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English Court Holds Obligation in English Law Facilities Agreement Continues in French Insolvency Proceedings

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At a glance

Lenders successfully sought an English court declaration that a company in French insolvency proceedings (*sauvegarde*) nonetheless needed to comply with information obligations under an English law senior facilities agreement ("SFA"). The borrower — part of the Comexposium group, the leading event organiser — had resisted compliance based on protections within the *sauvegarde* proceedings.

This case is an unusual example of the English court being required to determine a disputed question of foreign insolvency law, by reference to evidence from expert witnesses. The effect of the timing of the case is also unusual, in that the insolvency proceedings were commenced pre-Brexit but the litigation proceedings were commenced post-Brexit; this raised interesting implications regarding the application of European law.

The parties' response to this judgment remains to be seen. This is a declaratory judgment and not an order requiring the borrower specifically to perform its obligations under the information covenants. Time is short, as the confirmation hearing before the French court in respect of the borrower's *sauvegarde* plan is scheduled for 14 September 2021.

Background

Sauvegarde: The borrower is subject to French *sauvegarde* proceedings, a form of debtor-in-possession safeguard or "rehabilitation" proceeding for a company in financial difficulties. Within *sauvegarde* (and the protection of an automatic stay), a company can propose a restructuring plan to its creditors; even if creditors reject the plan, the French court can nonetheless give effect to it, including maturity extensions of up to 10 years.

The borrower's *sauvegarde* proceedings were commenced prior to the Brexit implementation date, 31 December 2020. Accordingly, the European Insolvency Regulation continues to apply in the UK in respect of the *sauvegarde* proceedings; as a result, French law governs the legal effects of the *sauvegarde* proceeding and those effects must be automatically recognised in England.

Information request: The agent (on lenders' instructions) requested from the borrower information and access to books, accounts, records and group management. This request arose out of lenders' concern that the borrower would propose a restructuring plan that favoured its shareholders over its creditors; without the information requested, lenders would not be able to engage with any proposed restructuring plan in a meaningful way to protect their interests. (If and once a restructuring plan is approved, the lenders would be bound by its terms and the information sought would serve no purpose.)

Request refused: The borrower refused to comply, contending that the effect of the *sauvegarde*, as a matter of French insolvency law, was to render its obligations under the SFA unenforceable.

Application: The claimant lenders sought declarations regarding the defendant borrower's obligations under the SFA to provide information. The European Judgments Regulation did not apply to this claim, because the litigation proceedings were commenced following the Brexit implementation date.

Sauvegarde plan: The borrower published its draft *sauvegarde* plan shortly prior to the trial, proposing to extend the repayment date for the €483 million due under the SFA by up to 10 years (with shareholders maintaining their near-100% shareholding). The plan confirmation hearing in France is scheduled for 14 September 2021, with judgment expected about a week later.

The jurisdiction challenge

The borrower unsuccessfully sought a declaration that the English court had no jurisdiction to hear the claim.

The borrower contended that the claim derived from and was closely linked to the *sauvegarde* and accordingly (under Article 6(1) of the European Insolvency Regulation), because the *sauvegarde* was in the jurisdiction of the borrower's centre of main interests, the French courts had jurisdiction to hear the claim.

These arguments were rejected by the English court in July 2021, holding that the declarations sought by the lenders derived from the SFA and rules of civil and commercial law, and not from the *sauvegarde* proceedings. The English court *did* have jurisdiction to hear the claim, by reason of the exclusive jurisdiction clause in the SFA (and would also have had jurisdiction to hear the claim — under the European Judgments Regulation — had the claim been commenced prior to the Brexit implementation date).

The substantive dispute: did *sauvegarde* render the SFA information obligations unenforceable?

The question for the English court was the impact of French insolvency law on the obligations under the SFA. This turned on disputed questions of French law — specifically, whether the SFA was a "current contract" under the French Commercial Code and therefore whether it was any longer enforceable within the *sauvegarde*. English courts treat foreign law as a matter of fact to be proved by the party basing their claim or defence upon it; generally foreign law is proved by expert evidence.

The English court heard evidence from competing French law experts over a four-day trial in mid-August; Kramer J handed down judgment on 3 September.

Enforceability principle: Did the information reporting covenants under the SFA remain enforceable notwithstanding the *sauvegarde* proceedings (as a matter of French insolvency law)?

Held: The information reporting covenants remained enforceable as a matter of French insolvency law.

Expert evidence on behalf of the borrower contended that, as a matter of French insolvency law, if a contract is not "ongoing" (at the date of commencement of the *sauvegarde* proceeding) then it is not enforceable against the debtor within *sauvegarde*. The existence of this "enforceability principle" was disputed by expert evidence on behalf of the lenders. (The experts agreed that the SFA was not an "ongoing contract" under French law, because the main characteristic of the contract — the lending of money — had already been fulfilled.)

The court found in favour of the lenders: the French authorities did not support the "enforceability principle" propounded by the borrower.

Relief: Even if the court found the covenants remained enforceable, should it exercise its discretion to grant relief in favour of the lenders?

Held: The court granted the declaratory relief sought.

The borrower had submitted that such relief would interfere in the *sauvegarde* proceeding and undermine the statutory regime for the provision of information in France. However, the court noted that:

- the borrower's refusal to provide information had fuelled the creditors' suspicion that the *sauvegarde* was being used to advance shareholders' interests at the expense of the creditors; that suspicion was "not unreasonable";
- creditors had not received all information to which they were entitled;
- the court did not accept the borrower's arguments that the relief would have no substantial effect; and
- the borrower had made a determined attempt to thwart the lenders' requests for information, only providing that required by the plan and French law. "It has done so under the cover that it is under no obligation to comply because of the French Commercial Code. Now the cover has been blown, they do not have a basis for withholding the information."

The substantive judgment is here. The judgment in relation to the preliminary jurisdiction challenge is here.

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