

# Pratt's Journal of Bankruptcy Law

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# Insolvency Challenge Rights

*By Tina Hoffmann, Nicola Hughes, Amy Jacks, Hervé Kensicher, Malte Richter, Inga Rupp, Devi Shah, Stefanie Skoruppa, Patrick Teboul, Marco Wilhelm and Alexandra Wood\**

*This article provides a comparative overview of the most important challenge rights offered by the insolvency laws of Germany and France as well as England and Wales, but is in no way conclusive.*

## INTRODUCTION

The overall principle of the insolvency laws of many countries is the equal treatment of the creditors of the insolvency debtor. In order to increase the insolvency estate of a given debtor, the relevant insolvency practitioner is oftentimes entitled to insolvency challenge rights, enabling him (or even other creditors, as the case may be) to have certain transfers of assets, which have reduced the insolvency estate to the detriment of individual or all creditors, reversed. The challenge rights in particular take into account that it is often attempted in pre-insolvency phases to deprive the creditors of access to the debtor's assets by way of objectively unjustified transfers of assets or to put individual creditors in a better position.

This article provides a comparative overview of the most important challenge rights offered by the insolvency laws of Germany and France as well as England and Wales, but is in no way conclusive.

## GERMANY

### GENERAL

The most important principle of German insolvency law is the equal treatment of the creditors of the insolvency debtor. Therefore, the insolvency administrator or, in case of self-administration proceedings (*Eigenverwaltungsverfahren*), the insolvency trustee (*Sachwalter*) may challenge transactions:

- entered into prior to the opening of the insolvency proceedings,

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- which place the creditors at a disadvantage, and
- provided that the German Insolvency Code (*Insolvenzordnung*, (InsO)) provides for a respective insolvency challenge right.

The challenge rights can only be exercised by the insolvency administrator or, as the case may be, the insolvency trustee (*Sachwalter*) (i.e., creditors cannot exercise the challenge rights).

## DIFFERENT CHALLENGE RIGHTS

### **Congruent Coverage – Preference Payments (Entitled to Receive Benefit)**

Any legal act which granted the creditor a security (*Sicherung*) or satisfied his claims (*Befriedigung*) may be challenged according to Section 130 InsO, if the debtor was illiquid at the time the transaction took place and if such transaction took place:

- within the last three months prior to the insolvency filing (*Insolvenzantrag*) and provided that the creditor had knowledge of such illiquidity; or
- following the insolvency filing and provided that the creditor had knowledge of either the illiquidity or the insolvency filing.

In this context, knowledge of the illiquidity or the insolvency filing is deemed equivalent to knowledge of circumstances which necessarily indicate the illiquidity or the insolvency filing. Furthermore, knowledge is presumed in the case of related parties (*nahestehende Personen*).<sup>1</sup>

### **Incongruent Coverage – Preference Payments (Not Entitled to Receive Benefit)**

Any legal act through which the creditor obtains security or satisfaction of his claim without being entitled (i) to such security or satisfaction, or (ii) to a security or satisfaction of this kind or at that time may be challenged according to Section 131 InsO, provided that the legal act to be challenged took place:

- within the last month prior to the insolvency filing or after the insolvency filing, or
- within the second or third month prior to the insolvency filing, provided that (i) the debtor was illiquid at the time of the legal act, or (ii) the creditor was aware at that time that the legal act places other insolvency creditors at a disadvantage (such knowledge is presumed in

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<sup>1</sup> Section 130 para 3 InsO.

the case of related parties (*nahestehende Personen*).<sup>2</sup>

### **Directly Disadvantageous Transaction**

Any transaction entered into by the debtor which places insolvency creditors at a direct disadvantage may be challenged according to Section 132 InsO, if the transaction took place:

- within the last three months prior to the insolvency filing and provided that the debtor was illiquid at that time and the creditor had knowledge of such illiquidity, or
- following the insolvency filing and provided that the creditor had knowledge of either the illiquidity or the insolvency filing.

In this context, knowledge is presumed in the case of related parties (*nahestehende Personen*).<sup>3</sup>

### **Willful Disadvantage**

#### ***General***

Legal acts may be challenged according to Section 133 InsO, if the debtor had the intention to disadvantage creditors and if the other party had knowledge of such intention (knowledge is presumed if the other party knows of the debtor's imminent illiquidity and the placement of creditors to their disadvantage), if the transaction took place:

- within ten years prior to the insolvency filing or thereafter;
- within a period of four years prior to the insolvency filing, provided that the other party received security or satisfaction from the transaction, or
- within a period of four years prior to the insolvency filing, if the legal act granted or enabled the other party to obtain security or satisfaction to which the other party was entitled in the manner and at the time, whereby the knowledge of the intent of the debtor to disadvantage creditors is only presumed if the other party knew of the debtor's actual illiquidity.

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<sup>2</sup> Section 131 para 2 InsO.

<sup>3</sup> Section 132 para 3 InsO.



### ***Willful Disadvantage in Connection with Related Party's Transactions***

A contract concluded between the debtor and a related party against consideration which directly disadvantages the creditors of the insolvency proceedings may be challenged according to Section 133 para 4 InsO, unless:

- the legal act took place more than two years prior to the insolvency filing, or
- the other party was not aware of the debtor's intention to disadvantage the creditors at the time the legal act took place.

### **Gratuitous Benefits**

Gratuitous benefits granted to a third party during the last four years prior to the insolvency filing may be challenged according to Section 134 InsO unless the gratuitous benefit was a common occasional gift of low value.

### **Shareholder Loans and Contributions to Silent Partners**

#### ***Shareholder Loan***

A legal act which, in respect of a shareholder's claim for repayment of a shareholder loan or a similar claim:

- granted security (*Sicherung*), can be challenged pursuant to Section 135 para 1 no 1 InsO, if such act took place within ten years prior to the insolvency filing or thereafter, or
- granted satisfaction (*Befriedigung*), can be challenged pursuant to Section 135 para 1 no 2 InsO, if such act took place within one year prior to the insolvency filing or thereafter.

The insolvency administrator may further challenge the satisfaction (*Befriedigung*) of a third-party claim for repayment of a loan according to Section 135 para 2 InsO if such claim was secured with a security granted by a shareholder or if this shareholder is liable for such claims as guarantor of the debtor and if such transaction was concluded within one year prior to the insolvency filing.

#### ***Contribution to Silent Partners***

A legal act through which a silent partner (*stiller Gesellschafter*):

- is paid back in full or in part his silent partner contribution (*Einlage*),  
or

- by which his share in the loss incurred is waived in full or in part may be challenged according to Section 136 InsO, if the underlying agreement was entered into within one year prior to or after the insolvency filing.

However, such challenge right does not exist, if the ground for opening the insolvency proceedings came into existence only after the agreement was concluded.

### **Avoidance of Floating Charges**

While floating charges within the meaning used under English law (see English section below) do not exist under German law, the legal concept is comparable to the blanket assignment (*Globalzession*), where the debtor has granted an assignment covering all or specific (present and future) receivables to the creditor.

With respect to blanket assignments, two points of reference come into consideration for a possible avoidance:

#### ***Agreement of the Blanket Assignment***

With respect to the agreement as such, challenge rights are usually excluded, as the provision of collateral itself (here: the agreement of the blanket assignment) is regularly to be regarded as a cash transaction (see below) if it is appropriate collateral granted for a new loan.

#### ***Receivables***

With respect to the actual coming into existence of the respective assigned (future) receivable or, as the case may be, the creation/realization of value (*Werthaltigmachen*) of the individual claim, challenge rights are possible if, at the time, the assigned claim comes into existence, the requirements of a congruent coverage pursuant to Section 130 InsO (see above) have been met. Even if the agreement of a blanket assignment as such is incontestable, the insolvency administrator may still be entitled to contest those claims that arise in the future and are then covered by the assignment. As a result, in case of blanket assignments, (collateral) claims that have arisen within the three months prior to the insolvency filing, are at risk of being subject to avoidance.

### **Extortionate Credit Transactions / Disproportionate Security Package**

While the granting of a security package itself may be subject to challenge rights under the general rules (see above), the InsO does not contain specific

rules of challenge on extortionate credit transactions or disproportionate security packages as such. Rather, this aspect is governed by longstanding (civil law) case law issued by the Federal Court of Justice (*Bundesgerichtshof*). Simply put, with respect to blanket assignments, if it is already clear at the time of the assignment (initial overcollateralization (*anfängliche Übersicherung*)) that there will be a conspicuous disproportion between the realizable value of the assigned claims and the secured claim of the lender/creditor in the – still uncertain – event of realization (whether a conspicuous disproportion exists must be determined on a case-by-case basis, however, according to some legal literature, a conspicuous disproportion exists if the realizable value of the security is 150% to 300% higher than the value of the claim), then the assignment is deemed immoral (*sittenwidrig*) pursuant to Section 138 para. 1 German Civil Code (*Bürgerliches Gesetzbuch*) and therefore void due to initial over-collateralization, if certain value limits are exceeded and the lender/creditor knew or at least should have known of the circumstances of the over-collateralization.

A merely subsequent overcollateralization (*nachträgliche Übersicherung*), e.g., with respect to blanket assignments because of the assigned portfolio of claims being subject to constant change (revolving portfolio), and the assignee suddenly receiving more security than necessary (e.g. if the nominal value of the collateral exceeds 150% of the secured claims), is not immoral, but gives rise to a claim for release of the excess collateral (regardless of whether or not such claim has been expressly agreed upon).

## EXEMPTIONS

In case of a so-called cash transaction (*Bargeschäft*), a challenge of the transaction is explicitly excluded by law, with the exception of a challenge based on a willful prejudice or an incongruent coverage. In case of a challenge due to willful disadvantage, the privilege for cash transactions is not excluded in general, but rather only if the debtor has been acting unfairly (*unlauter*) and the addressee has realized such unfairness.

A cash transaction within the meaning of Section 142 InsO exists if the debtor's assets directly (*unmittelbar*) receive an equivalent consideration for the debtor's performance. The exchange of performance and consideration is "direct" within the meaning of this provision if it takes place in a close proximity of time given the type of performance exchanged and taking into account customary business practices. In case of the debtor paying salaries to his employee, such close proximity of time is stipulated to be fulfilled if the time between work performance and payment of the remuneration does not exceed three months.

## ENGLAND AND WALES

### GENERAL

The most important principle of insolvency law in England and Wales is the equal treatment of the creditors of the insolvency debtor. Therefore, the appointed administrator or liquidator may challenge transactions:

- entered into prior to the opening of the insolvency proceedings,
- which place the creditors at a disadvantage, and
- provided that the Insolvency Act 1986 (IA) provides for a respective insolvency challenge right.

Certain challenge rights may also be exercised by victims prejudiced by the transaction (with leave of the court) or certain regulatory bodies.

### DIFFERENT CHALLENGE RIGHTS

#### **Congruent Coverage – Preference Payments (Entitled To Receive Benefit)**

*Preference:* Section 239 IA provides a challenge right where the liquidator or administrator is able to prove the following:

- the action has the effect of putting the creditor, surety or guarantor into a better position than they would have been had the debtor gone into insolvent liquidation without that thing happening first (the preference);
- the preference was given within six months of the onset of the administration or liquidation (or within two years if the debtor and relevant third party are “connected,” as defined in the IA);
- the debtor was influenced by a desire to put the recipient of the preference in a better position than they would have been had the debtor gone into insolvent liquidation without that thing happening first – a desire which is presumed if that party is connected to the debtor; and
- at the time the preference was given, the debtor was unable to pay its debts or became unable to pay its debts in consequence of the preference.

#### **Incongruent Coverage – Preference Payments (Not Entitled to Receive Benefit)**

The requirements for challenge as a preference set out above do not change whether the recipient was entitled to receive the benefit or not.

### **Directly Disadvantageous Transaction**

*Transaction at an undervalue:* A gift made, or a transaction entered into by a debtor on terms that the debtor received no consideration, or the value of the consideration was significantly less than the value of the consideration provided by the third party may be challenged according to Section 238 IA if:

- the transaction was entered into within two years of the onset of the administration or liquidation; and
- at the time the transaction was entered into, the company was unable to pay its debts or became unable to pay its debts in consequence of the transaction.

It is a defense to the challenge right if the transaction was entered into in good faith and for the purpose of carrying on the company's business; and at the time it did so, there were reasonable grounds for believing that the transaction would benefit it. However, there is a presumption against good faith if the third party (i) had notice of the relevant surrounding circumstances, or (ii) was connected with the company.

### **Willful Disadvantage**

#### ***General***

*Transaction defrauding creditors:* Transactions at an undervalue (according to Section 238 IA) entered into by the debtor for prejudicial purposes may be challenged according to Section 423 IA if the court is satisfied that the relevant transaction was entered into for the purpose of putting assets beyond the reach of creditors; or otherwise prejudicing the interests of creditors.

It is also possible for:

- other victims prejudiced by the transaction (with leave of the court);
- the PRA or FCA; or
- the Pensions Regulator, to make an application to court pursuant to Section 423 IA.

There are no restrictions on the period of time a court can look back prior to the onset of the administration or liquidation.

A challenge under Section 423 IA may also be pursued outside administration/liquidation.

#### ***Willful Disadvantage in Connection with Related Party's Transactions***

The requirements for challenge as a transaction defrauding creditors set out above apply regardless of whether the recipient is a connected party.

### **Gratuitous Benefits**

Gratuitous benefits may be challenged as a transaction at an undervalue according to Section 238 IA if the requirements set out above can be satisfied.

### **Shareholder Loans and Contributions to Silent Partners**

Not applicable in England and Wales.

### **Avoidance Of Floating Charges**

*Avoidance of certain floating charges:* In a liquidation or administration a floating charge created at the relevant time is invalid except to the extent of new value if:

- the floating charge was created by the debtor within twelve months of the onset of the administration or liquidation (or within two years in the case of a connected party); and
- if the floating charge was created in favor of a person not connected with the debtor, at the time the transaction was entered into, the debtor was unable to pay its debts or became unable to pay its debts in consequence of the transaction.

### **Extortionate Credit Transactions / Disproportionate Security Package**

*Extortionate credit transactions:* A liquidator or administrator may challenge a transaction according to Section 244 IA where credit was provided to the debtor on the grounds that it was extortionate if they can prove the following:

- that the transaction was entered into within three years of the onset of administration or liquidation; and
- having regard to the risk accepted by the credit provider, the terms of the transaction were such as to require grossly exorbitant payments to be made in respect of the provision of the credit or it otherwise contravened ordinary principles of fair dealing.

There is a presumption that the transaction was extortionate unless the defending credit provider proves the contrary.

## **EXEMPTIONS**

In England and Wales, the exemptions vary for each challenge right.

### **Preference**

A challenge right may not exist in the context of preference payments, if the debtor was not influenced by a desire to put the recipient of the preference in

a better position than they would have been had the debtor gone into insolvent liquidation without that thing happening first. However, there is a statutory presumption of the desire to prefer if the debtor and relevant third party are connected.

The challenge right will only exist if the debtor was either unable to pay its debts at the time of the transaction or became unable to pay its debts in consequence of the transaction (the Insolvency Requirement).

### **Transaction at an Undervalue**

A challenge right may not exist if the transaction was entered into in good faith and for the purpose of carrying on the debtor's business; and at the time it did so, there were reasonable grounds for believing that the transaction would benefit it. The Insolvency Requirement is also applicable here.

### **Transaction Defrauding Creditors**

A challenge right may not exist unless the court is satisfied that the transaction at an undervalue was entered into by the debtor for the purpose of putting assets beyond the reach of creditors; or otherwise prejudicing the interests of creditors.

### **Avoidance of Certain Floating Charges**

A floating charge will not be invalid if it was created more than twelve months before the onset of the administration or liquidation (or more than two years in the case of a connected party). The Insolvency Requirement is also applicable here.

### **Extortionate Credit Transactions**

A challenge right may not exist if the transaction was entered into more than three years before the onset of the administration or liquidation.

## **FRANCE**

### **GENERAL**

The equal treatment of an insolvent debtor's creditors is among the most important principles of French insolvency law. Certain transactions, acts or payments (Suspect Transactions, as detailed in art. L.632-1 and L.632-2 of the French Commercial Code (Com. Code)) therefore must or (as applicable) may

be held void if made by the insolvent debtor during the suspect period (see below) or even, regarding gratuitous acts, up to six months before.

### **Suspect Transactions**

Suspect Transactions are:

- mandatorily void Suspect Transactions, which are listed in Com. Code art. L.632-1 and which the court must set aside; and
- optionally voidable Suspect Transactions, which are defined in Com. Code art. L.632-2 and the setting-aside of which is left to the court's appreciation.

The "suspect period" runs from the cessation of payments date to the date of the judgment opening the *redressement judiciaire* (insolvent rehabilitation) or *liquidation judiciaire* (insolvent liquidation) proceeding (the insolvency judgment). The "cessation of payments date" is that when the debtor became insolvent (i.e. unable to satisfy its liabilities due and payable with its cash and other immediately available liquid assets), as determined by the court in the insolvency judgment (or subsequently). The insolvent debtor is under a legal duty to file for insolvency within 45 days from the cessation of payments date. The court may determine that the cessation of payments actually occurred on a date earlier than asserted by the debtor, but not earlier than 18 months prior to the insolvency judgment.<sup>4</sup>

The right to challenge Suspect Transactions with a view to the setting-aside thereof is open only to the judicial administrator (*administrateur judiciaire*), the creditors' judicial representative (*mandataire judiciaire*) or liquidator (*liquidateur*) or the plan commissioner (*commissaire à l'exécution du plan*), as well as the public prosecutor.<sup>5</sup> The debtor, or the creditors themselves, do not have this challenge right.

## **DIFFERENT CHALLENGE RIGHTS**

### **Congruent Coverage – Preference Payments (Entitled to Receive Benefit)**

#### ***Significantly Unbalanced Commutative Contract***

If an insolvent debtor enters into a commutative contract (i.e., one in which performance and consideration are meant to be equivalent, e.g., a sale contract)

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<sup>4</sup> Com. Code art. L.631-8.

<sup>5</sup> Com. Code art. L.632-4.



during the suspect period and its obligations thereunder significantly exceed those of the other party, then such contract is a mandatorily void Suspect Transaction.<sup>6</sup>

***Payment by Unusual Means***

Any payment made by an insolvent debtor during the suspect period in respect of a debt due and payable is a mandatorily void Suspect Transaction, if made otherwise than:

- in cash (or in kind if so stipulated in the relevant contract),
- by trade instruments (cheque, bill of exchange, promissory note),
- by wire transfer,
- by means of a receivables assignment (pursuant to art. L.313-23 of the French Monetary and Financial Code), or
- by any other means of payment commonly used in the relevant business sector.<sup>7</sup>

***Conservatory Attachment Measures***

Any conservatory attachment measure is a mandatorily void Suspect Transaction, if effected during the suspect period, unless effected on the basis of a notice of attachment dated prior to the suspect period.<sup>8</sup>

**Incongruent Coverage – Preference Payments (Not Entitled to Receive Benefit)**

***Payment of a Debt Not Yet Due***

Any payment made by an insolvent debtor during the suspect period in respect of a debt that, on the date of payment, is not yet due and payable is a mandatorily void Suspect Transaction, regardless of whether made in cash, by setoff or otherwise.<sup>9</sup>

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<sup>6</sup> Com. Code art. L.632-1 I.2°.

<sup>7</sup> Com. Code art. L.632-1 I.4°.

<sup>8</sup> Com. Code art. L.632-1 I.8°.

<sup>9</sup> Com. Code art. L.632-1 I.3°.

***New Security to Secure a Prior Debt****Mandatorily Void Suspect Transactions are:*

- Any contractual security or right of retention granted by an insolvent debtor over any of its assets, if granted during the suspect period to secure a previously incurred debt, whether incurred earlier during the suspect period or before the suspect period,<sup>10</sup> unless (i) the new security replaces an existing security interest of equivalent nature and scope (which was not itself void under that same provision) or (ii) is a receivables assignment governed by art. L.313-23 of the French Monetary and Financial Code and made in furtherance of a receivables assignment undertaking entered into before the suspect period.
- A legal mortgage granted to secure a court judgment rendered against the insolvent debtor in respect of a previously incurred debt, if granted during the suspect period.<sup>11</sup>
- Any deposit or escrow effected pursuant to a court decision, whether by way of security or as a conservatory attachment measure, if made during the suspect period on the basis of a court decision that is not yet final.<sup>12</sup>

***Transfer to a Trust or a Trust Amendment****Mandatorily Void Suspect Transactions are:*

- The transfer of any asset of the insolvent debtor to a trust estate (*transfert dans un patrimoine fiduciaire*), if effected during the suspect period, unless effected by way of security for a debt incurred simultaneously with such transfer.<sup>13</sup>
- Any amendment to an existing trust agreement, if entered into during the suspect period for the purpose of allowing a debt incurred prior to the entry into the amendment to be secured by assets previously transferred to the trust estate.<sup>14</sup>

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<sup>10</sup> Com. Code art. L.632-1 I.6°.

<sup>11</sup> Com. Code art. L.632-1 I.7°.

<sup>12</sup> Com. Code art. L.632-1 I.7°.

<sup>13</sup> Com. Code art. L.632-1 I.10°.

<sup>14</sup> Com. Code art. L.632-1 I.11°.

### ***Stock Options***

Any corporate decision to grant stock options, as well as any exercise of existing stock options, is a mandatorily void Suspect Transaction if it occurs during the suspect period.<sup>15</sup>

### ***Shielding of an Individual Business Owner's Personal Assets***

Where an individual business owner has separate estates (one made up of assets allocated to the operation of his/her business and the other containing his/her personal assets (which are thereby legally shielded from any action by his/her business creditors)), any change in the allocation of such assets is a mandatorily void Suspect Transaction, if made for the benefit of his/her personal estate and occurring during the suspect period.<sup>16</sup>

An individual business owner's principal personal residence is by law shielded from actions by his/her business creditors. The individual business owner may also file a notarized statement whereby other specified real estate assets of his/hers are shielded from actions by his/her business creditors, but such statement is a mandatorily void Suspect Transaction if made during the suspect period.<sup>17</sup> In addition, any such statement made during the six months preceding the suspect period is an optionally voidable Suspect Transaction.<sup>18</sup>

### **Directly Disadvantageous Transaction**

Not applicable under French law. For details, please refer to "Significantly unbalanced commutative contract" in the "Congruent Coverage – Preference Payments (entitled to receive benefit)" section above.

### **Willful Disadvantage**

#### ***General***

Any payment made by an insolvent debtor during the suspect period in respect of a debt that is due and payable, regardless of whether made in cash, by set-off or otherwise, is an optionally voidable Suspect Transaction if at the

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<sup>15</sup> Com. Code art. L.632-1 I.9°.

<sup>16</sup> Com. Code art. L.632-1 I.12°.

<sup>17</sup> Com. Code art. L.632-1 I.12°.

<sup>18</sup> Com. Code art. L.632-1 II.

time of the payment the paid creditor has actual knowledge, or in the circumstances ought to have been aware, of the insolvent debtor's cessation of payments situation.<sup>19</sup>

Similarly, any non-gratuitous transaction entered into by the insolvent debtor during the suspect period is an optionally voidable Suspect Transaction if at the time of entry into the transaction the insolvent debtor's counterparty has actual knowledge, or in the circumstances ought to have been aware, of the insolvent debtor's cessation of payments situation

See also in the "Congruent Coverage – Preference Payments (entitled to receive benefit)" section above.

### ***Willful Disadvantage in Connection With Related Party's Transactions***

The criteria for determining whether a transaction is a Suspect Transaction do not change whether the party dealing with the insolvent debtor is a connected party or not.

### **Gratuitous Benefits**

Any transfer of title to movable or immovable property of the insolvent debtor is a mandatorily void Suspect Transaction if gratuitous (i.e., without consideration) and made during the suspect period.<sup>20</sup>

Any such gratuitous transfer is also an optionally voidable Suspect Transaction if made during the six months preceding the suspect period.<sup>21</sup>

### **Shareholder Loans and Contributions to Silent Partners**

Not applicable in France.

### **Avoidance of Floating Charges**

Not applicable in France.

### **Extortionate Credit Transactions / Disproportionate Security Package**

A lender (or other provider of financial support) may not be held liable for the insolvency of a debtor, except in certain circumstances, including in the case

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<sup>19</sup> Com. Code art. L.632-2.

<sup>20</sup> Com. Code art. L.632-1 I.1°.

<sup>21</sup> Com. Code art. L.632-1 II.

of fraud, material involvement in the management of the debtor or the obtaining of a security package that is disproportionate to the financial support provided. Where the lender is held liable on any of those grounds, the security obtained by the lender may be set aside in whole or in part and reduced by the court.<sup>22</sup>

## **EXEMPTIONS**

Exemptions, where applicable, are mentioned in the description of each relevant Suspect Transaction above.

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<sup>22</sup> Com. Code art. L.650-1.