Tünkers v Expert France
Case C-641/16 *Tünkers France, Tünkers Maschinenbau GmbH v Expert France* 9th November 2017
Request for a preliminary ruling under Article 267 TFEU from France
Court of Justice of the European Union

Key Words
EU Insolvency Regulation 1346/2000; jurisdiction; unfair competition; insolvency proceeding; closely connected actions; assignment; business transfer.

Summary of Facts of the Case

This was a reference for a preliminary ruling from France in respect of the applicability of Article 3(1) of the EIR to an action in damages for unfair competition brought by Expert France against Tunkers (French and German branches) [para 2].

Expert Maschinenbau GmbH was a company incorporated in Germany, carrying on business manufacturing components in the automobile industry field. Expert France was the exclusive distributor of Expert in France [para 7]. On 14 July 2006, a German court opened an insolvency proceeding against Expert Maschinenbau GmbH [para 8].

On 13 September 2006, the insolvency practitioner of Expert Maschinenbau concluded a transfer agreement with Tünkers Maschinenbau GmbH ('TM'), which provided for the takeover of (part of) Expert Maschinenbau's business. For this reason, TM contacted the clients of Expert France, to inform them that it was the new distributor in France [para 9-10]. This action by Tunkers France was viewed by Expert France as an act of unfair competition, for which a claim was brought before the Commercial Court of Paris to hear an action for damages.

Tunkers challenged the jurisdiction of the Paris Commercial Court on the basis that insolvency proceedings had been opened in Germany which, pursuant to Article 3(1) of the European Insolvency Regulation 2000, they claimed fell within the jurisdiction of the German Court where main insolvency proceedings had been opened [para 12] as the action derives directly from the insolvency proceedings [para 13].

The Court of Cassation of France decided to stay the proceeding and to refer the following question to the CJEU:

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Can Article 3 of the European Insolvency Regulation be interpreted as meaning that the jurisdiction of main insolvency proceedings will also extend to an action seeking to establish liability in relation to an assignee of part of a business that was acquired in the course of the insolvency proceedings is accused of misrepresenting itself as the exclusive distributor of the goods manufactured by the debtor? [para 15]

Cooperation and/ or Coordination Issue

The co-operation issue in this case regards the scope of the jurisdiction of the court which opened the insolvency proceedings within the meaning of Article 3(1) of Regulation No 1346/2000 to extend to actions that are related, though not directly connected to the main insolvency proceeding. The co-operation problem here is that a finding that the EIR does not extend to such actions will fragment the legal actions associated with the insolvency proceeding, possibly dissipating assets in the process to the detriment of the collective of creditors. That said, the facts of this case are degrees of separation from the facts of cases in which an avoidance action is brought by a liquidator (see *FTex* and *Nickel & Goeldner)*, which is arguably far more closely connected than the action in this case.

Bringing an action of this nature could be viewed as an attempt to avoid cooperation under the EIR and its Recast.

Resolution

The CJEU considered that the ruling required the determination of the scope of jurisdiction under Article 3(1) of the European Insolvency Regulation and whether the action in question fell within the exception of the Brussels Regulation for insolvency proceedings [para 16]. The court noted that these two regulations should be interpreted in order to avoid any overlap between the rule of law in those texts and to avoid any legal vacuum. As such, the scope of the EIR should not be broadly interpreted, as was determined in the *Nickel & Goeldner* case [para 18]. Those actions falling outside the scope of the EIR should correspondingly fall within the Brussels Regulation [para 17].

The Court of Justice of the European Union, after having pointed out that Recital 6 of the EIR specifies that 'the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which "are *delivered directly* on the basis of the insolvency proceedings and are *closely connected* with such proceedings'" [para 20] decided that the action for damages for unfair competition was out of the scope of the EIR.

The decisive criterion for determining the area within which an action falls relies on the legal basis of the action, in which case it must be determined whether the right or obligation forming the basis of the action is derived from ordinary rules of civil and commercial law, or in the rules specific to insolvency proceedings (per Nickel & Goeldner para 27) [para 22].

The court determined in this case that the action in question does not challenge the validity of the assignment carried out in the course of the insolvency proceedings, but the subsequent behaviour of the assignee in contacting the customers of Expert France to the detriment of its interests [para 23]. The action is therefore a separate action not based on rules specific to insolvency proceedings [para 27].

In relation to the close link with insolvency proceedings, it was determined that once a right has been acquired through assignment, it cannot retain a direct link with the debtor's insolvency (in all

cases) [para 29] reflecting a similar finding in *F-Tex* in relation to the assignment of claims against third parties to a creditor.

For these reasons, the action for damages resulting from unfair competition was legitimately brought before the Commercial Court of Paris and was not covered by Article 3(1) of the EIR.

Applicability to Preventive Restructuring

Since transfer agreements are one of the most common operations in restructuring procedures, either just involving a branch of the company or its entirety, it is important to understand how the actions related to them might be considered and treated. In particular, both the proposing debtor and the acquiring third parties might have an interest to know in advance which court will have jurisdiction over the actions related to the transfer.

In addition, as many restructuring procedures will be included in Annex A of the EIR Recast in order to rely on the consolidation, recognition, and enforcement benefits of that regulation, a clear division of related actions is useful, which this line of cases has helped to clarify to some extent, which may prevent conflicts of this nature in the future. That said, the number of nuanced differences between these cases and the actions in question indicate that the story is likely ongoing given the broad array of potential actions about which disputes could arise among the Member States.

Applicability of Existing Rules and Guidelines

EIR Recast:

Under the EIR Recast the CJEU's decision would have been the same.

According to the principle of proportionality, Reg. 848/2015 should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which "are directly derived from insolvency proceedings and are closely linked with the" (see Recital 6).

The criteria set by the EIR Recast still require the judgments to have a close and direct link with the main insolvency proceeding. Therefore, the unfair damages' action examined above would have fallen outside the scope of Reg. 848/2015.

Rules and Guidelines:

Principle 24 of the ALI-III Global Principles ("Control of Assets") provides that "if there is not a domestic insolvency case pending with respect to the debtor, then:

(i) upon recognition, a representative of a foreign insolvency case should be given legal control, and assistance in obtaining practical control, of the debtor's assets, wherever they are located, to the same extent as a domestic insolvency administrator;

(ii) upon recognition, a representative of a foreign insolvency case should be permitted to remove assets to another jurisdiction, where doing so is appropriate for the purposes of the insolvency case and if there is no undue prejudice to creditors.

If Global Principle 24.1 applies the representative of a foreign proceeding is subject to the same level of accountability towards the court of the situs as would be required of an insolvency administrator appointed in a domestic proceeding".

The above-mentioned principle confirms the necessity to entrust the representative of the foreign insolvency case - where no domestic insolvency case is pending -with a wide and practical control power over the debtor's assets located in a different country.