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REPUBLIC OF FRANCE

ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Pole 5 - Room 16

JUDGMENT OF 15 JANUARY 2019

(No. 01/2019, 21 pages)

General Directory Entry Number: No. RG 18/04671 – Portalis ID. 35L7-V-B7C-B5GA6

Decision referred to the Court: Judgment of 22 February 2018 - Commercial Court of Paris – No. RG 201800000084

APPELLANTS:

Company "(A)"

Having its registered office: [...]

[...]

SIRET ID. No.: [...]

Represented by its legal representatives,

Counsel: [...]

Company "(F)"

Having its registered office: [...]

[...]

Represented by its legal representatives,

Counsel: [...]

Company " (G)"

Having its registered office: [...]

[...]

Represented by its legal representatives,

Counsel: [...]

Company"(H)"

Having its registered office: [...]

[...]

Represented by its legal representatives,

Counsel: [...]

RESPONDENTS:

Company "(C)"

Having its registered office: [...]

[...]

SIRET ID. No.: [...]

Represented by its legal representatives,

Counsel: [...]

Company "(E)"

Having its registered office: [...]

[...]

SIRET ID. No.: [...]

Represented by its legal representatives,

Counsel: [...]

COURT COMPOSITION:

The case was discussed in open court on 03 December 2018, before the Court composed of:

[...], President

[...], Judge

[...], Judge

who ruled on the case, a report was produced at the hearing by [...] under the conditions provided for by Article 785 of the French Code of Civil Procedure.

Clerk, during the discussions: [...]

JUDGEMENT:

- ADVERSARIAL

- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the French Code of Civil Procedure.

- signed by [...], President and by[...], Clerk to whom the minute was delivered by the signatory judge.

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1- STATEMENT OF FACTS:

1. Company (A) is engaged in the purchase, sale and processing of metals operating under the trade name "[...] TRADING".
2. It states that it has purchased raw gold in the form of bullion for jewelry from the Colombian company (B) and has entrusted the transport of these goods to the company (C) (hereinafter referred to as the company (C)).
3. On 15 and 16 June 2016, two packages were delivered to Company (C) for a value of USD 49,874.70 (for package No. 806 113 166 764) and USD 49,999.87 (for package No. 806 113 166 823) respectively for delivery to the premises of Company (D), a subsidiary of Company (A), engage in the smelting and refining, purchase and sale of precious metals, located in Paris (75012).
4. Both packages were received by company (C) in Roissy on 21 June 2016, which drew up the customs declarations and then subcontracted to company (E) (hereinafter referred to as company (E)), under a subcontract entered into by these two companies on 12 May and 7 June 2016, the delivery of these packages to company (D) in the 12th *arrondissement* of Paris. If company (C) reports that it delivered the two packages on 22 June 2016 against receipt signed by a Mr. D., company (A) reports that it never received these packages.
5. A report for theft was filed by Company (A) on 23 June 2016, which assessed the damage at USD 99,874.57, noting that it was compensated for the sum of USD 49,874.57 and supported the amount of the USD 50,000 deductible.
6. Company (A)'s insurers appointed an expert on 27 June 2016 to determine the circumstances and causes of the damage, who submitted his report on 15 July 2016, showing that the two

packages were delivered to an individual who falsely introduced himself as a representative of the company [...] TRADING.

7. By registered letter with acknowledgement of receipt dated 27 October 2016, company (A) and its insurers, companies (F), (G) and (H), gave formal notice to company (C) to pay them the sum of USD 99,874.57 corresponding to the claimed value of the two packages.

8. As this formal notice had remained unsuccessful, company (A) and its insurers, by bailiff's deed dated 13 December 2016, summoned company (C) to obtain an order to pay the respective sums of USD 49,874.57 and USD 50,000, in addition to the sum of EUR 1,410 for expert fees and EUR 7,000 under Article 700 of the French Code of Civil Procedure.

9. Company (C) has brought third-party proceedings against company (E).

II - PROCEEDINGS

A) The Judgment of the Paris Commercial Court of 22 February 2018:

10. On 22 February 2018, the Paris Commercial Court delivered a judgment with provisional enforcement in which it:

- Found that the Montreal Convention on Carriage by Air did not apply;

- Found that the company (C)'s general conditions of carriage applied;

- Found that the action of companies (A), (F), (G) and (H) was admissible;

- Sentenced company (C) to pay to companies (A), (F), (G) and (H) together the sum of USD 200 plus interest at the statutory rate as from 27 October 2016;

- Sentenced company (E) to reimburse Company (C) the sum of USD 200;

- Sentenced company (C) to pay to companies (A), (F), (G) and (H) the sum of 10,000 euros under Article 700 of the French Code of Civil Procedure;

- Sentenced company (E) to pay Company (C) the sum of 7,000 euros under Article 700 of the French Code of Civil Procedure.

- Order (C) and (E) to pay the costs in solidum.

11. In essence, the Paris Commercial Court considered that:

i. The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999 (hereinafter referred to as the "Montreal Convention") was not intended to apply to the present dispute since it had been proved that the damage had occurred as a result of the land transport of the goods and not during the carriage by air.

ii. The general conditions provided for in the contract of carriage entered into between company (A) and company (C) were to apply and those, in the absence of a declaration of value on the air waybills, provide for a limitation of liability which the court applied to assess the amount of sums due to company (A), after considering that there was no evidence of willful misconduct ("*faute inexcusable*").

B) The Appeal Lodged by Companies (A), (F), (G) and (H):

12. Companies (A), (F), (G) and (H) appealed this judgment on 2 March 2018 in that it:

    i. found that the general conditions of company (C) applied;

    ii. refused to consider the existence of an willful misconduct of company (C) and its substitute, company (E) ;

    iii. sentenced company (C) to pay (A) and its insurers the sum of USD 200 or its equivalent in euros and dismissed the parties' further or contrary claims.

III - CLAIMS OF THE PARTIES :

A) Claims of Companies (A), (F), (G) and (H):

13. According to their latest submissions sent electronically on 22 October 2018, companies (A), (F), (G) and (H) requested the Court of Appeal, under Articles L. 133-1 and L. 133-8 et seq. of the French Commercial Code, to:

Uphold the Referred Judgment in that it:

Found that the request admissible and had merit.

Found and ruled that the Montreal Convention did not apply to the dispute that arose during land transport.

Found and ruled that that evidence of injury to company (A) and its insurers was provided.

Found and ruled that company (C) was liable for damage to the goods.

Sentenced company (C) to pay company (A) the sum of 7,000 euros pursuant to Article 700 of the French code of civil procedure.

Reverse the Judgment for the Remainder and Rule Again to:

Find and rule that company (C) has committed a willful misconduct, therefore preventing it from availing itself of the limitations of liability.

Find and rule that company (E) has committed a willful misconduct therefore preventing company (C) from availing itself of the limitations of liability.

Sentence company (C) accordingly to pay to companies (F), (G) and (H) the sums of USD 49,874.57 USD and 1,410 Euros for expert fees, plus interest at the statutory rate as from the first formal notice of 27 October 2016.

Sentence company (C) accordingly to pay company (A) the sum of USD 50,000 plus interest at the statutory rate as from the first formal notice of 27 October 2016.

Order interest capitalization.

Sentence company (C) to pay under the appeal procedure to companies (F), (G) and (H) and to company (A) the sum of 30,000 euros under Article 700 of the French Code of Civil Procedure and to pay all costs.

B) Claims of Company (C)

14. By summary submissions sent electronically on 12 October 2018, company (C) requested the Court of Appeal, especially under Articles L. 133-1 et seq. of the French Commercial Code and Article 1231-1 of the French Civil Code, to:

FIND and RULE that the cross appeal of company (C) is admissible and that it has merit

Primarily,

OVERTURN the judgment of the Paris Commercial Court dated 22 February 2018 in that it found the claims of company (A) and the insurance companies (F) (UK) (GROUP[...]), (G) and (H) admissible;

Consequently,

FIND and RULE that the appeal lodged by company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) is inadmissible,

In the alternative, if, by extraordinary circumstances, the Court found the appellants' claims admissible:

OVERTURN the judgment of the Paris Commercial Court dated 22 February 2018 in that it found that the claims of company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) had merit,

FIND and RULE that the claims of company (A) and the insurance companies (F) (UK) (GROUP[...]), (G) and (H) have no merit,

As a result,

DISMISS THEIR CLAIMS

In the further alternative, if, by extraordinary circumstances, the Court found that the appellants' claims had merit;

UPHOLD the judgment of the Paris Commercial Court dated 22 February 22, 2018 in that it limited the liability of company (C) to the sum of USD 200,

Consequently,

DISMISS the claims of company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) which exceed this amount,

In the further alternative, in the very unlikely case that the Court excluded the limitation of liability of (C)

FIND and RULE that there is no evidence of the quantum of the alleged damage,

Consequently,

DISMISS the claims of company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H),

In any event, on the release by company (E),

UPHOLD the judgment of the Paris Commercial Court dated 22 February 2018 in that it ordered company (E) to release and hold harmless company (C) France for any sentence handed down against it,

In any event,

SENTENCE jointly and severally company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) and company (E) to pay to company (C) France the sum of €15,000 pursuant to Article 700 of the French Code of Civil Procedure and to pay all costs including the legal fees of Me ( ), counsel, in accordance with the provisions of Article 699 of the French Code of Civil Procedure.

C) Claims of Company (E):

15. By submissions in response sent electronically on 9 August 2018, company (E) requested the Court of Appeal, especially under Articles L. 133-1 et seq. of the French Commercial Code and Article 1231-1 of the French Civil Code, to:

FIND and RULE that the cross appeal of company (E) is admissible and that it has merit

Primarily,

OVERTURN the judgment of the Paris Commercial Court dated 22 February 2018 in that it found the claims of company (A) and the insurance companies (F) (UK) (GROUP[...]), (G) and (H) admissible;

Consequently,

FIND and RULE that the appeal lodged by company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) is inadmissible,

In the alternative, if, by extraordinary circumstances, the Court found the appellants' claims admissible:

OVERTURN the judgment of the Paris Commercial Court dated 22 February 2018 in that it found that the claims of company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) had merit,

FIND and RULE that the claims of company (A) and the insurance companies (F) (UK) (GROUP[...]), (G) and (H) have no merit,

As a result,

DISMISS THEIR CLAIMS

In the further alternative, if, by extraordinary circumstances, the Court found that the appellants' claims had merit;

UPHOLD the judgment of the Paris Commercial Court dated 22 February 22, 2018 in that it limited the liability of company (C) and (E) to the sum of USD 200,

Consequently,

DISMISS the claims of company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H) which exceed this amount,

In the further alternative, in the very unlikely case that the Court excluded the limitation of liability of (C) and (E)

FIND and RULE that there is no evidence of the quantum of the alleged damage,

Consequently,

DISMISS the claims of company (A) and the insurance companies (F) (UK) (GROUP [...]), (G) and (H),

DISMISS the request of company (C) (FRANCE) for conviction against company (E) under Article 700 of the French Code of Civil Procedure.

In any event,

SENTENCE jointly and severally company (A) and the insurance companies (F) (UK) (GROUP [...)), (G) and (H) and to pay to company (E) the sum of €15,000 pursuant to Article 700 of the French Code of Civil Procedure and to pay all costs including the legal fees of SELARL [...], counsel, in accordance with the provisions of Article 699 of the French Code of Civil Procedure.

IV. HEARING OF M. (X).

During the hearing held on 3 December 2018, the Court herd the submissions of Mr. (X), the President and Chief Executive Officer of company (A). During this hearing, the latter confirmed the content of his written statement.

V- STATEMENT OF THE GROUNDS AND REASONS FOR THE DECISION

A) Does the Montreal Convention Apply to this Dispute?

16. Company (A), company (G), company (H) and company (F) argue that, in accordance with Articles 1 and 38 of the Montreal Convention, the latter is not intended to apply to the present dispute since it governs carriage by air *stricto sensu* and does not apply to damage occurring during land transport whether it precede, follow or accompany carriage by air, which shall be settled based on the law specific to each of these modes of transport.

17. They specify in this respect that if Article 18.4 of this Convention provides that when land transport is performed as part of the performance of the contract of carriage by air for loading, delivery or transshipment, and any damage is presumed to result from an event occurring during carriage by air, this is a mere presumption which can be rebutted by evidence to the contrary. In this respect, they argue that in the present case, there is evidence that the packages disappeared during the land phase of the transport between the distribution agency (C) located in La Courneuve and the consignee's premises located

in Paris (75012), so that the Montreal Convention is not intended to apply.

18. Responding to company (C), company (A) and its insurers state that the parties have not made any choice to apply the Montreal Convention. They argue, on the one hand, that this choice would be ineffective since this Convention excludes from its scope damage occurring during the post-land transport phase of the goods, and on the other hand, that transport documents produced by company (C), which according to the appellants cannot be qualified as air waybills, provide for simple information that "some international treaties, including the Warsaw and Montreal Conventions may be applied to transport", which cannot be considered a choice of law.

19. In response thereto, company (C) and company (E) argue that since the damage occurred during the carriage of goods by air from Colombia to France, two States signatories to the Montreal Convention, it is appropriate to apply this Convention and the limitation of liability clause provided for in Article 22.3, besides, the parties had expressly intended to apply this convention since the reference to international conventions, and in particular to the Montreal Convention and the liability rules resulting therefrom, appears on air waybills ("AWB") above the shipper's signature.

20. They recall that, pursuant to Article 1 thereof, this Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward but also to carriage to be performed by several successive carriers which is deemed to constitute a single carriage for the purposes of this Convention where it has been considered by the parties as a single operation, whether it has been concluded in the form of a single contract or a series of contracts, and that it does not lose its international character by the fact that a single contract or series of contracts must be performed entirely in the territory of the same State.

21. They add that the key factor in assessing whether the carriage is by air 'and therefore in applying the provisions of the Montreal Convention' is the legal custody of the thing entrusted to the carrier and that in this case the parties have indeed considered the two deliveries as two single and indivisible operations, as evidenced by the air waybills (AWB) which state that the journeys were to take place from the premises of the company "[...]" in Colombia to the premises of the company "[...] TRADING c/o (D)" in Paris, the disputed packages being placed in the custody of company (C) for this journey, the land transport performed by company (E), agent of (C), to be considered as a mere phase in the execution of the contract of carriage by air.

Thereupon,

22. The documents produced show that the contractual relations between company (A) and company (C) are evidenced by two air waybills under the terms of which company (A) has entrusted company (C) with the transport of two packages, respectively worth USD 49,874.70 for package No. 806 113 166 764 and USD 49,999.87 for package No. 806 113 166 823, from the premises of company (B) located in Colombia to the premises of company (D) located in Paris.

23. These air waybills refer to the application of "certain international treaties" and in particular the Warsaw or Montreal Convention as well as the conditions of carriage of company (C), which are provided in the file.

24. As a result, as this is an air transport operation from Colombia to France, two countries that have ratified the Montréal Convention, whose Article 1 provides that it applies "to all international carriage of persons, baggage or cargo performed by aircraft for reward", the latter is intended thus to govern, subject to a detailed examination of its provisions and scope, the contractual relations between company (A) and company (C).

25. Pursuant to Article 38 of the said Convention, "In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1".

26. In this respect, this Convention provides in Article 18-4 that "The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air".

27. It results from this article that transport by land, necessary to enable the goods to be delivered to the consignee and thereby to fulfil the contract of international carriage by air, does not have the effect of excluding the application of the Montreal Convention, since transport can be considered as a single operation. In this case, Article 18.4 provides that any damage is presumed to result from an event occurring during the carriage by air.

28. However, as mentioned in this article, this is a mere presumption ("subject to proof to the contrary"). Thus, if it is proved that the damage does not result from an event occurring during carriage by air, then the Montreal Convention is no longer intended to apply.

29. In the present case, it results both from the filing of a report for theft dated 23 June 2016 and from an expert report drawn up on 15 July 2016 at the request of the company (A)'s insurers retracing the route of the disputed packages that the facts causing the damage were committed on the occasion of the delivery of the two packages by company (E), a road carrier, to Paris in the 12th *arrondissement*.

30. Consequently, it is necessary to uphold the judgment of the Commercial Court which ruled against the application of the Montreal Convention and to examine the carrier's liability under the rules of domestic law governing the carriage of goods by land.

B) Is the Action of Company (A), Company (G), Company (H) and COMPANY (F) Admissible?

31. Company (C) and Company (E) argue that the claim by Company (A) is late both with respect to Articles 31.2 and 31.4 of the Montreal Convention according to which, in the event of damage, the consignee must, under penalty of inadmissibility, address a protest to the carrier immediately after the discovery of the damage and, at the latest, within

fourteen days for goods from the date of their receipt, that with regard to the general conditions of (C) which provide that all claims for damage (apparent or hidden), delay (including complaints relating to loss of profit) or missing items must be notified within 21 days after delivery of the shipment as soon as the packages have been delivered on 22 June 2016 and that the claim period expired on 13 July 2016 so that the claim, filed on 27 October 2016, missed the deadline.

32. Company (A), Company (G), Company (H) and Company (F) argue that they filed their claim on 27 October 2016, i.e. within the 9-month period provided for in Article 21.2 of the company (C)'s general conditions of carriage applicable in the event of loss of packages so that their claim is admissible, only this period shall be taken into account and not the 21-day period after delivery whose application is invoked by the respondents and which concerns claims for damage (apparent or hidden), delay (including complaints relating to loss of profit) or missing items. In the alternative, company (A) considers that it informed company (C) as soon as 22 June 2016 of the absence of delivery of the packages and therefore to have in any case satisfied the 21-day deadline if this deadline were to apply.

Thereupon:

33. As recalled above, the Montreal Convention and the time limits provided for in that Convention are not applicable in this case, so that the admissibility of the action will be examined in the light of the general conditions of carriage of company (C).

34. According to article 21.1 of these general conditions of carriage, relating to "Claims for damage, delay or missing items", "All claims for damage (apparent or hidden), delay (including claims for loss of profit) or missing items must be notified to (C) within 21 calendar days after delivery of the Shipment, failing which no claim for damages may be made against (C) (...)".

35. Pursuant to Article 21.2 of these same general conditions of carriage relating to "Other claims" (Loss, non-delivery, or unrealized delivery), "Any other claim, including but not limited to loss, non-delivery or defective delivery, must be received by (C) within 9 months after the package has been delivered to (C)".

36. In the present case, the circumstances of the dispute and in particular from the report for theft filed on 23 June 2016 on behalf of the company (A) corroborated by the report of expertise commissioned at the request of the insurers of company (A), for which company(C) 's safety and security manager was heard, as well as company (E)'s operations manager, show that the disputed packages were not delivered to the consignee mentioned on the airway bills, namely "Patrick S." but rather to an unknown person who signed under the name of Mr. D. whom it is not disputed that he is neither an employee of company (A), nor of its subsidiary, company (D).

37. In view of these elements which characterize the non-delivery of the goods to its agreed consignee, company (C) cannot argue, to claim the application of the 21-day period provided for in the said Article 21.1, that the complaint concerns damage (apparent or hidden) to the packages, delay (including complaints relating to loss of profit) or even

"missing items", whereas in the event of non-delivery only the 9-month period provided for in Article 21.2 is intended to apply.

38. As the parcels were delivered to company (C) on 15 and 16 June 2016 and not delivered to the addressee and company (A) having sent a complaint by registered letter with acknowledgement of receipt on 27 October 2016, i.e. before the expiry of the aforementioned 9-month period, its claim, as well as that of its insurers, is admissible indeed.

C) Is the Liability of Company (C) and/or Company (E) Incurred?

39. Company (A), company (G), company (H) and company (F) claim that company (C) does not meet its burden of proof as to the delivery of the packages to their consignee, which must be understood as the physical delivery of the goods to the consignee or its representative who accepts them. On the contrary, they add that proof of non-delivery is largely provided by the elements of the file and was acknowledged by (C) during the expert operations, as well as proof of the contents of the packages and their amount with regard to the information reported in the customs declarations on the nature and value of the packages.

40. The appellant companies point out that the carrier is bound by a strict liability ("*obligation de résultat*") and that in any event a fault has been committed by company (C) as a result of the delivery of the packages to a third party. They consider that company (C) is therefore liable, since the packages were lost during transport while they were in the company (C)'s custody, and that the company is liable for their loss, it being specified that the shipper was not at fault, the address indicated in the transport documents being clear and accurate and containing all the necessary information to carry out the delivery of the package, the driver having not taken the time to carry out the necessary checks and investigations to ensure the proper delivery of the goods.

41. They add that company (C) and its substitute have each committed a willful misconduct depriving them of the benefit of the limitations of liability provided in the general conditions of the contract of carriage. They specify that only one of these conducts is sufficient to deprive the company (C) of the possibility of invoking the limitations of liability and recall that with regard to the provisions of Article L. 3224-1 of the French Transport Code, as with the freight forwarder, company (C) has a two-fold responsibility and must answer, on the one hand, for its own conduct insofar as it is the cause of the damage to the goods and, on the other hand, for the substitutes it has used for the performance of the transport.

42. They specify that the four conditions of willful misconduct are met: the deliberate nature of the misconduct, the awareness of the probability of damage, the reckless acceptance of this risk, and the absence of a valid reason. They thus explain that the deliberate nature of the fault and the awareness of the probability of damage are established insofar as company (C), which knew the nature and value of the packages, shared the shipment of two packages of gold for a total value of USD 99,874.57, infringing its own internal rules which prohibit the amount of precious metal shipments from exceeding USD 50,000 and

by entrusting the transport of these raw gold packages worth USD 100,000 to a subcontractor without giving him any specific instructions or warnings and without ensuring its skills. They add that by not applying the most basic precautionary measures and knowing that they were necessary, company (C) necessarily recklessly accepted the risk of theft of the goods and that there is no valid reason to justify the company's failure to comply with its own safety rules.

43. They argue that the willful misconduct of company (E) is also demonstrated as the company has entrusted the transport to a driver whom it knew to be inexperienced, so that it deliberately failed to fulfil its obligations under the subcontract with company (C), which requires that the drivers meet the conditions of experience and comply with the procedures laid down by (C), while the two packages were delivered to an unknown person unrelated to the consignee, outside its premises, without any verification of its identity, and the carrier was necessarily aware that it was likely that the packages would be stolen.

44. In response thereto, company (C) argues that it has not met its burden of proof since there is no evidence, on the one hand, that the disputed packages were not delivered and that they contained gold whereas proof of delivery of the disputed folds is established by the journey histories and delivery notes (C) and, on the other hand, that the signature of the consignee's representative and the company stamp are in no way mandatory, proof of delivery can be established by any means.

45. Company (C) and company (E) further claim that the negligence of company (A) characterized by the lack of precision of the delivery address is such as to exempt them from liability both under Article 20 of the Montreal Convention and under domestic law relating to the transport of goods by land with regard to the lack of indication of the building, the floor on which company (A) or (D)'s offices were located whereas the delivery address covered at least three different buildings and some fifty companies have their premises at this address; to the deliberate secrecy of company (A) as to the exact location of its offices; to the recklessness of the latter to send precious materials without taking the slightest precaution and without providing a complete delivery address.

46. In the alternative, company (C) and company (E) state that, if they were found liable, their liability shall be limited, in accordance with the provisions of the Montreal Convention and their own conditions of carriage, as no declaration of value had been made and the declaration of value for customs purposes is not such as to remove the liability ceiling of the air carrier. They also point out that, even if willful misconduct is established, willful misconduct does not preclude the limitations of liability provided for in the Montreal Convention. They specify that liability can therefore only be limited to US$ 100 per shipment, i.e. the sum of € 90.94 for transport under AWB no. 8061 1316 6823 and the sum of € 90.80 for transport under AWB no. 8061 1316 6764.

47. Company (C) and company (E) argue in any event that if their liability was governed by land transport then company (C) is not liable because of the shipper's misconduct due to the shipper's negligence and that there is no evidence of willful misconduct, since the person

to whom the deliverer, who did not know the nature of the goods transported, handed over the packages was precisely in the building and on the floor that he had been indicated as corresponding to the premises of company (A) and that person introduced himself as the manager of that company, so that the deliverer had the bona fide belief that he was standing in front of the consignee;

Thereupon,

On the Liability of Company (C)

48. As indicated above, since the Montreal Convention has been discarded, the merits of the claims shall be only assessed in the light of French domestic law applicable to the case, namely the rules governing domestic road transport and the general conditions of carriage agreed between the parties, as the facts causing the damage were committed during the road transport of packages in France.

49. In this respect, it should be recalled that, pursuant to Article L. 3224-1 of the French Transport Code, "If it does not perform a contract of carriage with its own means, the public road carrier of goods may subcontract it, in whole or in part, to another public road carriage company under its responsibility.

    (...)

    The responsibilities of the road carrier who uses subcontracting are those provided for in the Commercial Code for freight forwarders (...)".

50. In this case, company (C) has undertaken, under the terms of two air waybills, to deliver two packages on behalf of company (A) from Colombia to France and to deliver them to "Mr. Patrick S." at the following address: "[...] Trading C/(D) [number- name of the[...] (75012)]".

51. Company (C) has entrusted the delivery of these packages to company (E) under a "subcontract for the road transport of consignments" executed on 12 May and 7 June 2016.

52. It is therefore necessary to assess the liability of company (C), which arranged the disputed transport, in accordance with the aforementioned Article L. 3224-1, in the light of the liability scheme applicable to the freight forwarder.

53. In this respect, pursuant to Article L. 132-5 of the French Commercial Code, the freight forwarder is liable for damage or loss of goods and things, unless otherwise stipulated in the consignment note, or force majeure. It is also the guarantor under Article L. 132-6 of the same code of facts of the intermediary freight forwarder to whom he addresses the goods.

54. In the present case, no clause avoiding liability results from the aforementioned general conditions of carriage of the company (C), and moreover that company does not invoke such clause.

55. Company (C) is therefore liable for the loss of the goods, which is sufficiently established in this case contrary to its allegations. Indeed, as indicated above, the disputed goods were not delivered to Mr S. on 22 June 2016, despite being identified as the only consignee mentioned on the two air waybills of 15 and 16 June 2016, but to an individual who called himself Mr D. who, having falsely introduced himself to the delivery driver of company (E) as a representative of the company [...] Trading, was wrongly delivered the disputed packages.

56. In this respect, the respondents are ill-grounded, in order to avoid their liability, to invoke a fault committed by company (A) because of the alleged lack of accuracy of the delivery address provided by the latter or its recklessness in entrusting the transport of packages with a cumulative value of USD 99 874.57.

57. Indeed, on the one hand, it appears from the information on the air waybills that it was in any case up to company (C) to inform its subcontractor, that they include the name of the consignee (Mr. Patrick S.), his telephone number, and the accurate address of the place of delivery ([...] Trading C/ (D), number, rue in Paris 75012) in such a way that sufficient information was brought to the attention of the carrier to fulfil its obligation to deliver without the possibility to raise the argument of the lack of building number in which the consignee's premises are located, as it results from the documents produced and in particular from the aforementioned expert report that this information appears on the sign dedicated to this company hung under the porch located at the entrance.

58. On the other hand, according to the provisions of the French Homeland Security Code, and in particular Articles R. 613-24 and L. 613-27, not impugned by company (C) and company (E), are subject to special requirements "activities consisting in transporting on public roads and supervision, until their actual delivery: (...) 2° Jewelry representing a value of at least 100,000 euros" and "under this section, are deemed to be jewels: articles, including watchmaking articles, intended for adornment which include precious metals under legal standards, rare materials or materials resulting from innovative technologies, precious stones or natural or cultured pearls and precious metal jewelry components used in the manufacturing cycle shall be considered as jewelry under this section". The disputed transport, in so far as it does not exceed the amount of EUR 100 000, could thus be entrusted to a non-specialized carrier, as confirmed by the interpretation of these texts by the *Conseil national des activités privées de sécurité* of the Ministry of the Interior, without this circumstance being tantamount to negligence on the part of Gold by Gold, even though it has been stated by Mr S. both at its hearing before the Court and in its written statement, without this fact being disputed, that 94 similar deliveries were entrusted by the latter to company (C) between January 2014 and April 2017, without any incident.

59. With regard to these elements, the liability of company (C) is incurred.

On the Enforcement of the Clause Limiting the Liability of Company (C);

60. Article 18.1 of the general conditions of carriage governing the relationship between company (A) and company (C) states that "Unless the Shipper reports a higher Declared

Value for the Carriage on the (international) Shipment Note and pays the required charges, the liability of (C) is limited to the greater of (a) the amount provided for in the applicable international convention or local legislation, or (b) €22 per kilogram, or (c) US$100 per Shipment".

61. As no special declaration of value has been made in this case, company (C) is likely to rely on this clause limiting liability if there is no evidence of willful misconduct.

62. In this respect, Article L. 133-8 of the French Commercial Code, which is also intended to apply to the liability of the freight forwarder, provides that "Only the willful misconduct of the carrier or the freight forwarder is tantamount to deceit. Misconduct qualifies as willful when it implies the awareness of the probability of damage and its reckless acceptance without valid reason. Any clause to the contrary shall be deemed unwritten.

On the Willful Misconduct of Company (C)

63. In order to ascertain such misconduct of company (C), company (A) argues that it results from the mutualization of the sending of packages of which it knew the value and the delivery of these packages to an inexperienced driver without any indication of their value.

64. In the present case, it appears from the documents produced that company (C) cannot seriously dispute having known the contents of the packages entrusted to it, whereas on the one hand, the value of these packages is specified on the two air waybills (USD 49 874,70 for package No 806 113 166 764 and USD 49 999,87 for package No 806 113 166 823) which also bear the words "Metal AU", corresponding to the symbol for gold ("AU") and that, on the other hand, it is not disputed by the parties that many similar shipments had been carried out since 2014 by company (C) to company (A).

65. It also appears from the circumstances of the dispute that the two disputed packages together were taken over by company (E) on 22 June 2016, to be delivered to company (A), whereas according to the expert report, Mr. G., the safety and security manager of company (C), reported "not to understand the fact that two packages with a total value of USD 100,000 were inside the same delivery vehicle, whereas it is set that the sum of USD 50,000 shall not be exceeded".

66. However, if this information tends to show that a misconduct has been committed as a result of non-compliance with the own internal safety rules of company (C), this misconduct, if not substantiated as to the source of these internal rules, their force and scope within the company itself, is not such as to ascertain a deliberate misconduct involving from this stage that company (C) was aware of the probability of damage and its reckless acceptance without valid reason.

67. Similarly, if it is established that the company's delivery driver (E) was not the 'usual' driver of the distribution tour, this circumstance is also not such as to ascertain such misconduct of company (C), while the latter produces the contract of subcontracting entered into with company (E) from which it emerges that the latter undertakes to provide a service "in particular in accordance with the provisions of Appendices 1, 2, 3, 4 and 6 and to use

appropriate equipment and driving personnel" with the said appendices providing especially for a set of delivery specifications (Appendix 2 entitled "Delivery Procedures") which precisely detail the steps to be taken by the service provider for the delivery in order to ensure that it runs smoothly and in particular the protocols to be followed with regard to the checks to be carried out before the delivery tour (verification of the condition of the packages) and the operations to be carried out during delivery (and in particular the fact that "for packages, delivery on the floor is included in the service, the Supplier must therefore report to the consignee's door") or an Appendix 3 relating to "the collection procedures' which indicate that it is the responsibility of the service provider (company (E)) to identify the packages to be delivered in that it is specified that "Each package must be accompanied by a manual or automated air waybill (AWB)".

68. Give these elements, if the circumstances of delivery of the packages to the company (E) constitute an obvious negligence on the part of company (C), they are not of such a nature as to attribute to it, a willful misconduct within the meaning of the aforementioned article L. 133-8.

On the Willful Misconduct of Company (E)

69. It results from the information provided during the discussions and in particular from the delivery history traced by the expert appointed by the insurers of company (A), but also from the "Tracking" sheets issued by company (C) that the agent of company (E), who was in charge of delivering the two packages with a respective value of USD 49,874.70 for package No. 806113166 764 and USD 49,999.87 for package No. 806 113 166 823, delivered these packages, not to the consignee but to a person who introduced himself as a representative thereof, without however taking the trouble to verify its relationship with the company receiving the packages, in particular by requesting that the stamp of this company be affixed, while the delivery of the packages did not take place on the premises of company (D), but in a corridor of a building (building C) not corresponding to the building in which the company's premises are located.

70. In this respect, it should be noted that, pursuant to Appendix 2 of the subcontract entered into with company (C), company (E) has nevertheless undertaken to deliver the packages "on the floor" (...) the Supplier must therefore report to the consignee's door" as well as to the address "mentioned on the consignment note, or to a person other than the person or entity mentioned on the consignment note, who appears to be authorized to accept the consignment in the name and on behalf of the consignee (person in the recipient's home for private individuals, receptionists for companies)".

71. It is also established by the documents produced and in particular the expert report and the geolocation sheet of the vehicle used (BD-998-HH) for this delivery annexed to the expert report that the vehicle stopped not at the exact delivery address but nearby between 10:18 and 10:22 am. It appears that the steps taken by the deliverer were necessarily very brief despite the allegations of company (C) and company (E), since the driver-deliverer could not take the time necessary to fulfil his obligation to deliver under

normal conditions within this period of time and more especially as it is not disputed that at the said delivery address indicated, about fifty companies are referenced so that, if the deliverer does not know the place, as this was the case, he could not reasonably perform this assignment with the required diligence within the aforementioned period.

72. Finally, company (E) could not be unaware of the contents of the above-mentioned packages, as the subcontract entered into with company (C) mentions that air waybills are to be provided to it among other information for delivery, each package being "accompanied" by such a bill. Yet, as noted above, the value of the packages is shown on the two air waybills in question, as well as the mention "metal AU" leaving little doubt about the precious contents of the packages, which did not prevent company (E) from entrusting the delivery tour of 22 June 2018 to a driver who was not the usual one but a stand-in.

73. Give these elements, which attest to the delivery to an individual whose relationship with the consignee has not been verified, or even confirmed using the stamp of that company of which that individual did not carry, of two packages of a value of nearly USD 100,000, outside the premises of the consignee's company in a corridor located in another building thant the one in which the premises are located, all within 4 minutes, in contradiction with its obligations under the subcontract, it shall be considered that the misconduct of company (E) qualifies as willful since, by acting deliberately in this way, the company could not fail to be aware of the probability of theft, and the sequence of failures implies a reckless acceptance of the damage without valid reason.

74. Company (C), which shall be held liable for the fact of its subcontractor and therefore for the latter's willful misconduct, cannot therefore oppose company (A) with the aforementioned limitation of liability clause so that the judgment of the Paris Commercial Court will be overruled on this ground.

D) The Damages

75. Company (C) argues that as there is no evidence of the quantum of their loss, the claims for damages of company (A), company (G), company (H) and company (F) shall be dismissed, since the invoices relate to shipments of 27 May 2016, i.e. one month before the parcels are taken over by (C), that the weight of the goods mentioned on the invoices does not correspond to the weight of the packages and that company (A) is not in a position to produce proof of the actual debit of the sum of USD 99 874.57 from its bank accounts, nor proof of the contents of the packages and their value.

76. Company (A), company (G), company (H) and company (F) argue that contrary to what company (C) claims, the payment of the invoices of the purchase of these goods is properly evidenced, by providing a payment notice from HSBC Bank that shows the name of the beneficiary, the amount of payment that corresponds to that of the purchase invoices and the date of the transaction and specifies that the price of the goods transported is also indicated on the transport slips (C) and customs declarations.

Thereupon,

77. The damage to company (A) results from the loss of the goods acquired from company (B) and for which the two invoices no. 673 and no. 674 dated 27 May 2016 produced in the discussions attest to their purchase by the first to the second.

78. In this respect, the difference in weight of these packages with those actually handled by company (C) is not such as to support a difference in content between the packages acquired from the company (B) (from a respective weight of 1548.12 gr and 1561.25 gr) and the packages made for the air transport of these goods, being necessarily different (respectively 1.8 kg and 1.9 kg) because they include the packaging, while the air waybills mentioning the delivery to company (C) of two packages of a respective value of USD 49,874.70 (for package No 806 113166 764) and USD 49,999.87 (for package No 806 113 166 823) in addition to the corresponding customs declarations made on 21 June 2016 mentioning the same amounts.

79. Finally, while the ownership of the packages is not disputed or claimed by the seller (company (B)), the respondents are not entitled to challenge it in order to contest the reality of the damage caused to company (A) and to request justification of the actual payment to company (B), it being observed that a payment notice from HSBC bank is also produced relating to a transaction for the benefit of company (B) of an equivalent amount.

80. Given these elements, company (G), company (H) and company (F) prove a loss of USD 49,874.57 corresponding to the amount paid to company (A) pursuant to the insurance contracts as compensation and for which they are subrogated by virtue of a receipt signed on 25 October 2016, in addition to the cost of the expertise up to 1,410 euros, and company (A) proves that it has suffered damage of USD 50,000 corresponding to the amount it has remained liable for.

81. Consequently, company (C) shall be sentenced to pay to companies (G), (H) and (F) the sums of USD 49,874.57 or its equivalent in euro at the exchange rate on the date of this decision, plus interest at the legal rate from 27 October 2016, the date of the formal notice and 1,410 euros for the costs of expertise with interest at the legal rate as from the summons dated 13 December 2016, and to sentence company (C) to pay to company (A) the sum of USD 50,000 or its equivalent in euros, at the exchange rate on the date of this decision plus interest at the legal rate as from 27 October 2016, the date of the formal notice.

82. Provisions of Article 1343-2 of the French Civil Code shall also be enforced and capitalization of interest due for a full year as from 13 December 2016, the date of the summons before the Commercial Court, shall be ordered.

E) The Indemnity of Company (C) by Company (E)

83. It appears from the subcontract entered into between company (C) and company (E) and in particular from Article 7 thereof that "the provider shall guarantee and indemnify (C) for any damages, legal costs, attorney's fees, fines and other costs whatsoever claimed from

(C) as a result of damage to the consignments, in the event of loss of the said consignments or in the event of late delivery, caused by the misconduct or negligence of the service provider or its staff".

84. In the light of the circumstances of the damage referred to above and these contractual terms which company (E) does not impugn, company (E) shall be ordered to indemnify company (C) from any sentence against it pursuant to this decision, including the costs and expenses referred to below.

F) Costs and Expenses

85. The fate of the costs and the procedural indemnity was properly settled by the Commercial Court in its judgment of 22 February 2018.

86. At this court level, company (C), the losing party, shall be ordered pay the costs of the appeal.

87. In addition, it shall be ordered to pay to company (A) and to companies (G), (H) and (F), which had to incur irrecoverable costs in order to assert their rights, compensation under Article 700 of the French Code of Civil Procedure, which fair overall sum is set at EUR 15,000.

88. The application by company (C) to sentence company (E) under Article 700 of the French Code of Civil Procedure shall be dismissed.

VI- ON THESE GROUNDS:

89. **The court hereby upholds the judgment of the Paris Commercial Court of 22 February 2018 in so far as it:**

(1) Found that the Montreal Convention on Carriage by Air did not apply;

(2) Found that the action of companies (A), (F), (G) and (H) was admissible;

(3) Sentenced company (C) to pay to companies (A), (F), (G) and (H) together, the sum of 10,000 euros under Article 700 of the French Code of Civil Procedure.

(4) Sentenced company (E) to pay Company (C) the sum of 7,000 euros under Article 700 of the French Code of Civil Procedure.

(5) Order companies (C) and (E) to pay the costs in solidum.

90. **The Court overturns the judgment of the Paris Commercial Court of 22 February 2018 for the remainder and rules again to:**

(6) Find that company (E) has committed a willful misconduct preventing company (C) from availing itself of the clause limiting liability;

(7) Find that company (C) is accountable for the willful misconduct of company (E);

(8) Sentence company (C) to pay companies (G), (H) and (F) the sums of USD 49,874.57 or its equivalent in euro at the exchange rate on the date of this decision, plus interest at the legal rate from 27 October 2016, and 1,410 euros for the costs of expertise with interest at the legal rate as from the summons dated 13 December 2016;

(9) Sentence company (C) to pay to company (A) the sum of USD 50,000 or its equivalent in euros, at the exchange rate on the date of this decision plus interest at the legal rate as from 27 October 2016;

(10) Order the capitalization of interest due for a full year from 13 December 2016;

91. The Court adds to the judgment of the Paris Commercial Court of 22 February 2018 that it:

(11) Sentences company (C) to pay to companies (G), (H) and (F) and to company (A) the global amount of 15,000 euros under Article 700 of the French Code of Civil Procedure as well as the costs of the appeal.

(12) Dismisses the claim of company (C) under Article 700 of the French Code of Civil Procedure against company (E);

(13) Orders that company (E) indemnify company (C) from any sentences handed down against it pursuant to this Decision.

The Clerk

[...]

The President

[...]

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