Cross-border insolvency after Brexit: *Where are we now? Où en sommes-nous? ¿Dónde estamos?*

Stefan Ramel, Georges-Louis Harang and José Carles consider the impact of Brexit on insolvency proceedings in the UK compared to France and Spain

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The genesis of this article is a joint presentation that the authors gave on the occasion of the annual Guildhall Chambers insolvency seminar in Bristol (UK), which provided an opportunity to discuss the impact of Brexit on insolvency proceedings involving British entities or, more generally, the UK, specifically by reference to the comparative position in France and Spain.

The principal and well-known effect of Brexit insofar as it concerns insolvency is that, subject to some limited transitional provisions (see Article 67(3)(c) of the UK-EU Withdrawal Agreement), Regulation (EU) 2015 / 848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) no longer applies in situations involving the UK.

This means that after Brexit, insolvency proceedings between the UK and Spain or France do not benefit from automatic recognition under the Recast European Insolvency Regulation. Looking at the matter from the perspective of a UK practitioner, that raises obvious issues as to how UK insolvency proceedings will be treated in France and Spain and what steps a UK practitioner can take to protect their debtor's estate.

How do we obtain recognition of UK insolvency proceedings in Spain or France after Brexit?

There are no bilateral treaties between the UK and Spain or between the UK and France nor common multilateral treaties (such as the Hague Convention) on recognition and enforcement of insolvency proceedings to which the UK, Spain and/or France are a party. Although the UK[1] has adopted legislation based on the UNCITRAL Model Law, Spain and France have not.

Therefore, when dealing with recognition of UK proceedings in Spain as in France we will need to apply the common solutions of Private International Law: the exequatur.

In Spain, Article 742 of the Recast Insolvency Act[2] requires an exequatur prior to obtaining recognition of a foreign ruling opening an insolvency proceeding abroad (i.e. in the UK) as well to obtain recognition of the foreign administrator or representative. The ruling must refer to collective proceedings based on the insolvency of the debtor aimed at reorganization or liquidation and it must be final. The debtor must have participated in the proceeding, unless it was duly notified and with sufficient time to oppose (in case the insolvency proceeding is forced by its creditors). The jurisdiction of the foreign court or authority that has opened the foreign proceeding needs to be based on similar criteria to the Spanish Insolvency Act (COMI (Centre of main interests) for foreign main-proceedings or an establishment for foreign non-main proceedings) or an "*equivalent reasonable connection*". Thus, a "*sufficient connection*" (such as contracts being subject to English Law) would not be, per se, enough for a Spanish court to grant exequatur of UK proceedings opened on those sole grounds. Spanish law logically provides for the public policy exception.

Once the exequatur of the insolvency opening is obtained, foreign insolvency-related judgments would be recognized without the need for any further proceedings, given that they meet the criteria referred above (for example, any notice requirement).

In France, we anticipate that the consequences of Brexit on UK insolvency proceedings / judgments are mainly:

- A lack of *res judicata* of the UK judgment, which notably means that (i) there will be no automatic and immediate recognition of the UK judgment / of the main proceeding initiated in the UK where the debtor's COMI is located, (ii) there will be no divestiture of the debtor's assets located in France, (iii) these assets might by seized by a third party, (iv) there will be no automatic stay of individual enforcement actions and (v) any creditors may sue the debtor.
- A lack of enforceability of the UK judgment which notably means that (i) no acts of execution on the debtor's assets located on French

territory could be considered and (ii) the recognition of the UK judgment per se will be strictly limited (without the exequatur, the position of the UK IP remains recognised under French law especially to enable him/her to launch an exequatur petition / to declare claims – any parties may launch interim measures).

To avoid the very narrow recognition of the UK judgment and its consequences due to Brexit, the UK judgment which opens proceedings or has an effect on the persons, property, rights or obligations of the parties will need to obtain the exequatur to be enforceable on French territory. Pursuant to case law, three cumulative criteria should be respected/fulfilled: jurisdiction of the foreign judge, lack of fraud and the conformity of the foreign judgment to the French international public order. Depending on the court seized in France, the average duration of the proceedings (at first instance) is between 6 and 12 months.

What measures can Spanish or French Courts adopt to protect the assets of a UK insolvent company in Spain or France?

In Spain, Article 748 of the Recast Insolvency Act provides for the exequatur of foreign precautionary measures. Therefore, Spanish commercial court may also recognize and execute UK interim measures adopted prior to the opening of foreign UK main proceedings.

On the other hand, Spanish Commercial Courts may also adopt their own precautionary measures under Spanish law, such as:

- a stay on enforcement proceedings against the assets or rights of the UK debtor (so that assets located in Spain are protected);
- an attribution of administration and/or realization powers to the foreign representative (or the person appointed) of assets and rights located in Spain that are perishable, could suffer serious damage or deterioration or could significantly decrease in value; or
- the suspension of the debtor's powers to sell, dispose of or encumber its Spanish assets and rights.

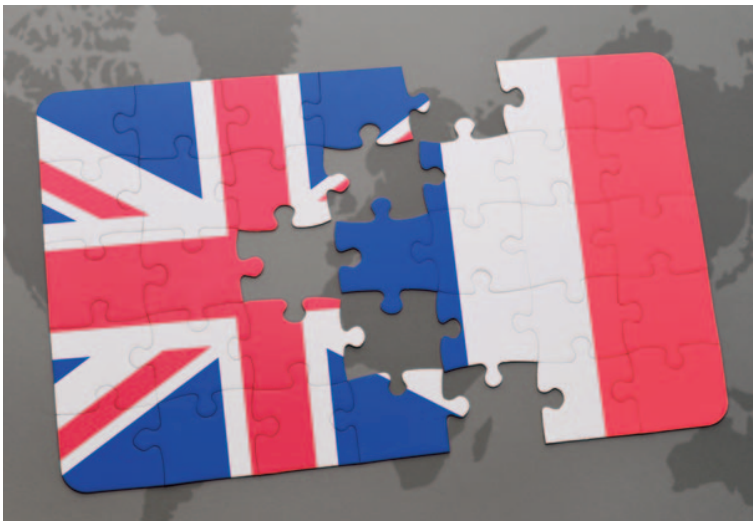
The request for precautionary measures in Spain may precede the request for exequatur of the foreign ruling opening the foreign proceeding. However, in these cases, Spanish commercial courts will require that the request for exequatur of the foreign ruling opening the foreign proceeding is filed within a 20-day period.

What about France?

In France, to avoid a run on first arrived/first served, there is room for possible immediate effects of the UK judgment before obtaining the exequatur in limited circumstances in order to secure assets. The UK IP/litigant (creditor) is therefore not deprived of legal actions to protect assets located on the French territory by performing interim measures.

Within this context, French law allows a litigant to approach the judge with jurisdiction in order to be authorized, for instance, to freeze any sums on the debtor's bank account or to obtain a mortgage on any properties held by the debtor. However, such interim measures need to be followed within a month by proceedings on the merits, in our case by proceedings under which the litigant will request the exequatur of the UK judgment in order for this to be validated and to obtain a decision on the merits (without this introduction of proceedings on the merits, the interim measures will be considered null and void). Such interim measures will make the asset unavailable during proceedings on the merits.

There is also a possibility, for a UK IP (representing UK creditors), to open an insolvency proceeding against a debtor with its COMI located in France.



Conclusion

Although it is still, relatively speaking, early days since Brexit has fully taken effect, it is clear already that it will cause complications, delays and additional cost to a UK insolvency practitioner who has to take any sort of legal steps in France or Spain. However, and even in the absence of a treaty-level agreement between the EU and the UK on insolvency matters, it can be hoped that as it becomes more common, in countries such as France and Spain, for a UK insolvency practitioner to be seeking an exequatur, such that lawyers and judges in such countries re-acquaint themselves with the necessary process, there will in due course be savings in time, complexity and cost.■

> ***After Brexit, insolvency proceedings between the UK and Spain or France do not benefit from automatic recognition under the Recast European Insolvency Regulation***

Footnotes:

1 Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency (1997) has been adopted in Great Britain and the overseas territories of British Virgin Islands and Gibraltar. In this regard, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

2 Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal, available at the Spanish Official Gazette at https://www.boe.es/buscar/act.php?id=BOE-A-2020-4859.

3 Decisions : *Munzer* - Cass. 1re civ., 7 janv. 1964, *Bachir* - Cass. 1re civ., 4 oct. 1967, *Simitch* - Cass. 1re civ., 6 févr. 1985 and recently, Cass. 1re civ., 6 juillet 2016, n° 15-15580.