

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16
International Chamber

JUDGMENT OF 26 MARCH 2019

RULING ON JURISDICTION

(No 8 pages)

General Directory Entry Number : **RG No 19/00061** —

Decision referred to the Court: Order of 21 December 2018 - Meaux Commercial Court— RG No 2018007991

APPELLANT:

Company X, a company incorporated under Portuguese law
Having its registered office: [...]

Registered in the Portuguese Commercial and Companies Register under the number [...]

Represented by its legal representatives,

Represented by..., member of the Bar of : [...]

RESPONDENT:

Company ‘Y’, a company incorporated under French law
Having its registered office: [...]

Registered in the Commercial and Companies Register under the number [...]

Represented by its legal representatives,

Represented by..., of the Bar of [...]: [...]

COURT COMPOSITION

The case was discussed on 25 February 2019 in open court, before the Court composed of:

President
Judge
Judge

who ruled on the case, a report was presented at the hearing by [...] in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing: [...]

JUDGEMENT

– Adversarial

— judgement 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 Code of Civil Procedure.

— signed by..., President and by..., Clerk to whom the minute was delivered by the signatory judge.

I- Facts and procedure

1. On 28 May 2015 (Y), a company incorporated under French law, assigned its shares in the company ('A') to the company (X) at a price of EUR 37 500.
2. By writ of 7 September 2018, the company (Y) brought an action against the company (X) before the Meaux Commercial Court to obtain, inter alia, payment of the sum of EUR 37 500 pursuant to the assignment signed on 28 May 2015.
3. By an order of 21 December 2018, the President of the Meaux Commercial Court dismissed the plea of lack of jurisdiction and remitted the case for the final judgment.
4. On 3 January 2019, the company (X) lodged an appeal against that decision and was authorised by order of 4 January 2019 to summon the company (Y) for a hearing fixed on 21 January 2019, that writ of-summons having been issued on 9 January 2019.
5. At the hearing on 21 January 2019, the case was remitted to 28 January 2019 and then to the hearings of 11 and 25 February 2019.

II- Claims of the parties

6. According to its latest submissions sent electronically on 1 February 2019, the company (X) requests the Court, inter alia, to comply with Article 75 of the Code of Civil Procedure, Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012 known as 'Brussels I bis (recast)' and Article 1247 of the Civil Code in the version applicable at 28 May 2015, to :

DISMISS company 'Y's plea of nullity

RECEIVE the appeal by the appellant against the order of the Court of First Instance dated 21 December 2018

OVERTURN this decision in all of its provisions ;

DISMISS company (Y)'s claims

And ruling again :

RULE FOR the plea of lack of jurisdiction raised in *limine litis* by the Portuguese company (X),

ORDER the parties to be heard before the Portuguese courts having jurisdiction,

ORDER company (Y) to pay EUR 6 500 for irrecoverable costs,

ORDER company (Y) to pay the costs of the proceedings at first instance and on appeal.

7. In support of its appeal, the company (X) claims in essence that:

— Pursuant to Article 5.1 of Regulation No 1215/2012, together with Sections 2 to 7 of Chapter II of that regulation, and more specifically Article 7 (1) (a) of that regulation, the court having jurisdiction is *that of* the place of performance of the obligation in question, which must be understood as the obligation to have to pay the transfer price of shares to the transferor ;

- The applicable law for determining the place of performance of the disputed obligation is, in the absence of a choice by the parties, pursuant to Article 4.2 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, known as ‘Rome I’, the law of the country in which the party who must provide the characteristic performance has his habitual residence, and therefore, in the present case, the French law as the characteristic performance of a share purchase agreement is the transfer of ownership of the shares borne by the transferor, who resides in France;

— Pursuant to paragraph 3 of Article 1247 of the Civil Code, in the version applicable to the date of the contract, the obligation to pay a sum of money must be performed at the place where the debtor is domiciled, which, in the present case, must lead to the designation of the Portuguese court as being the place where it has its seat in Portugal, being noted that shares do not constitute “*corps certains*” but rather some “*choses fongibles*”, so that they cannot fall within the scope of paragraph 2 of Article 1247;

— That procedure is knowingly brought before a court with no territorial jurisdiction for purely evidential purposes against the holding company of its shareholder, the company (X), whereas the company (Y) deliberately concealed the content of its annual accounts from 2014 (absence of publication), requiring the company (X) to bring an action against its managing director before the Meaux Commercial Court to obtain that information removed from his own attention. It considers that that proceeding is thus used to damage its interests and those of its parent company under Portuguese law and that having been forced to engage financial resources in order to enforce the misuse of the European rules of procedure and jurisdiction, it is entitled to seek a procedural indemnity;

— With regard to the plea of nullity of the writ, the appellant states that the second original of the writ of summons issued by the bailiff consisted of a first page of double copies of which the first

copy was dated 9 January 2019 and the second copy had no date indicated, with the result that company (Y) now attempts to take advantage from the fact that the first page of the writ of summons had no date to create the appearance of irregularity of the document served, whereas full writ, comprising 106 pages, was served on it and that, in any event, the company (Y) does not show how the alleged irregularity caused the disruption of its defence so that it does not demonstrate that the irregularity has adversely affected its interests.

8. According to its latest submissions sent electronically on 7 February 2019, the company (Y) asks the Court, in particular with reference to Article 7.1a (a) of Regulation EU No 1215/2012 and Article 4 of Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 ('Rome I'), to:

(I) FIND the company (Y)'s requests have merits,

CONSEQUENTLY :

FIND that the writ of summons served by SELARL [] is null and void due to its formal irregularity;

FIND non admissible the appeal brought by the company (X);

IN THE ALTERNATIVE:

DISMISS the appeal brought by the company (X) against the interim order of 21 December 2018;

RULE that the President of the Meaux Commercial Court has jurisdiction to rule on the substantive claims made by the company (Y);

IN ANY EVENT:

ORDER the company (X) to pay to the company (Y) the sum of EUR 4,000 under Article 700 of the Code of Civil Procedure,

ORDER the company (X) to pay all the costs of the appeal.

9. In essence, the company (Y) submits that:

— The writ of summons is null and void because the copy served at its seat does not refer to its date, which is a substantial procedural requirement under penalty of nullity, and that this irregularity adversely affects its interests.

— Pursuant to Article 7 (1) (a), which is applicable in the present case, the obligation on which the application is based, namely the transfer of shares by the transferor, which is the relevant one and not the subject of the claim (payment by the assignee), results in the jurisdiction of the French court to be confirmed where the dispute relates to the transfer of shares in a French company — Company (A) which has its registered office in Ferrières en Brie (77164) ... — by a French company, the company (Y) which has its registered office in Croissy Beaubourg (77183) ... and that is the consequence of a contract for the transfer of shares made in Ferrière en Brie (77164). The place of performance of the obligation in question, namely the disposal of shares in the company (A), cannot therefore fall within the territorial jurisdiction of the Portuguese courts.

10. The Court refers, for a fuller account of the facts and claims of the parties, to the decision and to the above mentioned pleadings, in accordance with the provisions of Article 455 of the Code of

Civil Procedure.

II — Reasons for the decision

On the plea of nullity-of the writ of summons ;

11. Pursuant to Article 648 of the Code of Civil Procedure, any bailiff's writ shall have a date, failing which the writ will be deemed to be null and void.

12. In the present case, the writ of summons issued by the company (X) against the company (Y) and lodged with the Court by electronic means on 14 January 2019 refers to its date, namely '9 January 2019'.

13. If a copy of that writ of summons and of the documents handed down to the company (Y) on which it relies, which includes 106 pages according to the terms of the bailiff, has an incomplete date since it refers only to the year "2019" without specifying the day and month of that year, it may not complain of having its interests adversely affected since it clearly indicates an obligation to appear at a hearing which was to take place on 21 January 2019, which means that the company (Y) was informed of the date on which the case should be heard and that, since this case was adjourned several times, the company (Y) could indeed file its submissions and appear at the hearing held on 25 February 2019, with the result that the writ of summons cannot be deemed to be null and void as the material omission, which cannot be seen on the copy lodged with the Court, has not adversely affected its interests.

14. The plea of nullity must therefore be dismissed.

On the plea of lack of jurisdiction;

15. It is common ground that on 28 May 2015 the company (Y), a company incorporated under French law, assigned to the company (X), a company incorporated under Portuguese law, its shares in the company (A) at a price of EUR 37 500. The share purchase agreement, drafted in the form of a Cerfa document, does not contain any clause conferring jurisdiction.

16. Since the present action for payment is brought by a company governed by French law against a company governed by Portuguese law, the case referred to the Court is an international dispute which falls within the scope of 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.

17. Pursuant to Article 4 (1) of that regulation, " *Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.* "

18. That provision thus confers jurisdiction on the Portuguese courts, the appellant, the defendant in the action for payment initiated by the company (Y), which has its registered office in Portugal.

19. However, under Article 5.1 of Regulation No 1215/2012, persons domiciled in a Member State may also be sued in the courts of another Member State by virtue of the rules set out in Sections 2 to 7 of the chapter relating to 'Jurisdiction', or in Articles 7 to 26 of that regulation.

20. Under Article 7 (1) (a) of that regulation, a person domiciled in a Member State may also be sued:

a) *In matters relating to a contract, in the court for the place of performance of the obligation in question;*

b) *for the purposes of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

- *in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, —*

- *in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,*

c) *If point (b) does not apply then point (a) applies. ’*

21. In the present case, as the share purchase agreement is neither a contract for the sale of goods nor a contract for the provision of services, the determination of the court having jurisdiction must be made in accordance with Article 7 (1) (a), and *point (a)* must apply if *point (b)* does not apply.

22. The company (Y) may therefore be sued in the court “*of the place of performance of the obligation in question*”, which shall be deemed to be the contractual obligation on which the legal action is based, in the present case, the monetary obligation by the company X to pay the price of the shares.

23. The place of performance of the obligation must be determined in accordance with the law governing the disputed obligation in accordance with the conflict rules of the Court.

24. Pursuant to Article 4.2 of Regulation (EC) No 593/2008 of 17 June 2008, in the absence of a choice by the parties, the contract is governed, where it is not covered by Article 4.1, which is the case here as regards a share purchase agreement, by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

25. In the present case, the characteristic performance of the assignment of shares is the transfer of ownership of the shares, in this case the obligation on the company (Y), which must be performed in France as regards an assignment made in that country and relating to shares in a French assigned company.

26. It is therefore necessary to determine the place of performance of the obligation under French law and more specifically under Article 1247 of the former civil code, in force at the date of conclusion of the transfer agreement.

27. Under Article 1247 of that code, in its version prior to the order of 10 February 2016, “*Payment must be made-at the place designated in the agreement. If the place is not designated, the payment, in the case of a specific property, must be done where, the specific property was at the time the obligation was contracted (...) Apart from those cases, payment must be made at the domicile of the debtor*”.

28. In the light of that provision, the transfer at issue, relating to shares; and thus of “*choses fongibles*”, the payment must be made at the domicile of the debtor or the place of the company’s registered office (X) in Portugal, with the result that the court of that Member State, which is, moreover, the court designated under Article 4.1 of Regulation 1215/2012, is also the court designated to have jurisdiction by Article 7 § 1 of that regulation to hear the case.

29. The Meaux commercial court must be therefore declared as having no jurisdiction to hear and determine the company's (Y) action so that the order will therefore be overturned and the parties directed to better lodge their claims.

Costs;

30. The company (Y), losing party, must be ordered to pay the costs of the proceedings of the first instance and of the appeal.

31. In addition, it must be ordered to pay to the company (X), which had to incur irrecoverable costs in asserting its rights, compensation under Article 700 of the Code of Civil Procedure, which it is equitable to fix at EUR 3 000.

IV. ON THOSE GROUNDS, HEREBY

(1) Overturns the order of the Meaux commercial court of 21 December 2018 in all its provisions;

And ruling again :

(2) Rules that the Meaux commercial court tribunal has no territorial jurisdiction;

(3) Directs the parties to better lodge their claims

(4) Orders the company (Y) to pay to the company (X) the sum of EUR 3 000 under Article 700 of the Code of Civil Procedure;

(5) Orders the company (Y) to pay the costs of the proceedings of the first instance and of the appeal.

Clerk

President