

The post-Brexit cross-border world; a Franco-English comparison

Over the next five pages, **Stefan Ramel** and **Georges-Louis Harang** pose questions and answers on cross-border insolvency proceedings in a world where Brexit has sent processes back in time.

s we write this piece in the autumn of 2018, the clock is rapidly ticking towards 23.00 GMT on 29 March 2019, the date of the UK's exit from the European Union. The date set by Michel Barnier, the EU's chief negotiator, for the completion of the intricate disentanglement negotiations – 31 October 2018 – came and went with no agreement.

However, on 14 November 2018, both the EU and the UK published a final Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018. The agreement will need to be approved by the domestic bodies of the EU and the UK. The draft makes provision, at article 126 for a transitional period until 31 December 2020.

During the transition period, 'union law' will continue to apply in the UK. In theory, that will include Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the insolvency regulation) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels regulation).

On 12 July 2018, following a muchpublicised meeting of ministers at Chequers, the UK published a white paper on the future relationship between the UK and the EU. Regarding insolvency and civil and commercial litigation generally, the UK's proposal is to seek to join the Lugano convention, while also exploring a new bilateral agreement with the EU on civil judicial cooperation, which would include a package of laws on jurisdiction, applicable law, and the recognition and enforcement of judgments including in relation to insolvency. As matters stand, the EU is not prepared to accept the 'Chequers plan'.

This piece is written from the starting hypothesis that no bilateral agreement is reached between the UK and the EU (and that there is no applicable international convention) that would govern the period after the end of the transitional period referred to above. The premise is that the insolvency regulation will cease to apply, as will the Brussels regulation. We are in no doubt that, should that came to pass, it would have serious consequences for crossborder insolvency. But what would the landscape look like? Will UK proceedings be recognised abroad, and vice versa?

In the first case, the French avocat will pose questions to the UK lawyer about the extent to which it is possible to recognise French proceedings and judgments stemming therefrom in the UK post-Brexit. Then, the roles will be reversed, with the UK lawyer asking the French avocat for assistance in obtaining recognition of UK proceedings in France.

In true European cross-border spirit, and because this article will be of relevance to practitioners in both the UK and in France, it is being published in English in *RECOVERY* magazine and it will also be published in a French journal.

We wish, for the avoidance of doubt, to make clear that the views expressed in this article are our own, and that they are not intended to be relied upon as legal advice. The questions we address are deliberately generic and focus on the available framework to insolvency practitioners (IPs) in the relevant scenarios.

Each country's probable position

In the UK, the two key sources of law that deal with the inward-looking request for assistance of a non-UK insolvency officeholder are, firstly, the UNCITRAL Model Law on Cross-Border Insolvency of 30 May 1997 UNCITRAL, incorporated into UK law by the Cross-Border Insolvency Regulation 2006 (SI No. 1030/2006) (the model law). Secondly, the common law on cross-border insolvency, which in the last ten years has seen unprecedented and dramatic developments circumstances in which it applies and its scope. There is a third source, in the form of s426 of the Insolvency Act 1986, albeit in case of an incoming request for assistance from France, that section is unlikely to be of much use, since France is not a relevant country or territory for the purposes of

In France, on the basis that France has not implemented the UNCITRAL model law on cross-border insolvency, and in the absence of a bilateral convention between France and the UK, a UK IP seeking to act within the territorial jurisdiction of France will need to rely upon French private international law and specifically existing jurisprudence, which currently applies in insolvency scenarios in respect of countries that are not parties to the insolvency regulation or the Brussels regulation. Such a practitioner will need to consider French insolvency law, in particular articles L 610-1 et seq of the Code de commerce in addition to other French legislation depending on the specific issues that arise. For example, if the issue concerns a security interest, it will be necessary to refer to the relevant law on security interests, most of which is to be found in the Code Civil.



POST-BREXIT ENGLAND AND WALES

The status of French proceedings in England and Wales

Avocat Georges-Louis Harang poses questions to barrister Stefan Ramel.

Is there a risk that rival insolvency proceedings concerning the same debtor could be opened in France and the UK?

Under the insolvency regulation, save for a scenario in which an entity has its 'centre of main interests' in one member state – thus opening the door to the opening of main insolvency proceedings – and an 'establishment' in a second member state – thus enabling the opening of secondary proceedings – it is not (or at least it shouldn't be) possible to have rival insolvency proceedings.

Without the insolvency regulation, the short answer to the question is, yes, there is a risk. That is not, however, a full answer to the question. The French office-holder, or, in certain circumstances, a French creditor, may have a number of different options in relation to potential English proceedings.

Under the model law, provided that the relevant French insolvency proceedings qualify as a 'foreign proceeding' (for example, a French conciliation may not qualify) and the French office-holder qualifies as a 'foreign representative', then the panoply of remedies contained in the model law becomes available. The first step ought to be to seek recognition (articles 15–17). Thereafter, articles 20 and 21 may be engaged in enabling the French office-

holder to seek relief from the English courts. That relief could include, for example, a stay on creditor actions or execution against the debtor's assets.

I would strongly recommend seeking advice at that point. There is no guarantee that an English court would necessarily grant a stay: see, for example *Bakhshiyeva* v. *Sberbank of Russia* [2018] EWHC 59 (Ch), a

The premise is that the insolvency regulation will cease to apply, as will the Brussels regulation.

decision of Hildyard J who, at the request of a number creditors with potential claims based on instruments governed by English law, applied the rule in Antony Gibbs & Sons v. La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399 and declined to continue a stay in support of Azeri law restructuring proceedings.

Under the model law, it would be open to the French office-holder to apply directly to the English courts to commence insolvency proceedings against the relevant entity under the Insolvency Act 1986 (article 11). Moreover, and in the case of a French creditor, by article 13 of the model law, a French creditor has the same rights as regards the commencement and participation of a proceeding under English insolvency law as a creditor in Great Britain.

If proceedings against the relevant entity are opened in England and Wales, then by article 28 of the model law, and provided that the French proceedings qualify as 'foreign main proceedings' under the model law, then the UK proceedings would, so far as the debtor's assets are concerned, effectively be territorial. The model law also contains provisions for both court to court and office-holder to office-holder cooperation and communication.

If, for whatever reason, it was decided not to proceed under the model law, much the same outcome could probably be achieved by invoking the English court's discretionary jurisdiction to order the ancillary winding up of the relevant entity: see, for example, *Re BCCI SA* (No 10) [1997] Ch 213. In this scenario, the powers of an English office-holder would very likely be limited to collecting English assets, settling a list of English creditors, and, after paying any preferential creditors, remitting the balance of any realisations to the foreign insolvency proceeding.



If the English court opted not to make an ancillary winding-up order, or such an order was not sought at all, it would nonetheless be open to the English court to supply assistance where possible and, within the confines of UK law, to the French proceedings: Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36. Such assistance might include permitting

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the French office-holder to realise assets in the UK, or even instituting proceedings in the UK. It is difficult in addressing this generic question, though, to go much further than to indicate that there would be a willingness to assist a French proceeding.

What would be the criteria for the opening of concurrent proceedings?

If a French insolvency office-holder proceeded under article 11 of the model law, then, according to the terms of the model law, it is simply necessary for the French office-holder to demonstrate that the requirements under the Insolvency Act 1986 for the commencement of such a proceeding are met. There is, as matters stand, limited assistance that can be derived from cases directly on point on article 11 of the model law; this is an area in which one could expect development of the English court's approach through jurisprudence in due course.

In the case of administration under schedule B1 of the Insolvency Act 1986, and assuming that a French registered entity would be a qualifying entity for the purposes of paragraph 111(1A) of schedule B1, the French office-holder would need to demonstrate that the entity is insolvent, and that one of the purposes of administration is reasonably likely to be achieved. In the case of liquidation, it would presumably be necessary to satisfy ss221 et seq of the Insolvency Act 1986. That would include, for example, demonstrating that the relevant entity has ceased to carry on business, or is carrying on business only for the purposes of winding up its affairs. In addition, however, the English court retains discretion on whether to order a winding-up.

In the case of an ancillary winding up, and assuming for a moment that the French entity is in a formal French insolvency process, and that the French



courts are the appropriate courts in which to conduct the winding up, then the English court has discretion over whether or not to open ancillary winding-up proceedings. It would take into account whether ancillary winding-up proceedings are necessary, or whether it would be more appropriate to grant the French insolvency office-holder assistance but without opening insolvency proceedings in England and Wales.

If any such proceedings were to be opened, would they be rescue or liquidation proceedings?

As to whether the proceedings would be in the nature of rescue proceedings or winding-up proceedings, if the French insolvency office-holder was driving the process, then they ought to have a choice of which proceeding to apply for.



A French creditor has the same rights as regards the commencement and participation of a proceeding under English insolvency law as a creditor in Great Britain.

If, however, a hostile French or UK creditor was driving the process then, whether under the model law or the common law, it is very likely that the English court would require the French office-holder to be informed of the request to open the proceedings and would then permit that office-holder to be heard on whatever application was made by the hostile creditor. Note: as they currently stand, rr3.10, 3.12(g) and 7.9 of the Insolvency (England and Wales) Rules

2016 require notice to be given to a member state liquidator; it will be necessary in due course to ascertain how those rules are amended after Brexit.

Assuming though that the relevant French insolvency office-holder has notice of any request to open proceedings then, in such circumstances, the French insolvency office-holder would, in any event, retain the option to cross-apply for the more appropriate type of proceedings (provided the criteria referred to in the previous answer were made out).

What documents will the French insolvency office-holder need in order to perform their functions in the UK?

The model law is prescriptive as to what documents would be required in order for a foreign insolvency office-holder to obtain recognition of their proceedings in the UK.



Much the same outcome could probably be achieved by invoking the English court's discretionary jurisdiction to order the ancillary winding up of the relevant entity.

By article 15(2) of the model law, in the case of an application for recognition, it is necessary for the application to be accompanied by a certified copy of the commencing the foreign proceeding and appointing the foreign representative or by a certificate from the foreign court affirming the existence of the proceeding and foreign appointment of the foreign representative. By article 15(4) of the model law, those documents would need to be translated from French to English. It would be best practice to obtain and use the same documents, if proceeding under the common law, for instance to obtain an ancillary winding-up order.



POST-BREXIT FRANCE

The status of English and Welsh proceedings in France

Barrister Stefan Ramel poses questions to avocat Georges-Louis Harang.

Is there a risk that rival insolvency proceedings concerning the same debtor could be opened in France and the UK?

On the starting premise that the insolvency regulation has ceased to apply, there would be a risk of conflicting insolvency proceedings. The concepts of 'main proceedings' and 'secondary proceedings' would no longer apply and each side could argue that its own courts were competent to open such proceedings. The principle of the jurisdiction of the court first seized would not apply.

There is, as matters stand, limited assistance that can be derived from cases directly on point on article 11 of the model law.

There is a risk that parties will use the possibility of rival proceedings in another country as part of a strategy to persuade a domestic judge to open insolvency proceedings in their own country, so as to benefit from that judge's protection. The opposite may however be true: the parties could use the lack of automatic recognition of a UK insolvency proceeding in France to continue to treat the company situated in France as solvent and to ignore all the mandatory rules of the UK insolvency proceedings, in particular the prevention of ongoing payments and the moratorium on creditor action.

Finally, a 'hard' Brexit would have the effect of transporting parties who have interests in France and in the UK back in time to a point in recent history before the application of EU regulations, a time at which separate insolvency processes were managed with the complexity that is a byproduct of multiple jurisdictions and of having a company with assets in France or of a defaulting debtor company situated in France.

What would be the criteria for the opening of concurrent proceedings?

A UK office-holder, a French creditor, a French debtor company or even a third party wanting to commence proceedings before a French judge would need to respect French procedural law in order to

open such proceedings, which would mean meeting the relevant jurisdictional criteria.

According to the provisions of article R 600-1 of the *Code de commerce*, those jurisdictional, geographical criteria depend on the domicile or head office of the debtor company or, in the absence of a head office, the centre of its principal interests in France, which, if it had an establishment (not in the sense of the insolvency regulation) in France, to the place where that establishment or the main one of its secondary establishments were situated in France (*Cour de cassation, chambre commerciale*, 11 April 1995).

It is also relevant to have in mind the potential impact of:

the provisions contained in articles 14 and 15 of the Code civil, which deal with the 'nationality privilege', enable a French jurisdiction to be seized on the basis that one of the parties (for example, creditor or debtor company) has French nationality. However, the possibility of using those articles is curtailed somewhat by (i) the Cour de cassation, which limits the efficiency of articles 14 and 15 in order to give effects to foreign decisions, and (ii) the fact that the provisions of the abovementioned article 15 also provide that they are excluded if the litigation is connected in a specified way to another state whose jurisdiction has been seized first, and that that other choice of jurisdiction is not fanciful.

• the notion of *confusion de patrimoine* (intermingling of assets and liabilities between entities) and *fictivité* (alleging that a foreign procedure is not valid) may also complicate the situation.

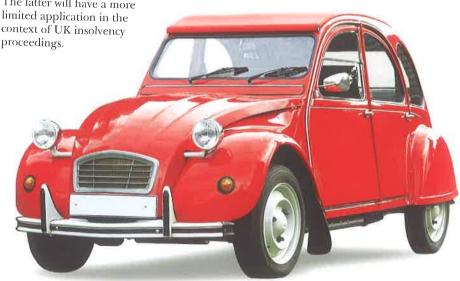
The latter will have a more

Having said all of that, proceedings that affect UK and French interests could intermingle and rival each other, which would put into play different interests and create a period of uncertainty as to what ought to happen to existing contracts, what debts should appear as liabilities of the entity, and as to assets, such as movable and immoveable property, which can be realised.

A 'hard' Brexit would have the effect of transporting parties who have interests in France and in the UK back in time to a point in recent history before the application of EU regulations.

This could, however, be avoided if the judgment opening the proceedings in the UK obtains an *exequatur* (recognition), allowing it to be recognised in the French legal system and acquiring the authority of *res judicata* to make it enforceable. In this context, no further proceedings could be opened and the UK procedure would apply in France as well as the law applicable to this procedure (except in some cases where French law will still apply, for example in relation to property and employees).

A UK office-holder should promptly seek the exequatur of the judgment opening the UK insolvency proceedings to make



that decision enforceable as a matter of French law and to enable the office-holder to serenely exercise his or her functions without competition from a French proceeding and for the benefit of the parties for whom he or she acts. Failing that, a French creditor, or a French debtor company, could be tempted to seize its 'own' (French) judge to obtain their protection, and the application of its (French) national law, and to avoid the realisation of its assets or, to the contrary, to ensure that its assets are seized before a foreign insolvency office-holder for the benefit of foreign creditors.

There would almost certainly be a rush to obtain an *exequatur*, given that insolvency proceedings are time sensitive.

If any such proceedings were to be opened, would they be rescue or liquidation proceedings?

The type of French insolvency proceeding selected does not depend on rival proceedings in another country, although, of course, such proceedings could be considered if the relevant judgment-holder obtained an *exequatur*.

A UK office-holder would have to refer to the criteria fixed by French law for the opening of a proceeding of redressement judiciaire, liquidation judiciaire or even sauvegarde. The criteria that will be applied are those that apply to those types of procedures, and in turn they depend on the extent of the financial difficulties affecting the insolvent entity.

Proceed

Proceedings that affect UK and French interests could intermingle and rival each other, which would put into play different interests and create a period of uncertainty as to what ought to happen.

A UK office-holder (or their lawyers) will need to acquaint themselves with such criteria and to ensure that they are observed, except where the UK office-holder sought to obtain an exequator of their own (UK) procedure in France.

Once a French insolvency proceeding is opened, depending on the type of proceeding, a UK office-holder will have imposed upon them the various bodies of that French procedure collective, and will need to work with those bodies. It is not difficult to see how the interests of the UK office-holder and the relevant French body might diverge, for example in the context of claims to recover debts, managing the position of employees or the realisation of



assets, or even whether the entity should continue trading.

The insolvency regulation introduces a level of cooperation between office-holders in different jurisdictions; it is to be feared that the situation post-Brexit will give rise to antagonisms between office-holders, each one defending their own interests and not the more global interest that a universal insolvency proceeding would have.

All of the above strongly militates in favour of considering, as early as possible, obtaining an exequatur in France of the UK decision opening insolvency proceedings, and all other judgments that flow therefrom. The earlier an exequatur is obtained, the sooner it will create an advantageous situation, in particular where a procedure has a UK office-holder in the driving seat and the judgment opening their proceedings is enforceable against others (a French insolvency office-holder, a French creditor, the employees located within the French jurisdiction, and the French debtor), and UK not French law applies (except in some cases, as for properties and employees).

What documents will the UK insolvency office-holder need in order to perform their functions in France?

This will depend on what the UK office-holder/UK parties with interests in French assets or a French debtor entity wish to do.

Without any particular procedural steps, and because a foreign decision opening insolvency proceedings is considered in French law to be a titre (title) that cannot be ignored, a UK office-holder could, for example, initiate proceedings before a French court to represent UK creditors, seek the opening of a French insolvency proceeding or lodge, in a French insolvency proceeding or lodge, in a French insolvency proceedure, a claim on behalf of creditors that they represent. In short, they would have title to act in France: DFC Group AS, Cour de cassation, chambre commerciale, 28 June 2016.

If it is a case of recognising the decision opening UK insolvency proceedings, as explained above, it will be necessary to obtain the *exequatur* of the judgment opening proceedings and any judgments that flow therefrom to ensure they become enforceable in France and to ensure a freedom of action without having to deal with a French insolvency process and to prevent the potential loss of assets since the debtor (whether foreign or French) who is located in France is not subject to any moratorium on legal process or impediment

to disposing of its assets (and the assets could be disposed of to the detriment of the UK insolvency proceedings).

In order to do that, it is necessary to meet the conditions imposed by the decisions in *Munzer (Cour de cassation, 1st chambre civile,* 7 January 1964) and *Bachir (Cour de cassation, 1st chambre civile,* 4 October 1967) and more recently the decision in *Conelissen (Cour de cassation, 1st chambre civile,* 20 February 2007) that consist of ensuring that the following are met: (i) the jurisdiction of the foreign tribunal or court, (ii) whether the decision conforms to public international law and (iii) the absence of fraud.

It is also necessary that no insolvency proceedings have been opened in France in relation to the same debtor: see the decision of the *Cour de cassation* in its judgment in *BCCI* (*Cour de cassation*,



The exequatur could become, in the future, a weapon to which a UK office-holder will frequently have to have recourse.

Chambre commerciale, 11 April 1995). If that condition is not met, a UK office-holder will not be able to obtain an exequatur, and will need to cooperate with any rival French insolvency proceeding in discharging his or her functions. Without an exequatur, it will be open to the UK office-holder to oppose the opening of a rival French insolvency proceeding, if the latter is sought after the judgment in relation to the exequatur of the foreign decision.

It is important to note that an exequatur is generally considered prospective and not retrospective; it applies for the future from the moment when the decision to grant the exequatur is given.

The exequatur could become, in the future, a weapon to which a UK office-holder will frequently have to have recourse, and should, in cross-border cases involving France, become an automatic part of the armoury.



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