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De Facto Management, Mismanagement and Possible Sanctions Incurred by Financial Investors in the Context of Unsuccessful LBO Transactions in France

Anker Sørensen, Partner, and **Brice Mathieu**, Associate, Reed Smith LLP, Paris, France

In a 'perfect scenario', exit for a profitable target company/group acquired by a private equity fund by way of a leveraged buyout[1] ('LBO') transaction is usually through:

- flotation on a publicly listed market;
- sale of Newco[2] set-up to facilitate acquisition of target by a trade purchaser; or
- secondary or further buyout.

Should the acquired target be unprofitable, exit tends to be by one of the following methods:

- winding-up Newco through insolvency proceedings;
- sale of the private equity fund's shareholdings to the management team, often for a low price; or
- capitalisation of a portion of the claims owed to creditors and/or the transfer of equity capital to the senior or mezzanine lenders for a nominal value who will then proceed to sell the business or the shares at a later date after the restructuring of the company.

On 7 December 2011, Moody's released a report including its study of 40 large, bubble-era leveraged buyouts. For many of the LBOs featured in the report, Moody's highlight weak revenue growth, soft earnings performance, a high default rate and stable to declining ratings. Private equity investors await better conditions for an exit.

One might think that, as in 2009 and 2010, LBO activity in France is likely to be affected if, as some anticipate, the economy deteriorates in 2012. On the one hand, some expect buyout activity in 2012 to resume at a more regular rhythm and be characterised by an increase in public-to-private transactions and secondary buyouts. On the other hand, one might presume (and there are strong indicators) that there will be several LBO/debt restructurings prior to contemplating a possible exit and/or the disposal of underperforming entities within groups of companies held in portfolio by FCPRs ('*fonds communs de placement à risques*').

Considering the current economic climate in most European countries and particularly in France, private equity firms may encounter many difficulties in 2012 in setting up LBO transactions with acceptable financial conditions or, in some cases, to comply with covenants contained within the initial financing arrangements.[3]

During this upcoming year private equity investors may also face other difficulties with respect to possible claims against them in their questionable position as co-employer or *de facto* director in the context of insolvency proceedings. Indeed, with the temptation to bring claims against the wealthiest, shareholders with deep pockets are more likely be targeted when companies succumb to insolvency proceedings.

Furthermore, certain French courts of first instance[4] have also recently ruled that management companies ('*sociétés de gestion*') of investment funds can be considered as co-employers of the persons employed in the

Notes

1 An LBO acquisition basically consists in the acquisition by a Newco of another company or group of companies. In terms of structuring the financing of the acquisition, the funds come from (i) equity finance from a private equity provider and the executive management of the target and (ii) debt finance (which will be redeemed by dividend payments from the target and its subsidiaries, if any) from financial institutions to meet the price of acquisition.

2 In the majority of cases Newco has the corporate form of a *société par actions simplifiée* or SAS (i.e., a simplified joint stock company) as under French law it offers certain flexibility in terms of tailor-made adjustments of the company's by-laws compared to *sociétés anonymes* (joint stock companies) whose organisation and applicable statutory provisions are more cumbersome.

3 However, on 29 June 2011, the AFIC (the French Private Equity Association) and OpinionWay (a French institution specialising in market research activities) issued the results of their joint investigation showing that more than 80% of the companies under LBO have not encountered debt/financial difficulties in 2010. Most of the situations have been resolved and only 0.6% of the portfolio investments at the end of 2009 have been liquidated with a cessation of activity.

4 Conseil des prud'hommes (Employment Tribunal) of Lens, 28 November 2008 and Tribunal de Grande Instance (i.e., French court of first instance) of Nanterre, ordonnance de référé, 20 November 2009, RG No. 09/02615.

companies acquired by these funds. These decisions implicate a management company in the redeployment of dismissed employees in all the companies owned by the FCPR it manages.

However, the courts of first instance decisions have been overturned by the Court of Appeal of Versailles and Douai which rejected, on their specific facts, the ruling that management companies could be considered as co-employers.[5]

The looming economic crisis may have an indirect effect on the approach French judges take in determining the role of management companies which manage companies owned by their FCPRs. As set out in the first instance decisions mentioned above, French courts may take a bolder approach in extending liability to management companies in the face of loss-making portfolio companies held by FCPRs.

The risk of extending liability may be particularly increased for management companies if they have been regularly involved in the daily management of companies in which their FCPRs are shareholders. Such involvement is often justified by the fact that management companies must ensure the continuity of the investments carried out by their FCPRs. In this respect, as 'representatives' of their FCPRs, management companies usually receive the same information as target's management and at the same time. The information sought is mostly financial and more sophisticated than the information which 'ordinary' shareholders can obtain outside of a LBO context.

Therefore, should target's financial situation deteriorate, management companies may request financial documentation on a more regular basis (for instance, weekly) to determine the most efficient way to overcome the company's financial and operating difficulties.

In a financial crisis scenario access to the same information as the statutory managers could, depending on how the management company uses that information and the influence it has over the decisions of the managers, be considered as evidence of the management company's involvement in target's daily management. Potentially this could lead to qualification of management companies as *de facto* managers, which may be prejudicial to them in the event of subsequent insolvency proceedings if an act of mismanagement attributable to them contributes can be shown to have caused a shortfall of the insolvent company's assets. Such shortfall ('*l'insuffisance d'actif*') is the difference between the company's outstanding liabilities and the

Note 1: There is a legal theory (the co-employment theory: '*théorie du co-emploi*') which has, been developed in recent times by French case law to impose, under certain conditions, an employer's obligations on a party other than the entity who on the face of it is the contracted employer. The result of this is that employees of a French company can pierce the corporate veil to hold the ultimate parent company liable for restructuring costs, including severance packages and damages for unfair dismissal. An employee may be entitled to look to both his apparent contractual employer but also to the third party, referred to as the co-employer, for compensation.

The existence of an employment relationship is traditionally identified by the performance of duties by the employee under the authority and instructions of the employer company (i.e., 'lien de subordination'). However recent case law tends to ignore this criterion, taking instead a wider, more business oriented view of 'employer'. It has thus held that employees who are made redundant by a bankrupt company can have two employer companies in the same group which could result in competing (i) interests, (ii) business activities and (iii) management between the companies in question – usually a parent company and one of its affiliates.[6]

Note 2: The FCPR is the most commonly used investment vehicle in France for private equity transactions and is in many ways comparable to an investment limited partnership in the UK and in the US. In accordance with the French Monetary and Financial Code's provisions, FCPRs do not have legal capacity but are an unincorporated fund involving joint ownership of securities. Any agreements must be executed by the management company on the FCPRs' behalf.[7]

FCPRs are managed by management companies in compliance with the funds' by-laws, which lay out specific rights and obligations between the investors and the management companies with regard to, in particular, investment policy and portfolio management.

Management companies must be approved by the French Securities Regulator (*Autorité des Marchés Financiers*) and comply with organisational and conduct of business rules intended to ensure investor protection and the legality of transactions.

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5 CA Versailles, 3 February 2010, RG No. 09/06068 and No. 09/09154 and CA Douai, 27 November 2009, RG No. 08/03825.

6 In 2011, the Labour chamber of the French *Cour de cassation* ruled on a particularly large amount of co-employment matters especially on the determination of the criteria of co-employment such as for example: Cass. Soc., 18 January 2011, No. 09-69.199, Cass, Soc., 22 June 2011 (existence of a triple confusion), No. 09-69.021, Cass, Soc., 28 September 2011, No. 10-12.278 and Cass, Soc., 30 November 2011, No. 10-22.964.

7 Articles L. 214-8 and L. 214-8-1 of French Monetary and Financial Code ('*Code monétaire et financier*').

value/sales price of its remaining assets. In specific circumstances management companies may attract financial, professional and criminal sanctions and should therefore exercise caution.

We are not aware of any material case law which has held that a privileged right and access to information and its use by its recipient, without any other factors, should lead to the recipient being deemed involved in the management of a company. But it may not take much more involvement in management above privileged access to information before a court is persuaded to hold that the recipient should be considered as a *de facto* manager.

1. Different ways management companies are involved in companies held in the portfolios of their FCPRs

In France, it is standard practice for the FCPR's by-laws to provide that management companies are responsible for identifying, assessing, and deciding on the investments and following-up on the investments and divestments in compliance with the FCPR's direction and policy. At all times, management companies act on behalf of unit-holders (*porteurs de parts*) and are exclusively entitled to exercise voting rights in companies held by their FCPRs. In addition, representatives and employees of the management company may be appointed as directors or members of the supervisory board of the company held in their FCPR's portfolios.

In the context of a LBO transaction, the reason and justification for a management company's involvement is to obtain sufficient information to control or at least monitor the investments of their FCPRs. As financial investors, the standard status as shareholder is not sufficient to satisfy their requirements for company information and their statutory rights are not sufficiently adapted to these needs. In addition, certain key decisions and strategic undertakings must be jointly decided by the managers and approved by the financial investors, which justifies such an involvement.

Management companies' involvement and monitoring often consists in:

(i) the attendance of the directors, employees or even shareholders of the management company themselves at Newco's supervisory board meetings. The visibility of management companies' involvement in Newcos is especially reinforced with respect to third parties in relation to Newcos incorporated in Paris.[8] As a result of the rulings of the Court of Appeal of Paris, it is easy to confuse who is management in the minds of third parties looking at companies held by Newcos. The Paris Court of Appeal has ruled that if the by-laws of an SAS provide for a supervisory board ('*conseil de surveillance*'), the members of such board must be registered with the trade and companies registry and appear in the *Kbis* excerpt[9] (i.e., such members will appear in a basic company search). The French Ministry of Justice has confirmed this solution and extended it to the members of the board of directors of SAS.[10] However, the commercial court of Versailles has refused to register other types of management body which go by a name other than '*conseil d'administration*' (i.e., '*comité de direction*'), even if they have similar powers to those specifically mentioned in article R. 123-54 of the French Commercial Code. The Versailles court has taken the view that these provisions must be strictly interpreted, which seems to be in line with the case law of the French *Cour de cassation*;[11]

(ii) granting itself certain powers in the by-laws and/or shareholders' agreement of Newco. Shareholders' agreements generally include clauses relating to the distribution of powers within Newco and target between investors and managers. In the majority of cases the investors agree to allow the managers to run Newco and target with certain limits to prevent the company being managed at the sole discretion of the managers. In this respect, shareholders' agreements usually provide for:

  (a) privileged information clauses and reporting obligations which stipulate that management must provide accounting, financial or commercial company information on a regular basis (for example, every month, quarter, semester, year-end) to the financial shareholders in the manner set out in the shareholders' agreement;

  (b) prior authorisation clauses including a list of important/strategic decisions which require the prior authorisation of the financial investors, given through their members on the supervisory board or board of directors of Newco. The scope of these decisions referred to in these clauses will mainly cover (i) commitments where potential financial impact is significant (such as the granting of security interests), (ii) strategic directions unforeseen in the business plan and the

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8 In France, companies are incorporated and registered locally at one of the 135 commercial courts' registrars.

9 CA Paris, 18 May 2010, No. 10/00710, RJDA 10/10 No. 972.

10 Rép. du Luart: Sénat 9-9-2010, No. 12583 p. 2366.

11 Cass. Com., 8 April 2008, No. 06-15.193: RJDA 7/08 No. 817.

annual budget, and (iii) structural decisions affecting the balancing of affairs or the agreement in relation to LBO transactions.

Some of these rights may be directly attached to preferential shares as detailed in Newco's by-laws.

2. Consequences of such involvement: the risk of qualification as *de facto* manager and examples of sanctions

When shareholders are in a position to exercise a certain degree of influence on the management of a company they risk being held as *de facto* managers. However, a majority shareholding in itself is not considered as sufficient evidence to justify such a finding. The person or entity in question must have been involved in acts of management. Illustrations of cases where this has been the case are not difficult to find:

(i) the French *Cour de cassation* held that a majority shareholder was a *de facto* manager by undertaking, in a regular and continued fashion, a positive role in management, in particular by negotiating with suppliers for the purchase of goods for the company;[12]

(ii) a shareholder with 38% of the share capital was held to be a *de facto* manager on the basis that he had attended numerous board meetings without being a board member, signed letters as a director without having the status and authority to do so and had benefitted from a company car;[13]

(iii) as part of a claim for shortfall of assets in insolvency proceedings, the French *Cour de cassation*[14] upheld the decision of the Court of Appeal of Bordeaux, which held that a member of a supervisory board liable to bear all of the company's liabilities where the by-laws provided that the prior authorisation of the supervisory board was required for any financial transaction exceeding FF 1,000 (i.e., EUR 150). This threshold was considered to be excessively low and thereby empowered the members of the supervisory board with real management powers.

More particularly, with implied consent of the shareholders of the company, the member of the supervisory board was in fact granted with executive powers and accordingly took control of the management of the company (e.g., he ordered specific goods on behalf of the company).

Finally, the French *Cour de cassation* added that nothing could have been done without the member of the supervisory board's consent and ordered him liable to pay for all of the company's liabilities.

2.1. De facto management

As a preliminary remark, it is worth noting that the clauses referred to in section 1 above limiting the statutory powers of Newco or target's legal representatives are, generally speaking, unenforceable against third parties but potentially increase the risk of the FCPRs' management company being considered as *de facto* manager.

If it can be proved that a management company or its directors, employees or shareholders have in fact, all the powers to act as the real management of Newco and/or target and to run and manage these companies as if they were statutory managers, they may be considered as *de facto* managers and as such, subject to the same sanctions as statutory managers.

According to French case law,[15] a *de facto* manager is an individual who, or a legal entity which, has not been appointed as statutory manager but carry out management of the legal entity (e.g., company or association) with absolute and independent power that decisively influences the legal entity.

However, liability as a *de facto* manager requires regular involvement in the daily management of the companies held in the FCPR's portfolio and, in this process, the carrying out of acts of mismanagement. Being a *de facto* manager is not a liability *per se*. It only becomes one when the *de facto* manager mismanages the company or commits an offence specific to managers (e.g., misappropriation of corporate assets: '*abus de biens sociaux*' or distribution of fictitious dividends: '*distribution de dividendes fictifs*').

The qualification of *de facto* manager is a question of fact that is left to the assessment of the lower courts. The French courts will refer to a wide range of corroborating evidence ('*faisceau d'indices convergents*') in relation to the behaviour of the *de facto* manager in question and the overall circumstances of the matter.

The Court of Appeal of Versailles has tended to adopt a particularly wide interpretation of the concept of *de facto* manager. In one case, the Court held a bank (Worms bank) liable to pay the company's debt in its position as *de facto* manager due to its acts of

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12 Cass. Com., 25 January 1994, No. 91-20.007.
13 CA Paris, 11 October 1996.
14 Cass. Com., 11 March 1986, No. 84-12.967.
15 CA Paris, 16 December 1997, JCP E 1998, 718, p. 250.

mismanagement in the management, control and surveillance of the company.[16]

The Court of Appeal of Versailles held Worms bank liable to bear all the SPAD 24 SA's liabilities for management fault in its position as a *de facto* director.

Worms bank, that indirectly held 20% of the share capital of SPAD 24 SA, prudently decided not to accept any executive functions or office within SPAD 24 SA but allowed two of its directors (its executive officer and its equity director), to be nominated as members of the Board of Directors of SPAD 24 SA.

The Court of Appeal of Versailles determined that the under-capitalised company, SPAD 24 SA, granted cash advances to holding and real estate companies belonging to the same group. The cash advances exceeded the financial capacity of each of these companies to repay them.

In the context of a judicial liquidation of companies belonging to the same group as SPAD 24 SA, of which SPAD 24 SA was a shareholder, the court held that Worms bank was acting in the position of a *de facto* director of SPAD 24 SA through the involvement of its two directors appointed to SPAD 24 SA. As *de facto* director, the court thereafter held the bank, with its two directors, liable to bear SPAD 24 SA's liabilities, which amounted to EUR 44 million, for their mismanagement of the insolvent companies. The bank's mismanagement resulted from the misconduct of these two directors in the management, control and monitoring of SPAD 24 SA.

The Court of Appeal held that the finding that Worms bank was a *de facto* director resulted from its managers' performance as directors of SPAD 24 SA, as the managers were acting under the authority and orders of the bank.

Worms bank was accordingly held to be a *de facto* director of SPAD 24 SA. It was also to note that the two managers of Worms bank in their capacity as directors of SPAD 24 SA were held liable together with Worms bank, notwithstanding that they were acting under the bank's authority.

2.2. Extended definition of mismanagement

Mismanagement may result from positive acts, such as a breach of the company's by-laws, and omissions, such as the failure to supervise a company's chairman or managing director. Therefore, *de facto* managers may be held liable for the errors made by the statutory managers if their supervision could have prevented them.[17]

Even though their number has been declining in recent years, mismanagement claims are not uncommon and may rise again if the economy deteriorates as anticipated. It should be noted that a liquidator is paid proportionally to the amount of claims recovered so that, for this reason, the liquidator has a personal interest in pursuing such claims.[18]

For a mismanagement claim to be brought against statutory or *de facto* managers, the following four criteria must be met:

- the legal entity must be in liquidation;
- an act of mismanagement must be proved;
- there must be a deficiency of assets linked with the legal entity's debts, which is almost always the case in a liquidation proceedings; and
- a causal link must exist between the act of mismanagement and the deficiency of assets.

Mismanagement claims are only effective if a causal link can be established between the mismanagement and the deficiency of assets. If there is no such link and the mismanagement did not contribute to the shortfall of assets, then the managers will not be held liable.

The existence of a causal link is of course subject to the courts' evaluation of the facts which can lead to varied and unpredictable results. This uncertainty is particularly destabilising where significant losses may potentially be transferred to individuals, if such links are found.

Mismanagement claims may be brought by either the liquidator[19] or the public prosecutor. Alternatively, if the liquidator and the public prosecutor fail to or decide not to act, the controllers[20] may take action. If the liquidator fails to answer a formal notice sent by at least two controllers within two months from the date of reception of the formal notice, the majority of them will then be allowed to file a claim in lieu of the liquidator.

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16 CA Versailles, 13e ch., 29 April 2004, Chouraqui et a. c/ Me. Segard eta., Juris-Data No. 2004-246087. The decision of the Court of Appeal of Versailles was confirmed by the French *Cour de cassation:* Cass. Com., 27 June 2006, No. 0415-831, Bull. No. 922.

17 Cass. Com., 3 January 1995.

18 Articles R. 663-29 *et seq.* of the French Commercial Code.

19 In judicial liquidation ('*liquidation judiciaire*'), a judicial liquidator ('*liquidateur judiciaire*'), selected from the list of registered creditors' representatives ('*mandataires judiciaires*'), is appointed by the commercial court. His role is to represent the debtor and he is entitled to initiate legal actions on behalf of the creditors as a whole. He also receives and verifies the proofs of claims.

20 Up to five creditors can be appointed as controllers ('*contrôleurs*'). Their role consists in (i) the supervision of the proceedings and (ii) a duty to assist the creditors' representative (verification of debts) and the insolvency judge ('*juge-commissaire*') in his/her supervisory role of the insolvency procedure.

2.3. Potential sanctions imposed in case of shortfall of assets caused by acts of mismanagement

2.3.1. Financial sanctions

In a liquidation scenario ('*liquidation judiciaire*'), pursuant to Article L. 651-2 of the French Commercial Code, the management, either statutory or *de facto,* of the insolvent legal entity may be sued for mismanagement and held liable for all or part of the shortfall of assets. The extent of such liability will usually depend on management's involvement in the legal entity, its behaviour, the level of information known and the type of mismanagement involved.

Courts have very broad power when deciding on the amount a manager will be liable to pay. Article L. 651-2 merely states that a director may be ordered to pay 'all or part' of the shortfall of assets. The court is not obliged to impose such a sanction, but if it does, it has the ability to adjust its order according to the facts before the court.

The maximum liability that can be imposed by the courts is, in principle, the amount of the deficiency of the company's assets over its debts. In addition, directors who are considered as third parties *vis-à-vis* the company, can bring a civil claim against any individual or legal entity, including the statutory auditors of the company,[21] if a fault can be evidenced in fulfilling their missions and which contributed to or caused the loss.[22]

Several factors have been held to be relevant when determining individual liabilities including:

– the director's independence; and
– the conditions under which the director came to manage the company and the amount of freedom he was granted in the decision making process.

The court is not obliged to have any regard to whether or not the director received remuneration or whether internal arrangements existed as to the share of liability of the company's debts.

2.3.2. Professional sanctions

The panoply of civil sanctions that may apply includes professional sanctions. Professional sanctions result in a manager being banned from running, managing, administrating or controlling a company or association. According to Articles L. 652-1 and L. 653-4 of the French Commercial Code, statutory or *de facto* managers may risk such sanctions when they:

– dispose of the legal entity's assets as though they were their own;
– hide behind the legal entity to undertake commercial transactions for their own interest;
– use the legal entity's assets or credit against the legal entity's interest, for personal gain, or to benefit another company in which they have a direct or indirect interest;
– wrongfully pursue, in their personal interest, a loss-making transaction, which could only lead to the insolvency of the legal entity; or
– misappropriate or conceal all or part of the legal entity's assets, or fraudulently increase the debts of the legal entity.

In addition to these situations, Article L. 653-5 of the French Commercial Code also provides a list of events in relation to which a claim attracting such sanctions may be initiated, namely when the statutory or *de facto* managers:

– with the intention of avoiding or delaying the opening of an insolvency procedure, make acquisitions with a view to resale below market price, or used reckless means to raise funds;
– undertook financial commitments for others, for no consideration, for too great an amount given the financial situation of the legal entity; or
– after cessation of payments, and with knowledge of cessation of payments, paid, or had paid a creditor to the detriment of other creditors.

In any of the situations in which such sanctions may be imposed, Article L. 653-8 of the French Commercial Code provides that any of the statutory or *de facto* managers may be banned from managing, running and controlling, directly or indirectly any company, including companies which do not undertake economic activities, and/or any business.

2.3.3. Criminal sanctions – '*la banqueroute*'

Both statutory and *de facto* managers may also face criminal sanctions: '*la banqueroute*'. Such criminal sanctions will only apply if insolvency or liquidation proceedings have been opened against the legal entity in question. Article L. 654-2 of the French Commercial Code lists the situations in which criminal sanctions may be imposed, namely if statutory or *de facto* managers:

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21 Cass, Com., 2 July 1973, D.73, p. 674, note Y. Guyon.
22 The civil claim will be brought before the French civil courts under general civil liability rules (Articles 1382 and 1383 of the French Civil Code).

- raised funds by reckless means, or made acquisitions with a view to resale below market price, in order to delay or avoid the opening of insolvency proceedings;
- misappropriated or concealed all or part of the debtor's assets;
- fraudulently increased the debtor's debt;
- falsified, destroyed or failed to keep proper accounts; or
- maintained manifestly incomplete or irregular accounts in contravention of the law.

In accordance with Article L. 654-3 of the French Commercial Code, this offence may only be prosecuted before criminal courts and is punishable by a maximum of five years imprisonment, a EUR 75,000 fine for individuals plus additional sanctions and a EUR 375,000 fine for legal entities.

3. A range of cautious measures and guidelines

The main objective for management companies is to have control without managing the target group and therefore a fair balance between these sometimes competing objectives must be reached. In this respect, FCPRs wish to monitor the management of the target group in which they have invested without being qualified as *de facto* managers (or co-employers) and possibly incurring significant sanctions.

As to the corporate governance structure to adopt in Newco, it is still recommended to keep a dualistic structure ('*directoire*': executive board and '*conseil de surveillance*': supervisory board) in a SAS, with the necessary adjustments to allow for more flexibility than a SA. In such a structure, management are members of the '*directoire*' and financial investors are members of the supervisory board.

In addition, provisions of the shareholders' agreement must be carefully drafted, and should not involve financial investors in daily management.

In a LBO shareholders' agreement, it might be wise and cautious to carefully limit the decisions that require prior authorisation of financial investors. These should be limited to strategic and significant financial decisions for Newco (approval of the budget, investment, divestments, loans), and to expressly exclude those in relation to daily current management. Decisions such as the recruitment of an employee or the initiation of legal claims may be referable to the financial investors but they must be determinable according to thresholds set by the company itself.

One could also contemplate a contractual loosening of the prior authorisation regime during the course of the LBO in order to allow financial investors lesser control, once 'cruising speed' with the management is reached, and notably over the target group's operating companies.

It may also be relevant for financial investors to refer to financial covenants to determine which decisions require prior authorisation, since the banker's involvement and interventionism has for a while been subject to the same *de facto* management issue.[23]

Finally, in the context of a crisis, financial investors should also take care of:

- not delaying an inevitable filing of declaration of cessation of payments;
- not trying to recover all or part of their claims because of the company's financial difficulties; and
- not making management decisions or set-up a policy contrary to the company's corporate interest.

Notes

23 Given that the involvement of banks may go beyond offering financial support to companies and businesses, their directors are frequently pursued for liability when one of their clients becomes insolvent. Most often, claims are commenced under Article 1382 of the French Civil Code, for wrongfully supporting a company in cessation of payments. However, claims have also been brought under Article L. 651-2 of the French Commercial Code, where the claimant tries to show that the bank became a *de facto* manager of the company in cessation of payment.