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Forum shopping and filing insolvency
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National Report of France

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1. Proper place for commencement of insolvency proceedings and centre of main interests.

As preliminary point, please note that the following questions are tackled from the point of view of business law only, meaning that the answers given do not deal with insolvency proceedings concerning natural persons.

a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?

According to international and to EU regulation (for example, regulation 1346/2000 of the European Council, dated 29 May 2000) concerning insolvency proceedings, the applicable law is the law of the judge hearing the case (*lex fori*). It is a matter of consistency considering the local specificities of each body of the proceedings. This rule is applicable under French law.

The next issue to come is how to determine the competent court.

- **Under French national law** (Article R. 600-1 of the French Commercial Code), the court which is competent to hear the case is the Commercial Court of the region where the head office of the company –as a legal person– is registered.

However, if the head office of the debtor is not located in France, a French court could still have jurisdiction. In this case, the competent court is the Commercial Court of the region where the debtor has the centre of his main interests (through a secondary establishment or business).

If the debtor has an activity or has some goods located in France, the French Commercial courts can also have jurisdiction, but this possibility is not widely applied.

Finally, if the proceedings is extended to some other companies (due to confusion of capitals or due to a fictitious company), the court which initiated the proceeding remains competent for the whole case.

- **Under European regulation** 1346/2000 of the European Council, dated 29 May 2000, the place where the debtor's centre of main interests is located is presumed to be the place where the head office is registered. This presumption may still be rebutted. This criterion is only applicable to the intra-Community relations, in order to define the international jurisdiction of the courts of the Member States. The criterion designates the State whose courts have jurisdiction to hear the case, but leaves it to that State to designate the specific national court that will have jurisdiction to hear the case.

b. Is there in your country a notion or definition of the debtor's centre of main interests ("COMI")?

There is a notion of the debtor's centre of main interests under French law. Please see the next question for further explanations relating to this notion.

c. Which are the factors relevant to the determination of centre of main interests?

The debtor's centre of main interests is defined under European law (EU regulation 1346/2000 of the European Council, dated 29 May 2000) as being the office or the place where the debtor

regularly administers his/her interests (meaning the place where the debtor conducts the administration of its business). This place is therefore ascertainable by third parties.

The same notion is applicable under French law. Any interested party can demonstrate that the head office registered in the bylaws is only fictitious and that the administration of the business is conducted from another place. If the real head office is located in France, the competent court will be the French commercial court in the region where the real head office is located (Civ. 1ère, 21 July 1987, n° 85-18.504).

d. Is this essential in determining the jurisdiction?

Since any interested party can demonstrate that the head office registered in the bylaws is fictitious, this notion of debtor's centre of main interests is likely to change the jurisdiction of a court to another. This is why this notion can be considered as being decisive in determining the jurisdiction.

However, the challenge of the location of the COMI is quite rare.

e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?

There are both international and supranational regulations regarding the proper place for commencement of insolvency proceedings and regarding the determination of the centre of main interests (Article R. 600-1 of the French Commercial Code and EU regulation 1346/2000 of the European Council, dated 29 May 2000). For further explanations, please refer to questions 1.a and 1.c.

f. Is the debtor's centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?

Please see above (question 1.a).

g. Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?

Insolvency proceedings can be opened on the application of some specific persons (defined by law) depending on the kind of proceedings. The claimant can bring the action, at his choice, to the court that he/she considers as being competent. Both jurisdiction related to the subject matter and territorial jurisdiction can be discussed "*in limine litis*" in front of the court that received the application of the claimant.

That is to say that the place corresponding to the centre of main interests can be discussed in front of the court before any defense on the substance. The party arguing that the court hearing the case is incompetent (probably the defendant) must explain in front of the judge which court actually has jurisdiction to hear the case and why. After a contradictory debate, the court will

decide on its own jurisdiction to hear the case, which implies that the judge decides what place corresponds to the centre of main interests.

Only afterwards the court will decide whether or not to initiate the proceedings.

2. Movement of the place of registration (or habitual residence) of centre of main interest.

- a. Is it possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?**

It is possible for the debtor to move its place of registration (or habitual residence) prior the commencement of insolvency proceedings. According to the Article R. 600-1 of the French Commercial Code, if the debtor moves its place of registration less than 6 months before the seising of the Court, the court located in the region of the initial registered office is the only one to have jurisdiction to hear the case. The aim of this regulation is precisely to avoid any kind of *forum shopping*.

From a European perspective, the European Court of Justice ruled that the criterion for who has jurisdiction is set on the date of the seising of the Court (European Court of Justice, 17 January 2006, case C-1/04, *Staubitz-Schreiber*). That is to say that any change of the place of registration that could occur after this date would not have any effect in determining the jurisdiction.

- b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?**

The rules established in question 2a remain applicable for what concerns the move of a debtor's centre of main interests prior to commencement of insolvency proceedings. Indeed, the aim remains the same: to avoid any kind of *forum shopping* (as an example, see case law of the European Court of Justice, n° C-1/04, dated 17 January 2006)

- c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?**

The debtor can move his/her centre of main interests between the time of the application for commencement and the actual commencement of those proceedings, but it will not have any effect on the competent court, meaning that the court who had normally jurisdiction at the date of the application will still have jurisdiction to hear the case.

- d. If there is evidence of such a move in close proximity to the commencement of the commencement, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?**

If a move occurred during the period of 6 months prior the commencement of the proceedings, the court having jurisdiction in the territory of the new registered office will not have jurisdiction to hear the case.

- e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?**

Both the European Court of Justice and the French regulation have introduced specific rules in order to avoid *forum shopping* (cf. supra n° 2a).

- f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?**

In France, with rare exceptions due to territorial specificities, the law is imposed uniformly throughout the country. However, different courts can have different ways to implement the legal principles through their decisions, or can apply the law more or less severely (especially with respect to the sanctions imposed on the former executive officer in the event of a judicial liquidation). This is why the parties could eventually prefer one court more than another.

- g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?**

Before any kind of judiciary decision, the creditor can discuss "*in limine litis*" the material and the territorial jurisdiction of the court hearing the case.

Moreover, the creditor can challenge the "Opening Judgment" of the secondary proceedings through third-party proceedings according to article L. 661-2 of the French Commercial Code and article 583 of the French 'Code de procedure civile', in case of fraud or if the creditor can invoke his/her own defences. The fraud corresponds for example to a case in which the judgment has the effect of depriving the creditor of his rights because of a mistake made by the debtor who might have invoked a defence in the best interest of the creditor. Moreover, the creditor can invoke his/her own defences when he/she can invoke a new argument to protect his/her rights, it being understood that this argument could not have been invoked by the debtor.

3. Recognition of foreign proceedings, main and secondary proceedings

- a. Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of centre of main interests?**

The commencement of insolvency proceedings (known as being the main one) doesn't prohibit the commencement of other proceedings (known as being the secondary one) against the same

debtor in another Member State. The secondary proceedings can only consist of judiciary liquidations. These secondary proceedings are contingent upon the main proceedings and have limited effects in terms of territoriality.

Secondary proceedings can only be opened in another Member State if the debtor has an establishment in this other Member State (EU regulation 1346/2000 of the European Council, dated 29 May 2000, article 3.2). This notion of establishment refers to “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”.

b. Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?

EU regulation 1346/2000 of the European Council, dated 29 May 2000 provides for the notion of main and secondary proceedings. Under French law, this notion is applicable as well and is applied in case-law (for an example, please see Com., 2 December 2014, n° 13-20.203).

c. Does your legislation permits secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets located in that State where secondary proceedings are opened?

Secondary proceedings are permitted in accordance with European legislation (EU regulation 1346/2000 of the European Council, dated 29 May 2000), and they are recognized as well under French law, more specifically by case law.

However, even if secondary proceedings can be opened to run in parallel with the main proceedings, the competent court to open secondary proceedings has to consider the aims of the main proceedings. The goal is to ensure efficiency and effectiveness of international insolvency proceedings, through cooperation between main and secondary proceedings, in order to guarantee the primacy of main proceedings.

The secondary proceedings only can affect the goods of the debtor that are situated in the country of the jurisdiction which is competent to open these proceedings (EU regulation 1346/2000 of the European Council, dated 29 May 2000, article 3.2). However, the territorial nature does not concern the liabilities.

d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.

A creditor can challenge the “Opening Judgment” of the secondary proceedings through third-party proceedings according to article L. 661-2 of the French Commercial Code and to article 583 of the French ‘Code de procédure civile’, in case of fraud or if the creditor can invoke his/her own defences. The fraud corresponds for example to a case in which the judgment has the effect of depriving the creditor of his rights because of a mistake made by the debtor who might have invoked a defence in the best interest of the creditor. Moreover, the creditor can invoke his/her own defences when he/she can invoke a new argument to protect his/her rights, it being understood that this argument could not have been invoked by the debtor.

Another way to challenge the proceedings designated as secondary could be to prove that the claimant asking for an “Opening Judgment” does not have one of the status allowing a person to do so, according to the law (article L. 640-5 of the French Commercial Code).

4. Abuse of process

- a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?**

Under French law, a court is not able to take account of abuse of its processes as a ground to decline recognition, since the jurisdiction of a court is totally independent from the notion of abuse.

- b. What happens if the applicant falsely claims the centre of main interests to be in a particular State?**

According to the article 32-1 of the French ‘Code de Procédure Civile’, the claimant acting in a deliberately dilatory manner may be sentenced to a civil fine (up to 3000 euros), and to pay damages to another party. Those issues of abuse are governed by French law as far as the punishment is concerned.

- c. Are those issues governed by international or supranational regulations or only by domestic law?**

The notion of abuse of process is governed by domestic law only.