Lender liability and fault for deepening insolvency: a comparative analysis[*]

PAUL J OMAR[**]
JENNIFER GANT[***]

1 *Introduction*

The issue of how companies in a financially difficult position are to be financed is an important but delicate one. The approach to insolvency will undoubtedly require the directors to consider whether an extension to existing finance or new finance is an option. This consideration is fraught with danger, given that many of the responses directors might take, including asset disposals, payment of the most pressing demands, enhancing existing or granting further security in favour of creditors as well as entering into further funding obligations that may invite creditors to impose higher/greater than usual terms as a measure of the heightened risk of lending at the insolvency threshold, may well attract the use of transactional avoidance measures known to most insolvency systems. As an added peril, to continue trading while within sight of the moment of formal insolvency may also attract the application of wrongful or insolvent trading rules, also a feature of many developed legal systems. General misfeasance, of which the above may be particular illustrations, may also attract liability. The justification for the rules dealing with the avoidance of transactions, wrongful trading and misfeasance (more generally) is that continued trading and transacting may have a disadvantageous impact on the position of creditors overall. Thus, directors are to be encouraged to seek help at the earliest opportunity, by engaging turnaround, pre-insolvency and insolvency measures, whichever may be appropriate. Thus, they can avoid exposure to liability and the chances of litigation being brought by an insolvency office-holder keen to ensure that the estate is restored to the position it ought to have been in had these transactions not taken place.

In classic insolvency, the above measures generally do not invite consideration of the creditor's position, except as perhaps a party from whom property (or its value) may be recovered if transactions of a claw-back type have taken place to their benefit and any incidental liability this may incur so as to restore the estate. It is less usual to discuss, in situations where financing is obtained, whether the creditors in those instances are exposed to risks other than those usually attendant on lending transactions: the possibility that their lending decision may have a detrimental impact on the position of other creditors by increasing the level of indebtedness to one creditor, which, with concomitant security, will put that creditor at a manifest advantage when compared to others. In many legal systems, lenders will have no liability provided they lend prudently and in line with rules set by those regulatory and oversight bodies that may exist or generally accepted canons of banking prevailing in the jurisdiction. However, the notion of when it may be prudent as opposed to otherwise will usually take place, just like the examination of when wrongful trading has occurred, on the basis of an *ex post facto* analysis. A court may

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[**] Gray's Inn, Barrister.
[***] Doctoral Candidate Nottingham Law School.

well re-qualify the lending transaction as imprudent, resulting in that creditor perhaps losing the benefit of any advantage or priority gained through security. Exceptionally, a court may decide that the extent of the lending decision goes beyond the merely imprudent and acquires overtones of negligence or wilful behaviour, leading to possible liability to the debtor's estate or other creditors. This view of a general liability for creditors arising out of the lending arrangement, as opposed to a specific liability in particularly targeted instances (usually on grounds of public policy), is not a universal one.

It is the intention in this article to look at two contrasting approaches to creditor liability, that in France, where a generalised principle exists, albeit attenuated by insolvency law reforms in the mid-2000s, and that in the United Kingdom, where contractual freedom and a robust lending culture have given less room for the development of creditor liability rules except in very limited and carefully crafted instances.

2 *France*[1]

In France, the developed doctrine of "improper support" (*soutien abusif*) has resulted in lenders being potentially subject to sanctions, particularly if the lender's behaviour is deemed to have contributed to the insolvency of the debtor. This would usually only occur where the lender gave or extended credit, which was beyond the capacity of the debtor to handle appropriately, thus leading to an aggravation of its financial problems. In addition, lenders could face sanctions if their participation in the financing of a business or other close connexion resulted in their becoming closely enmeshed in the activities of the debtor with the consequent acquisition of the status of a *de facto* or shadow director. These latter sanctions still remain as a possibility in insolvency, but the doctrine of improper support saw considerable limitations placed upon its use in 2005. These occurred as an incidental by-product of the reforms to the framework for insolvency law in France that saw the introduction of the "preservation" (*sauvegarde*) procedure in that year.[2] As of 1 January 2006, the date this new regime came into force, the general landscape of French insolvency law saw some fundamental changes in the shape of the procedures which were available, including in relation to lender liability. Minor amendments were made in 2008, as part of a further tranche of reforms, but which have not radically altered the impact of these provisions.[3]

2.1 *Soutien abusif*: the traditional position

The doctrine is said to have its roots in case-law developed in the mid-1970s by the commercial chamber of the *cour de cassation*, particularly the *Arrêt Laroche* on 7 January 1976, and based more generally on the tort liability provisions of the Civil Code.[4] Under the law of 1985,[5] the text that governed insolvency law from 1986 until consolidated within a reinvigorated Commercial Code in 2000, the principle derived from that case and from a later judgment of the same chamber on 16 November 1996 clearly established the application of lender liability to the then new regime for

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[1] This section is a substantial updating and reworking of a piece first published by Omar as "Reforms to lender liability in France" 2006 ICR 277.

[2] Law no 2005-845 of 26 July 2005 on the preservation of enterprises (law of 2005). See discussion below.

[3] a 129, Ordinance no 2008-1485 of 18 Dec 2008.

[4] a 1382, Civil Code. This principle states simply that the author of a harm for which he is deemed legally responsible is obliged to compensate the party whose loss is occasioned by that harm.

[5] Law no 85-98 of 25 Jan 1985 (law of 1985).

insolvency procedures.[6] As the doctrine was developed, a lender would normally be liable to the insolvent estate if it knowingly supplied credit to a business that was in a "compromised situation" (*situation compromise*).[7] Liability could also result from the failure to supervise the use to which the credit was put where this was a condition attached to the supply of credit, often found in the form of a clause in contracts applicable to most banking services and overdrafts.[8] Using the same tort provisions, a lender could become liable to a third party, for example a guarantor whose guarantee was subsequently called in as a result of the debtor's failure. The principle established by the case-law could also extend to suppliers of goods and services as well as mutual insurance organisations whose remit is normally to support their membership with loans during times of need.[9]

The action against the lender at fault would normally be brought by the creditors' representative, the official in insolvency proceedings appointed to conduct the verification and admission of claims.[10] Proof of whether a lender was aware of the debtor's financial situation needed to be brought by the party making the allegation.[11] Indeed, in many instances, those alleging fault needed to prove that the lender had information available to it that the directors of the debtor business did not know at the time they entered into the loan arrangements.[12] It was nevertheless open to the judges hearing the case to make a finding that, given the state of facts and evidence, the lender was to be regarded as being perfectly aware of the debtor being in a perilous situation.[13]

A link between the fault attributable to the lender and the insolvency also needed to be shown.[14] Where the granting of credit could be deemed unlawful and/or accompanied by strategies designed to solely benefit the creditor and not to properly serve the needs of reconstructing a business, then liability was clear.[15] However, a creditor could not be held liable for any of the consequences of the granting of credit, unless one of the exceptions (detailed below) was found, unless the circumstances in which the credit was granted revealed a fault in relation to the loan (*concours fautif*).[16] Furthermore, if the insolvency was shown to result from the actions of a third party, such as one of the company's debtors failing to make payment, or if the lender's contribution to the insolvency was negligible, then the lender would escape liability.[17]

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[6] Noted in Minutes of a Colloquium organised by the Compagnie des Conseils et Experts Financiers held 30 March 2006 on "Sauvegarde, the new opportunity for the firm", containing a paper by Lafortune "A particular aspect: the liability of creditors" 16, formerly <www.ccef.net/content/PDF2006/CRColloquemars2006.pdf> (site no longer available).

[7] Cassation commerciale 26 Apr 1994 RJDA 10/94 No 1050.

[8] Cassation commerciale 18 May 1993 Bull Civ IV No 190.

[9] Lafortune (n 6) 16, citing Cassation commerciale 30 Oct 2000 Bull Civ IV No 170 and Cassation commerciale 10 Dec 2003 Bull Civ IV No 199.

[10] Most insolvencies under the Law of 1985 required the appointment of an administrator and a creditor's representative, both insolvency practitioners by qualification, to form a diarchy running proceedings. It is not until the introduction of *sauvegarde* in 2005 that, subject to not exceeding a threshold requirement, the directors of debtor companies had the option of remaining in possession of the business.

[11] Cassation commerciale, RJDA 3/92 No. 237.

[12] Lafortune (n 6) 16-17, citing Cassation commerciale 11 May 1999 Bull Civ IV No 95, Cassation commerciale 26 March 2002 Bull Civ IV No 57 and Cassation commerciale, 24 Sept 2003 Bull Civ IV No 137.

[13] Cassation commerciale 1 Febr 1994 Bull Civ IV No 39.

[14] Cassation commerciale 24 March 1992, JCP éd E 1993 pan240.

[15] CA Orleans, 13 Jan 2011 Rev Proc Coll 2011 no 205.

[16] Cassation commerciale 27 March 2012 D 2012 1455.

[17] Cassation commerciale 2 May 1983 D 1984 IR 89.

In any event, the lender could raise several defences to an allegation of improper support. The lender could allege that it was not properly informed or entitled to be informed of the situation in which the debtor was to be found. This tended to be the claim most often made where the lender wished to avoid any accusation of being involved in the management of the company, for which liability could also be found under the sanctions provisions of the law of 1985. Nevertheless, courts tended to hold that lenders were required to be vigilant and liability could attach where it was held that it would be reasonable to presume that the bank could not have been unaware of the situation.[18] Similarly, it could also be held that the bank had the necessary information or means at its disposal and ought to have made enquiries, in default of which liability would attach.[19]

A lender could also allege that there was sufficient backing for the company by the public authorities which did not lead the lender to assume that the situation was irremediably compromised. This was especially the case where the business in question was known to be considered by the authorities to have public importance or be vital for the economic well-being of particular communities, when public subsidies or other support could be forthcoming. In this event, a lender would not necessarily have any reason not to continue furnishing credit and a lender in this position might have no option than to participate in a rescue plan organised as part of insolvency proceedings.[20] Inevitably, given the political interests behind much of French business, where pressure might be brought to bear on lenders to ease restrictions on credit, allegations of this type would usually surface in insolvency proceedings as a defence to a claim of improper support.

Beyond the defences available, the consequences of liability tended to be harsh. If found liable, the contribution of the lender was usually deemed equal to the difference between the results of the insolvency proceedings in the instant case and what they would have been if the lender had not contributed to artificially prolonging the life of the company. In fact, the provision of excess credit or means of finance which only serves to further indebt the business will normally fall under the heading of improper support.[21] This was a constant theme in the case-law, with a later case defining the liability in terms of “the worsening of the deficiency in assets the [lender] contributed to creating”.[22]

In general terms, there could be two distinct contributions that the lender was required to make. Firstly, it could be required to contribute to the collective loss suffered by all the creditors. Secondly, it could be required to meet any individual claims arising from losses individual creditors suffered. The collective loss was defined to be worth the value of the difference between the value of the declared debts and the dividends payable as a result of the procedure. The courts also held that this included any depreciation on the debts suffered by the creditors and any loss of interest.[23] Individual loss was defined to exclude the direct loss attributable to the insolvency, but did include commercial losses suffered by the loss of a trading partner and future profits.[24] Nonetheless, the liability was not open-ended and, in order to

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[18] Cassation commerciale 22 July 1980 Bull Civ IV No 317.

[19] Cassation commerciale 18 Jan 1994 BRDA 94-4 p10.

[20] Cassation commerciale, 9 Nov 1993, Bull Civ IV No. 384.

[21] Cassation commerciale, 11 Oct 1994 D 1994 IR 240.

[22] Lafortune (n 6) 17, quoting from Cassation commerciale, 22 March 2005, Bull Civ IV No 67.

[23] Cassation commerciale, 25 Nov 1986, D 1987 jur 88.

[24] Cassation commerciale, 15 July 1982, Bull Civ IV No 233.

establish what the lender's contribution would be, proof of causation needed to be brought, a factor that usually tended to limit or qualify the losses. However, the position of lenders and creditors generally in the event of their debtor's insolvency was uncertain and many high-profile rescues proved worrisome for the lenders concerned.

2.2 The reform initiative and post-reform position

The events leading up to the general reforms to insolvency law and practice in France in 2005 have been chronicled elsewhere.[25] In summary, a new procedure in the shape of anticipatory rescue proceedings was created called preservation (*sauvegarde*), the existing procedures of judicial rescue and liquidation surviving with the processes much tightened up and time limits accelerated, while the pre-insolvency procedure called "friendly settlement" (*règlement amiable*) was revised and renamed "conciliation" (*conciliation*). One of the chief innovations in the text was to extend the overall time limit for the declaration of insolvency to 45 days (from the previous 15), within which conciliation remained available to debtors alongside the more formal rescue procedures. Preservation, however, would not be available after the moment of formal insolvency. Insolvency procedures were also made available to debtors not previously covered by the legislation, mostly debtors of professional standing, while the sanctions regime was reviewed with many penalties deemed incompatible with preservation and restricted to being used in the context of judicial rescue and/or liquidation. This would be the case of the vulnerable transaction rules, which would only apply to judicial rescue procedures.[26]

In the revised sanctions section, the law of 2005 also addressed the issue of improper support. In the Explanatory Memorandum accompanying the draft introduced into parliament, the reasoning used to justify this change was that the information provided to all parties for the purposes of negotiating an agreement in conciliation or a rescue plan (in preservation or judicial rescue) puts all creditors in the best negotiating position possible. It would thus be unreasonable to allow the creditors to invoke a right to pursue a fellow creditor on the basis that previous financing arrangements seemed to give a misleading impression of the debtor's financial status.[27]

The law of 2005 thus introduced a new article limiting liability for any supply of credit, except in cases of fraud, deliberate interference in the management of the debtor company as well as where any guarantees acquired by the creditor are deemed disproportionate to the credit supplied. One of the consequences of liability being established was that any guarantees would be deemed void.[28] The 2008 amendments altered this statement to allow for the reduction of the amounts of the guarantees as an alternative to their being declared void. The passage of the 2005 provision through parliament was not, however, entirely without incident. The provision in fact began as a limited reform in the context of conciliation proceedings in order to protect the position

[25] See Omar "Reforms to the framework of insolvency law and practice in France: 1996-2006" ch 6 in Broc and Parry (eds) *Corporate Rescue: An Overview of Recent Developments* (2006) 111-150; Omar "French insolvency law: the 2004 draft law and reform perspectives" 2005 *ICR* 65; Omar "French insolvency law and the 2005 reforms" 2005 *ICCLR* 490. For reforms subsequent to 2005, see Omar "French insolvency law: remodelling the reforms of 2005" 2009 *ICCLR* 225; Omar "Preservation and pre-packs *à la Française*: the evolution of French insolvency law after 2005" 2011 *ICCLR* 258; Omar "Tinkering at the edges: insolvency law reforms in France (again!)" 2014 *ICCLR* (forthcoming).
[26] In articles L. 632-1 and 632-2, Commercial Code.
[27] Exposé des Motifs 5-6.
[28] a 126 Law of 2005, introducing a new a L 650-1, Commercial Code.

of creditors offering post-commencement financing.[29] By the time of the final draft, what was then article 142*bis* contained the elements seen in the completed reforms, while the post-commencement financing provision was dealt with elsewhere in the text. Nonetheless, neither set of provisions met with the entire approval of parliament. By way of example, amendments were tabled in the senate seeking to remove the provision dealing with improper support entirely on grounds that the text privileged the interests of lenders above all others, particularly given the fact it formed an unacceptable limitation on the general legal principle of liability as well as the "derisory [sanctions] in light of the profits amassed by banks".[30]

The *rapporteur*'s objection in response stated the purpose of the provision as clarifying the proper extent of liability due to the uncertain state of the case-law on the matter. The then *Garde des Sceaux*,[31] Clement, was particularly incensed by the amendment, given the government's view that defining the scope of improper support would make it easier to avoid lenders refusing credit in rescue situations.

The measure ultimately passed, becoming part of the law of 2005 on 13 July 2005. However, this was not the end of the matter. Under the French constitution, members of parliament have the right to refer texts to the constitutional court to decide whether the provisions are compatible with the constitution and sacrosanct principles of French law, often called constitutional values (*valeurs constitutionnelles*). The reference on 14 July 2005 invited the court to declare on the improper support provision as well as that governing the protection of post-commencement financing.[32] The constitutional court was not convinced by the reference, which based itself on the possibility of breaches of the principle of equality of treatment at the heart of the French constitution.[33] The court stated, referring to the protection for post-commencement financing, that creditors who took the risk of providing fresh funds during insolvency are in very much a different position to pre-insolvency creditors waiving or deferring debt and are not to be taken, despite the possibility of laying off risk through insurance or syndication of loans, to be as a result of the provision in a better position than other creditors. Therefore, there was no breach of the equality of treatment principle.[34]

As for the limitation of liability for improper support, the court was not convinced by the argument that lenders were thus made exempt from responsibility in breach of general tort principles and article 4 of the Declaration of the Rights of Man and the Citizen 1789,[35] holding that the text as drafted in fact clearly enunciated the cases in which liability still remained and that the clarification of the law allowed for an obstacle preventing lenders from assisting in the debtor's rescue to be lifted, thus satisfying the objective of general public interest. In any event, the court stated that lenders sought to be made liable had the option to provide evidence to the contrary and to appeal any adverse finding, thus preserving the parity of all parties in proceedings. As a result of the court's decision, the way was prepared for the law of 2005 to be finally adopted on 26 July 2005 and promulgated the next day.

2.3 The exceptions to the presumption of non-liability

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[29] a 8 of the *Assemblée Nationale* draft no 1596.

[30] See comment by Mme Assassi speaking to the amendment in the Senate on 30 June 2005, www.senat.fr/cra/s20050630/s20050630H95.html (3-05-2014).

[31] Lit "Keeper of the seals", the official title of the minister of justice.

[32] a 8 law of 2005, amending the renumbered a 611-11 of the Commercial Code.

[33] Possibly analogous to the *pari passu* principle familiar to insolvency law.

[34] See the constitutional court's decision no 2005-522 DC of 22 July 2005, published in the Official Journal of the same date.

[35] This text states: "Liberty consists of being able to do all that does not harm another."

The law of 2005 changes raise a presumption of non-liability, subject to three stated exceptions. The fact that the text was drafted in this way was of interest to commentators studying the text who termed the provision a “partial professional immunity”[36] and a “principle of non-liability”.[37] What was also of interest was that the text did not distinguish between debts arising prior to or after the opening of proceedings, nor was it limited in its application to any one or more of the various procedures available, giving it a universal vocation. Furthermore, the exemption from liability protected creditors from possible claims by any of the parties usually involved in this type of claim, whether the debtor itself, other creditors or guarantors for the debtor’s obligations.[38] Nonetheless, the scope of the exceptions remained to be determined and there could be difficulties in interpreting the extent of the liability in certain instances of lender behaviour. Hence, the utility of the case law in fleshing out some of its parameters.

2.3.1 The fraud exception

Fraud is deemed to take place in circumstances where, under the general law, an act is fraudulent in nature or is accomplished in the context of acts that could give rise to a criminal charge. Examples of general law offences that would raise a presumption of fraud or fraudulent intent include defrauding customers or contractual partners, tax evasion, smuggling and the illicit trafficking of substances.[39] Nonetheless, in the immediate context of insolvency, there are a number of specific situations that could give rise to an allegation of fraudulent behaviour. The transactional avoidance provisions,[40] which after the law of 2005 apply only to the situation of judicial rescue and liquidation proceedings, forbid acts involving the transfer without consideration of the debtor’s property, the entry by the debtor into obligations resulting in a manifest and disproportionate burden (as might be the case of security), the payment of debts that have not yet fallen due, the payment of debts already falling due by unauthorised means (principally payments in kind and non-exempt instruments), the sequestration of funds made in pursuance of a guarantee, the creation and enforcement of security, the exercise of options to acquire shares/stock as well as the constitution of trust funds (*patrimoine de fiducie*) and alteration of trust instruments.

All of these transactions will be void if made after the date of cessation of payments, while property transfers made without consideration within the six months prior to this date may also be annulled.[41] Furthermore, payments for debts arising post-commencement and burdensome contracts entered into by the debtor after the date of cessation of payments may be avoided where it is proved the other party knew of the cessation of payments.[42] Although, following the adoption of the law of 1985, preferential payments to creditors no longer constitute an offence punishable by criminal law,[43] behaviour by lenders seeking to maximise their position may fall foul of any of these provisions and raise a presumption of fraud in addition to any civil liability engaged as a result.

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[36] Lafortune, above note 7, at 17.

[37] See Legeais *Les concours consentis à une enterprise en difficultés* JCP éd. E (2005) 1747. Commentary generally on the scope and extent of the provision has been sparse, but relatively consistent over the years.

[38] Legeais (n 37) 1747-1748.

[39] Lafortune (n 6) 19.

[40] a L 632-1 and L. 632-2, Commercial Code.

[41] Ibid a L. 632-1.

[42] Ibid a L. 632-2.

[43] Cassation criminelle, 21 June 1993, Petites Affiches, 26 Jan 1994, 20.

Fraud would also be an issue where a lender is deemed complicit in the activities of the debtor that are susceptible to a charge of criminal bankruptcy, which exposes the author of the act to five years imprisonment and a fine of €75 000.[44] The types of activity include, in the event of judicial administration or liquidation proceedings being instituted, raising funds by ruinous means, such as through the sale of assets at undervalue in order to delay the onset of insolvency, diverting or dissimulating assets belonging to the debtor, fraudulently increasing the debt owed by the debtor and falsifying, destroying or failing to keep those accounts required by law.[45] In one instance, ruinous means was interpreted as covering the case of a lender who was found guilty of abetting the act of criminal bankruptcy by providing excess credit.[46] Where a court noted that a banker had written to the company director forbidding the issue of any more cheques on the company account, but had let the director move moneys to his personal account and write cheques from that account, the banker could be found guilty of being an accomplice.[47]

Furthermore, within the context of criminal proceedings, a court has stated that normal credit can be deemed excessive where it is considered to go beyond the reasonable needs of the business.[48] One of the issues here will be the extent to which the fraudulent intention can be attributed to the knowledge of a possible harm to the interests of other creditors and it is possible that a wide interpretation by the courts of the concept of fraud could undermine the impact of the presumption of non-liability.[49] It seems, however, that the courts require more than simple negligence, such as by permitting a doubtful promissory note to be discounted, especially where there were no suspicions that the activities of the debtor were otherwise than normal.[50] Actual knowledge, proved to the standard required for a criminal offence, of the fact that the debtor was in cessation of payments and wished to delay the filing of proceedings by means of acquiring further funds that were ruinous (*ruineux*) because excessive as well as the banker's conscious decision to associate himself with the debtor's activities would be required to engender liability.[51]

Other activities giving rise to a presumption of fraud could include the concealment or dissimulation of all or part of the assets belonging to the debtor in the interests of any of its directors and the fraudulent submission within preservation, judicial rescue or judicial liquidation proceedings of debts alleged to be owed, all of which would attract the same penalties as for criminal bankruptcy.[52] A lender may also be liable to a penalty of two years imprisonment and a fine of €30 000 for agreeing to the payment of any debt or constitution of security by the debtor during the observation period of preservation or judicial rescue proceedings without the consent of the supervising judge or receiving the payment of a debt made in breach of any

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[44] a L 654-3, Commercial Code. The penalties are increased by a L 654-4 in the case of a principal or accomplice who is a manager of a business that offers investment services to seven years imprisonment and a fine of €100 000. There is also a range of supplementary penalties contained in a L 654-5, including the loss of civic rights and exclusion from the profession or business in whose exercise the offence was committed.
[45] a L 654-2. This provision contains elements in common with a L 653-5.
[46] Cassation criminelle, 3 April 1991, JCP éd E 1992.I.154.11.
[47] Cassation criminelle, 9 Oct 1989, D 1990 somm 120.
[48] Cassation criminelle, 30 Oct 1989, JCP éd E 1991 pan 65.
[49] Legeais (n 37) 1748.
[50] Cassation criminelle, 13 Nov 1989, Rev Proc Coll 1990.287.
[51] CA Paris, 14 Febr 2000, D.2002.somm.205.
[52] a L 654-9, Commercial Code.

prohibition during the same proceedings or outside the terms of a preservation or rescue plan as well as agreeing to the alienation of any property deemed inalienable for the purposes of a sales plan.[53] Lastly, agreement by a creditor to a contract carrying a special advantage whose burden is borne solely by the debtor, which would also cover the position of security and other possible advantages, will attract the possible avoidance of the contract and the penalties set out in article 314-1 of the Penal Code.[54] In all of these situations, it might be difficult for a creditor to resist the allegation of intention to commit fraud where the constituent elements of any of the offences are proved.

2.3.2 The "interference" (*immixtion*) in management exception

Instances where the relationship between debtor and lender goes beyond normal commercial relations, as can arise by the development of close ties through the supply of goods and credit, will give rise to questions of whether the dependency and close management relations that may be a result will characterise the lender as part of the debtor's management with the consequence that the lender acquires the status of a director. Once this status is established, the full panoply of the sanctions regime is in theory available, although the application of certain civil and criminal liability provisions will depend on which type of insolvency proceedings are initiated, sanctions and the preservation process being deemed incompatible. Normally, where a lender accepts appointment, for example under a corporate debtor's articles of association as a *de jure* director (*dirigeant de droit*), the unsurprising consequence is that the lender will, in common with all other directors, be liable for acts committed during the period of office.[55] Although the practice may be uncommon in France, the Law of 1985 certainly facilitated the possibility of appointments of lenders because it relaxed the automatic presumptions of causation and liability in previous insolvency legislation.[56] However, the type of participation in management that is the focus of this provision is the unwarranted interference in the debtor's capacity to decide business matters, a fact that will place the lender in the position of being treated in law as a shadow or *de facto* director (*dirigeant de fait*).

An individual will enjoy the status of a shadow director where he exercises the powers of a director regularly or in the absence of the directors or where he represents to third parties that he is a director to the extent that he is able to make financial and commercial decisions which bind the company. This may also occur where the individual exercises influence on the directors so that they act in accordance with his instructions.[57] Incorporated entities, such as companies and most financial lenders, which satisfy the above conditions will also be treated as having the status of a shadow director, in which case it may be held jointly and severally liable with the representative it appoints to the debtor's management board for the consequences of interference with the management of the insolvent debtor.[58] Close economic dependence, which is often the case in groups and may be characterised by generous or exclusive dependence on a unique source for credit facilities may result in liability for a lender in this position if it plays an important role in management decisions.[59]

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[53] Ibid., a L 654-8.
[54] Ibid., a L 654-13.
[55] Cassation commerciale, 24 Jan 1983, RJ Com. 1984.215.
[56] Comment made in the compendium Lamy droit du financement (1995 ed) par 2678.
[57] CA Versailles, 20 Jan 1994, RJDA 94-4 no 461.
[58] TC Paris, 5 Jan 1994, RJDA 94-4, no.456.
[59] CA Aix-en-Provence, 26 May 1981, D.1983.IR.60.

A lender which, although not a *de jure* director, delegated one of its members of staff to permanently advise a debtor, was held liable where this member of staff took part in management decisions.[60] The question of fictional companies and common purpose has also been the subject of much case-law and debate on the circumstances in which piercing the corporate veil is permitted.[61] Identity of management and pursuit of common aims or commercial activity are key factors in assessing the reality of separate company identity. Companies which share a common manager may find that insolvency proceedings involving one company may be extended to all companies thus associated.[62] If a debtor and lender share one or more directors, there may be a question of whether the personal link is strong enough to have influenced the debtor's decisions, an affirmative answer naturally exposing the lender to liability.

The finding that a lender has interfered in the debtor's management may have consequences beyond a finding of improper support. Title V of Book VI of the Commercial Code set out a wide range of sanctions in the context of insolvency matters. These include liability for a deficiency of assets revealed as a result of the termination of a preservation or judicial rescue plan or the liquidation of a corporate debtor, which will entitle the court to decide that the debts will be borne by some or all of the *de jure* or *de facto* directors who have contributed to the management fault that is at the root of the deficiency arising.[63] Personal bankruptcy is also an option open where the above allegations are proved.[64] It is also available where a different set of constitutive facts are operative, including where ruinous means are used to procure funds with the intention of avoiding or delaying the opening of judicial administration or liquidation proceedings, where obligations are subscribed to that are disproportionate to the needs of the debtor having regard to the situation the debtor was in, where payment to a creditor is authorised after cessation of payments and in knowledge of the cause of this, to the prejudice of other creditors, where voluntarily abstaining from co-operating with those responsible for proceedings forms an obstacle to its progress and where accounts are fictitious, manifestly incomplete, irregular or missing.[65] Subsidiary penalties where personal bankruptcy is ordered may include a prohibition from standing for public office.[66] Nevertheless, as an alternative to personal bankruptcy, a court may order disqualification from being involved in business or the management activities.[67] Finally, conviction for criminal bankruptcy, in much the same circumstances as those outlined above in the section on the fraud exception and the lender's complicity in the debtor's activities, may also apply to lenders or their representatives who take on the status of *de jure* or *de facto* directors.

2.3.3 The disproportionate guarantees/security exception

The issue of how disproportionate a guarantee has to be before it is caught by this exception to the presumption of non-liability is one that some say affords the judges the widest scope for judicial decision-making.[68] The formulation for the provision is

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[60] CA Paris, 3 March 1978, D.1978.IR.420.

[61] See Soinne "Identité ou diversité des notions de fictivité et de confusion des patrimoines" *Petites Affiches* (6-12-1995) 12.

[62] Cassation commerciale, 8 Feb 1994, *Petites Affiches* (24-05-1995) 33.

[63] a L. 651-1, Commercial Code.

[64] a L 653-4.

[65] a L 653-5. This provision contains elements in common with a L 654-2.

[66] a L 653-10.

[67] a L 653-8.

[68] Legeais (n 37) 1748.

certainly different from that usually found in the context of guarantees and notably the need to examine the disproportionality as between the amount of the guarantee and the assets and income of the guarantor.[69] The text of the law of 2005 requires the comparison to be made between the amount of the loan and the amount of the guarantee. The text is also wider in its application because of the use of the word “guarantee”, as opposed to “security”, and its more extensive and inclusive meaning in law.[70] This has the result of applying the concept of proportionality and the need to assess the guarantee by this standard, usually encountered where individuals deal with lenders to contracts hitherto excluded and notably contracts between directors of an incorporated debtor and the lender, by which the principle of limited liability is often avoided. Nonetheless, there are a number of problems with the text. The first is that it does not stipulate whether the comparison (between guarantee and loan amounts) is to be made at the time the loan is entered into or when the guarantee is called in, although Legeais thinks it likely that it is when the contract is first entered into in consideration for the lending being advanced to the debtor. Secondly, the text does not decide whether the comparison between the guarantee and the loan is to be made in function of the actual amount drawn down by the company or that notionally available to it. This worry is reflected in comments made on the CREDA website which point to the tendency in some quarters for loans to be made in return for open-ended guarantees covering the assets present and future of the borrower.[71] The result may be that loans, especially to businesses in a “delicate situation”, may have to be made subject to ceilings being placed on the concomitant guarantees. Nevertheless, apart from valuation problems for difficult assets, a final problem remains in evaluating the possible disproportion of a guarantee where more than one guarantee is obtained in respect of the same lending transaction,[72] when the issue will be whether the risk of recovery should be factored in to the decision as to any possible disproportionality.

2.3.4 The impact on lender behaviour in France

Lenders have often faced problems with perception and mistrust from the public, which applies equally to public perception of lenders in France.[73] The role of the banks in the financial crisis just past, whose effects are still being felt today, has led to heightened public perceptions of the role they play in the functioning of economies. It is true that particularly in insolvency, the role of the lender is potentially ambiguous, given that the lender will be seeking the recovery of existing lending and the best position with respect to any later lending it gives so as to assist the potential for rescue. The curtailing of liability for improper support assists the clarification of what was a potential source of unease for lenders, particularly where the debtor was fast approaching the point of no return, when the (non-) availability of finance could result in rescue or annihilation. It does not, as feared by those opposing the introduction of the presumption of non-liability, represent a wholesale exculpation of all behaviour by lenders. It is unlikely that lenders will be any the less cautious in lending or indeed make the assessment of the prospect of recovery any the less important in their

[69] a L 313-10 and L 341-4, Consumer Code.
[70] Legeais (n 37) 1749.
[71] Message posted by A. Reygrobellet (Chambre de Commerce et d’Industrie de Paris) on 20 Sept 2005 at the Centre de Recherche sur le Droit des Affaires: www.creda.ccip.fr (no longer available).
[72] Legeais (n 37) 1749.
[73] See Watt “The spirit of insolvency in France” 1996 *ICCLR* 266.

calculations. In France, it is said that the law will not "excuse [lenders] from their duty to be vigilant or discriminating".[74]

Coupled with the protection for post-commencement financing in the context of conciliation, the effect may be to incite lenders to engage more in informal workouts with their debtors, safe in the knowledge that the advancement of further funds geared towards making rescue a realistic objective will not be unduly sanctioned. In fact, the law has strengthened the role of creditors in these workouts by expressly recognising, in 2010, a pre-pack version of preservation.[75] Overall, the view may be formed that, while the principle of liability, as curtailed by the changes in 2005, sets the parameters of lender behaviour, it does not have a great impact on the vast majority of lending arrangements, but only on those where the closeness of the relationship between debtor and creditor can lead to either pressure being placed by the creditor on the scope of the debtor's autonomy or there is a deliberate intention to flout the law. As such, the case law examples, while illustrative, do not represent the reality of the lending environment in France.

3 *The United Kingdom*

In the United Kingdom, a very different attitude to lenders has traditionally prevailed: the principle of *pacta sunt servanda* (agreements must be honoured). While in France, there are a number of mechanisms through which irresponsible lenders can be held to account, British lenders do not apparently suffer the same weight of responsibility to account for their behaviour with regard to a lending agreement short of those credit terms or actions which amount to extortion or fraud. Rather, debtors, whether individual or corporate, are generally expected to take responsibility for the agreements they enter into with creditors and to deal with the consequences of those agreements despite any advantage taken by creditors.

3.1 Limited control over the consumer lending contract

Only limited controls aimed at preventing fraud, extortion and in some cases unfairness are applied to consumer lending contracts in the United Kingdom. The applicable controls are contained in the main legislation dealing with consumer lending: the Consumer Credit Act 1974[76] and subsidiary legislation dealing with unfair terms in such contracts.[77] Sections 140A-140D are a more recent formulation, having been inserted into the 1974 act in 2006,[78] replacing repealed sections 137-140 of the former act. The repealed section 137 formerly allowed courts to "reopen" agreements and rewrite terms, though this was limited to agreements valued at under £25 000 and applied to extortionate agreements only. Section 138 then defined extortionate as "grossly exorbitant" or otherwise in contravention of ordinary principles of fair dealing.[79] In determining whether an agreement was extortionate under these sections, the court would look at facts, such as the prevailing interest rates compared to those applied in the agreement; the debtor's age, experience, business capacity and health; whether or not the debtor was under financial pressure; the

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[74] Legeais (n 37) 1748.

[75] The "accelerated financial preservation" (*sauvegarde financière accélérée*) procedure, which was introduced by a 57-58, Law no. 2010-1249 of 22 Oct 2010.

[76] Notably s 140A-140D, Consumer Credit Act 1974.

[77] The Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

[78] Consumer Credit Act 2006.

[79] This is language that is also picked up in s 244, Insolvency Act 1986 (1986 c 45), which introduces a statutory claw-back action in cases of extortionate credit transactions, defined in very much the same way.

creditor's relationship to debtor; degree of risk to creditor having regard to value of security; and any other relevant considerations. In *Falco Finance Ltd* v *Gough*,[80] the rate payable under a credit agreement rose by 5% for the remainder of a mortgage term if payments were even one day late. It was held that this term was extortionate in the credit bargain. However, in *Ketley v Scott*,[81] an interest rate of 48% was not deemed extortionate as it was justified by the "extraordinary nature and urgency of transaction". These circumstances were held to cover the terms contained in a typical bridging loan agreement. On the facts of this case, the court was not motivated to exercise its discretion to alleviate the terms of the interest rate owing to the deceit of the debtor in not revealing an existing mortgage. In another case, an increase of the compound interest rate from 20% to 40% on default occurring was not held to be extortionate, in this case because the parties were deemed to have entered into the bargain with eyes open and was by its very nature high risk. The fact that in *White v Davenham Trust Ltd*, the parties were also not dealing as consumers was also held to be relevant.[82]

The provisions which replaced the repealed legislation do contain broader circumstances in which the court will intercede in a credit agreement, which also covers the extortionate conditions contained in the repealed sections. Section 140A states that a court can determine whether the relationship between the creditor and debtor is unfair based on the terms of the agreement or a related agreement; the way that the creditor has exercised or enforced its rights; and/or any other thing done or not done by the creditor in the context of the agreement or a related agreement. In making its decision on the fairness of a credit agreement and whether or not section 140A should apply, the court will have regard to all relevant matters, including those matters relating to the characteristics of the creditor and the debtor. Section 140B grants the court power to require a creditor to repay amounts to the debtor; to return secured; or to refrain from doing certain acts. The court may also reduce the overall debt and even set aside the contract in its entirety or certain of its terms. The new sections 140A and 140B place no value limit on consumer lending contracts and allow agreements which are merely "unfair" to be amended or rewritten by the court. These amendments extend the liability of lenders well beyond those bargains deemed as extortionate under the 1974 act. The new sections do not go so far as to try to control lender behaviour through sanctions, but to broaden the circumstances in which the court can intervene in cases of unfairness. However, their biggest defect in serving as guidance to creditors as to the parameters of the lending arrangement is that they do not apply to corporate debtors, save where such a debtor is jointly liable together with an individual consumer.[83]

3.2 The secured creditor's responsibilities in receivership

Receivership aims to give the creditor holding a qualifying form of security a priority right to the assets of a company and allows the creditor to seize them quickly. It is derived from land law, where historically a receiver of property was often appointed under a mortgage to take over the debtor's chief asset, his land, so that it could be sold to repay the creditor what is owed. The mortgage contract would contain a clause stipulating that the lender had the right to appoint someone to enter onto land and recover it under specified conditions. However, where the land was used for a variety

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[80] (28 Oct 1999) Macclesfield county court (unreported).
[81] *Ketley v Scott* 1980 CCLR 137.
[82] 2010 EWHC 2784 (Ch).
[83] s 185(5) of the Consumer Credit Act 1974.

of functions (growing crops; pasturing herd animals etc), it was usual to give the receiver the right not simply to take property into custody, but also to "manage" the property, in which case the title used was "receiver and manager". In more modern times, as the property law practice became more widespread and used in commercial lending arrangements against all forms of property, receivers could be appointed in a variety of situations: under a fixed charge; under a "lightweight" floating charge over a small amount of a company's assets; but, more usually, under a floating charge given as security under an instrument, often referred to as a debenture.

In the Insolvency Act of 1986 formulation, which partially codified the practice of receivership (and incidentally retitling it administrative receivership), a floating charge would cover all or most of the company's assets and would entitle the person appointed (known as the administrative receiver) to act. This person would usually be an insolvency practitioner. Receivers could also be appointed by the court if there was a defect in the underlying deed or if the powers of the court were required to compel the debtor. While the 2002 reforms largely abolished administrative receivership,[84] the procedure can still be used by creditors holding a qualifying floating charge created before the changes or in relation to those charges, whenever created, which fall within one of the specified exceptions.[85] Law of Property Act 1925 receivers may still be appointed. The interest in examining receivership is that the rights flow out of the lending arrangement and have led to the discussion of liability on the part of the secured creditor, albeit in limited circumstances that revolve around the appointments process and liability for receivers' actions.

3.2.1 The appointments process

Receivership normally commences when the debtor does something to trigger the appointment of a receiver by breaching one of the terms of the lending agreement. The floating charge is said at that point to "crystallise". Typical triggers include default in interest payments; default in loan repayments subject to notice being given; default in maintaining gearing levels (referring to the ratio of debt to assets); default in maintaining the asset base by selling or dissipating assets; default in prudential management such as failing to insure property, over-paying directors or failing to carry out audits; or that the company has a petition for winding up, an administration order against it or a receiver has been appointed under another charge. Payment on demand is usual and the company need not be warned it is in danger of default. For example, in *Cripps (Pharmaceuticals) Ltd v Wickenden*,[86] failure to pay within two hours of the due date was sufficient to allow the appointment of a receiver. In *Bank of Baroda v Panessar*, a demand for payment without stating the sum owed entitled the appointment of a receiver to be made one hour following the demand.[87] However, a debenture holder must act in good faith in making the appointment of a receiver. In *Downsview Nominees v First City Corporation*, a floating charge holder of a New Zealand company appointed its controlling shareholder as receiver.[88] The receiver subsequently behaved improperly, acting in the interests of the shareholders, rather

[84] Enterprise Act 2002 (2002 c. 40).
[85] s250, which inserts a new s 72A, Insolvency Act 1986 creating the prohibition, subject to the exceptions listed in s 72B-GA. These include: capital market arrangements worth at least £50 million; public-private partnerships with step-in rights; utility projects with step-in rights; urban regeneration projects; project finance worth at least £50 million; (5) financial market arrangements; system-charges and collateral security charges; registered social landlords and protected railway companies.
[86] 1973 2 All ER 606.
[87] 1987 Ch 335.
[88] 1993 AC 295.

than the debenture holder. The privy council found that, in addition to the receiver failing to act in good faith, the company also had not acted in good faith in appointing a receiver who had an interest in the company as a shareholder and allowing him to continue to act in a way contrary to his duty.

In the United Kingdom,[89] the requirement to appoint an insolvency practitioner would usually avoid the situation revealed in the *Downsview* case, as insolvency practitioners must have indemnity insurance[90] and are bound by a professional code of conduct. Normally, however, financial lenders would ask for independent advice from an accountant or for an auditor's report, before making an appointment. Occasionally, the accountant would be appointed the receiver, which carried with it the benefit of having prior knowledge of debtor's affairs, but such an appointment could also lead to a possible conflict of interest. Generally, wrongful appointments of receivers were deemed to occur where: (1) the grounds for appointment were not properly specified in debenture; (2) the charge was invalid for lack of registration;[91] (3) the charge was a preference;[92] (4) the charge was granted while the company was insolvent and within the relation-back period;[93] or (5) the charge was part of an extortionate credit transaction.[94] Under the pre-Enterprise Act 2002 regime, floating charge holders would also lose their rights where an administration order had been issued before an appointment could be made.[95] Some appointments could also be invalid if made while a petition for administration was awaiting a hearing, in which case the company might have a right of action against the receiver personally.[96] However, receivers would normally ask for an indemnity from secured creditors as part of their conditions of appointment. In such cases, the court could force the debenture holder to bear any liabilities accrued by reason of the receiver's invalid appointment.[97]

3.2.3 Receivers' actions

The receiver principally acts on behalf of the interests of a secured creditor. However, the clause appointing the receiver usually deems him to be an agent of the debtor company,[98] which effectively minimises the liability of the creditor making the appointment. As agent of the company, the administrative receiver has the same power as a director and can therefore gather in and deal with the company's assets. The administrative receiver also benefits from limited liability as agent for the company and is therefore not personally liable for what he does on behalf of the company, unless the appointment is wrongful or he behaves contrary to professional etiquette. His limited liability is, however, subject to exceptions in the case of new contracts entered following his appointment and employment contracts. Nevertheless, an administrative receiver could be guilty of misfeasance under section 212 of the Insolvency Act 1986 and could also be disqualified in the same way as company directors can.[99]

[89] Receiverships and the concept of the floating charge were extended to Scotland by the Companies (Floating Charges and Receivers) (Scotland) Act 1972.
[90] s 390(3) of the Insolvency Act 1986.
[91] s 874 of the Companies Act 2006.
[92] s 240 of the Insolvency Act 1986.
[93] s 245.
[94] s 244.
[95] s 11(3)(b)-(c).
[96] *Windsor Refrigeration Co Ltd v Branch Nominees Ltd* 1961 Ch 375.
[97] s 34 of the Insolvency Act 1986.
[98] s 44.
[99] Company Directors' Disqualification Act 1986.

Normally, the company is vicariously liable for the acts of the receiver, unless he breaches the authority given by his appointment or the fiduciary duty generally owed by an agent to his principal. As such, the receiver is normally free to exercise commercial judgment with respect to the disposal of assets and is not obliged to wait for the best possible market conditions to sell them.[100] However, the receiver does owe a duty to the mortgagor and guarantors of assets to take reasonable care to obtain the best possible price.[101] There is, however, no general duty of care, a fact determined in the (previously mentioned) *Downsview* case where, in addition to the findings against the receiver and the company, the Privy Council said there was a general duty to act in good faith, but that the receiver did not owe a general duty of care. However, in *Medforth v Blake*, receivers were appointed over a pig farm with the power to manage, but when they failed to obtain commercial discounts on animal feed, the farmer sued them for mismanagement.[102] The court of appeal held that it was a receiver's decision whether to manage or to sell the farm as long as he fulfilled his primary duty to bring about a situation where a secured debt could be discharged. In this case, the receivers did not choose to take on the management duties. If receivers had chosen to manage the farm, they could not exclude a duty to manage with due diligence, which may have included the application for food discounts, breach of which may have rendered them liable to mismanagement. Determination of a receiver's liability will also call into question the extent of the secured creditor's responsibility as governed by the contract between them.

3.3 Creditors' responsibility in collective procedures

The shift away from receivership moves the focus to whether liability arises by virtue of the lending contract in the arena of collective procedures. With the effective abolition of administrative receivership, secured creditors obtained the right to initiate administration proceedings and appoint their own administrator. Under the scheme introduced by the Enterprise Act 2002, the appointment of an administrator may be made by the court,[103] at the request of the company or its directors[104] as well as by the holder of a floating charge.[105] The new purposes of administration as introduced by the 2002 act are firstly to rescue the company as a going concern and, where this is not possible, to do what is necessary to achieve a better result than would be available upon the liquidation of the company and finally, if these first two options are not possible, to realise property to make a distribution to the secured and preferential creditors.[106] This final option functions as receivership did under the pre-Enterprise Act 2002 scheme. While a great many changes occurred to create an emphasis on corporate rescue under the Enterprise Act 2002 innovations, there appear to be no additional liabilities applied to secured creditors in relation to their responsibilities as lenders.

The lack of liability under the Enterprise Act 2002 scheme could perhaps be explained on the basis that the receivership function and its attitudes have been

[100] *Cuckmere Brick Ltd v Mutual Finance Ltd* 1971 Ch 949.
[101] *American Express International v Hurley* 1986 BCLC 52. There is also a general repugnance to allow asset sales to/appropriations by the creditor or associated parties, as decided in *Tse Kwong Lam v Wong Chit Sen* 1983 1 WLR 1349.
[102] *Medforth v Blake* 1999 2 BCLC 221.
[103] Insolvency Act 1986, sch B1, par 2, 10-13.
[104] par 22-34.
[105] par 14-21.
[106] par 3.

transferred or subsumed into the administration procedure. An exception is made in that the secured creditor may be required to indemnify any person against liability that might arise under a defective appointment of an administrator.[107] Although there is no general duty of care owed by the administrator to creditors,[108] which would serve to attract any vicarious liability on the part of an appointor, administrators are under an obligation to act in the collective interest and may be exposed to sanctions for misfeasance and liability for causing unfair harm to the interests of one or more of the creditors/shareholders.[109] Whether these are sufficient bases on which to make an argument to expose the appointor to liability has not yet been decided.

3.4 The impact on lender behaviour in the United Kingdom

The lending environment in the United Kingdom has been as exposed to the global financial crisis as that in France. Yet, there does not seem to be any call for a generalised framework of responsibility, except in the loosest sense, that banker should have to justify why, in an age of austerity, the profits of lenders should be used to pay emoluments and remuneration far exceeding the perceived (and morally acceptable) norms for society. Only in the case of consumer lending has there been, historically, an acceptance of the need to regulate the content of the contract, though the limitation to non-corporate lending makes a generalised application of this principle impossible. The freedom to contract explains why the institution of receivership flourished till recently. This was despite the grave potential for conflict between the receiver's appointment and obligation to the secured creditor to collect moneys with his behaviour while in charge of the company and any duty owed to the company as an agent). In cases of conflict, the question always was whose interest should prevail. This situation might may also be analysed in terms of liability: the secured creditor has little liability, while the company is liable for most things as the principal. Is this fair? One answer might be: it is a contract for lending and the parties are free to negotiate the terms; if the parties agree, then the consequences are also agreed. However, most lending is in the form of a standard contract with standard terms, so can companies really be said to be free to bargain? Despite these questions, there was, apart from the issue of possible wrongful appointments (essentially a breach of contract by the secured creditor) and perhaps some responsibility for a receiver's actions, little appetite to open scrutiny of the lending arrangement, still less to institute a general principle of creditor's liability. This attitude appears to inform the way in which administration has developed since the 2002 reforms giving the collective approach priority within the insolvency framework in the United Kingdom.

SAMEVATTING

This article does not pretend to offer a comprehensive overview of all of the creditor liability schemes and variations thereof that may exist throughout the world. The comparisons here are between two systems that may stand as exemplars of diametrically opposed views. Both systems depart from very different conceptions and bases for liability, though there are some limited similarities between both positions in the modern insolvency context, a convergence in modern European views towards insolvency law perhaps being noticeable here. In that light, the protection for post-commencement financing and a reluctance to hold creditors unnecessarily liable appears to be the modern European view. Although this does not represent too great a change to the traditional United Kingdom position, the introduction of these concepts has required a seismic shift in attitude by the French legislator, particularly given the historic approach to *soutien abusif*.

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[107] par 21.
[108] *Kyrris v Oldham* 2004 1 BCLC 305.
[109] Insolvency Act 1986, sch B1, par 74-75.

Further apparent similarities in both systems include the focus on vulnerable transaction rules and interference in management/shadow director status as generators of liability. However, in France, this focus is connected to attempts to revive the general liability rule by invoking participation in fraud (which includes most of the vulnerable transactions rules) and assumption of status as a shadow director. The creation of a generalised rule is a position the United Kingdom never reached in statute or the case-law. Although it appears harder in the United Kingdom to attach liability for banks as shadow directors,[110] vulnerable transaction rules are often encountered in practice and serve the same restorative end to swell the debtor's estate to enhance dividends to creditors. However, because both systems depart from different premises, the aim in the United Kingdom appears to be to elicit a contribution based on responsibility. Hence, the focus on consumer lending and responsibility for wrongful appointments and action by receivers and/or administrators as potentially involving some attribution of liability to creditors (usually the secured creditors responsible for such appointments). In the final analysis, there may be little commonalty between the positions these exemplars have reached.

The question may be asked, though, whether there would be any merit in reviewing the similarities and differences between the systems with view to understanding if there is any international consensus, particularly within the European Union, for a measure that would generalise such a liability in the insolvency context. In fact, recent attempts by the European Union to kick-start again the company law harmonisation programme through the formulation of an Action Plan in 2012 have tended to focus on issues such as the management of risks, the duties of directors and their role in oversight as well as corporate social responsibility as a whole, thus placing the emphasis on prudential behaviour squarely within the province of individual companies. This suggests that debtors would largely be responsible for monitoring their own exposure to risks. This would tangentially deal with the debtor-creditor relationship as engaged through external contracting in the context of lending, creating and providing security as well as guarantees. Overall, the measures would seem to leave creditors unaffected to the extent that they do not pressure debtors to engage in unwarranted risk-taking. In the insolvency context, recent work on the reform of the European Insolvency Regulation has thrown up the question of whether the time has come to consider the achievability of substantive law reform and thus harmonisation of member states' laws. Here too, apart from the specific issue of vulnerable transactions, which are also a topic on which work has been carried out by the UNCITRAL Working Group V on Insolvency, there has been little that addresses the responsibility of creditors directly. Even more recently, the proposals emanating from the Commission Recommendation of 2014 mention only one form of liability that is connected to lending or that has potentially an application in the insolvency context. That is the withdrawal, in Recommendation 29, of protection for post-commencement financing (or "new moneys") in connection with the formulation of restructuring plans for small- and medium-sized enterprises in the event that fraud is encountered in connection with the provision of lending. It does not, however, detail whether there is any associated liability on the part of the parties involved, whether the debtor or creditor(s).

For the moment, therefore, it seems as if the focus is more on regulating access to lending and encouraging prudential behaviour on the part of debtors and creditors with respect to risk-taking. Even in France, where such a principle exists, it is in practice carefully circumscribed by the lending contract and in the checks and balances that are inherent in the creditor's assessment of the debtor's capacity to borrow, a position that is incidentally reflective of practice in the United Kingdom. This may also explain why, in France, instances in the reported case law of liability are sparse. This convergence in the approaches of both jurisdictions to looking at the lending matrix, a position that is broadly representative of the general view in Europe, might also explain why any unified view of creditor liability may ultimately be off the agenda.

[110] See the general discussion on parties that might be drawn into shadow directorships in *Multinational Gas and Petrochemical Company v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258.