

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16
International Commercial Chamber

(No 10/2019, 9 pages)

JUDGMENT OF 10 SEPTEMBER 2019

RULING ON JURISDICTION

General Directory Entry Number : **RG 19/06981** — No Portalis **35L7-V-B7D-B7UFJ**

Decision referred to the Court: Judgment of 24 January 2019 - PARIS Commercial Court RG No 2018052786

APPELLANT:

SA ITS WINGS, a company incorporated under Luxembourg law
Having its registered office at 1A, rue Jean Piret L-253 0 LUXEMBOURG,
Registered in the Luxembourg Trade and Companies Register under the number No: B194201
Represented by its legal representatives

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

RESPONDENT:

SA LA POSTE
Having its registered office at 9, rue du Colonel Pierre Avia, 75015 PARIS
Registered in the Trade and Companies Register under the number No 356 000 000
Represented by its legal representatives

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

COURT COMPOSITION

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

Fabienne SCHALLER, President
Laure ALDEBERT, Judge
Laurence LEHMANN, Judge

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

Clerk at the hearing: Clémentine GLEMET

JUDGMENT

- 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 Code of Civil Procedure.
- signed by Fabienne SCHALLER, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I. Statement of the facts and proceedings

Facts

1. ITS Wings, a limited liability company incorporated under Luxembourg law, is the holding company of the Actissia group, leader in cultural products, which it took control of in 2015, following major difficulties faced by the group from 2013 onwards.
2. Through Actissia Club, the Actissia group holds the entire capital of France Loisirs, which is active in book distribution and publishing, in particular on the model of a book club to which its members subscribe.
3. France Loisirs went into receivership ordered by the Paris Commercial Court on December 1, 2017 and benefits from a recovery plan since December 28, 2018.
4. For the routing and delivery of single-piece items, France Loisirs entered into a distribution contract in 2015 with La Poste, of which it was already a customer, entitled "Contrat Gamme Colissimo Entreprise".
5. La Poste claimed an unsecured debt of EUR 1,894,968.55 to be included in France Loisirs' liabilities by registered letter dated 23 January 2018 addressed to the receiver appointed by the Paris Commercial Court, arising from unpaid postage invoices corresponding, on the one hand, to invoices arising from the mail activity (EUR 377,138.97) and on the other hand, to invoices arising from the parcel activity (EUR 1,517,829.58), informing it furthermore that its claim was guaranteed by the holding company ITS Wings according to a letter of support dated 14 March 2017.
6. By registered letter dated 19 December 2017, reiterated on 23 January 2018, La Poste served formal notice on ITS Wings to pay the sum of EUR 1,894,968,55 owed by France Loisirs on the basis of the letter of support drafted by ITS Wings as follows : "*confirms the total and joint and several support from the Company, which owns 100% of the Actissia group, to France Loisirs and/or any other company of the Actissia group, for all the obligations contracted with La Poste group, whatever the nature and whatever the amount*".
7. "*The Company undertakes to pay, without discussing, all amounts due in the event that France Loisirs or any other company in the Actissia group is unable to honour its commitments to La Poste group*".

Proceedings

8. The formal notices remaining unanswered, it is in this context that, by writs served on 26 April 2018, La Poste summoned ITS Wings before the President of the Paris Commercial Court, ruling in summary proceedings to obtain payment of the sum of EUR 1,894,968.55 that it considered due under the guarantee.
9. ITS Wings raised an objection in limine lis to the lack of territorial jurisdiction in favour of the

Luxembourg courts.

10. By interim order dated 12 September 2018, the President of the Commercial Court of Paris found that there was no need of interim measures and referred the case to the 3rd chamber of the court.

11. By decision dated 24 January 2019, the Paris Commercial Court asserted its jurisdiction as follows :

- " - Finds La Poste admissible but its plea of bar to proceedings has no merits ; dismisses it;
- Finds SA ITS WINGS admissible but its plea of lack of jurisdiction with no merits;
- Finds that it has territorial jurisdiction;
- Directs the Clerk to notify this decision by registered letter with acknowledgement of receipt addressed to the parties exclusively;
- Holds that, pursuant to Article 84 of the CPC, an appeal against this decision may be lodged within fifteen days of the said notification
- Refers the case back to the collegial hearing of the 3rd Chamber on Wednesday 20 February at 2 p.m., to plead on the merits;
- Rejects the application under article 700 of the CPC; and
- Reserves the costs."

12. ITS Wings appealed this decision by notice of 11 April 2019 and, after having been authorized to do so by order of 10 May 2019, summoned La Poste by bailiff's deed of 17 May 2019 to appear at the hearing of 25 June 2019 at which the case was heard.

II. CLAIMS OF THE PARTIES

13. According to its submissions, sent electronically on 11 April 2019, ITS Wings request the Court, under Articles 83 et seq. of the Code of Civil Procedure and Regulations of the European Parliament and of the Council No 1215/2012 of 12 December 2012 and No 593/2008 of 17 June 2008, to

- FIND ITS Wings admissible and that its appeal has merits;

Allowing it:

- OVERTURN the judgment of the Commercial Court of Paris of 24 January 2019 in all its provisions and ruling again;

Consequently:

- FIND AND RULE that the French courts have no territorial jurisdiction in favour of one of the commercial chambers of the District Court of Luxembourg;

In any case:

- ORDER La Poste to pay SA ITS Wings the sum of EUR 15,000 under Article 700 of the Code of Civil Procedure;

- ORDER La Poste to pay all the costs of the present proceedings and of their consequences.

14. According to its its submissions sent electronically on 13 June 2019, La Poste requests the Court, under Articles 4 and 7 of the Brussels I Regulation (recast) and Article 568 of the Code of Civil Procedure, to :

- UPHOLD the judgment handed down by the Commercial Court of Paris on 24 January 2019,

- FIND the French forum has international jurisdiction hear this case,

- ORDER SA ITS Wings to pay the sum of 5 000 € under Article 700 of the Code of Civil Procedure,

- ORDER ITS Wings SA to pay all the costs.

III. PLEAS OF THE PARTIES

15. ITS Wings argues firstly that the Commercial Court wrongly rejected its plea of lack of territorial jurisdiction by misapplying the rules on conflict of jurisdiction in holding that the letter of support constituted a contract for the provision of services under Article 7 of the Brussels I Regulation (recast), that French law was applicable, in particular Article 1343-4 of the Civil Code, and that France was the country with which it had a closer connection which justified the overriding jurisdiction of the French courts.

16. It argues that the letter of support is an autonomous contract and not ancillary to the contract concluded with La Poste in 2015, which alone would have closer links with France.

17. ITS Wings argues that, in the absence of jurisdiction clause and choice of law clause in the letter of support, Article 4 of the Brussels I Regulation (recast) designates the courts of Luxembourg, the place of the defendant's registered office.

18. It adds that the application of the optional rules of jurisdiction provided for in Article 7 of the Brussels I Regulation (recast) also designates the courts of Luxembourg, the place of performance of the obligation in question.

19. It points out that, in order to determine territorial jurisdiction on the basis of Article 7 of the Brussels I Regulation (recast), it is necessary to determine the law applicable to the letter of support and that Article 4(2) of the Rome I Regulation refers to the law of the country of the debtor of the obligation in the present case Luxembourg law.

20. ITS Wings specifies that, exceptionally, it is permissible to derogate from this rule 'where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, in which case the contract is subject to the law of that other country' by application of Article 4(3) of the Rome I Regulation. It submits that, in that case, it is also the law of Luxembourg that should apply, having regard to the following connecting factors:

- ITS Wings is a company incorporated under the laws of Luxembourg and of Luxembourg

nationality;

- ITS Wings has its registered office in Luxembourg ;
- ITS Wings carries out all its activities as a holding company in Luxembourg and the letter of support was subscribed and issued in Luxembourg as a unilateral commitment.

21. ITS Wings submits that Luxembourg law thus shall apply to the determination of the place of obligation under the guarantee and states that, under Luxembourg law, Article 1247 of the Civil Code provides that 'payment must be made at the debtor's domicile' (principle of *quérabilité*) so that the Luxembourg courts shall have jurisdiction in its view.

22. As a reply, La Poste sets out the same reasoning in its written submissions as regards the designation and application of the rules on conflict of jurisdiction and of law and thus agrees that jurisdiction is determined by application of Article 7(a) of the Brussels I Regulation (recast), which involves determining the law applicable to the obligation in question by application of Article 4 of the Rome I Regulation.

23. It submits, however, that the escape clause provided for in Article 4(3) of the Rome I Regulation applies in this case because there are more connecting factors with France than with Luxembourg, arguing that :

- The relationship under the main obligation between La Poste and France Loisirs is subject to French law ;
- This relationship of obligation is concluded in France;
- It is performed in France;
- France Loisirs, main debtor, has its registered office in France and is registered in France ; LA POSTE, creditor, has its registered office in France and is registered in France ;
- France Loisirs is the subject of insolvency proceedings before the French commercial courts; and
- The company ACTISSIA, owner of France Loisirs, also has its headquarters and is registered in France.

24. It infers from this that the court rightly found a closer connection with France than Luxembourg in order to apply French law, which provides that the place of payment of the monetary obligation is the creditor's domicile pursuant to Article 1343-4 of the Civil Code (principle of *portabilité*), so that the rules on conflict of laws and jurisdiction designate the jurisdiction of the French courts over this claim.

25. La Poste further explains that the court's classification of the security at issue under 'provision of service', criticised by the appellant, has no legal consequence and was not a decisive ground since the Commercial Court characterised the connecting link with France.

26. La Poste also argues, irrespective of the independent or ancillary nature of the letter of support, that this act undoubtedly has a closer connection with France in view of its proximity to the 'basic contract', the distribution contract signed with La Poste in 2015, from which it cannot be splitted, as the purpose of the letter of support was for the holding company to secure the relationship between La Poste and France Loisirs in France.

IV. REASONS FOR THE DECISION

On the plea of lack of jurisdiction

27. As the present action for payment is brought by a company governed by French law against a company governed by Luxembourg law, the court is seised of a dispute of an international nature 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, known as Brussels I (recast).

28. The Regulation enacted to settle conflicts of jurisdiction pursues the objective of legal certainty by strengthening the legal protection of persons established in the European Union by enabling both the plaintiff to easily identify the court which it can bring proceedings before and the defendant to reasonably foresee before which court it can be sued.

29. According to the principle laid down in Article 4(1) of the Regulation, the courts of the place where the defendant has its domicile shall have jurisdiction. Thus under that provision the Luxembourg courts shall have jurisdiction in the present case, since the appellant, defendant in the action on warranty brought by La Poste, has its registered office in Luxembourg.

30. The Regulation does, however, provides alternative grounds of jurisdiction for the plaintiff. Thus, pursuant to Article 5(1) of the Brussels I Regulation (recast), persons having their domicile in a Member State may also be sued in the courts of another Member State under the rules set out in Sections 2 to 7 of the Chapter on "Jurisdiction", i.e. Articles 7 to 26 of that Regulation.

31. In contractual matters, excepting prorogation of jurisdiction not applicable in this case, since the letter of support on which the claim for payment is based does not contain a clause conferring jurisdiction or a provision on applicable law, Article 7 of the Brussels I Regulation (recast) provides that a person having its domicile in a Member State may also be sued :

“(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose 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;”

32. In the present case, the undertaking of ITS Wings on which La Poste's claim is based is a letter entitled 'Letter of support' signed by the sole director of ITS Wings in Luxembourg, worded as follows:

" confirms the total and joint and several support of the Company, which owns 100 % of the Actissia group, to France Loisirs and/or any other company in the Actissia group, in all obligations contracted with La Poste group, whatever the nature and whatever the amount.

The Company undertakes to pay, without discussing, all amounts due in the event that France Loisirs or any other company in the Actissia group is unable to honour its commitments to La Poste group".

33. It is agreed in the debate that the letter of support is neither a contract for the sale of goods nor a contract for the provision of services within the meaning of the Brussels I Regulation (recast), as it does not cover the provision of a specific activity in consideration of remuneration, so that court with jurisdiction shall be determined by application of Article 7(1)(a) of the Brussels I Regulation (recast) .

34. It is therefore necessary to determine the "place of performance of the obligation in question" in this case the place of performance of the warranty provided for in the letter of support.

35. Since no contractual document provides the place of performance, this must be determined in accordance with the law governing the disputed obligation according to the rules of conflict of laws of the seised court.

36. In this regard, the provisions of Regulation No 593/2008 of 17 June 2008 on the law applicable to contractual obligations, known as Rome I, are applicable.

37. Article 4(2) of the Rome I Regulation provides that, in the absence of a choice of law by the parties, the contract shall be governed, where it is not covered by Article 4(1), which is the case here, by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. By way of derogation, Article 4(3) provides that « where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that referred to in paragraph 1 or 2, the law of that other country shall apply. »

38. The application of Article 4(3) of the Rome I Regulation must remain exceptional so as not to jeopardise the general objective of predictability and legal certainty of the Regulation. It thus requires a demonstration that the contract is in fact more closely connected with a country other than that of the debtor of the characteristic performance. If, according to Recital 20 of the Rome I Regulation, "*account should be taken of whether the contract in question has a very close relationship with another contract or contracts*" for the application of Article 4(3) of the Regulation, the general argument based on the ancillary nature of a guarantee cannot in itself suffice to confer the attraction effect referred to in Article 4(3) of the Regulation.

39. In the present case, in the absence of a choice of law by the parties in the support letter, the law designated by application of Article 4(2) of the Rome I Regulation is Luxembourg law, Luxembourg being the place of the registered office of ITS Wings, the debtor of the characteristic performance, namely the guarantee provided for in the letter of support, which is a service which is performed at the address of the debtor.

40. La Poste argues on the basis of Article 4(3) of the Rome I Regulation referred to above that, despite the location of the registered office of ITS Wings, the letter of support has a closer relationship with France than with Luxembourg and that French law should apply.

41. It claims that, under French law, Article 1343-4 of the Civil Code provides that the obligation to pay shall be performed at the address of the payee and that since the place of payment is France, the jurisdiction of the French court asserted by the first judges shall be upheld.

42. However, the Court observes that since this is an obligation of guarantee and not an "obligation to pay a sum of money", the performance of the said obligation at the address of the payee has not been established.

43. La Poste does not therefore establish that France is the country with which the guarantee has

manifestly a closer relationship justifying alternative jurisdiction of the French courts in respect of the abovementioned provisions.

44. The letter of support concluded in Luxembourg two years after the delivery contract concluded between La Poste and France Loisirs in 2015 does not refer to any contractual document to which it is attached.

45. It encompasses, without any further clarification or endorsement of a contractual relationship, all the commitments of France Loisirs or any company in the Actissia group vis-à-vis La Poste in general.

46. La Poste does not provide any evidence as to the circumstances in which the support letter was signed that would corroborate the alleged tie between the 2015 distribution contract and the guarantee, justifying to apply to the operation the French law of that contract.

47. It does not deny that the undertaking was obtained in 2017 against a background of financial difficulties of the Actissia group and its subsidiaries in order to facilitate the extension of the payment deadlines of France Loisirs, whose cash position at that date was in jeopardy.

48. Ultimately, the fact that Actissia, France Loisirs and La Poste, named in the letter of support, are French is not a sufficient connecting factor to claim that the operation is purely internal to France, as the letter of support concerns a group whose activity is not shown to be exclusively confined to French territory.

49. In these circumstances it is not appropriate to apply the provisions of Article 4(3) of the Rome I Regulation, which shall remain exceptional in nature.

50. For all these reasons, there is no need to derogate from the rule of jurisdiction of the court of the defendant's place of domicile, which in this case is Luxembourg.

51. The judgment shall therefore be overturned and the parties directed to better lodge their claims under Article 96 of the Code of Civil Procedure.

Costs and expenses

52. La Poste, the losing party, shall be ordered to pay the costs of the appeal.

53. In addition, it shall be ordered to pay ITS Wings, which had to incur irrecoverable costs, an indemnity under Article 700 of the Code of Civil Procedure, which fair overall sum is set at EUR 2,000.

V. FOR THESE REASONS, the court hereby

1. OVERTURNS the judgment of the Paris Commercial Court of 24 January 2019 in all its aspects.

Ruling again,

2. FINDS that the Paris Commercial Court has no jurisdiction ;

3. DIRECTS La Poste to better lodge its claim ;

4. ORDERS La Poste to pay ITS Wings the sum of EUR 2 000 under Article 700 of the Code of

Civil Procedure;

5. ORDERS La Poste to pay the costs to be recovered in accordance with the provisions of Article 699 of the Code of Civil Procedure.

Clerk
Clémentine GLEMET

President
Fabienne SCHALLER