

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16
International Commercial Chamber

(No 11/2019, 8 pages)

JUDGMENT OF 12 NOVEMBER 2019

General Directory Entry Number : **RG 19/03149 — No Portalis 35L7-V-B7D-B7IW A**

Decision referred to the Court: Judgment of 17 January 2019 — PARIS Commercial Court RG No 2017029017

APPELLANT:

LLOYDS BANK PLC,

Registered in England under the number No 00002065

Having its registered office at 25 Gresham Street -LONDON - C2V 7HN , UNITED KINGDOM

Represented by its legal representatives

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

RESPONDENT:

SARL [X]

Registered in the Nanterre Trade and Companies Registry under the number [...]

Having its registered office: [...]

Represented by its legal representatives

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

Monsieur [Y]

Born on

Having his domicile :

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

COURT COMPOSITION

The case was heard on 7 October 2019 in open court, before the Court composed of:

François ANCEL, President

Fabienne SCHALLER, Judge

Laurence ALDEBERT, Judge

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 François ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I- Facts and proceedings

Facts

1. [X] , a company registered under French law, is a limited liability company with a single shareholder whose activity is insurance brokerage, bank brokerage and asset optimisation. It states that it provides financial investment advice, is registered as an insurance broker with ORIAS (*Organisme pour le Registre unique des Intermédiaires en Assurances, Banque et Finance*) and is an intermediary in banking and payment services.
2. Mr. [Y] presents himself as the sole partner and manager of [X].
3. [X] states that it has invested on an online platform called 4Investcapital-Option Investments a total amount of EUR 95 650 paid in three instalments:
 - EUR 45,550 on November 14, 2014;
 - EUR 24,000 on 2 January 2015;
 - EUR 6,100 on 3 January 2015;
4. These sums were transferred by bank transfer from the accounts of [X] opened in France in the books of Société Générale to the accounts of 4investcapital opened in the books of Lloyds Bank.
5. [X] and Mr. [Y] indicate that they have not been able to withdraw these invested funds, as the online trading platform has disappeared.
6. It is in this context that [X] and Mr. [Y] summoned by writ dated April 6, 2017 Société Générale and Lloyds Bank before the Commercial Court of Paris in order to obtain that they be ordered in solidum, in particular under Article 1240 of the Civil Code and Articles L.561-5 and L.561-6 of the Monetary and Financial Code, to reimburse the sum of "EUR 96,650" in compensation for the loss of the funds invested on the trading platform, in addition to EUR 10,000 euros for moral prejudice.

Proceedings

7. In an initial interlocutory ruling dated 25 October 2018, the Commercial Court of Paris rejected the plea of lack of jurisdiction in favour of the English courts raised by Lloyds Bank.
8. In a further interlocutory ruling dated 17 January 2019, the Paris Commercial Court:
 - ruled that the applicable law is French law;
 - referred the case to the public hearing of 13 February 2019;
 - dismissed the parties' claim for application of the provisions of Article 700 of the Code of Civil Procedure.
9. By notice dated 11 February 2019, Lloyds Bank appealed this judgment.

10. By order dated 4 June 2019, the pre-trial judge held admissible the immediate appeal lodged by Lloyds Bank.

II- Claims of the parties

11. According to its latest submissions sent electronically on 3 July 2019, Lloyds Bank requests the Court, pursuant to Articles 4, 480, 482, 544, 545 and 606 to 608 of the Code of Civil Procedure and Article 4 of the Rome II Regulation, Article 7.1.2 of the Brussels I Regulation (recast) and Articles L.561-2 et seq. of the Monetary and Financial Code, to :

FIND that Lloyds Bank's appeal is admissible and has merits ;

Consequently,

OVERTURN the judgment in that it found that the place of occurrence of the damage materialized "in the accounting and legal sense" in the corporate accounts of [X] and consequently "said the French law applicable to the present litigation";

Ruling again,

FIND that the provisions of the Monetary and Financial Code referred to by Mr [Y] and [X] as a basis of their claims are not applicable against Lloyds Bank in respect of the account opened with a branch in England by a customer established in England;

FIND that the place where the damage occurred is the place where the misappropriation by Investment-Option occurred, in this case the United Kingdom, where the latter, registered in the United Kingdom, had opened an account with Lloyds Bank before it disappeared; that the place where the alleged damage materialized, likely to result immediately and directly from the possible fault of Lloyds Bank, is located in England, where the funds were lost and not in France, the place where the transfer was debited to [X]'s bank account with Société Générale and where its assets are located;

Consequently and in any case,

FIND that only the law of England and Wales is applicable to the claims brought by Mr [Y] and [X] against Lloyds Bank;

ORDER jointly and severally Mr [Y] and [X] to pay Lloyds Bank the sum of EUR 10 000 under the provisions of Article 700 of the Code of Civil Procedure;

ORDER Mr. [Y] and [X] jointly and severally to pay all costs which may be recovered by [] of the law firm [], in accordance with the provisions of Article 699 of the Code of Civil Procedure.

12. According to the submissions sent electronically on 29 September 2019, Mr [Y] and [X] request the court, in particular under Article 4 of Regulation No 867/2007 of 11 July 2007 and the former Article 1382 of the Civil Code, to :

- UPHOLD in all its provisions the judgment of the Commercial Court of Paris and consequently reject the plea of lack of jurisdiction raised by the appellant;

Consequently,

- ORDER LLOYDS BANK to pay all the costs of the proceedings;
- ORDER LLOYDS BANK to pay to [X] the sum of EUR 5,000 under Article 700 of the Code of Civil Procedure;
- ORDER LLOYDS BANK to pay Mr. [Y] the sum of EUR 5,000 under Article 700 of the Code of Civil Procedure;

13. According to the submissions sent electronically on 5 July 2019, Société Générale request the Paris Court of Appeal to :

- ACKNOWLEDGE that SOCIÉTÉ GÉNÉRALE relies on the Courts' assessment of Lloyds Bank's appeal against the judgment of the Paris Commercial Court of January 17, 2019 ;
- ORDER the losing party to pay the costs.

III — Pleas of the parties

14. **LLOYDS BANK stresses** that the provisions of the Monetary and Financial Code relating to the duty of vigilance, and in particular Articles L. 561-5 and L. 561-6 thereof, cannot be applied against it as only the persons mentioned in Article L. 561-2, of which it is not part, are subject to these obligations and maintains furthermore that English law alone is applicable with regard to the location of the damage, pursuant to Article 4 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations and Article 7(2) of the Brussels I Regulation (recast), the interpretation of which is transposable to the legal situations governed by the abovementioned Article 4. Lloyds Bank indicates that English law is applicable, England being the place of the harmful event. It points out that its registered office is in London, so that the alleged breaches of its duty of care could only have been committed in the United Kingdom. It argues that the place where the damage occurred is the place where the duties of care and diligence were allegedly broken, which is therefore its registered office in London or its branch in England, or the place where the account of Option Investments was operated and from which the funds paid by [X] were lost.

15. **As a response, Mr [Y] and [X] argue** in substance that the law of the place where the damage occurred should be applied, which strikes a balance between the interests of the author of the damage and those of the injured party, while respecting modern ions of liability law which require the applicable law to be that of the country where the damage occurred. They indicate that the applicable law is the law where the damage is suffered, without any other criterion being applicable, and that from an accounting point of view the damage can be seen in the accounts of [X] and, correlatively, in the loss incurred in the assets of Mr [Y]. They add that since they are domiciled in France and the accounts are also kept in France, these links with France justify the French jurisdiction which establish it naturally. They explain that the English bank attempts to confuse the acts which contributed to the production of the harm and the harm itself, it being observed that if the preparatory acts are necessary for the production of the harm, they can never be confused with the harm which is the consequence thereof.

16. Société Générale does not challenge the application of French law to it and relies on the Court's assessment of the merits of Lloyds Bank's appeal of the judgment of the Paris Commercial Court of 17 January 2019, as well as, more generally, on the question of the law applicable to the claims against the latter.

IV - Reasons of the decision

17. It should be noted that the debate is only about the law applicable to the action for damages brought by [X] and Mr. [Y] against one of the defendants, Lloyds Bank, for breach of its obligations of supervision and vigilance regarding the accounts opened in its books by InvestCapital, the application of French law to the action brought by the former against Société Générale is not questioned.

18. As the action brought against Lloyds Bank, whose registered office is in London, is in tort, the applicable law must be determined by the conflict of laws rule provided for by Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter referred to as "the Rome II Regulation").

19. Under Article 4 of that Regulation :

"1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

20. Recital 16 of that Regulation further provides that "(...). A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability".

21. In accordance with Recital 7 of the Rome II Regulation, which provides that "*The substantive scope and the provisions of this Regulation should be consistent with 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) (Brussels I) and the instruments dealing with the law applicable to contractual obligations.*", the term of the "country where the damage occurs" shall be interpreted in a manner consistent with these texts.

22. In this respect, both Regulation 44/2001 of 20 December 2000 (Article 5.3) and Regulation 1215/2012 of 12 December 2012 (Article 7.2) provide that in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in the court of the place where the harmful event occurred or is likely to occur.

23. The Court of Justice of the European Union has on several occasions had to interpret the meaning of a reference to "the court of the place where the harmful event occurred" for the purpose of determining jurisdiction. That Court has thus held that the of "court of the place where the harmful event occurred" is intended to cover both to the place where the damage occurred and to the place of the causal event giving rise to that damage.

24. For the purposes of applying the Rome II Regulation, the criterion of the place of the causal

event is expressly set aside by the abovementioned Article 4(1), that is to say, there is no double option and the law of the place where the damage occurs is the principle.

25. Lloyds Bank cannot therefore be followed where it bases the application of English law on the fact that the alleged breaches of its duty of care were committed in the United Kingdom.

26. On the other hand, a consistent interpretation of the s of "*place where the damage occurs*" in Article 4.1 of the Rome II Regulation and "*place where the damage occurred*" should be adopted, corresponding to the autonomous interpretation by the Court of Justice of the European Union of the term of "*place where the harmful event occurred*" under Regulation No 44/2001.

27. In this respect, it is clear from the case-law of the Court of Justice of the European Union on jurisdiction that, in a case regarding an action brought by a person domiciled in Italy who lodged with Lloyd's Bank, whose registered office is in London, promissory notes, the return of which had been refused on account of the allegedly dubious origin of these notes, the Court held that the term of "*place where the harmful event occurred*" does not cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State and that "*Whilst it has thus been recognized that the term 'place where the harmful event occurred' within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.*" (ECJ 19 September 1995 Marinari C-364/93).

28. In another case concerning an action in tort brought by a person domiciled in Austria against several persons domiciled in Germany, in their capacity as directors or investment consultants of an asset management company, also established in Germany, to obtain compensation for the financial loss suffered, the Court held that the term '*place where the harmful event occurred*' does not refer the place where the claimant is domiciled or where '*his assets are concentrated*' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State' (ECJ 10 June 2004 Kronhofer, C-168/02).

29. In a case concerning an action brought by a person domiciled in Austria against Barclays Bank established in London for damages for the devaluation of a financial investment which he had made through a financial instrument issued by that bank, the Court held that '*The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts*' (CJEU 28 January 2015 Kolassa C-375/13).

30. Finally, in a case regarding an action brought by a person domiciled in Austria against Barclays Bank established in London for reimbursement of damage resulting from a loss suffered in connection with an investment in financial securities issued by the latter, the Court held that "*the courts of that investor's domicile are the courts for the place where the harmful event occurred within the meaning of that provision, have jurisdiction to hear and determine that action, where the damage the investor claims to have suffered consists in financial loss which occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts and the other specific circumstances of that situation also contribute to attributing jurisdiction to those courts*" (CJEU 12 September 2018 Löber C-304/17).

31. These elements show that, in line with the interpretation reached for determining jurisdiction in

accordance with the invitation given in Recital 7 of the Rome II Regulation, it must be held that, where the alleged damage consists of financial loss, the law of the country of the victim's domicile is applicable where the damage is suffered directly on the victim's bank account opened with a bank established in the country of this domicile, or where, alternatively, in accordance with Article 4.3 above, the harmful event is manifestly more closely connected and is such as to designate the law of that domicile, it being specified, however, that the mere fact that financial consequences affect the claimant is not sufficient to justify the application of the law of the country of his domicile.

32. In the present case, it appears from the circumstances of the dispute that [X] and Mr. [Y], after having viewed the information provided on an online platform managed by the English company 4InvestCapital, gave the order to Société Générale to transfer to the accounts of this company open in the books of Lloyds Bank located in London, a total amount of EUR 95,650 and that the attempts undertaken to recover their funds were in vain.

33. Thus, the place where the harm occurred directly is in this case the place where the undue appropriation of the funds occurred, i.e. on 4InvestCapital's account open in the books of Lloyds Bank in London and not on the account open in the books of Société Générale in France and even less the place where the accounting records of [X] and Mr [Y] are kept or the location of their assets in France.

34. Moreover, the sole circumstance that the funds were invested by means of a transfer order from accounts opened in France through Société Générale, in the absence of any other connecting factor submitted by the respondents establishing closer links likely to contribute to the designation of French law, is insufficient to justify the application of this law in order to rule on the liability of a bank established in London in connection with the management of an account opened in its books by a company governed by foreign law.

35. In the light of the foregoing, it shall be held that the law of England and Wales is applicable to the action for damages brought by X and Mr.Y against Lloyds Bank so that the judgment of 17 January 2019 shall be overturned.

Costs and expenses

36. [X] and Mr [Y], the losing parties, shall be ordered in solidum to pay the costs which may be recovered pursuant to Article 699 of the Code of Civil Procedure.

37. In addition, they shall be ordered in solidum to pay Lloyds Bank, which had to incur irrecoverable costs in order to assert its rights, compensation under Article 700 of the Code of Civil Procedure which fair overall sum is set at EUR 5,000.

V. ON THESE GROUNDS, THE COURT HEREBY

1. Overturns the judgment of the Paris Commercial Court dated 17 January 2019 in so far as it held that French law is applicable to the action brought against Lloyds Bank ;

Ruling in addition,

2. Finds that the action brought by [X] and Mr. [Y] against Lloyds Bank is governed by the law of England and Wales;

3. Orders in solidum [X] and Mr [Y] to pay Lloyds Bank the sum of EUR 5 000 pursuant to Article 700 of the Code of Civil Procedure;

4. Orders in solidum [X] and Mr [Y] to pay the costs, which may be recovered pursuant to Article 699 of the Code of Civil Procedure by Mr [].

Clerk
Clémentine GLEMET

President
François ANCEL