Flowdesk™

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INSOLVENCY POLICY

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PREAMBLE

1. This Insolvency Policy is governed by French law and should be read in conjunction with Flowdesk's General Terms and Conditions as well as each Special Terms and Conditions applicable between Flowdesk and its relevant creditor.

2. This Insolvency Policy summarizes the general rules applicable to creditors of ailing companies under French law, based on the articles of the French Commercial Code in force at the date of the last update of this Insolvency Policy. In the event of any update, amendment or change to the French regulation, this Insolvency Policy may become obsolete.

3. Furthermore, the rules set out in this Insolvency Policy are not exhaustive and should not be construed as legal advice. Creditors are solely responsible for seeking independent legal advice, based on the facts applicable to them and the specific circumstances which may be relevant to their situation.

4. In addition, please note that this Insolvency Policy is drafted for the convenience of Flowdesk's personnel only and no person shall be entitled to rely on this Insolvency Policy to bring any claim or action or exert any right or interest which may not be otherwise available to them under French law.

5. Capitalized terms not expressly defined herein will have the meaning ascribed to them in Flowdesk's General Terms and Conditions, as updated or amended from time to time. In the event of any inconsistency between the General Terms and Conditions or any Special Terms and Conditions, and this Insolvency Policy, the General Terms and Conditions or Special Terms and Conditions will prevail.

A. SENIORITY OF DEBTS

6. The order of repayment of debts in French insolvency proceedings, which is governed by section 2 "Ranking of Claims" of Chapter III "Repayment of Debts" of Part VI "Ailing Companies" of Title IV "Judicial Liquidation and Recovery" (articles L. 643-7-1 to L. 643-8), can be complex. Exceptions may

apply in certain cases and rules may differ depending on the applicable type of insolvency procedure, such as Ad Hoc Proceedings (*mandat ad hoc*), Conciliation Proceedings (*conciliation*), Safeguard Proceedings (*procédure de sauvegarde*), Expedited Safeguard Proceedings (*sauvegarde accélérée*), Rehabilitation Proceedings (*redressement judiciaire*), or Liquidation Proceedings (*liquidation judiciaire*). However, the ranking set out below provides a rough understanding of creditors' ordinary ranking in the waterfall of payments. No special procedures apply to foreign creditors although they have two additional months to file proof of their claims.

7. A portion of employees' pre-petition claims benefit from a super-senior status, pursuant to article L. 643-8 2° of the French Commercial Code (*superprivilège des salaires*). This essentially protects the last 60 days' wages in arrears before the judgment opening insolvency proceedings. If the bankruptcy estate cannot pay these claims from its available cash, they are paid as advances by a national wage insurance body (Association pour la Gestion du régime de garantie des créances de Salariés), which replaces the employees as a creditor.

8. Post-petition court costs, which essentially include the fees of the court-appointed agents (administrator and creditors' representative) or of the liquidator rank next pursuant to article L. 643-8 3° of the French Commercial Code.

9. Lenders that extended credit to a company as part of a workout agreement during conciliation proceedings next rank ahead of all pre-petition and post-petition claims, if this does not prevent insolvency at a later stage, pursuant to article L. 643-8 5° of the French Commercial Code.

10. When they arise for the purpose of funding the observation period or represent consideration due in a business transaction directly connected to the company's business activities during the observation period, post-petition claims benefit from a preferred status and must be paid when they fall due, pursuant to article L. 643-8 9° of the French Commercial Code. If not, they rank ahead of both secured and unsecured pre-petition claims in safeguard and in rehabilitation proceedings. In a nutshell, they comprise (in this order):

    - post-petition employees' claims;
    - new money facilities extended during the observation period (subject to prior approval of the insolvency judge) or as part of a safeguard or rehabilitation plan approved or modified by court judgment, which benefit from the new statutory privilege ;
    - post-petition claims arising out of the continuation of an ongoing contract, when the contracting party accepts a deferral of payment; and
    - other post-petition claims

11. Other pre-petition claims are paid after arrears of wages, post-petition court costs, new money facilities extended in a court-approved conciliation workout agreement, and post-petition senior claims, according to their rank and privilege. Among these pre-petition claims, pre-petition tax claims rank ahead of pre-petition secured claims, pre-petition social security claims, certain pre-petition employees' senior claims (essentially, wages owed to employees for the last six months of work prior

to bankruptcy), and unsecured claims (post-petition claims not qualifying for the senior status are treated as unsecured claims).

12. Secured Creditors. Secured creditors (pledge[1], Dailly assignment of receivables, assignment of receivables[2], delegation of claims against third parties[3], cash collateral charge[4], fiducie) are usually paid by preference to unsecured creditors. Certain types of secured creditors, essentially creditors that were transferred ownership or title to the secured assets, do not rank in the waterfall since they benefit from a possession right and will, in practice, rank ahead of all other creditors. This is notably the case for creditors benefiting from a retention right (for example, French share pledges) or from a trust agreement (fiducie) over the secured asset.

13. Shareholders do not receive any repayment of their capital investment, unless a surplus remains after all the creditors have been paid in full (which is extremely rare).

B. RECOVERY OF DEBTS

i. Seizure of the Debtor's Property

14. A creditor can seize any asset belonging to the defaulting debtor if the creditor has an immediately enforceable debt instrument (*titre exécutoire*) (that is, an instrument created by a deed executed before a notary or a court decision). If the debtor persists in not paying, the creditor can auction the asset and be paid out of the proceeds. The main types of seizure are:

- Seizure of tangible property (*saisie-vente*). This applies to all the debtor's tangible assets.
- Seizure of intangible property (*saisie-attribution*). The creditor seizes a sum of money belonging to the debtor and held by a third party (usually a bank). There is an accelerated procedure lasting eight days that allows a creditor to seize listed securities that have been deposited in a securities account.

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[1] A pledge is a security interest over a tangible or intangible asset created by contract. It can be used to secure the payment of any type of debt. If the debtor defaults, the creditor can either:
- apply for a court order transferring ownership of the pledged asset to it; of
- be paid in cash from the proceeds of auctioning the asset.

Parties to a pledge agreement can provide, at the time the pledge is created or thereafter, that the creditor can enforce the pledge through an alternative out-of-court enforcement process (pacte commissoire), under which the secured creditor is automatically vested with title to the asset, the value of which is determined by an expert's appraisal (the expert is appointed by the parties or the court).

Some pledges confer to the secured creditor a right of retention (droit de rétention) over the pledged asset. The pledged asset is transferred to, and retained by, the creditor until the debt has been paid in full. An increasingly common type of pledge with a retention right is one taken over the securities account opened with a bank to record the securities' book entry (nantissement de compte-titres). The creditor can retain the securities until it has been paid in full, even if the debtor becomes insolvent and the court-appointed administrator tries to repossess the securities so that they can be included in a sale plan (plan de cession). Generally, there are no specific formalities to create a pledge. However, to ensure third parties cannot challenge its existence or date of creation, certain types of pledges must be registered with a specific public registry.

[2] *Cession de créances à titre de garantie de droit commun.* Ordinance no 2021-1192 dated 15 September 2021 reforming French law on security interests has created a new framework for the assignment of receivables granted as a guarantee. This type of assignment can be used when the statutory conditions for the Dailly assignment of receivables are not met.

[3] Délégation. A debtor transfers claims against its own debtor to the creditor under an agreement between the three parties. A delegation can be:
- perfect (parfaite), where the initial debtor is no longer bound to pay its creditor (the transferred debtor replaces the initial debtor vis-à-vis the creditor); or
- imperfect (imparfaite), where the initial debtor continues to be bound to pay its creditor (the transferred debtor becomes an additional debtor to the creditor).

[4] *Gage-espèces or cession d'une somme d'argent à titre de garantie.* Title to cash collateral is transferred to the creditor. If the debtor defaults, the creditor can set-off all sums owed by the debtor against the creditor's obligation to return the charged cash to the debtor.

- Seizure of immovable property (*saisie-immobilière*). Mortgaged property is transferred to the creditor or a third-party bidder through the civil court.

ii. Protective Measure

15. If a creditor does not have an enforceable debt instrument, protective measures over the debtor's assets (mesures *conservatoires*) can still be granted by court order provided there is both a: true basis for the creditor's claim and a risk that the creditor will not recover the claim. Once a court order granting protective measures is obtained, the creditor must start an action on the merits within one month, otherwise the order becomes invalid.

16. Protective measures can be granted as either :

- Attachments (saisies conservatoires). These allow a creditor to freeze any asset (tangible or intangible) belonging to the debtor. The asset cannot be transferred until the creditor obtains an enforceable debt instrument. Specific rules apply to certain types of attachments (such as attachments of wages).

- Orders authorising the taking of security (*sûretés judiciaires*). These authorise a creditor to take security over the debtor's:

o immovable property (*hypothèque judiciaire provisoire*);

o goodwill (*nantissement judiciaire provisoire de fonds de commerce*); or

o shares or securities (*nantissement judiciaire provisoire d'actions, de parts sociales ou de valeurs mobilières*).

17. Creditors can obtain an emergency order granting a provisional payment (*provision*) provided there are no clear grounds for challenging the basis of their claims. An application must be made to the president of the competent court and is usually dealt with within eight days (or 24 hours if a real emergency can be shown). While the order only lasts until a final decision is made on the merits of the case, it is immediately enforceable. Creditors must start a main action against the debtor to recover the balance of their claims.

18. To secure their claims, creditors can also ask the court to grant protective measures over the debtor's assets until a final decision is made.

19. Once a petition for safeguard, rehabilitation, or liquidation proceedings has been filed and accepted by the court, the debtor is prohibited from paying pre-petition claims. Any violation of the prohibition is subject to criminal penalties. However, set-off between pre- and post-petition claims that are deemed "connected" is allowed (provided the creditor filed, in due course, proof of claim for those pre-petition claims). The Cassation Court has held that obligations are connected when either (i) they result from a single contract or (ii) they are carried out under a contract setting out the business relationship between the parties. The obligations are carried out under separate contracts that constitute a single global contractual arrangement.

C. LIABILITY

i. Director

20. Liability can arise when, as a result of management errors, a company's assets do not cover its debts. In liquidation proceedings, an action for mismanagement (other than mere negligence) can lead to the insolvent company's management being liable for all or part of the company's debts. Liability extends to formally appointed directors or managers with representation powers as well any individual or entity that is not officially a director or manager but has repeatedly influenced the company's management or strategic decisions (that is, shadow (de facto) directors/managers).

21. A parent company can also be held liable for an insolvent subsidiary's debts if it has been appointed as a director or is deemed a shadow director or manager of that subsidiary (for example, through individual(s) appointed at the shareholder's request

22. In addition, directors (including de facto directors/managers) found liable for certain breaches can be (independent of any action or criminal prosecution based on the same facts) forced to assign their equity interest in the company or prohibited from managing any business for up to 15 years and from holding any public office for up to five years. Breaches include :

- Using the company's assets or credit for their own benefit, or the benefit of another corporate entity in which they have a direct or indirect interest.
- Using the company to conduct and conceal business transactions for their own benefit.
- Carrying out business activities at a loss to further their own interests, knowing that this would lead to the company's insolvency.
- Fraudulently embezzling or concealing all or part of the company's assets.
- Fraudulently increasing the company's debts.

ii. Parent Entity (Domestic or Foreign)

23. The main liability risks faced by a parent company (either French or foreign) when its subsidiary files for bankruptcy are as follows:

- Liability action for mismanagement. A shareholder can be held liable for mismanagement if they were appointed as de jure director of the subsidiary or repeatedly exercised an influence on management decisions and can therefore be deemed a de facto director (see above, *Director*). Liability can arise where, due to management errors, the subsidiary's assets do not cover its debts.

- Piercing the corporate veil.

- Liability to employees. Under French law, employees can seek indemnification for breach of their employment contracts against their legal employer. However, case law has developed the concept of de facto or co-employment (*co-emploi*) and the courts allow employees to seek compensation against a shadow or de facto employer. To find de facto employment, French courts must find either a direct relationship of subordination between the employee and the alleged co-employer; or blending of interest, activities, and human resources' management between the two co-employers.

- In a group of companies, the second criterion is met if the parent company systematically interferes in the management of its subsidiary, resulting in a total loss of autonomy of the subsidiary. If the above conditions are met, the employee is entitled to sue both its legal employer and its shadow co-employer (for example, in relation to redundancy payments, damages for unfair dismissal, and so on). The creditors' representative, the liquidator, or the employees themselves can also try to obtain indemnification in tort if lay-offs occur as a result of wrongful negligence or decisions made by the direct or indirect shareholders of the insolvent company.

iii. Lender

24. All types of lenders (not only financial institutions) are exempt from liability with respect to loans or credit facilities they have granted, except in the event of fraud, improper interference with the company's management or when the lender has obtained a security interest that is disproportionate to the amount of the loan. The Cassation Court has held that, to trigger lender liability, the loan itself must, in addition, qualify as an act of wrongdoing (e.g.: abusive support to a debtor that in fact had no prospect of recovery, therefore creating a misleading appearance of solvency to the prejudice of other creditors).

D. SETTING ASIDE TRANSACTIONS

25. In rehabilitation and liquidation proceedings, any transaction entered into during the hardening period (*période suspecte*) (including transactions entered into with members of the same corporate family) can be subject to clawback provisions, pursuant to article L. 632-1 of the French Commercial Code.

26. The following transactions are automatically void (that is, the court must declare these transactions void on petition by the administrator, the liquidator, or the Public Prosecutor) if concluded during the hardening period:

- Any deed entered into without consideration transferring title to movable or immovable property.
- Any bilateral contract under which the debtor's obligations significantly exceed those of the other party.
- Any payment by any means made for debts that have not fallen due on the date when payment is made.
- All payments for outstanding debts that are not made in cash, wire transfer, remittance of negotiable instruments, *Dailly* assignment of receivables, or any other means commonly used in business transactions.
- Deposits or consignments of money made under article 2350 of the French Civil Code (governing pledges over certain intangible assets, including claims) in the absence of a final judgment.

- Any contractual security interests or retention right granted to secure a pre-existing debt, except:
  - security interests granted as replacement of an existing security interest of an equivalent nature and scope; and
  - *Dailly* assignments of receivables implemented in execution of a framework agreement entered into before the hardening period.
- Any judicial mortgage granted to secure a pre-existing debt.
- Any protective measure, unless the measure was recorded or registered before the date of insolvency.
- Any grant, exercise, or resale of stock options made under Article L. 225-177 *et seq.* of the French Commercial Code.
- Any transfer of movables or assignment of rights into a trust estate, unless this transfer or assignment is made as a guarantee of a debt concurrently undertaken.
- Any amendment to a trust agreement affecting the rights and movables already assigned or transferred to a trust estate as a guarantee of debts undertaken before that amendment