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## *The Liability of Creditors in French Insolvencies*

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# **The Liability of Creditors in French Insolvencies**

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## **Introduction**

Companies may over the course of their working lives form close relationships, often running joint accounts for the supply of goods and materials, often receiving and extending credit, often offering ease of payment and credit terms. A creditor, however, may find himself the object of sanctions if his behaviour is deemed to have contributed to the insolvency of the debtor. This may occur where the creditor has given or extended credit, supplies or other means to the debtor, which were beyond the capacity of the debtor to handle appropriately. In this situation, the creditor may be held liable to the insolvency for the benefit of other creditors. Similarly, a creditor may be held liable to the insolvency for improperly withdrawing credit or credit facilities or supplies, leading inexorably to the insolvency of the debtor company.

Liability may also attach where the creditor through his actions is seen to take part in the management of the debtor company in such a way as to influence decisions of the debtor company. A creditor in this situation may be treated in effect as a shadow director of the company and be liable to the insolvency for acts carried out by the company and to contributing to the insolvency for any financial consequences of these acts. Equally, a creditor may become involved because of this status as an accessory to criminal acts, leading to criminal penalties in addition to civil ones.

## **A. The Extension of Credit**

### **The Foundation of Liability**

A creditor is liable to the insolvency if he knowingly supplies credit to a business that is in a compromised situation.<sup>1</sup> Liability may also result from failure to supervise the use to which the credit is put if this condition is attached to the supply of credit. Although this clause is more often applicable to banking services and overdrafts, a creditor may find himself liable for failing to supervise in the case of inter-company loans and other credit facilities.<sup>2</sup> The action against the creditor at fault is normally brought by the creditors' representative. A creditor may also be liable to a third party, for example a guarantor whose guarantee is subsequently called in.<sup>3</sup>

Proof of whether a creditor is aware of the situation must be brought by the party making the allegation.<sup>4</sup> It is nevertheless open to the judges hearing the case to make a finding that, given the state of facts and evidence, the creditor was to be regarded as being perfectly aware of the perilous situation of the debtor.<sup>5</sup> A link

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<sup>1</sup>Cassation commerciale, 26 April 1994, RJDA 10/94 No. 1050.

<sup>2</sup>Cassation commerciale, 18 May 1993, Bull. Civ. IV No. 190.

<sup>3</sup>This liability may be based on the provisions of Art. 1382, Civil Code.

<sup>4</sup>Cassation commerciale, RJDA 3/92 No. 237.

<sup>5</sup>Cassation commerciale, 1 February 1994, Bull. Civ. IV No. 39.

between the fault attributable to the creditor and the insolvency must be shown.<sup>6</sup> If the insolvency is shown to result from the action of a third party, such as one of the company's debtors failing to make payment, or if the creditor's contribution to the insolvency is negligible, then the creditor will escape liability.<sup>7</sup>

### **Defences to Liability**

The creditor may raise several defences to an allegation of improper financial assistance. The creditor may allege that he was not properly informed or entitled to be informed of the situation in which the debtor was to be found. This is especially so if the creditor wishes to avoid any accusation of being involved in the management of the company, for which liability could be found. Nevertheless, creditors are required to be vigilant and liability may attach if it is held that it would be reasonable to presume that the creditor could not have been unaware of the situation.<sup>8</sup> Similarly, it may be held that the creditor had the necessary information or means at his disposal and ought to have made enquiries, in default of which liability will attach.<sup>9</sup>

A creditor may also allege that there was sufficient backing for the company by the public authorities which did not lead the creditor to assume that the situation was compromised. This is especially the case if the company in question is considered by the authorities as being a vital business, when public subsidies or other support may be given, in which case a bank or supplier would have no reason not to continue furnishing credit. A creditor in this situation may have no option than to participate in a rescue plan.<sup>10</sup> This may also be the case if pressure is brought to bear on creditors to ease restrictions on credit.

### **Consequences of Liability**

The contribution of the creditor is equal to the difference between the results of the insolvency proceedings in the instant case and what they would have been if the creditor had not contributed to artificially prolonging the life of the company.<sup>11</sup> There may be two distinct contributions that the creditor is required to make. Firstly, he may be required to contribute to the collective loss suffered by all the creditors. Secondly, he may be required to meet any individual claims arising from losses individual creditors have suffered. The collective loss has been 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 have held that this also includes any depreciation on the debts suffered by the creditors and any loss of interest.<sup>12</sup> Individual loss has been defined not to include the direct loss attributable to the insolvency, but does include commercial losses suffered by the loss of a trading partner and future profits.<sup>13</sup>

## **B. The Withdrawal of Credit**

<sup>6</sup>Cassation commerciale, 24 March 1992, JCP éd E 1993.pan.240.

<sup>7</sup>Cassation commerciale, 2 May 1983, D.1984.IR.89.

<sup>8</sup>Cassation commerciale, 22 July 1980, Bull. Civ. IV No. 317.

<sup>9</sup>Cassation commerciale, 18 January 1994, BRDA 94-4 p10.

<sup>10</sup>Cassation commerciale, 9 November 1993, Bull. Civ. IV No. 384.

<sup>11</sup>Cassation commerciale, 11 October 1994, D.1994.IR.240.

<sup>12</sup>Cassation commerciale, 25 November 1986, D.1987.jur.88.

<sup>13</sup>Cassation commerciale, 15 July 1982, Bull. Civ. IV No. 233.

There are two points at which liability may arise for a creditor in the situation of supplying credit to the debtor company. First, where the creditor wrongfully withdraws credit, which may be one of the key factors in prompting the debtor to enter insolvency proceedings. Second, where during insolvency proceedings, the creditor, whose contract continues by virtue of the provisions of the law on insolvency withdraws from the contract or fails to continue with the contract, which could compromise the success of insolvency proceedings.

### **Pre-Insolvency**

All contracts have to be examined to ascertain what terms they employ to offer either party the opportunity to escape being bound to continue performing the contract. Nevertheless, where a contract does not provide that reasons need be given, a creditor is not required to state why the contract is being terminated, though the decision to terminate must be sufficiently clear and unequivocal.<sup>14</sup> The law distinguishes between contracts which have a term to run and unlimited contracts. In the first instance, the contract naturally comes to an end at the date and premature termination will entitle the other party to damages, unless it can be shown that the termination is entirely due to the other party being in breach of its promises.<sup>15</sup> Contracts which have no set term are subject to proper notice being given, defined to mean clear notice given reasonably in advance of the date services are to cease.<sup>16</sup>

Contracts for the supply of credit, which are considered to be contracts of a personal nature,<sup>17</sup> are also subject to an exception, permitting a banker who has lost trust in the client to refuse to perform the agreement unless the other party is in a position to fulfil their obligations. It seems that a simple loss of trust will not entitle the banker to terminate the contract and damages are due for any breach deemed unlawful.<sup>18</sup> In a limited number of circumstances, termination of the credit contract may be performed without notice if the client has committed unlawful or fraudulent acts, such as issuing cheques without funds being available or despite a legal prohibition as well as producing false accounts and other falsified documents.<sup>19</sup> Termination of a contract by any other means will put the banker at fault and entitle the client to claim damages.<sup>20</sup>

A difficulty arises with the exception recognised at law that a creditor may cancel any credit given where the debtor is in a financial situation which is compromised. This is especially difficult for suppliers of credit, given that liability may attach for over-supply of credit, covered above. It is a delicate task to ascertain whether the debtor has reached an impasse in his financial arrangements that will not permit of a solution. Generally, a clear indication will be that the debtor has filed a declaration of cessation of payments, the formal precondition to the opening of insolvency proceedings.<sup>21</sup> However, a creditor may well find himself too late to

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<sup>14</sup>Cassation commerciale, 18 May 1993, Bull. Civ. IV No. 189.

<sup>15</sup>Cassation commerciale, 4 June 1991, No. 846-D.

<sup>16</sup>Cassation commerciale, 20 October 1982, D.1983.IR.466.

<sup>17</sup>Intuitu personae.

<sup>18</sup>CA Amiens, 4 October 1991, RPC 1992.314.

<sup>19</sup>Article 60, Law no. 84-46 of 24 January 1984.

<sup>20</sup>Cassation commerciale, 19 November 1985, Gaz. Pal. 1986.1.pan.

<sup>21</sup>Cassation commerciale, 25 February 1992, Les Petites Affiches, 15 February 1993, p.8.

present the debtor with notice of termination given that the effect of any purported termination will be subject to the provisions of the law on insolvency, which will be examined next.

### **During Insolvency**

The law on insolvency has opted for the continuation of business as a priority by providing that only the administrator may elect to continue or not any contracts current at the time insolvency proceedings are opened. A creditor may not elect to terminate any such contract, unless the administrator has failed to reply to a formal notice enquiring whether the contract is to continue within a month. Before this period expires, the administrator may obtain a further grace period for consideration on application to the supervising judge.<sup>22</sup>

The creditor is required to fulfil his part of the bargain, irrespective of any breaches of condition or warranty or failure to perform by the debtor prior to the judgment commencing the observation period.<sup>23</sup> Any liability resulting from these prior breaches may be proved as a debt, either through terms of the contract, if this provides for a calculation mechanism, or litigation. Performance by the creditor is not completely unilateral in nature as the administrator is bound to provide immediate payment for services rendered unless the creditor agrees to accept a delay. On the other hand, if the contract is one for payment by tranche, the administrator may still terminate the contract if it appears to him that he will not have the means to make all payments when due.<sup>24</sup> Where the administrator does not use the facility to perform the contract, his failure may give rise to damages, which will be calculated less any amount already paid in performance of the contract.<sup>25</sup> Any calculation of damages will be made by the supervising judge.<sup>26</sup>

The fact that only the administrator has the capacity to act is not without consequence for the creditor who seeks to terminate the contract. Even if a creditor has served the requisite notice before insolvency proceedings were instituted, the supervising judge may well order the creditor to continue supplying the debtor, subject to the proviso that payment for further supplies is made as and when deliveries are performed.<sup>27</sup> The only exception to this is the possibility that properly served notice according to the terms of Article 60 of the Law of 1984 dealing with banking may, despite the customer entering insolvency proceedings subsequently, entitle the banker to terminate the contract.<sup>28</sup> All other contracts, once continued, give rise to the same obligations on the part of the administrator and the creditor and any breaches will give rise to liability.

### **C. Taking Part in Management**

Where the relationship between debtor and creditor goes beyond mere commercial relations, there may be questions of interdependency and close

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<sup>22</sup>L. Art. 37 al. 1. References are to Law no. 85-98 of 25 January 1985 ('Law of 1985').

<sup>23</sup>L. Art. 37 al. 3.

<sup>24</sup>L. Art. 37 al. 2.

<sup>25</sup>L. Art. 37 al. 5.

<sup>26</sup>Cassation commerciale, 8 December 1987, Bull. Civ. Nos. 266, 267.

<sup>27</sup>L. Art. 40 (payment for services during insolvency a priority).

<sup>28</sup>This exception is also available to bankers for breaches by the administrator during performance of the contract.

management relations which may result in a creditor acquiring the status of a shadow director. Once this status is established, civil liability may result in two possible situations. First, the extension of judicial administration proceedings and, second, the imposition of personal bankruptcy.

### **Shadow Directors**

A person enjoys the status of a shadow director where he exercises the powers of an director to the extent that he is able to make financial and commercial decisions which bind the company.<sup>29</sup> This may occur where he exercises influence on the directors so that they act in accordance with his instructions.<sup>30</sup> A company which satisfies the above conditions may be considered to have the status of a shadow director, in which case its representative may be held jointly and severally liable with the company itself for the debts of the insolvent company.<sup>31</sup> Close economic dependence, which is often the case in groups and may be characterised by inter-company loans and supply or credit facilities may result in liability for a creditor in this position if it, as a holding company, is considered to exercise the role of a shadow director in one of its subsidiaries, especially if it plays an important role in management decisions.<sup>32</sup> A holding company may also be held liable where both companies give the appearance of being interdependent and under the same management.<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup>

### **Extension of Judicial Administration**

Company directors may be the subject of an action for personal liability where the company is insolvent and its assets are insufficient to repay the debts of the company. An essential prerequisite is that the company is first placed under judicial administration or is in liquidation.<sup>36</sup> The action may be brought by the administrator, creditors' representative, liquidator or the public prosecutor. Proceedings may also be opened by the court itself, the result being in this case that the court acts simultaneously as both plaintiff and judge.<sup>37</sup> When the debtor company is the subject of judicial administration or liquidation, creditors may not institute personal liability actions against the company directors.<sup>38</sup> Any decision by those individuals

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<sup>29</sup>Dirigeant de fait.

<sup>30</sup>CA Versailles, 20 January 1994, RJDA 94-4 no. 461.

<sup>31</sup>TC Paris, 5 January 1994, RJDA 94-4, no.456.

<sup>32</sup>CA Aix-en-Provence, 26 May 1981, D.1983.IR.60.

<sup>33</sup>Cassation commerciale, 18 October 1994, no.1951D, Mémento des Sociétés Commerciales no. 3396.

<sup>34</sup>Cassation commerciale, 8 February 1994, Les Petites Affiches 24 May 1995 No. 62, p. 33.

<sup>35</sup>See Identite ou diversite des notions de fictivite et de confusion des patrimoines, Soinne B., Les Petites Affiches, 6 December 1995, p. 12.

<sup>36</sup>L. Art. 179.

<sup>37</sup>L. Art. 183.

<sup>38</sup>CA Paris, 10 July 1987, RPC.1988.437.

authorised by law to take action not to do so will deprive creditors of their right to pursue directors for the repayment of debt.

The court has a wide discretion to investigate an alleged offence and may permit the supervising judge or another member of the court to have access to any records tending to show the financial situation of the directors in question. This information may be obtained, notwithstanding any other legal provision to the contrary, from public bodies, credit and lending institutions, insurance companies or social security offices in order to enable the court to assess the financial resources of the director available to meet any judgment.<sup>39</sup>

The sole criterion for application of the law is that the insolvency proceedings in respect of the company have revealed a deficiency in the assets to which the director is found to have contributed.<sup>40</sup> In addition, the directors of an insolvent company which is under judicial administration will also be subject to judicial administration where they have failed to discharge their liability for contributions to the repayment of the company's debts.<sup>41</sup> The same applies in situations where they have:

- (i) used the company's assets as their own;
- (ii) used the company to carry out their personal business;
- (iii) used the company's assets or credit for personal gain contrary to the company's interest or for the benefit of another company in which they have a direct or indirect interest;
- (iv) conducted the business of the company in an abusive manner for personal gain, resulting in the insolvency of the company;
- (v) destroyed, falsified or failed to keep proper accounts;
- (vi) misappropriated or concealed company assets or fraudulently increased the company's debts.<sup>42</sup>

It must be proven generally that the director in question was guilty of mismanagement which caused the loss of assets that contributed to the company being unable to meet its debts. The liability of company directors must be shown by a causal link between the act of mismanagement and the debt which arises.<sup>43</sup> It is not necessary to prove a direct link between a specific act and the damage which results.<sup>44</sup> It need not be the main or only cause. The concept of mismanagement is left undefined in the law and courts have therefore had to decide on a definition of mismanagement on a case to case basis. The most common findings of mismanagement have been where company directors:

- (i) have allowed the company to trade while manifestly insolvent;
- (ii) have embarked on projects beyond the company's financial capacity and which were not in its best interests;<sup>45</sup>
- (iii) have engaged the company in transactions, neither at arm's length nor of a commercial nature;

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<sup>39</sup>L. Art. 184.

<sup>40</sup>L. Art. 180 al. 1.

<sup>41</sup>L. Art. 181.

<sup>42</sup>L. Art. 182.

<sup>43</sup>Cannu et al., *Entreprises en Difficulté*, Joly, 1994, no.1652.

<sup>44</sup>L. Art. 180 al. 1.

<sup>45</sup>CA Aix-en-Provence, 9 December 1993, D.95.33.475.

(iv) have improperly extended credit beyond the company's means, relying simply on the banks to meet the company's cash flow needs.<sup>46</sup>

A court may fix the proportion in which directors may be liable to contribute. A court is not required to consider whether or not the director in question was remunerated for his services nor whether any internal arrangements existed to indemnify directors against liability. The maximum liability that may be imposed by a court is the difference between available assets and the sum necessary to meet its debts, regardless of whether or not the director in question was entirely responsible for the debt occurring.<sup>47</sup> Company directors are at liberty to institute civil proceedings against any third parties who may have contributed to or occasioned the loss being suffered, provided they have already satisfied the judgment of the court imposing personal liability. They may not, however, institute proceedings against their fellow directors for contributions.<sup>48</sup>

Any action must be brought within 3 years of the judgment of the court which approves the recovery plan for the company or orders that the company be placed in liquidation.<sup>49</sup> The amounts paid by the directors held personally liable for the company's debts are applied to either the reduction of the company's debts in accordance with the recovery plan or, in the case of a liquidation, the payment of creditors in accordance with their statutory ranking.<sup>50</sup> The procedure for the judicial administration of the directors of an insolvent company is similar to that applied to the company itself. The business affairs of the director will be examined and any suspect transactions during the period of relation back will be open to question. A judgment which finds that a director is personally liable for mismanagement may be enforced directly against the assets of a director. The order is directly enforceable and may be executed immediately, subject to suspension on application to the President of the Court of Appeal, who must be satisfied there exist good grounds for ordering a stay of execution.<sup>51</sup>

### **Personal Bankruptcy of Company Directors**

At any time during insolvency proceedings, the imposition of personal bankruptcy is an option open to the court. This rule applies to all commercial persons, all persons who directly or indirectly, as an appointed director or acting as a shadow director, managed or liquidated a private-law body which carried out business activities as well as to representatives of other entities which acted as directors of the subsidiary body.<sup>52</sup> The consequences of personal bankruptcy include a prohibition against managing any commercial enterprise.<sup>53</sup> The right to petition for the bankruptcy of a company director is limited to the administrator or liquidator of an insolvent company, the creditors' representative and the public prosecutor. A court may also initiate personal bankruptcy proceedings of its own motion.<sup>54</sup>

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<sup>46</sup>Cassation commerciale, 9 May 1995, Dict. Perm. des Diff. des Entreprises, Bulletin 138. 243, p. 7339.

<sup>47</sup>Cassation commerciale, 30 November 1993, Bull. Civ. IV No. 440.

<sup>48</sup>Cassation commerciale, 6 June 1995, RJDA 95-7, no. 903.

<sup>49</sup>L. Art. 180 al. 2.

<sup>50</sup>L. Art. 180 al. 3.

<sup>51</sup>L. Art. 155.

<sup>52</sup>L. Art. 185.

<sup>53</sup>L. Art. 186.

<sup>54</sup>L. Art. 191.

Persons considered directors of an insolvent company may be declared bankrupt in any of the following situations:

- (i) where extension of judicial administration to directors is justified;<sup>55</sup>
- (ii) where the company has been allowed to engage in illegal activities;
- (iii) where funds have been raised by reckless means, including the sale of company assets at under value, to delay eventual insolvency;
- (iv) where the company has been bound to a significant transaction for the benefit of a third party without any concomitant benefit;
- (v) where an unfair preference occurred after the declaration of insolvency;
- (vi) where judicial administration proceedings were not launched within 15 days of it becoming insolvent;<sup>56</sup>
- (vii) where directors have failed to pay company debts for which the court has found them to be personally liable.<sup>57</sup>

In any of the instances where a court may impose personal bankruptcy, as an alternative to such an order, a court may simply prohibit an director from managing or directing, whether directly or indirectly, any business engaged in economic activity. The prohibition may be limited to the management of one or several companies, as opposed to within personal bankruptcy, which involves a general prohibition.<sup>58</sup> The prohibition also extends to any debtor or company director, acting in bad faith, who has failed to supply the administrator with a list of the creditors and the amounts of the debts within eight days of the opening of insolvency proceedings.<sup>59</sup>

Anyone who has been subject to an order declaring him personally bankrupt or prohibited from being involved in the management of a company must refrain from voting in general meetings of the debtor company. In these instances, the court will appoint a representative to exercise any voting rights attached to the company director's shareholding.<sup>60</sup> Any person subject to an order imposing personal bankruptcy or prohibited from managing or directing a company or anyone subject to an order placing him in liquidation proceedings is prohibited from holding any public office.<sup>61</sup>

The court imposing sanctions, including personal bankruptcy or a prohibition from being involved in the management of any company, is obliged to set a term for the duration of these sanctions, which may not be less than five years. Similarly, the prohibition against holding public office may not be less than the five-year period required by law. If, however, the person subject to these sanctions has paid a sufficient contribution towards extinguishing the company's debts, he may petition the court to lift all or part of the sanctions imposed by it.<sup>62</sup>

#### **D. Accessory to Criminal Acts**

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<sup>55</sup>L. Art. 188.

<sup>56</sup>L. Art. 189.

<sup>57</sup>L. Art. 190.

<sup>58</sup>L. Art. 192 al. 1.

<sup>59</sup>L. Art. 192 al. 2.

<sup>60</sup>L. Art. 193.

<sup>61</sup>L. Art. 194.

<sup>62</sup>L. Art. 195.

The sanctions provided for in Title VII of the Law of 1985 apply to all commercial persons, all persons who directly or indirectly, as an appointed director or acting as a shadow director, managed or liquidated a private-law body which carried out business activities as well as to representatives of other entities which acted as directors of the subsidiary body.<sup>63</sup> This definition would necessarily cover a creditor acting as a shadow director as discussed in the previous section, but opens up that creditor to criminal penalties, where liability arises from acts, classified as being constitutive elements of criminal bankruptcy, as well as a variety of other offences.

### **Criminal Bankruptcy**

In the event of judicial administration or liquidation proceedings being instituted, any person to whom the above is applicable may be found guilty of criminal bankruptcy where that person:

- (i) engages in raising funds by reckless means, such as the sale of assets at under value, in order to delay the onset of insolvency;
- (ii) misappropriates or conceals assets belonging to the company;
- (iii) fraudulently increases the debt owed by the company;
- (iv) falsifies, destroys or fails to keep those accounts required by law.<sup>64</sup>

The definition of what constitutes reckless means has been the subject of judicial interpretation. In one instance, a banker was found guilty of abetting the act of criminal bankruptcy by providing excess credit.<sup>65</sup> The same may be true of any other creditor who provides excessive credit or supplies. Normally, the provision of excess credit or means of finance which only serve to further in debt the business will found an action brought by a liquidator in the interests of other creditors with view to a finding of contribution by the bank.<sup>66</sup> Following the adoption of the Law of 1985, preferential payments to creditors no longer constitute an offence punishable by criminal law, although civil sanctions and a finding of liability for a contribution may apply.<sup>67</sup>

Accomplices to the fact may also face criminal sanctions whether or not they have the quality of commercial persons themselves, or does it matter whether they hold a management or shadow position, directly or indirectly, in the debtor company. They need simply have contributed to the existence of the debt. In addition to facing possible bankruptcy or prohibition against being involved in the management of a company, company directors guilty of criminal acts may face imprisonment for a term of 5 years together with a fine of FF 500,000.<sup>68</sup> Where the company concerned is quoted on the stock exchange, the penalties are increased to 7 years and FF 700,000 respectively.<sup>69</sup>

Where the author or accomplice to an act is an individual, the courts may additionally impose the following penalties, including the loss of civil rights,

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<sup>63</sup>L. Art. 196.

<sup>64</sup>L. Art. 197.

<sup>65</sup>Cassation criminelle, 3 April 1991, JCP 92 éd E I.154.11.

<sup>66</sup>Cassation commerciale, 11 October 1994 no. 1802P, BRDA 94-20, p. 7.

<sup>67</sup>Cassation criminelle, 21 June 1993, Les Petites Affiches 26 January 1994, p. 20.

<sup>68</sup>L. Art. 198.

<sup>69</sup>L. Art. 199.

disqualification from being involved in the management of a company up to a maximum of five years or from exercising a profession where the offence was committed through a breach of professional rules, exclusion from a stock-exchange, also for a period of up to five years and loss of banking privileges, including the right to issue cheques. All these penalties may in addition be publicised.<sup>70</sup> The criminal court before which proceedings are held may decide that the individuals mentioned in Article 196 be pronounced personally bankrupt or that a disqualification from being involved in the management of a company apply to them.<sup>71</sup> Private-law bodies may face a finding of criminal liability and the imposition of fines and other penalties.<sup>72</sup>

### **Miscellaneous Offences**

Company directors may also be subject to imprisonment and a fine for criminal acts other than mismanagement. A company director, who may be subject to a term of 2 years imprisonment and/or a fine of FF 200,000 if during the period of observation he grants a mortgage over company property or otherwise disposes of company funds without proper authorisation or pays part or all of a debt which arose after the institution of insolvency proceedings.<sup>73</sup> Accomplices to the dissipation or dissimulation of assets acting in concert with those individuals mentioned in Article 196, persons who fraudulently declare non-existent debts and persons who have carried out business activities in the name of another person or using a false identity so as to conceal assets are all liable if found guilty to the same penalties provided for in the case of criminal bankruptcy.<sup>74</sup> This rule also applies to the spouse and relatives of any of those individuals.<sup>75</sup>

### **Summary**

Although much of the law relating to the supply and withdrawal of credit is derived from the relationship between banks and their customers, it is potentially applicable to other creditors in a variety of situations. Similarly, the rules derived from civil and criminal liability provisions of the Law of 1985 are most often found in the context of directors' liability. Nevertheless, both these sets of rules are of potential application to the creditor unwise enough to become enmeshed in the activities of the debtor. One of the more important consequences of a finding of liability is that the creditor may not seek to set off his debt against any award of damages. This is a clear principle of French law.<sup>76</sup> This is in addition to the other liabilities discussed above. For these reasons, creditors must be wary of too close a relationship, not otherwise justified by commercial exigencies.

**20th January 1997**

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<sup>70</sup>L. Art. 200.

<sup>71</sup>L. Art. 201.

<sup>72</sup>L. Art. 202.

<sup>73</sup>L. Art. 203.

<sup>74</sup>L. Art. 204.

<sup>75</sup>L. Art. 205.

<sup>76</sup>L. Art. 46 al. 3.