities remain with the company, which is liquidated.

c. England and Wales

Generally, an office holder must act in the best interests of creditors as a whole. If he fails to do so, he may be personally liable for breach of fiduciary duty

26 Code de commerce [C. com.] art. L. 642-5.
(misfeasance). Against this background, office holders are largely not obliged to consult with creditors regarding the continued conduct of the insolvency proceeding. Put simply, if creditors don’t like it, they can challenge it in Court, or sue the office holder for misfeasance.

Specifically, unsecured creditor involvement in or influence on the proceeding is largely limited to:

- Choosing the liquidator at the outset (usually by creditors holding a majority of the value of the claims against the insolvent company);
- Providing sanction and non-binding guidance (only if a creditors’ committee is formed in a liquidation);
- Approving an administrator’s statement of proposals (failing which the administrator must apply to Court);
- Approving a voluntary arrangement proposal (vote of creditors holding 75% in value of claims against the insolvent company required).

Secured creditors have stronger rights, which often cannot be affected without their consent.

6. Termination of Executory Contracts

   a. Germany

The administrator is authorized to attempt reorganization of the insolvent company’s business. The Insolvency Code\(^\text{27}\) contains provisions to make reorganization a bit easier. Upon the opening of insolvency proceedings, certain types of agreements\(^\text{28}\)

\(^{27}\) Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 103 ff.

\(^{28}\) For example, assignment contracts and agency agreements.
binding the insolvent company are automatically terminated. The administrator may also refuse further performance of certain executory agreements\(^\text{29}\) which the insolvent company signed before the insolvency proceedings were opened. These contracts might include financing arrangements, rent and lease contracts, contracts for the purchase of goods subject to retention of title agreements, employment contracts, and service contracts. A claim arising out of the termination of the contract might be a preferential claim or a general unsecured claim, depending on the type of contract.

In most cases, a solvent party to a contract may also exercise its rights to terminate the contract when the other party opens an insolvency proceeding. If the only basis for termination of the contract is the other party’s insolvency, however, that provision of the contract might be deemed void if it conflicts with the Insolvency Code.\(^\text{30}\)

b. France

In a *redressement judiciaire*, the company continues to operate its business during the observation period. Provided that the company complies with its undertakings, and notwithstanding any provision to the contrary, no contract in progress may be terminated by a third party without the prior consent of the *administrateur judiciaire*. However, all payment obligations by the company must be settled on a cash basis, unless otherwise agreed by the third party concerned.

c. England and Wales

Contracts are unaffected by administration, and remain binding on the company (in the absence of an insolvency termination clause). However, if a contract is not

\(^{29}\) Agreements that have not been fully performed by both parties.

\(^{30}\) Similar to the “ipso facto” clause in the U.S. Bankruptcy Code.
performed, the non-insolvent party to the contract may seek a Court Order instructing the office holder to perform the company’s obligations ("specific performance"). In the alternative, that party will have a right to claim and prove the damages arising from the breach of contract (likely to be an unsecured claim).

A liquidator has an express right to disclaim onerous or unprofitable contracts, again leaving the creditor to prove the claim for breach of contract in the liquidation.

7. Avoidable transfers – "Claw Back” provisions
   a. Germany

The administrator can seek to avoid a preferential transfer of company assets that occurred shortly before insolvency proceedings were opened. A preferential transfer is one that allows one creditor to receive more than other creditors, and has an adverse impact on creditors as a whole.31 The repayment of a shareholder loan or a payment to an affiliate company can be challenged if it occurred within the year before filing for insolvency.

The administrator may also seek to avoid gratuitous transfers of assets made by the debtor, as well as transfers of assets made by the debtor with the intention of inflicting damages on other creditors. A gratuitous transfer is a payment or other transfer of assets made to a party that is not a creditor, and is not entitled to receive the money or asset transferred by the insolvent company. The administrator may be challenge gratuitous transfers if they were made within four years before the

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31 Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, §§ 129 ff. This “claw back” right is similar to a U.S. Bankruptcy Trustee’s right to avoid preferential transfers.
insolvency filing. The administrator may challenge a transfer made with the intention of harming creditors within ten years before the insolvency filing.32

b. France

If the Court determines that a company is insolvent, it will open insolvency proceedings and will set out the “date of insolvency”. Such date may be set up to 18 months before the date of the judgment opening the liquidation. The period between the date of insolvency and the date of the judgment opening the liquidation proceeding is referred to as the “Période suspecte.” Certain decisions made during such period are automatically void (e.g., granting of a mortgage) or may be voided (e.g., payment of a debt due and payable while the creditor was aware of the situation of debtor’s insolvency) by the Court.

c. England and Wales

i. Preference

The office holder can challenge a transfer made by an insolvent company that puts the transferee in a better position than it would otherwise be in the insolvency, where any recovered assets would be shared pro-rata with other creditors. The “look back” period for the transfer is six months from the commencement of insolvency, extended to two years if the transferee is connected to the insolvent company.33

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32 Often called avoidable fraudulent transfer or fraudulent conveyances in U.S. law.
33 The company must be insolvent at the time of the transfer, or rendered insolvent as a result of the transfer.
ii. Transaction at an undervalue

The insolvency administrator can challenge a gift or other disposition of property for less than market value. The “look back” period is within two years prior to the commencement of the insolvency proceeding, and again the office holders must prove that the company was insolvent at the time of the transaction, or rendered insolvent as a result of the transaction.

iii. Transactions putting assets beyond the reach of creditors

This is very similar to transactions at an undervalue, except there is no defined “look back” period. The affected part or office holder must prove that the “dominant intention” of the company was to remove assets from the reach of creditors.

iv. Misfeasance

Misfeasance is usually alleged against directors for any breach of their fiduciary or any other duty owed to the company.

v. Wrongful trading

A director of an insolvent company can be made personally liable for the debts of the company if the director continues to trade while the company is hopelessly insolvent.

8. Creditors and Claims

a. Germany

A creditor’s rights against the insolvency estate depends on the type of claim the creditor holds. A creditor with a secured claim has the right to demand the
surrender of its collateral. If the collateral has been sold by the administrator, the secured creditor should be entitled to the net proceeds of the sale.\footnote{34}

A \textit{preferential} claim is a claim that arose during the insolvency proceeding. These claims might include the administrator’s fees and expenses, court costs, claims of creditors that loaned money or extended credit to the administrator, and claims of social plans for costs incurred during the insolvency under employment laws. Creditors with preferential claims are paid in full before any payment is made to holders of unsecured claims.

An \textit{unsecured} or general \textbf{insolvency} claim is a claim held by a creditor against the insolvent company before the insolvency proceeding was opened. General insolvency claims are often held by banks holding unsecured notes, bondholders, trade creditors, and contracting parties. A creditor holding a nonpreferential, unsecured general insolvency claim must file its claim with the administrator in order to receive any payment in the insolvency proceeding.\footnote{35} The administrator either rejects the filed claim or registers it with the insolvency schedule. If the administrator rejects the claim,\footnote{36} the creditor can bring a legal action to enforce the administrator to accept it.

If the administrator accepts the claim, the unsecured creditor is entitled to a payment from the insolvency estate on a pro rata basis with other unsecured general insolvency creditors. This payment will be made in accordance with the “insolvency quota” that is determined by the insolvency administrator at the end of the insolvency

\footnotetext[34]{34} Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, §§ 47 ff.

\footnotetext[35]{35} Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 38.

\footnotetext[36]{36} The administrator may reject the claim for reasons specified in the insolvency law, such as when the creditor has received a preferential transfer that the administrator can recover, or for general reasons, such as the creditor’s failure to provide proof of the debt.
The insolvency quota is calculated by dividing the remaining assets of the insolvency estate (the amount remaining from the liquidation of the company’s assets after paying secured creditors from their collateral and all preferential claims, including Court fees and the administrator’s fees) by the total amount of accepted and unsecured general insolvency claims.

A subordinated claim ranks lower than even the unsecured general insolvency claims. A claim for repayment of a shareholder loan is generally a subordinated claim. A claim might also be subordinated by contractual agreement. A subordinated claim will not be paid unless all higher ranking claims have been paid in full – that is, almost never.

### b. France

Creditors must declare their debts against the company in order to establish the amount and nature of the claims. Most of the company’s creditors (except the company’s employees) must declare the amount and nature of their claim against the insolvent company within 2 months after the publication in the Official Bulletin of Civil and Commercial Announcements (BODACC) of notice of the judgment opening the proceedings.

Creditors who are not located in metropolitan areas of France may declare their claims within four months from the announcement in the BODACC. Except for the time period for filing their claims, creditors from outside of metropolitan France (and

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37 The administrator’s determination of the insolvency quota is subject to review by the creditors’ committee and the Insolvency Court.

38 The two exceptions to this rule are (i) a claim by a shareholder who is not a director of the company and who does not hold more than 10% of the registered capital, and (ii) a claim by a shareholder who became a shareholder and made a loan in an attempt to rescue the company from insolvency, when that shareholder did not hold 10% or more of the stock of the company before the rescue attempt.
even from outside of the EU) are treated the same as creditors that are located in France.

Creditors are paid according to their order of priority:

- Superprivileged creditors (including AGS\textsuperscript{39} and Court expenses),

- Privileged creditors (debt contracted after the opening of the proceedings, secured debts),

- Unsecured creditors.

Certain creditors are excluded from this order of priority of claims, and are therefore treated without regard to their priority. These creditors include:

- A creditor that may set off its claims against a related debt that it owes the insolvent company;

- A seller of goods with a reservation of title clause in the sales contract, provided the insolvent company agreed in writing to the reservation of title clause on or before the date of delivery of the good; the seller is entitled to the return of the goods, or to payment of the sale price of the goods;

- A creditor with a claim secured by a “gage”\textsuperscript{40} may petition the Court for the return of the goods;

- A finance lease lessor (crédit-bailleur) may receive the unpaid rents due on the leased goods if the liquidator decides to exercise the purchase option, provided such payment does not exceed the market value of the goods.

\textsuperscript{39} Assurance Générale des Salaires, a special state insurance scheme.

\textsuperscript{40} A security interest or pledge.
c. England and Wales

The English statutory order of priority in distribution is (i) secured creditors, (ii) preferential creditors (now very restricted to capped employment claims), and (iii) unsecured creditors. There is a slight variation to this order, in that a proportion of floating charge realizations (as opposed to the other type of secured creditor with a fixed lien) is made available to unsecured creditors (known as “ring fencing”).

Unsecured creditors submit a “proof of debt” to the office holder, who then adjudicates the claim for dividend purposes. The office holder may accept the proof, reject it, or partly admit it. The creditor has a right of appeal and adversed decision to the Court. Unsecured creditors receive dividends on a pro-rata/passu basis with other unsecured creditors.

Secured creditors have far stronger rights and can often take control or possession of the secured assets in question. If the secured creditor cannot take control or possession of the collateral, but instead the collateral is sold, the office holder is obliged to account to the secured creditor for the funds realized and attributable to the collateral.

9. Administrative Insolvency

a. Germany

If the insolvency estate lacks the assets needed to satisfy all preferential claims – that is, claims arising during the administration of the insolvency estate – the administrator will notify the Court that a “state of mass insufficiency” exists.41 This

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41 Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 208.
declaration creates an “administrative insolvency.” Any new claims arising against the insolvency estate after the administrative insolvency is declared are given “superpriority” status. The “old” preferential creditors, whose claims arose after the insolvency proceeding was opened, but before the administrative insolvency was declared, can receive payment on a pro rata basis only after the “superpriority” preferential claims are paid in full. Holders of unsecured claims will not be paid at all. In the event of an administrative insolvency, the administrator may be personally liable to the “old” preferential creditors. The Insolvency Court will terminate the insolvency proceeding if the assets of the estate become insufficient to cover its cost.\footnote{Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 207.}

b. France

i. Debts generated after the opening of the insolvency proceedings

The repayment of loans made to the company after the opening of the redressement judiciaire, as well as of debts relating to agreed deferred payment of sums due in relation to contracts continued during the insolvency proceeding, are given priority against other debts created before the opening of the redressement judiciaire (except for salaries and Court expenses incurred during the proceeding).
ii. *Privilège de New Money*

A creditor that has provided the insolvent company cash financing or new goods or services pursuant to an approved agreement (*accord homologué*) during the insolvency proceeding is granted a priority claim to be paid before all other creditors (except for salaries and Court expenses incurred during the proceeding) ("*Privilège de New Money*”). However, this privilege does not apply to the company’s shareholders who would have provided the company with cash through a share capital increase.43

**c. England and Wales**

In English law, there is no equivalent “insolvency within an insolvency.” When the office holder, acting as agent of the company, has capacity to incur new debts, such debts are payable as an expense of the insolvency. Those expenses take priority over the office holder’s fees.

**10. Self-Administration**

**a. Germany**

The German Insolvency Statute allows a distressed company on the verge of insolvency to attempt to reorganize under self-administration.44 This proceeding is comparable to Chapter 11 of the U.S. Bankruptcy Code in that the debtor’s management remains in control of the administration of the debtor’s assets throughout the insolvency proceedings.

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43 Code de commerce [C. com.] art. L. 611-11. The priority claim is available in a *procédure de sauvegarde*, a *redressement judiciaire* or a *liquidation judiciaire*.

44 Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] [BGBl.] 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 270 ff.
The Insolvency Court will enter an Order for self-administration requested by the company, only if there are no circumstances that lead to the expectation that self-administration could negatively affect the company’s creditors. If the preliminary creditors’ committee unanimously supports the company’s request for self-administration, the Insolvency Court must grant the motion. The Insolvency Court will appoint an insolvency trustee to supervise the management of the self-administering company. The insolvency trustee will exercise many of the rights and powers that an the insolvency administrator might wield in regular insolvency proceedings, such as the right to avoid preferential or gratuitous transfers.

The order of self-administration can be subsequently revoked by the Court. If the self-administration is to be combined with an insolvency plan, the debtor can also apply for a so called “combined proceeding” (see Paragraph III. A. 12., supra).

Self-administration requires thorough preparation before the company files the insolvency petition. In order to successfully complete the self-administration, the company must gain the support of its main creditors, prepare restructuring measures, and install new management with restructuring experience. An Insolvency Court will delay or deny self-administration if no experienced insolvency practitioner is part of the management team.

b. France

In France, the concept of self-administration applies to pre-insolvency proceedings that may be initiated by the company. Under self-administration, the directors and CEO of the company remain in control. (See Paragraph III. A. 12. b., infra, for a discussion of pre-insolvency, self-administration proceedings in France.)

45 The company should file a motion for self-administration along with the initial insolvency petition, so the Court will appoint a preliminary insolvency trustee instead of a preliminary administrator.
c. England and Wales

The office holder in a liquidation or administration has broad-ranging statutory powers enabling him or her to administer the affairs of the company. However, neither a liquidator nor an administrator is appointed in a Company Volunteer Arrangement ("CVA"). In a CVA, the company formulates a proposal to creditors, seeking their consent to a restructuring or discounting of their debt. The company will try to persuade creditors that such a restructuring would result in a better outcome for them than a liquidation fire-sale. The company's proposal, if accepted by the creditors holding 75% of unconnected unsecured creditors in value, binds all unsecured creditors. The company then carries on its business, acting through its directors. The insolvency practitioner (called a Supervisor) only ensures that the company meets its re-scheduled obligations under the proposal. The Supervisor has the power to liquidate the company if it breaches the terms of the proposal. Importantly, the Supervisor does not run the company.

11. The Insolvency Plan

a. Germany

The goal of the insolvency plan proceedings\textsuperscript{46} is to preserve the business of the insolvent company as a going concern. An insolvency plan provides the company with the freedom and flexibility to provide the best result for the company and its creditors. It also allows the insolvent company to continue as a restructurd business. An insolvency plan proceeding may be initiated if the company's business can be restructured. An insolvency plan can be prepared before, and submitted together with, the insolvency petition. In the alternative, it can be developed by the company

\textsuperscript{46} Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, §§ 217 ff.
or the administrator after the insolvency proceeding is opened. Creditors may not propose an insolvency plan. Creditors may, however, instruct the insolvency administrator to propose a plan.

The insolvency plan may be a plan of liquidation, through which the company’s assets are liquidated and the proceeds distributed to creditors. If the company’s business has greater value as a going concern, the plan may be a transfer plan that provides for the sale of all or part of the business to a new legal entity. Alternatively, the plan may be a rehabilitation plan, under which the company is reorganized and discharged from all or part of its debts.

The insolvency plan must be approved by a vote of the creditors and the shareholders. The creditors and shareholders are divided into different groups – such as employees, suppliers, senior secured lenders, or junior secured lenders – according to their type of claim or stake. The plan will almost certainly provide for different treatment among different groups of creditors, but it must provide for equal treatment of all members within one group.

The plan is presented to creditors at a creditors’ meeting. The creditors vote on the adoption of the plan. In order for the plan to be adopted, the plan must receive the affirmative vote of at least one-half of the number of creditors holding the claims in that group. In addition, the sum of the claims held by those creditors voting in favor of the plan must exceed one-half of the total of all claims in the group. Even if a group of creditors fails to vote for the plan, the Court may approve the plan if the Court concludes that the plan does not worsen the position of those creditors compared to their situation in the absence of an insolvency plan, and if the plan provides them with a reasonable economical share of the assets that are to be distributed on the basis of the insolvency plan. This “cram down” rule also applies to
shareholders of the debtor who, under the former law, were able to obstruct certain corporate measures, such as the transfer of their shares to a third party under the insolvency plan. If the insolvency plan is approved by the creditors and the Court, the insolvency proceeding ends with the payment of the creditors pursuant to the plan.

b. France

If it appears that the company might solve its current difficulties and continue operating its business, the administrateur judiciaire will draw up a recovery plan (plan de redressement par voie de continuation) that will be submitted to the Court for approval. The duration of the plan may not exceed ten years. The administrator must pay particular attention to securing the debtor’s assets, collecting outstanding receivables, and deciding whether to continue the business, based on an economic evaluation of the enterprise and the reasons for the insolvency.

c. England and Wales

In an administration, the Administrator must send creditors a Statement of Proposals setting out the strategy for dealing with the company. The Administrator has eight weeks after his appointment to send the Statement of Proposals. The proposals may include selling parts of the company, trading the business, seeking further finance, or other options available. The proposals are made in accordance with statutory objectives, the first of which requires the Administrator to attempt to rescue the company as a going concern.

At a meeting held within ten weeks of the appointment, creditors can vote on whether to accept, modify or reject the Administrator’s proposals. If creditors fail to
approve the Administrator’s proposals, the Administrator must apply to the Court for directions as to how to proceed.

12. Combined Proceedings

a. Germany

A company can also restructure its business under Insolvency Court protection by combining an early filing for insolvency with a motion for the ordering of self-administration.\textsuperscript{47} Such an application must be based on pending illiquidity or over-indebtedness and not actual illiquidity.\textsuperscript{48} The Court will set a deadline of at most three months for the debtor to submit a draft insolvency plan. The Court will also appoint a preliminary trustee. If the insolvent company requests it, the Court will stay individual enforcement measures and grant the debtor the right to incur preferential debt until the deadline expires.

b. France

In order to help a troubled company that is sliding into insolvency, French law has developed various procedures designed to assist the troubled company and its creditors reach agreements, outside of the insolvency process, to restructure the troubled company’s obligations to its creditors. A company choosing to use one of these procedures remains in control of its operations. No receiver is appointed to assume the duties of the company’s management or board of directors.

i. Appointment of a Mandataire ad hoc\textsuperscript{49}

\textsuperscript{47} Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzbllt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 270 b.

\textsuperscript{48} The financial condition of the company must be endorsed by the certificate of an insolvency law expert.

\textsuperscript{49} Code de commerce [C. com] art. L611-3.
This scheme is the most confidential and the “lightest” in terms of proceedings and applicable rules. When a company is experiencing specifically identified difficulties, its legal representative may request the President of the relevant commercial Court (Tribunal de commerce) or civil Court (Tribunal de Grande Instance) to appoint an expert (mandataire ad hoc), who will help the management of the company to reach an agreement with creditors regarding a specific issue. In most cases, this issue revolves around rescheduling payment of one or several debts. This appointment is strictly confidential and does not affect the reputation or the financial credibility of the company. The mandataire ad hoc is usually an administrateur judiciaire (the French equivalent of a receiver).

The mandataire ad hoc has no binding authority over any party. His or her role is purely advisory. The mandataire ad hoc will help each party understand the other party’s position and will propose alternative arrangements to resolve the matters at issue. If this mission is successful, the parties will prepare and execute a settlement agreement specifying the terms of their amicable arrangements.
ii.  **Procédure de conciliation**\(^{50}\)

As with the *mandat ad hoc*, the *conciliation* is initiated by the company on a voluntary basis. Management of the company remains in place. The Court appoints a *conciliateur* to assist the company.

However, this specific procedure is less “contractual” in its operation than the *mandat ad hoc* and has several important differences. First, the *procédure de conciliation* is open to a company that is not yet insolvent, or that has been in a state of insolvency for less than 45 days. The conciliation may therefore be used when the company has just become insolvent, and is aimed at addressing a specific issue, the resolution of which would restore its financial situation.

The role of the *conciliateur* may go beyond that of a mere middleman. In addition to assisting the company in negotiating with its creditors, the *conciliateur* may also make proposals regarding the preservation of the company, the continuation of its business, and the preservation of employment within the company.

As with a *mandat ad hoc*, the company’s creditors remain free to initiate proceedings against the company to recover their debts. However, the judge may impose deferred terms of payment on them.\(^{51}\) In addition, the creditors cannot request a Court to initiate insolvency proceedings (*redressement judiciaire*) against a company that is subject to a *conciliation*.

The *conciliateur* is also entitled by law to negotiate rescheduling (or reduction) of debt with the tax and social security authorities. The duration of the *conciliateur*'s

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\(^{50}\) Code de commerce [C. com] art. L611-4.

\(^{51}\) Articles 1,244-1 et seq. of the French Code Civil.
mission cannot exceed five months in total. For this reason, companies tend to apply first for the appointment of a mandataire ad hoc before initiating a conciliation.

The financial recovery plan may also provide for new equity or debt contributions to be made by existing shareholders or by new shareholders. This is achieved by subscribing for new shares or for complex securities, such as convertible bonds, or bonds redeemable in shares. Once executed and acknowledged by the Court, the agreement with the creditors will be binding on the parties to it. The agreement and the conciliation will remain confidential.

Alternatively, the agreement may be formally approved (“homologué”) by the Court. In such a case, the agreement will not remain confidential. However, the creditors who have signed it will be prevented from initiating any proceedings against the company for the payment of the debts covered by the agreement. Also, if a sauvegarde or insolvency proceeding is initiated against the company at a later date, the repayment of any cash contribution made to the company in accordance with the agreement will hold a priority position against any debt existing before the opening of the procédure de conciliation (except salaries and Court expenses incurred during the insolvency proceedings).\(^{52}\)

iii. **Procédure de sauvegarde**\(^{53}\)

This procedure, introduced into French law in 2005, takes its inspiration from Chapter 11 of the U.S. Bankruptcy Code. Its purpose is to prevent a troubled company from becoming insolvent by providing it with strong protection from creditors and giving it time to draw up a recovery plan.

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52 See the discussion of “Privilège de New Money” in Paragraph III. A. 9. b. ii., supra.
While the _mandat ad hoc_ and the _conciliation_ may be seen as amicable processes designed to solve specific issues, the _procédure de sauvegarde_ is far closer in its operation, as well as in the solutions implemented, to the “regular” insolvency proceedings (_redressement judiciaire_). The procedure is designed for companies facing complex difficulties. This scheme is implemented under close supervision by various Court-appointed bodies, which liaise with the company and its creditors to initiate the recovery measures that are necessary to prevent the troubled company from becoming insolvent.

This procedure is aimed at the company that has not yet been compelled to file for insolvency – that is, has not been insolvent for 45 days – but has significant liabilities with which it cannot meet. The purpose of this procedure is to develop a plan for the company’s reorganization. The reorganization process may include a sale of part of the company’s assets. By opening such a procedure, the company sends a strong message to its creditors that they need to agree on a restructuring of the company’s liabilities, lest the company becoming insolvent in the near future.

By prohibiting the payment of all debts generated prior to the opening of the _sauvegarde_, as well as any legal action in relation to such debts, the procedure immediately gives the company some breathing room. Furthermore, it may enable the company to raise money to finance its operations. Loans made to the company after the opening of the _sauvegarde_, as well as debts arising from deferred payment of sums due on executory contracts, receive a priority over other debts created before the opening of the _sauvegarde_ or other types of debts, such as trade debt, incurred after such opening (except salaries and Court expenses incurred during the proceeding).
iv. **Sauvegarde accélérée**\(^5^4\) and **sauvegarde financière accélérée**\(^5^5\)

The main purpose of these procedures is to help a company already subject to a *conciliation* (but not to a regular *sauvegarde*) to arrange a restructuring plan developed with, and supported by, its main creditors under more flexible conditions and in a very short period of time (one to three months). In order to be eligible for this accelerated procedure, the company must meet the following criteria:

- It is already subject to a *conciliation*,
- It has developed with its main creditors a restructuring plan during the *conciliation*,
- It has not been insolvent for more than 45 days,
- It has either;
  - consolidated accounts; or
  - accounts certified by a statutory auditor or issued by a chartered accountant, and
  - more than 20 employees, and
  - total revenues (VAT excluded) for the previous fiscal year exceeding €3 million, or assets exceeding €1.5 million.

The duration of the *sauvegarde accélérée* cannot exceed three months. The restructuring plan must be approved by creditors participating in the *conciliation* that hold two-thirds of the value of the claims against the company. Once approved by the Court, the plan will be enforceable against those creditors who participated to the *conciliation*, even if they voted against the plan.

\(^{5^4}\) Code de commerce [C. com.] art.L.628-1.

\(^{5^5}\) Code de commerce [C. com.] art.L.628-9.
Sauvegarde financière accélérée is a specific type of sauvegarde accélérée that affects only financial creditors – generally, financial institutions and bondholders – and not suppliers or other trade creditors. It is dedicated, in particular, to heavily indebted companies that have obtained the support of the majority of their financial creditors during the conciliation. Its purpose is to overcome the opposition of that minority of the financial creditors that refuse the plan proposed.

The criteria for opening a sauvegarde financière accélérée are the same as those for a sauvegarde accélérée. However, the duration of such procedure cannot exceed two months.

c. England and Wales

There is no English equivalent of “combined proceedings.” The English administration procedure and Voluntary Arrangement (for small companies) has the protection of a moratorium for the period of the insolvency process. This allows the company “breathing space” from creditor actions or claims to enable the company to restructure its debts or rescue the company.

13. Termination of Insolvency Proceedings

a. Germany

If, after the completion of the liquidation, transfer or rehabilitation, the administrator has sufficient assets to repay all of the insolvent company’s debts, the company will be released from administration. This is a very rare occurrence. In most cases, unsecured general insolvency claims are paid only a percentage of their value, if at all. Unless the administrator can pay all of the insolvent company’s debts, the company is either removed from the Commercial Register or released from the insolvency proceeding, stripped of all assets.
b. France

The liquidation proceedings are closed after payment of all liabilities or in case of insufficiency of assets. The judgment closing the liquidation puts an end to the duties of the liquidator. The judgment of closing of the liquidation proceedings is subject to the same publicity formalities as the judgment opening the proceedings. Once the liquidation proceedings are closed, the company is delisted from the Trade and Companies Register.

c. England and Wales

An administration is a temporary procedure and will most likely develop into liquidation, dissolution, or simply return back to solvency via a voluntary arrangement, other compromise with creditors, or simply trading back to solvency with the assistance of the moratorium.

A voluntary arrangement will either be successfully complied with and then return to solvency or, in the event of a default that cannot be remedied, the Supervisor will be obligated to petition for liquidation.

A liquidation will be completed once (i) any available assets are collected and distributed to creditors by way of a dividend, (ii) the liquidator has completed his investigation into the affairs of the company and (iii) reported to creditors. On conclusion of the liquidation proceeding, the liquidator will apply to the Registrar of Companies to have the company dissolved (i.e. the legal ‘death’ of the company).

14. Employee Rights

a. Germany
Employees are protected by so called “insolvency money” that covers wages for a period of three months. Contracts of employment are not automatically terminated by the initiation of the insolvency proceedings, but they may be terminated with three months’ notice or, if applicable, with a shorter notice period. Certain other employee rights are limited in insolvency proceedings, as well.

**b. France**

Under French Law, the salaries owed as of the date of the judgment, as well as those owed after such date (including in the event that the Court has authorized the company to continue its business), may, be settled by the *Assurance Générale des Salaires* (“AGS”), a special state insurance scheme.

The AGS will step into the shoes of the employees against the company in the Liquidation proceedings with respect to the amounts it pays to the employees. The AGS will get a high priority (*superprivilège* and *privilège*) with respect to the payment of such debt.

Where it is necessary to dismiss employees, the dismissal falls within the legal regime of redundancies on economic grounds. The employees are made redundant by a simple notification letter sent by the *liquidateur* or *administrateur* (if any), subject to the prior notice rights provided in the employment contracts or collective agreements. If the company is not able to pay the dismissed employees, the AGS will pay their salaries and damages.

The employees shall benefit from a priority right in case of re-employment (*priorité de réembauchage*) and shall be offered a conversion contract (*contrat de*
reconversion). The dismissals shall take place within one month from the date of the judgment approving the plan (except for protected employees).

c. England and Wales

Debts owed to employees are a liability of the insolvent employer and, in most cases, will be an unsecured debt. These debts are ranked second to bottom in the order of insolvency priority for the purposes of calculating the proportion of debt to be repaid. Certain “remuneration” ranks as preferential debts and is third in the order of insolvency priority, behind secured debts and costs and expenses of the insolvency process. This is subject to a cap of all remuneration owed for the four month period before the start of the insolvency proceedings, up to a maximum of £800. Holiday pay, which is included within renumeration, is not limited in terms of time or financial level.

If an Administrator decides to carry on an insolvent business, it is possible that the Administrator will retain all or some of the employees. The Administrator has 14 days to choose whether to adopt employment contracts. This means that an Administrator is able to terminate such contracts within the first 14 days of appointment without creating a qualifying liability. After 14 days, the Administrator is deemed to have adopted any employment contracts that have not been terminated.
15. Management Duties and Liability

a. Germany

Under German law, even a limited liability company’s managing directors may be held personally liable if they fail to initiate an insolvency proceeding in a timely manner.\(^{57}\) If a managing director has reason to believe that the company is illiquid or over-indebted, the director must take prudent action to assess the company’s financial situation. If the managing director determines that the company is insolvent, the director is obligated to file for insolvency without undue delay, but in any event not more than three weeks after the company becomes insolvent.\(^{58}\) The filing may be delayed this long only if realistic options exist to avert insolvency.

While the company is illiquid or over-indebted, the managing director must preserve the company’s assets. If the managing director does not act in the manner of a prudent businessman, the director may be liable for any payments to shareholders that render the company illiquid. The managing director has the burden of proving that the illiquidity resulting from payments to shareholders could not have been foreseen by a prudent businessman.

The obligation to file a petition for insolvency applies equally to a German company and a company incorporated under the law of a foreign jurisdiction if the centre of main interests of the foreign company is in Germany. Thus, managing directors of foreign companies with their COMI in Germany must be aware of the distinctions between the German insolvency law and the insolvency laws in their home countries.

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\(^{57}\) German law requires a limited liability company to have at least one managing director. If the company does not have a managing director, the company’s shareholders or members of the supervisory board may face personal liability arising out of insolvency.

\(^{58}\) Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.], 3533, § 15 a.
b. France

Under French law, the company officers must file for insolvency within 45 days following the date when the company became insolvent. The company officers who fail to file for insolvency would be exposed to a “prohibition to manage” sentence. The failure to file for insolvency may also be considered a management fault, and may trigger the officer’s liability for insufficiency of assets.

i. Directors’ and Officers’ Liability

Under French Law, the main action against de jure or de facto managers of the entity subject to Liquidation proceedings is the action in insufficiency of assets (“insuffisance d’actifs”). These provisions apply to the managers of private law entities as well as to individuals who serve as permanent representatives of managing legal entities.

The action may be initiated within three years following the opening of the Liquidation proceedings and only by the liquidateur, the Public Prosecutor or by the controllers. Evidence has to be brought that:

- the concerned company is facing a situation of insufficiency of assets, - that is an excess of liabilities over assets; and
- a management fault has been committed by the concerned manager; and
- such management fault has contributed to the insufficiency of assets.

Case law considers that a management fault does not result from a decision that was made in the ordinary course of business with reasonable care, and that turned out to be a “bad decision” for the company. A management fault is generally
acknowledged where gross negligence or acts contrary to the company’s interest can be evidenced.

If the Court determines that these conditions are met, the Court may decide that the debts of the company subject to Liquidation proceedings will be borne, in whole or in part, by all or some of the managers who contributed to the management fault. If there are several managers, the Court may declare them jointly and severally liable.

ii. Liability of shareholders in commercial Courts

When the insolvent company is a limited liability company, its shareholders should generally not be held liable for the insolvent company’s debts, absent personal guaranties. However, a recent decision of the Tribunal de Commerce d’Orléans is of interest.59 This decision has considered, in the context of the insolvency of a French company, that the sole shareholder – a German company:

- had, directly and indirectly, full control of the French company (among other things, some executives of the sole shareholder were also the officers of the French company);
- had all powers to impose its own strategy;
- was fully responsible for the decisions taken;
- acted in breach of its duty by changing the name, the corporate governance and the management of the company in order to elude a legal procedure initiated by the French company’s statutory auditors (procédure d’alerte) as a result of the financial difficulties encountered by the French company;
- acted in breach of its duty by removing the cash from its French

59 Decision issued June 1, 2012 relating to former employees of the Quelle group, which was owned and controlled by a German fund called Aurelius.
subsidiary and putting the latter in a situation where it was not in a position to repay a loan; and

- acted in breach of its duty by favoring only its own interest to the detriment of the other group companies.

The Tribunal determined that such breaches had caused a loss to the French company’s employees. As a result, the sole shareholder was ordered to pay significant damages to 508 former employees of the French company.

This decision, although issued by a first degree commercial jurisdiction, has created significant concern among legal practitioners, as it considerably weakens the concept of the “corporate veil” limiting the liability of shareholders.

iii. Liability of Shareholders in Employment Courts

Employment law tribunals have on many occasions considered that the “acquired right directive” was applicable in similar circumstances. As a result the tribunals may order a transfer of the employees of the liquidated company to the new entity, or an indemnification of such employees (by the new entity and/or the shareholder of the liquidated company) for wrongful dismissal.

c. England and Wales

Directors of a company have an overriding statutory duty to act in the best interests of the company. In times of solvency, this means acting in the best interests of the company and its shareholders. If a company is in financial distress, however, the directors must act in the best interests of creditors. Failure to do so may make them personally liable for misfeasance.
Also, directors may be held personally liable for the debts of the company if they allow it to continue to trade in circumstances when they knew or ought to have concluded that there was no reasonable prospect of avoiding insolvency.

B. Doing business with a troubled company – German and French perspectives

1. Settlement agreement with an insolvent company

a. Germany

Under German law an amicable settlement other than a formal insolvency plan (see Paragraph III. A. 11, supra) requires the consent of each of the creditors. Such settlement is not binding on any creditor that is not a party to the settlement agreement. Furthermore, in the event of the opening of a subsequent formal insolvency proceeding, the stipulations of the settlement agreement and their execution may be subject to insolvency challenge rights (see Paragraph III. A. 7. a., supra). Therefore, an insolvency plan is often the preferable rehabilitation instrument for the creditor.

Compared to the formal insolvency plan, another important disadvantage of an amicable settlement is the high risk of personal liability of officers and shareholders in case of failure of the settlement (see Paragraph III. A. 15., supra, and Paragraph III. C., infra). Thus, debtors who act responsibly in times of crisis presumably would refuse an amicable settlement.

However, an amicable settlement does not require entering into a formal insolvency proceeding, which may represent a major advantage compared to an insolvency proceeding.

60 Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 28, 2006, 3 U 134/05.
plan. An amicable settlement must be well balanced and must treat all creditors equally. If the debtor does not follow these principles, creditors may withdraw from the settlement.62

b. France

Under French Law, the validity of a settlement agreement entered into with a distressed company will depend on whether the company is already under the protection of an insolvency proceeding. As mentioned in Paragraph III. A. 7. b., supra, the period between the date on which the insolvency occurred (Insolvency Date) and the date of the judgment opening the insolvency proceeding is referred to as the “période suspecte.” Certain transactions made during such period are void per se.63 These transactions include:

- Granting a mortgage,
- Paying debts that are not yet due and payable,
- Paying due and payable debts by abnormal means of payment,
- Entering into a significantly unbalanced contract.

Although settlement agreements are usually permitted, some French Courts have ruled that a settlement agreement was void per se in case it was significantly unbalanced.64

Some transactions are not void per se, but may be voided at the Court’s discretion, if (i) the transaction occurred after the date of insolvency, and (ii) the creditor was aware that the debtor was not making payments to creditors as they came due. Under French case law, the Court would void the transaction only if the creditor had

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63 Code de commerce [C. com.] art. L. 632-1.
specific knowledge that the debtor was insolvent. Such evidence might be difficult to establish. The Court will use circumstantial evidence in order to assess whether the creditor was aware of the debtor’s insolvency.

If the distressed company is already in the “observation period” of the insolvency proceeding, the juge-commissaire decides whether to authorize actions exceeding the routine management of the company, including entering into a settlement agreement. If it would potentially have a significant impact on the outcome of the proceeding, the juge-commissaire may only authorize a settlement after consulting with the public prosecutor.

If the distressed company is already in the liquidation process, the liquidateur judiciaire may, with the authorization of the juge-commissaire, settle claims of creditors.

2. Retention of title to property

   a. Germany

Retention of title provisions are generally treated as being fully enforceable in insolvency proceedings. However, such rights may be invalidated by insolvency challenge rights (see Paragraph III. A. 7., supra).

In Germany, there are only a few requirements for a valid retention of title, and a retention of title is a standard condition in practically all German terms of delivery. The retention of title implies that the seller can demand return of the goods, even in the event of the buyer’s insolvency, if the purchase price has not been paid.

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65 Code de commerce [C. com.] art. L. 622-7 II.
Under German law, the parties may agree to an extended retention of title ("erweiterter Eigentumsvorbehalt"), which means that all goods delivered serve as security for all claims between the parties. The parties may also agree on a prolonged retention of title ("verlängerter Eigentumsvorbehalt"). In this case, not only the goods delivered but also finished goods manufactured using the delivered goods serve as security for the seller’s claim.

Moreover, the retention of title can be combined with an assignment of the claims that will arise on resale of the goods ("Vorausabtretungsklausel"). If the buyer becomes insolvent, the seller then has security either in the goods that are still with the buyer, or in the receivables created by the resale of the goods. However, there is no security for amounts already paid, as these funds cannot usually be distinguished from other funds.

In case of insolvency of the buyer, the seller is entitled to demand the return of any goods that are still in possession of the buyer. For assigned claims arising out of the resale of the goods, the right to collect the receivables remains with the administrator or the debtor in possession. In such case the seller is entitled to compensation, calculated after deduction of the cost of the collection of the receivable.

b. France

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The seller may take legal action for recovering goods sold with a reservation of title clause, provided the unpaid goods still exist “in nature.” This means, it has to be identifiable and distinctive into the buyer's hand.\(^{71}\) Thus, the seller must:

- Identify the claimed goods, and
- Prove that the debtor has not yet paid for the goods.

The claim may also cover goods incorporated into other property (if the recovery does not damage it), as well as fungible goods (if the debtor possesses other goods of the same type and same quality).

The seller has three months from the date on which the insolvency has been officially announced in the BODACC to demand the return of the goods.\(^{72}\) The receiver or the company should respond to this claim within one month. Such response will consist of (i) either accepting the claim and returning the good covered by the reservation of title provision, (ii) accepting the claim and paying the price of the goods to the creditor, or (iii) rejecting the claim.\(^{73}\)

If the claim is rejected, or if no response is made within the one month period, the creditor will have one month to bring his claim before the juge-commisaire.\(^{74}\) The juge-commisaire’s decision can be appealed to the Commercial Court within ten days following the notification of the decision.

C. Officers and shareholders

1. Liability: de facto vs “official” officers

   a. Germany

\(^{71}\) Code de commerce [C. com.] art. L. 624-16.
\(^{72}\) Code de commerce [C. com.] art. L. 624-9.
\(^{73}\) Code de commerce [C. com.] art. L. 624-17.
In addition to directors, other persons involved in a company’s affairs may be held personally liable in an insolvency proceeding. Anyone who holds the power of representation in terms of controlling or controlled companies and in legal relations may be designated as a responsible person. This means, first and foremost, the following natural persons: in the “Aktiengesellschaft” (stock corporation), the “Genossenschaft” (co-operative), and the “rechtsfähiger Verein” (association having legal capacity), it is the “Vorstand” (board). In the “GmbH (Gesellschaft mit beschränkter Haftung” – company with limited liability), it is the “Geschäftsführer” (managing director).

An internal allocation of duties does not release the person responsible from his or her duty to file an insolvency proceeding. The person appointed as the agent (Organ) of the company is not exonerated by the fact that he or she is merely nominally shown to be the person responsible, even though another person is actually managing the business transactions.

A distinction is drawn at this point between the “factual agent” position and the “nominee” or “straw-man” position. A “factual agent” is a person who has not been formally appointed to an office, but nonetheless performs the functions of that office. A “straw-man” is a person who is formally appointed to a position, but is merely acting as an extended arm of the person behind the scenes (often with the full knowledge of other officers or directors of the company). Under the insolvency laws, both a factual agent and a straw-man can be responsible for filing an insolvency proceeding, and both are subject to liability if they fail to carry out this responsibility.75

b. France

75 Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 11, 2008, II ZR 291/06.
The distinction between *de facto* and *de jure* (official) officers does not apply to French insolvency law. Both are treated equally. The *de facto* officers are considered as *de jure* officers since they appear to be official officers in the eyes of third parties. As a matter of fact, any officers, *de facto* or official, can be liable regarding the action in insufficiency of assets.\(^7^6\) (see Paragraph III. A. 15. b. ii., *supra*).

**D. Opportunities offered by insolvency law**

1. **Out of Court arrangements and pre-insolvency proceedings**
   
   a. **Germany**

   Pre-insolvency proceedings are not currently available under German insolvency law. This situation has been subject to massive criticism from practitioners, and may change in the course of future common European legislative initiatives.

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\(^7^6\) Code de commerce [C. com.] art. L. 651-2.
b. France

Pre-insolvency mechanisms are available under French law and are aimed at restoring the company’s financial viability out of the Courts. For further details regarding these combined proceedings, please refer to Paragraph III. A. 12., supra.

In case of mandat ad hoc and conciliation, the Court is involved for the appointment of the mandataire and conciliateur, and might be involved to acknowledge the agreement between the company and its creditors (in order for it to enter into force), or to formally approve this agreement (in which case the agreement will not remain confidential). Under certain conditions, creditors may benefit from a “privilege de new money,” as further explained in Paragraph III. A. 9. ii., supra.

2. Taking over a company or some of its assets once the insolvency proceedings are open

a. Germany

It is common practice in Germany to rehabilitate a business by means of an asset deal. There are no general limitations regarding who may take over the company or its assets. The insolvency administrator (or the self-administrating debtor) is in charge of selling the company or its assets to the purchaser. As a rule, the Court is not empowered to interfere, but the consent of the creditors is required. However, the Court may dismiss the administrator if the interests of the creditors are jeopardized by the proposed transaction.
b. France

With some exceptions\(^{77}\) (e.g., shareholders and directors of the insolvent company), any person may file a bid for the takeover of all or part of the company’s assets both in the context of a *redressement judiciaire* (when it appears that the insolvent company cannot continue to operate its business) or of a *liquidation judiciaire*. The Court sets a deadline for offers to be submitted, and sets a date by which a report will be issued (by the *administrateur judiciaire* or the *liquidateur*) to the Court on the offers received. The Court will assess the merits of the offers based upon the criteria outlined in the French insolvency law. (See Paragraph III. A. 5. b., *supra*.) The bidders will acquire those assets identified in their offers, and will take aboard a limited number of employees in accordance with the terms of their offers. All other liabilities will remain with the company which will thereafter be liquidated and the employees not transferred to the bidders will be dismissed by the liquidator.

3. Acquiring shares of the company with new capital

a. Germany

The German Insolvency Statute provides for a debt-to-equity-swap, which may be integrated into an insolvency plan and which does not require the consent of the “old” shareholders.\(^{78}\) However, the debt-to-equity-swap as an instrument of rehabilitation is quite complicated and therefore has not yet become very common in practice. In addition, the insolvency plan may incorporate a share capital increase as a method of recapitalization.

\(^{77}\) The Court may however waive such exceptions.

\(^{78}\) Insolvenzordnung [InsO] [Insolvency Statute], Oct. 5, 1994 [Bundesgesetzblatt] (BGBl.) 2866, as last amended by Art. 6 G of the Act of August 31, 2013 [BGBl.] 3533, § 225 a sect, 1.
b. France

Share capital increase might be used under a sauvegarde or plan de continuation in order to recapitalize the company. Such share capital increase might even be a condition of the plan de sauvegarde or plan de continuation. The debtor must obtain the prior approval of the extraordinary shareholders’ meeting, and of the special general meetings (assemblées spéciales), as the case may be. The existing or new shareholders’ commitments will only be binding after the Court acknowledges the draft plan. This new cash contribution from shareholders will not benefit from the privilège de New Money (see Paragraph III. A. 9. b., supra).

4. Liquidating a poorly performing subsidiary

a. Germany

An insolvency proceeding can be a good and effective way to close down a poorly performing subsidiary in Germany. However, a company considering such a move must remain aware of the potential risks related to any insolvency proceeding. In order to avoid surprises, the company must act very carefully and always use a local lawyer with highly specialized skills and experience.

b. France

International companies are more frequently considering closing poorly performing subsidiaries through insolvency liquidation proceedings in order to avoid paying for redundancies. Before using liquidation proceedings, the holding company must make sure that the subsidiary: (i) has been properly managed and (ii) was independent from the other group companies as regards its management, in order to avoid any liability as shareholder and/or as de facto or de jure manager of the subsidiary. (See Section III. A. 15. b., supra.) The holding company should also
assess the assets that are located within the subsidiary to be liquidated, as it will in practice lose control over such assets.

IV. Conclusion

The twenty-eight members of the European Union have their own insolvency laws. Insolvency law is not consistent throughout the EU, and is certainly not consistent with the U.S. Bankruptcy Code. Although almost all EU member countries are bound by the EU Regulation on Insolvency, this Regulation only helps determine the Centre of Main Interests of the debtor for purposes of determining the proper forum for the insolvency proceeding. It does not provide any substantive insolvency law.

A creditor involved in a cross-border insolvency proceeding set in a European Union member country has certain rights, but those rights might vary from country to country. Consequently, the creditor needs to engage professionals who are familiar with the substantive law that controls the foreign insolvency proceeding.