# Insolvency-related actions under European Union Law: The Evolution of European and French jurisprudence on matters of jurisdiction and recognition of judgements

Sandra López

Université Paris 1 Panthéon-Sorbonne

**Abstract:**

This paper shall address the ongoing delimitation issues pertaining to insolvency-related actions as defined under European Insolvency Regulation and "other judgements" related to an action in civil and commercial matters. It will do so by analysing the fluctuations in the jurisprudence of both the Court of Justice of the European Union and the French Court of cassation, as well as by assessing the advancements in the area of insolvency-related actions enshrined in the new Insolvency Regulation (Regulation No. 2015/848).

**Key words:**

European Insolvency Law — Recast Insolvency Regulation — Insolvency-related judgements, Jurisdiction, Recognition and enforcement — Judicial cooperation in civil matters – French Law on Insolvency Proceedings.

Resumen**:**

Este documento abordará los actuales problemas de delimitación en materia de acciones relacionadas con la insolvencia tal que definidas por la legislación europea así como "otras sentencias" relacionadas con una acción en materia civil y mercantil. A este fin, serán analizadas las fluctuaciones en la jurisprudencia de la Corte de Justicia de la Unión Europea y de la Corte de casación francesa. Asimismo, se evaluarán las evoluciones en este ámbito consagradas en el nuevo Reglamento europeo sobre la insolvencia ( Reglamento N ° 2015/848).

**Palabras clave:**

Derecho europeo de la insolvencia — Regulación de la insolvencia — Sentencias relacionadas con la insolvencia, jurisdicción, reconocimiento y ejecución — Ley francesa de procedimientos de insolvencia.

One of the main contributions of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (hereinafter referred to as "Regulation No 1346/2000") is the principle of automatic recognition of insolvency proceedings. This principle was restated by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereinafter "Regulation No 2015/848"). Indeed, Article 19 of the latter provides for the immediate recognition, in all other Member States and without any procedural formality or publicity requirements, of the decision to open (principal) insolvency proceedings by a competent authority of a Member State. This rule shall also apply where "*on account of a debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States*".[1]

This principle of recognition extends beyond the principal insolvency procedure. Indeed, the secondary procedure also enjoys full recognition in all the other Member States, even if its effects are limited to the territory of the State of initiation of secondary proceedings. Moreover, Article 25(1) of Regulation No. 1346/2000 and Article 32 of Regulation No. 2015/848 extend that principle to judgements "*which concern the course and closure of insolvency proceedings, and compositions approved by that court*".[2] The same is true for so-called insolvency-related actions, defined as "*judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court*".[3]

Under Regulation No. 1346/2000, both the Court of Justice of the European Union (hereinafter referred to as "CJEU") and the French Court of cassation have sought, through their jurisprudence, to clarify the consistency of the principle of recognition. More precisely, they have attempted to delimit the scope of the European Insolvency Regulation and to distinguish it from that of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[4] (now Regulation No. 1215/2012,[5] hereinafter referred to as "Brussels I bis Regulation"). Their attempts have nonetheless paved the way for an inconsistent (or even contradictory) jurisprudence. The 2015 reform of the European Insolvency Regulation addressed some of these jurisprudential developments either by enshrining specific jurisprudential principles in the text of Regulation No. 2015/848, or by maintaining the provisions of the previous regulation. Despite the developments enacted via the new Insolvency Regulation, uncertainties around the jurisdiction over and the recognition of insolvency-related actions remain.

Article 25(1) subparagraph 2 of Regulation No. 1346/2000 provided for the immediate recognition of "*judgments deriving directly from the insolvency proceedings and which are closely linked with*

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[1] Regulation No 2015/848, Article 19(1) subparagraph 2.

[2] Regulation No. 2015/848, Article 32(1)

[3] Regulation No. 2015/848, Article 32(1) subparagraph 2.

[4] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

*them, even if they were handed down by another court*" – thereby recalling the formulation adopted by the CJEU in the *Gourdain v. Nadler* case.[6] This provision refers to the recognition of judgements alone. No direct reference is made to the question of jurisdiction – and more specifically to the question of whether jurisdiction to decide on insolvency-related actions should be determined on the basis of the European Insolvency Regulation or on that of the Brussels I (now Brussels I bis) Regulation.

This gap was filled by the CJUE in the *Seagon v. Deko Marty* case[7], whose contribution was confirmed and clarified by two subsequent CJEU judgments of 2009.[8] It follows from this jurisprudential construction that the courts of the Member state where the insolvency proceedings have been opened have jurisdiction over the insolvency-related actions. It also follows that, an action that is not based on the provisions of national law specifically governing insolvency proceedings, and that could have been initiated outside any insolvency procedure, falls within the scope of the Brussels I (now (now Brussels I bis) Regulation.

This jurisprudence was systematised by the CJEU in the *Nickel* judgment of September 4, 2014[9], in which the CJEU drew up a general criterion of distinction between the material scope of the Insolvency Regulation and that of the Brussels I Regulation. According to the Court of Justice, the fundamental criterion is the "*legal basis of the action*", which requires to determine "*whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings*."[10] This interpretation was echoed by the social chamber of the Court of Cassation in a judgment of 28 October 2015.[11] Nonetheless, this construction was later called into question by the CJEU's *H v. H.K.* judgment of December 4, 2014[12] which makes a disputable extension of the material scope of the Insolvency Regulation by considering that, since the contested action requires a state of insolvency, it derives directly from the insolvency proceedings and is closely linked with them.

The recast Regulation of 2015 aimed at clarifying the regime of insolvency-related actions as pertaining to matters of jurisdiction and recognition. On this issue, Regulation No 2015/848 has achieved a genuine jurisprudential consecration. Indeed, henceforth, Article 6 of the recast Regulation envisions insolvency-related actions on the angle of jurisdiction and not only in the

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6 CJEU Case C-133/78 re Henri Gourdain v Franz Nadler [1979].

7 CJEU Case C-339/07 re *Christopher Seagon, in his capacity as liquidator in respect of the assets of Frick TeppichbodenSupermärkte GmbH v Deko Marty Belgium NV*. [2009].

8 CJEU Case C-111/08 re *SCT Industri AB ilikvidation v Alpenblume AB. [2009]; CJEU Case C-292/08 re German Graphics GraphischeMaschinen GmbH v. van de Schee acting as liquidator of Holland Binding BV*. [2009].

9 CJEU Case C-157/13 re *Nickel &GoeldnerSpedition GmbH v 'Kintra' UAB*[2014].

10 CJEU Case C-157/13 re *Nickel &GoeldnerSpedition GmbH v 'Kintra' UAB*[2014], paragraph 27.

11 Cass. soc., 28 oct. 2015, n° 14-21319.

12 CJEU Case C-295/13 re *H v H.K.* [2014].

context of recognition. In doing so, this article enshrined the jurisprudential construction initiated by the *Seagon v. Deko Marty* judgement.

Although crucial, the advancements brought about by the recast Insolvency Regulation are insufficient, for they fail to clarify a number of critical issues concerning the notion of insolvency-related actions. Indeed, the elements of definition provided by the *Gourdain* judgement (above-cited) have repeatedly proven to be scant. However, the recast Regulation is silent as for any supplementary criterion of definition. This gap in the reform comes into view, for instance, when one studies the solution adopted by the CJEU in the *German Graphics* judgment of 2009 (above-cited).[13]

In France, the persistence of these uncertainties has recently been illustrated by two judgments rendered by the social chamber and the commercial chamber of the French Court of Cassation. The chambers were faced with two almost identical questions, respectively concerning an action for damages launched by an employee[14] and an action for unfair competition[15]. In both cases, the applicants invoked the same grounds, namely former Article 1382 of the French Civil Code. The question was whether the contentious extra-contractual actions derived directly from the insolvency proceedings and were closely linked with them. Despite the similarities in the facts, the chambers adopted completely different solutions.

Indeed, in its *Nortel* judgment of January 10, 2017, the social chamber aligned its position with the CJUE's *H v. H.K.* jurisprudence (above-cited), having held that the action for damages brought by an employee was directly linked to the principal insolvency proceedings on the basis of Article 3 of Regulation No 1346/2000, since it had been "*introduced in the context of the insolvency proceedings*". The social chamber therefore censured the court of appeal that had accepted its own jurisdiction on the basis of Article 5 of the Brussels I Regulation, which referred to the law of the place where the harmful event occurred.

Inversely, in its *Tuncker* judgment of November 29, 2016, the commercial chamber of the Court of Cassation followed a different path than that of the social chamber, despite being faced with a similar question. In this dispute, the commercial tribunal of Paris had declared to have jurisdiction over an action for unfair competition launched by a French company against, on the one hand, a German company subject to insolvency proceedings in Germany, and on the other hand, the latter's French subsidiary. The German company and its French subsidiary argued, on the grounds of Article 3 of Regulation No. 1346/2000, that the contentious action derived directly from the insolvency proceedings in Germany and was closely linked with them, the competent court therefore being the German court which opened the principal insolvency proceedings. The commercial chamber preferred to stay the proceedings and request a

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13 The position adopted by the CJEU in this judgement could be different nowadays if it was considered, following the *H v. H.K.* judgment of 2014, that the possibility of the contentious action being exercised outside insolvency proceedings is irrelevant.

14 Cass. soc., 10 janv. 2017, n° 15-12.284, aff. *Nortel* :JurisData n° 2017-000220.

15 Cass. com., 29 nov. 2016, n° 14-23.273, aff. *Tuncker.*

preliminary ruling to the CJEU. In its question, the commercial chamber used the specific terms of "*common law action*", thereby directly referring to the *Nickel* judgement (above-cited). The chamber's preliminary question gave the CJEU the opportunity to abandon its H v. H.K. jurisprudence and return to the *Nickel* principle.[16]

The CJUE responded with the *Tünkers France* judgment of November 9, 2017,[17] whereby it stated that:

> "*Article 3(1) of [Regulation No 1346/2000] must be interpreted as meaning that an action for damages for unfair competition by which the assignee of part of the business acquired in the course of insolvency proceedings is accused of misrepresenting itself as being the exclusive distributor of articles manufactured by the debtor does not fall within the jurisdiction of the court which opened the insolvency proceedings*."[18]

This judgment thus seems to mark a welcomed return to the *Nickel* jurisprudence. Furthermore, given that a textual definition of the concept of insolvency-related action is now enshrined by the provisions of the recast Insolvency Regulation, the somewhat 'flexible' interpretation of this concept previously retained by the CJEU would no longer be compatible with the requirements of Article 6 of said Regulation.[19]

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[16] Michel Menjucq, 'Tribunal compétent en matière d'action en responsabilité délictuelle contre le débiteur' in *Revue des procédures collectives* n° 3, Mai 2017, comm. 61.

[17] CJEU Case C-641/16 re *Tünkers France and TünkersMaschinenbauGmbH v Expert France* [2017].

[18] CJEU Case C-641/16 re *Tünkers France and TünkersMaschinenbauGmbH v Expert France* [2017], Dispositif.

[19] David Robine, 'Les actions connexes' in F. Jault-Seseke et D. Robine (dir.), *Le nouveau règlement insolvabilité : quelles évolutions ?* ,Lextenso, 2015, 61.

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