



INTERNATIONAL INSOLVENCY INSTITUTE

Cross-Border Insolvency Law and Practice in France

Paul J. Omar

From

The Paul J. Omar Collection

in

The International Insolvency Institute

Academic Forum Collection

<http://www.iiiglobal.org/component/jdownloads/viewcategory/647.html>

International Insolvency Institute

PMB 112

10332 Main Street

Fairfax, Virginia 22030-2410

USA

Email: info@iiiglobal.org

Cross-Border Insolvency Law and Practice in France

by
Paul J. Omar
of Gray's Inn, Barrister

Introduction

France has been a commercial trading nation since the earliest times. The annual fairs held on the plains of Champagne, instituted in the late 1100s, were a focus for the development of cross-European networks for trade and finance. This is said to have contributed directly to the development of a Europe-wide economic system.¹ With trade came undoubtedly the need to regulate for situations of economic hardship and domestic rules were introduced early to deal with insolvency. The framework for such measures in France has a long and ancient history, one of the first comprehensive ordinances anywhere being that promulgated in 1673 in the reign of Louis XIV. The impact of insolvency has also been felt at an international level with a number of instances occurring over the centuries. Although instances of international insolvencies proper have been little documented, it is known that the failure of the Bardi Bank in 1345 had repercussions on the financial stability of both the French and English Crowns.² This particular failure stemmed from a general crisis in banking involving most of the leading houses in Florence suffering from an overextension of credit.³ One of France's most eminent writers, Maurice Druon, chronicles the impact of the withdrawal of the Tolomei Bank to Siena on the finances of the French Crown in the mid-14th century.⁴

As examples of the early drive towards organisation of international proceedings, there exists a French ordinance of Louis XV of 9 April 1747.⁵ A later treatment of international insolvency occurs in the Franco-Swiss Treaty of 1777, one of whose provisions states that fraudulent bankrupts may not seek asylum in the other state in order to evade creditors.⁶ This treaty is said to be based on an earlier text concluded between France and a number of the Swiss cantons in 1715, which although on the theme of enforcement of foreign judgments does not expressly mention insolvency. This Treaty was revised between 1798 and 1828, each time carrying forward the insolvency theme. The Franco-Swiss Treaty of 1869, a later revision, is incidentally also said to be the model in Europe for later bilateral treaties of this type. The treaty applied to nationals and foreigners

¹See Davies, *Europe: A History* (1997) Pimlico at 370.

²See Le Cannu et al., *Entreprises en Difficulté* (1994) Joly Editions at para. 2027.

³See Davies, *op. cit.* at 401.

⁴See Druon, *Le Lis et le Lion* (1970) Livre de Poche at 203ff.

⁵See Nadelmann, *An International Bankruptcy Code: new Thoughts on an Old Idea* (1961) 10 ICLQ 70 at 75.

⁶Article 13, Treaty of 29 May 1777, cited by Lipstein, *Early Treaties for the Recognition and Enforcement of Foreign Bankruptcies* (Chapter 14) in Fletcher (ed.), *Cross-Border Insolvency: Comparative Dimensions* (The Aberystwyth Insolvency Papers) (1990) UKNCCL at 223.

resident in one of the states with assets or creditors in the other. Jurisdiction was in principle allocated to the courts where the debtor had a commercial establishment or, if a company, its seat. There was a sharp division in practice between French and Swiss courts where the debtor had establishments in both states or was established in one state with residence in the other, situations not provided for in the convention. The Swiss courts took a definitional approach, limiting jurisdiction to instances specifically provided for in the treaty. The French courts, although at first agreeing with this view, later took a more purposive approach, extending jurisdiction to any cross-border instance.⁷ As will be seen below, this purposive approach may in fact characterise the way the French courts have treated the issue of jurisdiction, which lies at the heart of any consideration of the rules that govern how French courts will react in instances of international insolvency.

Jurisdiction in Company Law Matters

As a preliminary point, in the case of jurisdiction over companies, the Civil Code states that companies whose seats are to be found on French territory are subject to French law. The law also states that third parties are entitled to assume that the location of the statutory seat raises a presumption of jurisdiction, although the company itself may not rely on this fact where the 'siège réel' (real seat) is considered to be elsewhere.⁸ The effects of the real seat doctrine are complex and differ between states that acknowledge its use, depending often on the precise context in which it is sought to apply the principle. According to this doctrine, a court is entitled to examine whether the location of the seat corresponds to the reality of business activity. In practice, the real seat doctrine means that the courts will seek to apply their law to a company where that company either has its real seat or substantial presence through having its centre of main interests in that jurisdiction. This will be irrespective of whether the company in question has been incorporated in another jurisdiction. A number of consequences arise from this position. The choice initially exercised by company promoters in respect of the proper law of the company may be frustrated. Furthermore, in the event that the law of the state in which the company has its real seat is applied in preference to that of the state of incorporation, this may engender a situation of conflict between both sets of rules. This may be particularly so, where enforcement of any orders made is subsequently sought in the jurisdiction of origin.

Jurisdiction Rules in Insolvency Matters

French law recognises the principle of hierarchy of laws, generally placing international law above domestic law in the legal order. Courts will therefore seek to give effect to the text of any international instruments and conventions.

⁷Ibid. at 224-225.

⁸Article 1837, Civil Code and Article L210-3, Commercial Code (formerly Article 3, Law no. 66-537 of 24 July 1966).

Nevertheless, there exist difficulties with regard to the extent to which domestic judges will be qualified to interpret and apply such treaties, it only having been recently decided that judges should seek to apply these texts without reference to the practice of the executive in this regard.⁹ In any event, in the absence of such texts, domestic legislation and legal rules are of application. Among these rules are those the courts use to determine their own jurisdiction and the Supreme Court has held as a general statement of law that internal rules of competence also extend to determining jurisdiction over international matters.¹⁰ As the Brussels Convention 1968 excludes insolvency from its remit, the basis for jurisdiction in insolvency must be determined by reference to these domestic law rules. There are two statutory tests of jurisdiction, the first deriving from the law dealing specifically with insolvency.¹¹ The second, a form of default provision, derives from general civil law rules as well as jurisdiction rules contained in the Civil Code. An extension of the latter test based on case-law has led to the application of jurisdiction of a territorial nature in situations where courts have held that local interests are at stake. In addition, the real seat doctrine is of application as a determinant of the tests of jurisdiction. Jurisdiction is a matter quite separate from the recognition of foreign orders, for which a special procedure, the *exéquatur*,¹² is provided in order that effect may be given to these orders on French territory.

Law of 1985 Provisions

In insolvency, a court is competent to exercise jurisdiction over a business, whose seat is located within the territorial jurisdiction of the court. Where a seat does not exist on French territory, the criterion used is the location of its 'centre principal de ses intérêts' (principal centre of interests) in France.¹³ The criterion based on the presence of a seat or the domicile of the debtor is one that has been long sanctioned by the case-law.¹⁴ In the case of incorporated bodies, the courts are aware of the ability of companies to determine the location of their incorporation and will examine whether the location of the registered office coincides with the place where activity is carried out.¹⁵ The examination will be conducted in light of the evidence presented to the court as to the location, frequency and duration of the activity alleged. Furthermore, it will be carried out in light of other factors showing a strong connection with the jurisdiction through, for example, the exercise of management or other vital company functions there.

In this context, the application of the real seat doctrine would allow for jurisdiction in a situation where a business maintains the appearance of having its seat in

⁹Cassation civile, 19 December 1995, GP 1996.1.panor.91.

¹⁰Cassation civile, 19 October 1959, D.1960.jur.37.

¹¹Law no. 85-98 of 25 January 1985 ('Law of 1985').

¹²From the Latin: 'let it be executed (enforced).'

¹³Article 1, Decree no. 85-1388 of 27 December 1985.

¹⁴Cassation requêtes, 8 and 26 April 1932, GP 1932.2.45.

¹⁵See Coviaux, *Jurisclasseurs Commercial: Droit International des Procédures Collectives* (fasc. 3130) at para. 31; Soinne, *Traité des Procédures Collectives* (1995) LITEC at para. 352.

another country but whose real presence and centre of interests is in France.¹⁶ Furthermore, the finding that the overseas seat is a fiction because the management operates within the jurisdiction also confers jurisdiction on the courts. This was the case of a company which claimed to have its seat in Monaco, but evidence was brought which showed that its board of directors operated in Paris, where its principal commercial operations also lay.¹⁷ Although the foreign seat might well be real, this fact has not prevented some courts from deciding that the jurisdiction tests were satisfied where the evidence showed that the effective centre of business was located in France. Similarly, the fact that proceedings are afoot in another jurisdiction does not prevent the courts from considering and initiating proceedings where they choose to do so.¹⁸

A particular instance of the application of these provisions is in the BCCI case, where the bank had establishments in Monaco and France. The Paris Commercial Court exercised its inherent jurisdiction under the Law of 1985 to open judicial rescue proceedings on 23 July 1991.¹⁹ Having ascertained that the bank was in a technical state of insolvency, the court proceeded to initiate proceedings. It held that, by virtue of the provisions of the Law of 1985, where the debtor had a real commercial presence in France despite having an overseas seat, the domestic courts were competent to open proceedings. Evidence of the commercial presence was amply provided by the existence of agencies in Paris, Marseilles and Cannes. The Paris establishment, in comparison with the others, was the principal establishment in France, a factor that further motivated the Commercial Court with regard to exercising jurisdiction. Similarly, with regard to the branch in Monaco, a French court could open proceedings by virtue of Article 2(2) of the Franco-Monegasque Treaty of 1950. The fact that foreign proceedings were in progress was not held to be an obstacle to proceedings being opened. This is especially true where the foreign proceedings have not yet been recognised by virtue of undergoing the *exéquatur* process. Nevertheless, the fact that local proceedings are opened would prevent foreign orders from obtaining recognition and thus would guarantee primacy to the domestic proceedings.²⁰ Once jurisdiction had been taken in this manner, the local court could then proceed to ascertain whether the debtor satisfied its criteria for the opening of formal proceedings.

The judgment of the Commercial Court, confirmed by the Paris Court of Appeal,²¹ in the BCCI case was further appealed by the liquidators appointed by the courts in Grand Cayman. The Supreme Court was confronted with two arguments on jurisdiction, the first relating to the universal effect of a foreign judgment given in time before a French judgment and whose merits were not subject to a

¹⁶Cassation civile, 21 July 1987, D.1988.jur.169.

¹⁷See Coviaux, *op. cit.* at para. 31, citing CA Paris, 9 July 1960 (unreported judgment).

¹⁸*Ibid.*, citing TC Seine, 10 August 1872, Clunet 1874.124 and CA Nancy, 8 May 1875, Clunet 1877.144.

¹⁹TC Paris, 23 July 1991, D.1992.jur.232.

²⁰See commentary by Rémy in D.1992.jur.232 at 234.

²¹CA Paris, 8 July 1992, D.1992.jur.476.

challenge. The second argument was in respect of whether the courts could in fact justify the opening of proceedings in light of the fact that the establishments in France and Monaco could not be said to constitute independent establishments, operating as they did under the direction of the parent bank. The Supreme Court gave short shrift to these arguments, stating that the existence of a foreign judgment, although it was entitled to recognition and had probative value before domestic courts, could not prevent a local court from exercising jurisdiction. This was provided no previous *exéquatur* had been obtained and where the court was not constrained by any international text requiring it to give precedence to the foreign judgment.

With respect to the qualification for opening proceedings, the rule iterated by the Supreme Court was that the location of the principal establishment governed the allocation of jurisdiction. In this case, it was amply satisfied on the evidence that the main activities of BCCI in France were carried out in Paris, whatever its status vis-à-vis the parent bank. The French courts were entitled to only take cognisance of activities carried out within the country to found jurisdiction.²² The independence of activities carried out in the country as compared to those in other jurisdictions is illustrated by two connected cases, in the first of which the interests of foreign creditors were at stake. Here the court held that foreign creditors were entitled to participate in the local insolvency, irrespective of any other claims they may have elsewhere, provided the debt they alleged was owed them had a close connection with the activities of the bank in France.²³ The second case concerned a creditor who sought to set off sums owed by it to the bank against debts owed by other branches of the bank. As the courts held that the law of the transaction was French, the creditor was unable to assert this claim as the courts would not take into account transactions elsewhere and the relevant criteria to satisfy such a claim under domestic law had not been met.²⁴

General Civil Law Provisions

The courts have traditionally recognised themselves as competent even in situations where the debtor has no domicile, seat or principal establishment in France. The precise extent of this jurisdiction is difficult to ascertain with precision and appears to some commentators to be opportunistic in nature. Often, jurisdiction is asserted because of the 'intérêts en présence' (interests in the case), for example the existence of creditors or employees within the jurisdiction. It is the case that without these interests, foreign orders affecting the debtor will often receive recognition. However, in the presence of some determinable benefit for local creditors, domestic judges often find it perfectly acceptable to open a second competing procedure affecting the same debtor.²⁵ The qualification used to describe the basis on which these proceedings are

²²Cassation commerciale, 11 April 1995, D.1995.jur.640.

²³CA Paris, 29 March 1994, D.1995.somm.385.

²⁴CA Paris, 15 June 1994, D.1995.somm.391.

²⁵See Coviaux, *op. cit.* at para. 32; Soinne, *op. cit.* at para. 352.

opened sometimes rests on finding that the debtor has a centre of activity located in France, which, while not amounting to a principal establishment, nevertheless constitutes a distinct operation from that at its seat or domicile.²⁶ Thus, where the business has only a branch or presence, an entity often without legal personality, a court may still submit the business to insolvency proceedings.²⁷ This was the case of the French subsidiary of a German computer company subject to insolvency proceedings in its home jurisdiction. To justify opening proceedings with regard to the subsidiary, the Supreme Court held that insolvency of the holding company meant that it was no longer able to support the activities of its subsidiary. Consequently, as the subsidiary faced a situation where it had ceased to make payments, this would entitle the courts to open formal proceedings.²⁸

Other court rulings are reported as going much further to establish jurisdiction. In these cases, even where the business has no establishment or other operations in France, creditors may still petition the court to apply insolvency proceedings to the debtor business. The courts have held that jurisdiction is satisfied by the conduct of business in the country, for example through the issue of securities or contracting for orders.²⁹ Furthermore, the courts have also used the presence of assets to justify proceedings, although the commentators are divided as to whether this use of powers by the court is an unwarranted extension of the territoriality principle.³⁰ Furthermore, the Supreme Court has held that creditors may choose, in the absence of a link between the business and any particular territorial jurisdiction, any court in which to file a claim based on the failure of the debtor to honour obligations contracted for by them towards a local creditor.³¹ In this case, more often than not, it is the successful creditor who first institutes proceedings who decides where proceedings will take place. Commentators are not persuaded that the justifications based on commercial presence, business activity or presence of assets are sound in principle, but despite this, it seems a constant feature of the case-law that jurisdiction may be satisfied in a number of ways reliant on general principles of jurisdiction.

Where justification in a legal source is necessary for these assertions of jurisdiction, it is often found in what is called the exorbitant jurisdiction principles contained in the Civil Code. These rules are of 'ordre public' status and are thus mandatory for French courts to follow, unless another text of a higher status (a constitution or international convention) states otherwise. According to these rules, a foreign person, whether resident or not in France, may be cited before a French court to answer for any obligations pursuant to a contract in France with a French citizen. Similarly, a contract with a French citizen made elsewhere is also

²⁶See Coviaux, *op. cit.* at para. 33.

²⁷CA Paris, 8 July 1992, D.1992.jur.476; RJ Com. 1993.7.

²⁸Cassation commerciale, 19 January 1988, Bull. Civ. IV no. 47; D.1988.jur.565.

²⁹TC Amiens, 8 May 1888, Clunet 1891.917, cited in Coviaux, *op. cit.* at para. 34.

³⁰CA Colmar-Metz, 10 May 1932, Clunet 1934.99, cited in Coviaux, *op. cit.* at para. 35.

³¹Cassation commerciale, 19 March 1979, Bull. Civ. IV no. 104; Rev. Sociétés 1979.567.

subject to the jurisdiction of the French courts.³² Furthermore, a French citizen may be answerable before French courts for obligations contracted for outside France, whether the obligations are owed to a French citizen or foreigner.³³ These exorbitant jurisdiction rules are of general impact and apply, as the courts have frequently held, to all areas of law, although very limited exceptions are recognised for administrative law and contracts in relation to foreign real property.³⁴ In insolvency, these texts have been given effect by the Supreme Court judgments in a consistent line of authority dating to the 1960s.³⁵

The views of commentators on the exorbitant rules are mixed. A significant majority of authors have strong reserves about the consequences of adopting a pro-creditor position in this regard, invariably leading to a multiplicity of proceedings. Suggestions have been made that the competence of the courts in these cases should be limited to instances where the foreign debtor has a secondary establishment or branch in operation. However, an observation has been made that, in many instances where the exorbitant jurisdiction is relied upon, the fact situation reveals that the debtor has a presence in France through a branch or registered address.³⁶ Nevertheless, the courts have held in one case, relying on the Civil Code provisions, that foreign creditors may petition the courts to open proceedings involving a French citizen domiciled within the jurisdiction, but whose principal establishment was located overseas. The facts, however, also reveal that the foreign court, when seised, disclaimed jurisdiction. It might be argued therefore that the domestic courts could not fail to act without jeopardising the interests of both the debtor and any creditor.³⁷

A further instance of the application of general rules comes from the use of the general 'ordre public' provision,³⁸ by which certain laws have a recognised status as texts that can not be derogated from in their application. The Law of 1985 is adjudged a law that governs commercial relations and is therefore a law of 'ordre public' nature and interest.³⁹ As such, jurisdiction may be taken even where these public interests are at stake. In cases where a court declares itself competent to initiate insolvency proceedings, it will apply in line with this view provisions of local law that appear to it to have 'ordre public' status. For example, rules that establish the liability of business partners or company directors for the repayment of business debts applies to all individuals, whether or not they are foreign nationals.⁴⁰ In an instance under a similar provision in an earlier law,⁴¹ the

³²Article 14, Civil Code.

³³Article 15, Civil Code.

³⁴See Coviaux, *op. cit.* at para. 38.

³⁵Cassation civile, 7 June 1962, Bull. Civ. II no. 506.

³⁶See Coviaux, *op. cit.* at paras. 39.

³⁷*Ibid.* at para. 40, citing CA Paris, 10 November 1960, Clunet 1961.486.

³⁸Article 3, Civil Code.

³⁹Cassation civile, 4 February 1992, D.1992.jur.181.

⁴⁰Article L624-1, Commercial Code (formerly Article 178, Law of 1985). CA Colmar, 30 May 1984, Juris-Data no. 40920.

⁴¹Article 99, Law no. 67-563 of 13 July 1967.

Supreme Court found a Swiss director liable for business debts, incurred by a French company, the relevant bilateral treaty not having made provision for this eventuality.⁴²

In general, domestic provisions that will be enforced are those applicable to the opening and conduct of insolvency proceedings, actions against partners and guarantors of unlimited companies, actions or prosecutions involving the directors and officers of businesses in cases of management mistakes, negligence or acts of criminal bankruptcy. Furthermore, local provisions will also apply to allegations of 'confusion de patrimoines' (confusion between personal and company assets or between the assets of several companies under the same management) and to the fictional incorporation of companies as a means of evading liability. The rules relating to creditors and their rights within the procedural context are also considered of 'ordre public' status.⁴³ An example may be seen in relation to proof of debts, where a foreign creditor was held strictly bound by the limitation period for declarations.⁴⁴ An exception exists, however, for security interests, including mortgages, charges and retention of title clauses, where the application of other laws may be justified by private international law rules.⁴⁵

Recognition and Enforcement of Foreign Proceedings

A foreign judgment is generally acknowledged as having the authority of the state from which it emanates. Nevertheless, the foreign judgment is still subject to an examination by French courts, which must decide what authority to accord it within the domestic system. This is performed through the procedure known as the *exéquatur*, which is treated by commentators as being the equivalent to formal adoption of the judgment by the domestic courts so that enforcement may take place. Prior to the *exéquatur* process being obtained, the position of a foreign judgment before the judicial system in France is more ambiguous. In essence, despite the fact that a foreign judgment may be in existence, this does not prevent a judge from opening local proceedings involving the debtor on the foundation of any of the jurisdictional bases mentioned above. Although this would seem to render a foreign judgment nugatory, the judgment still possesses a certain probative value. Recognition of this value is subsequently confirmed by making it enforceable through the *exéquatur*. Nevertheless, before this stage, the degree to which the foreign judgment may be acknowledged as a valid order, the effect it has within the domestic system and what reliance may be placed on it for purposes connected with proceedings is less certain.

⁴²Cassation commerciale, 16 July 1981, Bull. Civ. IV no. 212.

⁴³See Coviaux, *op. cit.* at paras. 44-94; Le Cannu et al., *op. cit.* at paras. 2043-7; Soinne, *op. cit.* at paras. 353-63.

⁴⁴CA Paris, 28 April 1998 (unreported judgment).

⁴⁵See Le Cannu, *op. cit.* at paras. 2048-56; Soinne, *op. cit.* at paras. 364-5.

The Foreign Judgment Prior to Recognition

Without recognition through the *exéquatur*, a foreign judgment is incapable of enforcement. This is held by commentators to be the result of the application of strict conflict rules and is justifiable in insolvency, having regard to its status as a measure of 'ordre public' law.⁴⁶ However, the existence of the foreign judgment may be recognised by a French court as having a certain probative value and may, in certain instances, have effect, particularly where the judgment affects the capacity and status of individuals subject to other personal laws. Although insolvency would seem a case for the application of this rule, especially where the foreign judgment declares the insolvent status of the debtor, the courts in France have steadfastly refused to give effect to any foreign judgment in insolvency that has not gone through the requisite recognition process. Nevertheless, a foreign judgment in insolvency is treated as having an effect insofar as it brings about a change in the status of the debtor, of which judicial notice may be taken.⁴⁷

The rights of foreign insolvency administrators to manage the insolvency process may be recognised as valid by the production of a foreign judgment. However, the judgment does not produce any effect on the debtor's possessions within the jurisdiction where execution or enforcement is necessary to deal with these assets. It may, nevertheless, be used as proof of the status of the insolvency administrator and the capacity given to him to act by the foreign court. The consequence of this is that the insolvency administrator will be able to act before the French courts, including for example where the debtor needs to be represented in litigation.⁴⁸ Examples of acts that the insolvency administrator will also be able to perform include making requests for preservation measures over assets, applying for formal recognition of the foreign judgment as well as proving foreign debts in any French proceedings. The extent of preservation measures that can be ordered pursuant to such a request include injunctions not to deal with assets and the seizure of property for the purposes of preventing execution by third parties, provided these measures do not in themselves amount to enforcement of the foreign order.⁴⁹ Nevertheless, a French court still retains the discretion to supervise the relevant official in the exercise of his functions and may decide not to accord the official automatic recognition of all his acts.

One qualification nevertheless remains in relation to the powers of the foreign insolvency administrator to act. The debtor, while proceedings have not been instituted in France or the foreign judgment recognised, remains free to deal with his own assets within the jurisdiction.⁵⁰ Even if the foreign judgment operates so

⁴⁶See Coviaux, *op. cit.* at para. 96; Soinne, *op. cit.* at para. 368.

⁴⁷*Ibid.* at para. 97, citing Cassation civile, 30 January 1912, S1916.1.113.

⁴⁸*Ibid.* at para. 99, citing TC Seine, 7 March 1957, GP 1957.2.123; See also Soinne, *op. cit.* at para. 369.

⁴⁹*Ibid.* at para. 100.

⁵⁰*Ibid.* at para. 101, citing Cassation civile, 17 July 1882, DP 83.1.65.

as to deprive him of the ability to deal with his assets universally, this being generally the case, the order can not affect the disposal of property within the jurisdiction. This may prove an insuperable state of affairs unless the insolvency administrator acts diligently to obtain preservation measures. Similarly, creditors in France may still exercise any rights against the debtor, including suing for payment, seizing property or requesting the opening of insolvency proceedings, despite the existence of a foreign judgment affecting these acts. The effect of any foreign composition will also fail to extend to assets or bind creditors within the jurisdiction without formal recognition through the *exéquatur*.⁵¹

Recognition Procedure

A foreign judgment may be registered in France and executed over assets of the debtor present within the jurisdiction, subject to the absence of a judgment or order by a domestic court opening proceedings in respect of the same debtor.⁵² The procedure for the recognition of a foreign judgment follows ordinary rules of civil procedure in relation to the recognition of foreign judgments. The application for the issue of a summons may be made by any interested party, this definition including a foreign insolvency administrator, creditor or debtor himself. The Public Prosecutor is also considered to enjoy the same right because of the extensive role given the official in the general insolvency law context.⁵³ The Supreme Court has dealt with the question of what constitutes a relevant interest in a case where the debtor itself applied for the *exéquatur* of a judgment declaring the company insolvent. It sought to justify this course of action by reference to debts owed to a number of French companies that it could potentially set off if these debts were taken into account in proceedings.⁵⁴ The application may be made before the courts in whose district the debtor has its centre of business activity within the jurisdiction. Where any other party makes the application, the debtor must be cited to appear even if the foreign judgment was obtained *ex parte*.⁵⁵

The court hearing the application must content itself with an examination of the regularity of the foreign judgment. The Supreme Court has had occasion to pronounce on what are the essential elements that a French court must look for in its examination of the validity of the foreign judgment. The conditions are that the foreign judge was competent to make the order in question and that the procedure used was the normal one in the instance. In addition, the law applied by the foreign judge must be the correct one in light of the private international rules the French courts would use in similar situations. Furthermore, no fraud induced the making of the order and, finally, that the order is compatible with domestic 'ordre public' rules. The examination, although quite detailed, is carried

⁵¹Ibid. at paras. 104-9.

⁵²Article 509, New Code of Civil Procedure.

⁵³See Coviaux, *op. cit.* at para. 111.

⁵⁴Cassation civile, 17 May 1983, Bull. Civ. I no. 147.

⁵⁵Cassation civile, 12 November 1986, Bull. Civ. I no. 257.

out solely with the aim of ensuring the protection of the French legal order and interests. To that extent, the examination of the validity of the foreign judgment should not amount to a retrial of the issues and substance of the decision.⁵⁶ The exéquatour of a judgment may also be obtained, even where the foreign procedure does not have a precise parallel in domestic law, an example being of the insolvency of a non-commercial person in the commercial courts.⁵⁷

Nevertheless, the exéquatour process must still ascertain that any judgment to be recognised does not offend general 'ordre public' rules. The concept of 'ordre public' is one that has a great history in French law and has a very well-developed tradition and jurisprudence of its own. A detailed treatment of the rules of this branch of law as they apply to insolvency matters would be inappropriate here. Nevertheless, in line with general principles, it may be said that the view a French judge should normally take is to ask whether the foreign judgment should be granted recognition or not. However, a judge may still grant recognition to a part of the judgment, where there is doubt or the conditions have not been fully satisfied with respect to this part, provided the judgment is capable of being severed in this way.⁵⁸ The fact that the parties do not point to any breach of the conditions is not considered sufficient grounds for a judge to accord the exéquatour without being himself satisfied. Similarly, the existence of a doubt as to any one of the conditions would entitle a judge to refuse recognition. This is compatible with the notion that the judge is the 'guardian of French sovereignty.'⁵⁹ The concept of 'ordre public' in this case also extends to the bases on which jurisdiction has been exercised by the foreign court, especially where it might conflict with the view taken by a domestic court as to its own jurisdictional qualifications. Despite the relatively low numbers of applications for recognition of foreign judgments in insolvency, commentators are able to state that the concept of 'ordre public' is in evolution with the tendency in French law towards more flexibility. Instances where hitherto recognition might have been difficult to obtain would not now face much dispute before the courts, the example given being the sea change in case-law with regard to the position of retention of title clauses.⁶⁰

The Effect of Recognition

Where the foreign judgment has been recognised, the domestic court will order that it receive the formal stamp of recognition. Once this is obtained, the foreign judgment carries the same authority as a judgment obtained in a French court and is *res judicata*. The effect will be to render the judgment capable of enforcement in France. Concurrent insolvency proceedings in France against the

⁵⁶ Cassation civile, 7 January 1964, JCP éd G 1964.II.13590. See Soinne, *op. cit.* at para. 374.

⁵⁷ See Eslami, *Spotlight on Transnational Bankruptcy* (2000) <www.europeanlawoffice.com/ld.cfm?Newsletters_Ref=2140>, citing Cassation Commerciale, 18 January 2000 (unreported judgment).

⁵⁸ See Mayer, *Droit International Privé* (1994) Montchrestien (Volume 4) at para. 416.

⁵⁹ *Ibid.* at para. 420.

⁶⁰ See Coviaux, *op. cit.* at para. 121.

debtor the subject of the judgment may not be initiated. Nevertheless, the judgment granting exéquatur may be appealed as any ordinary judgment in civil proceedings. Once final, it binds all parties to the original judgment and has effect as against third parties. Despite this, creditors may still appeal against the terms of the judgment as it affects them provided they show good cause. This might include where the creditors were in fact denied the right to participate in the foreign proceedings in question or where they have already proceeded to levy execution over assets within the jurisdiction.⁶¹ The exéquatur must be advertised in the same manner as any domestic judgment that initiates insolvency proceedings by publication in the 'BODACC', a specialist annexe of the Official Journal.

The judgment receiving recognition may only be enforced after the time when exéquatur is obtained and will generally only have effect prospectively.⁶² Any action taken by creditors between the date the foreign judgment is obtained and when it is recognised continue to have effect as regards the parties involved, not withstanding the fact that the exéquatur has subsequently been obtained. Nevertheless, this long standing principle was put into question following a celebrated case where the Supreme Court appeared to state that domestic courts should be prepared to accord retrospective effect to a subsequently recognised foreign judgment from the date the judgment was originally given. This would undoubtedly have an effect over the debtor's property and any rights over disposal that might well have been exercised in the interim. The case in question concerned a Danish distributor of French products that was declared insolvent. An important French creditor levied execution over real property in France, this being challenged by the insolvency administrators, who successfully sought exéquatur of the insolvency judgment.

The issue taken to appeal was whether the execution could continue to be maintained. The Court of Appeal decided that the original demand for payment was invalid and consequently the execution was void as against the interests in the insolvency. The Supreme Court quashed the judgment, holding that the true question was whether the execution could stand in light of the recognition of the judgment. It held that the issue fell to be decided according to the Danish law, being the procedural law, and avoided the execution on this basis. The justification raised by the court was that, although a foreign judgment could normally only be enforced following the exéquatur process, nothing prevented a French court from taking into account the effect that a Danish court would hold attached to the original judgment. In this case, the concept of a moratorium on execution was known to both legal systems and could not possibly offend against the French conception of 'ordre public'. However, it is likely that this type of retrospective recognition will be decided on a case by case basis and subject to continuing views on what constituted 'ordre public' rules.⁶³

⁶¹ See Coviaux, *op. cit.* at para. 123; Soinne, *op. cit.* at para. 375.

⁶² See Coviaux, *op. cit.* at para. 125; Soinne, *op. cit.* at para. 375.

⁶³ Cassation civile, 25 February 1986, Bull. Civ. I no. 38; JCP éd E 1987.14969.

Bilateral Conventions

France is a signatory to four bilateral treaties dealing with insolvency that at the time of writing are still in force.⁶⁴ A further treaty with Switzerland, noted above, was abrogated in 1992. The circumstances surrounding the abrogation of this treaty, officially because of the entry into force of the Lugano Convention 1988, are curious. The latter convention in fact preserved the effect of the treaties it mentions with respect to matters excluded from the competence of the convention.⁶⁵ These would, as in the Brussels Convention 1968, have included insolvency matters. Nevertheless, the two states concerned chose to abrogate the treaty completely. Commentators have deplored the loss of what had been a useful instrument and also observe that the paucity of treaties in this area may be proof of the difficulty in securing a consensus even at the bilateral level on the treatment of international insolvency.⁶⁶ The treaties have in common the application of the principle of unity of the procedure based on domicile of the debtor, although there are minor procedural deviations from the principle in some of the treaties. For example, the Treaty with Belgium allowed for non-domiciled businessmen of either state to be declared insolvent if they had a commercial establishment in any of the states.⁶⁷ Other common provisions include those on *res judicata*, applicable law and conflict resolution. There has been little case-law on treaty provisions, but the rules that emerge are not always uniform in approach.

In the case of the Treaty with Switzerland, the extension by a French court of insolvency proceedings involving a French subsidiary to its Swiss holding company on grounds of commonality of decision making was quashed. This occurred because the provision of the Treaty requiring the Swiss business to have a commercial establishment in France was not met by the participation of the holding company in acts preparatory to the formation of the subsidiary.⁶⁸ On similar lines, the extension by a French court of insolvency proceedings, permitted by French law, to a non-executive director resident in Belgium of a business also domiciled in Belgium, was held unjustifiable. This was because Belgian law did not recognise the extension to a non-businessman of insolvency procedures, the Treaty stating explicitly that the law of the seat of the business should govern issues arising from its insolvency.⁶⁹ A very different solution was found in a case extending insolvency procedures to a Monegasque bank. The bank had been connected with the fraudulent financing of three French businesses, also the subjects of proceedings. The court assumed that despite the absence of an establishment in France, insolvency procedures could still be

⁶⁴Treaties between France and Belgium of 8 July 1899, Italy of 3 June 1930, Monaco of 13 September 1950 and Austria of 27 February 1979.

⁶⁵Articles 55-56.

⁶⁶Soinne, *op. cit.* at para. 377.

⁶⁷*Ibid.* at para. 378.

⁶⁸CA Paris, 28 May 1991, D.1991.jur.98; GP 1991.2.507.

⁶⁹CA Paris, 13 March 1991, D.1992.jur.184.

extended under the provisions of the Treaty, although the judgment was quashed due to the insolvency administrator's failure to present evidence in time.⁷⁰

International Conventions and Developments

France has been active in the negotiation and conclusion of a number of international projects in the insolvency field. France is, together with a number of other European Countries, a signatory to a Convention in the field of insolvency, adopted under the aegis of the Council of Europe in 1990. It is designed to apply in situations where 'the insolvency of a debtor results in his being divested of assets and a manager being appointed to realise them'.⁷¹ The basic paradigm of this Convention involves the repartition of jurisdiction between main and secondary proceedings. The Convention deals with the power of insolvency administrators to act outside their home jurisdiction, the possibility of opening secondary proceedings in the territory of other member states and the possibility for creditors to lodge claims in foreign insolvencies. Despite the adoption of this Convention by twenty-three countries, it remains without force due to insufficient ratifications and the chances of this project being resurrected must now be considered to be unlikely. Not all of the commentary was positive with respect to this Convention, with one commentator stating that it was surprising that France had so readily signed up. This was given that the underlying philosophy of the Convention was so radically different from the domestic conception of the importance of insolvency, particularly its rescue elements.⁷² Furthermore, given the immense practical difficulties in implementing its provisions, it was unlikely that the Convention would have made much impact on the regulation of international insolvency.⁷³

The European Insolvency Convention 1995, of which France was an active promoter, was also a project that received much support from commentators and practitioners in France. This project, which began in the early 1960s, stemmed in part from the work on the Brussels Convention. French academics led and took part in the work that produced the first draft convention in the 1970s and continued to play a major role in the later work which took place over a number of decades.⁷⁴ Work within the European Community was suspended in 1985 apparently after a failure to agree a consensus on the second draft of the convention. A fresh impetus seems to have been given by the production of the Council of Europe text in 1990 although the working group was not reformed until

⁷⁰CA Aix-en-Provence, 19 April 1990, D.1991.jur.116.

⁷¹Article 38.

⁷²See Guillenchmidt (de), *Projet de convention du Conseil de l'Europe sur certains aspects internationaux de la faillite, Banque et Droit* 1989.7.191 at 192.

⁷³See Ramackers, *Réflexions critiques sur la Convention Européenne relative à certains aspects internationaux de la faillite, La Semaine Juridique* 1993.doctr.3685.277 at 279-280.

⁷⁴See Lemontey, *Perspectives d'unification du droit dans le projet de convention relative à la faillite* (1975) 11 RTDE 172; Noel, *Lignes directrices du projet de convention CEE relative à la faillite* (1975) 11 RTDE 159. Noel and Lemontey were also the authors of an explanatory memorandum on the 1970 draft of this convention.

1989. A final discussion draft of the European Community text was produced in 1994, which formed the basis for the version that the Council of Ministers were to approve in 1995. The influence of the Council of Europe text on this document was palpable, with commentators stating that the differences between early European Community drafts and this Convention represented 'a dramatic retreat from the universalism principle' inherent in previous drafts.⁷⁵ A comparison between the Conventions revealed similarities including the division between primary and secondary jurisdiction criteria, with the use of the 'centre of the debtor's main interests' to justify primary assumption of jurisdiction, although there were important differences in the later definitions used to develop the concepts. Differences, however, included the addition of uniform choice of law provisions, although some commentators regretted the territorial nature of some of these provisions.⁷⁶ The instrument, however, failed to enter into force because of a requirement for unanimity and the United Kingdom failed, for extraneous political reasons, to adhere in time.⁷⁷ The European Regulation on Insolvency Proceedings 2000, which revived this project without major amendment to its provisions, was adopted following a proposal co-authored by Germany and Finland in 1999. Given that the proposal has been enacted in the form of a Regulation, it will enter directly into force on 31 May 2002 in all of the member states in the European Union subject to Title IV of the EC Treaty.

Another international project in which there has been some interest in France is the UNCITRAL Model Law on Cross-Border Insolvency 1997.⁷⁸ The Model Law contains four key areas outlining the scope of the Model Law itself and rules for access by representatives of foreign insolvency proceedings, including those governing the treatment of foreign creditors. It also covers the effects of domestic recognition of foreign procedures and, most importantly, rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. The text represents essentially a compromise between different legislative traditions and is accompanied by a Guide to Enactment, which was produced in order to assist legislative draftsmen in adapting the Model Law to local conditions. A French commentator's view of the Model Law has stated that it is an '...ambitious and measured. Ambitious because [it] seeks to propose to States common rules for the treatment of international insolvencies.... Measured, because the rules do not require States to introduce profound legislative changes...'.⁷⁹ It is not known, however, whether the French Government is considering its implementation as an adjunct to the European Regulation on Insolvency Proceedings when this enters into force.

⁷⁵See Trautman et al., *Four Models for International Bankruptcy* (1993) 41 AJCL 573 at 602.

⁷⁶*Ibid.* at 604.

⁷⁷See Fletcher, *The European Community Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind* (1997) 23 BJIL 25.

⁷⁸(1997) 36 ILM 1386 with an Introductory Note by Burman and Westbrook.

⁷⁹See Vallens, *La faillite internationale - vers une loi modèle?* PA 1996.72.21.

Summary

The law and practice in France reveal a very strict territorial approach to insolvency with the aim of the law being to determine the conditions in which the courts in France must open proceedings. In most instances, domicile or the presence of an establishment determines jurisdiction according to the Law of 1985. The priorities in the Law of 1985 on preservation of business and employment lend the subject economic and political importance and the law itself is considered to have public order status, hence a law whose provisions are considered mandatory and from which courts are not free to depart. Nationality and presence of assets or business interests can also attract the exorbitant jurisdiction rules of the Civil Code, which are often invoked as an ancillary source of jurisdiction by French courts. Finally, the nature of interests in the cause is a strong incentive for courts to investigate whether there is cause to open proceedings, with the result that the courts in France are naturally willing to open proceedings if there is any evidence of a tangible benefit for local creditors. Given that the Supreme Court in France acts solely as a court of review as to whether the law has been correctly applied, a finding of fact by a lower court that there is such evidence is unlikely to be disturbed.

The logical application of the territorial rules is nevertheless conditional on there not being a foreign judgment whose recognition according to France's conflict of laws rules is mandatory. However, recognition is made subject to the foreign judgment being regarded as regular and to there not being an inconsistent domestic judgment. In practice, for all the recent curial flexibility noted by the commentators, this closes off recognition for many foreign judgments because they fall at the recognition hurdle or are simply too late, the diligent creditor having reached the French courts first. The overall impression of this type of system is that it is a reactive one that depends on the existence or not of a judgment and couches proceedings on this basis. It is not evident how far co-operation may be assisted where orders need to be taken during the currency of proceedings and these remain subject to the recognition process, always assuming that the initial foreign judgment has been recognised and is capable of enforcement.

The territorial nature of this jurisdiction may seem to run counter to attempts at achieving an international consensus on treatment of cross-border issues. Nevertheless, commentators say that recognition of strong national interests of this type has influenced the approaches, certainly at European level, towards constructing instruments with the aim of reconciling apparently conflicting views on territoriality and universalism. This may have its articulation in the paradigms of the Council of Europe Convention 1990 and the European Regulation on Insolvency Proceedings 2000 where secondary proceedings operate on an exclusively territorial basis. The construction of this type of proceedings may be said to be very reminiscent of French practice. The introduction of the latter text will very probably represent quite a significant change in the methodology of

French courts. This is because a wider form of framework for co-operation will be instituted with automatic recognition of judgments being one of its key features. As this will have a great impact on French practice, it remains to be seen how French courts will adapt and give effect to this framework. With the possibility that the promotion of the UNCITRAL Model Law will lead to consideration of its use in France, it is likely that French insolvency law and practice, especially its international aspects, will continue to evolve to meet the challenges of international insolvency.

11 February 2002