FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16

(No 09/2019, 14 pages)

JUDGMENT OF 10 SEPTEMBER 2019

General Directory Entry Number **: RG No 18/08657 — No Portalis 35L7-V-B7C-B5S7R**

Decision referred to the Court: Judgment of 22 February 2018 - PARIS Commercial Court - RG No 2014031574

APPELLANT:

SAAD INVESTMENTS COMPANY LIMITED (SICL)
Having its registered office by Grant Thornton Specialist Services (Cayman) Limited - PO BOX 765
10 Market Street - Carmana Bay Grand Cayman KY1-9006 GRAND CAYMAN (Cayman Islands)
Registered in Grand Cayman : 36279
Represented by its legal representatives

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

RESPONDENT:
IFA (SA),
Having its registered office by OUDART SA 10 A rue de la Paix 75002 PARIS
Registered in the Paris' trade and compagnies registry under the number : 316 330 059
Represented by its legal representatives

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

COURT COMPOSITION
The case was heard on 11 June 2019 in open court before the Court composed of:
François ANCEL, President
Fabienne SCHALLER, Judge
Laurence ALDEBERT, Judge

who ruled on the case, a report was presented at the hearing by François ANCEL, reporting judge, in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing : Saoussen HAKIRI

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. SAAD Investments Company Limited (hereinafter referred to as SICL) is a company incorporated under the law of Cayman Islands which had Mr (A) as chairman and which presents itself as a holding company managing the SAAD Group's assets, which activities focused on the real estate sector.

2. IFA is a private investment bank, formerly referred to as BSI Ifabanque, which requested the withdrawal of its licence as a credit institution on 28 March 2012. Mr. (A) was a shareholder of this bank and still a member of its board on 8 March 2012.

3. SICL went into judicial liquidation by judgment of 18 September 2009 from the Cayman Island's Grand Chamber, following the application made on 30 July 2009 by multiple creditors for a lump sum of USD 608,948,758.09. The liquidators have been put in charge of starting proceedings to proceed to the recovery of the company's assets and goods.

4. Having noted that bank transfer of USD 50,000,000 had been made by BSI Ifabanque, now IFA, on behalf of SICL to an account opened in the name Delmon Dana Company EC (hereinafter referred to as Delmon Dana) in May 2009, and stressing the suspicious nature of that transfer, which took place a few days before Mr. (A)'s assets, the former chairman and ultimate economic beneficiary of the SICL, were blocked by the regulator of the Saudi Arabian Monetary Authority, the liquidators of the SICL brought an action before the courts of the State of Bahrain against Delmon Dana in order to obtain the return of that sum, which they considered to have been fraudulently removed from the SICL creditors.

5. By judgment of 14 July 2013 handed down by the Barhain Chamber for Dispute Resolution, Delmon Dana has been ordered to pay this sum to the liquidators, which could not be recovered due to its state of insolvency.

Proceedings

6. On 26 June 2013, the SICL liquidators, acting in their official capacity, filed a claim under Article 145 of the Code of Civil Procedure with the President of Paris Commercial Court for the appointment of a bailiff in charge of looking for documents proving that the bank transfer to Delmon Dana had been made in violation of IFA's obligation and that IFA had knowingly facilitated a transaction aiming at diverting SICL's assets at a time where its financial situation was precarious.

7. By order dated 27 June 2013, the President of the Paris Commercial Court appointed a bailiff, with the task, in particular, of seeking and obtaining a certain number of documents and correspondence, including electronic correspondence, relating to the relations between IFA and

SICL, the transfer of USD 50,000,000 appearing on the May 2009 bank statement of SICL and the transactions carried out during May 2009 on the accounts.

8. The bailiff accomplished his mission in July 2013. On 1 August 2013, SICL sued IFA before the President of the court of first instance to order the bailiff to hand over all the documents collected during the execution of the ordered measure and placed under sequestration. As a counterclaim, IFA filed a request for withdrawal of the order of 27 June 2013.

9. By order of 30 January 2014, the President of the court of first instance dismissed, inter alia, IFA's application for withdrawal of the order of 27 June 2013.

10. It is in these circumtances that SICL, through its liquidators, also sued IFA before the Paris Commercial Court by bailiff's writ of 16 May 2014.

11. As the Court of Appeal dismissed, by judgment of 9 June 2016, its application for the withdrawal of the order of 27 June 2013, IFA lodged a claim before the Court of cassation, citing in particular the legitimate impediment resulting from the need to comply with the professional secrecy requirement set forth in Article L. 511-33 of the Monetary and Financial Code.

12. By judgment of 29 November 2017, the Court of Cassation dismissed IFA's claim, considering in particular that "banking secrecy set forth in Article L. 511-33 of the Monetary and Financial Code does not constitute a legitimate impediment within the meaning of Article 145 of the Code of Civil Procedure when the request for disclosure of documents is directed against the credit institution not in its capacity as a confidential third party but as a party to the lawsuit brought against it with a view to seeking its possible liability in carrying out the disputed transaction ».

13. In a judgment handed down on 22 February 2018, the Paris Commercial Court :

- Dismissed all claims of SICL acting by its judicial liquidators;
- Ordered SICL to pay IFA the sum of EUR 5,000 pursuant to Article 700 of the Code of Civil Procedure;
- Ordered SICL to pay the costs.

14. SICL, acting by its liquidators, appealed this decision by notice dated April 26, 2018.

15. Ruling by order of 20 November 2018 on IFA's request to have exhibits Nos 1 to 11, 13, 16, 20, 35, 43, 44, 49 to 55, 57 to 60, 62, 64, 66 and 67 communicated by SICL removed from the proceedings, the pre-trial judge invited SICL, acting by its liquidators, to communicate to IFA he translation of Exhibit No. 62 listed in its list of exhibits within 8 days from the date of his order and rejected the rest of IFA's requests.

16. The order for the termination of the proceedings was issued on June 4, 2019.

II- Claims of the parties

17. **According of its latest summary submissions sent electronically on 8 April 2019**, SICL, acting by its judicial liquidators (...), acting in this capacity, requests the court, in particular, under Articles 1147 and 1937 of the Civil Code and L. 561-1 et seq. of the Monetary and Financial Code to:

- OVERTURN in its entirety the decision issued by the Paris Commercial Court on February 22, 2018.

And, ruling again :

- FIND AND RULE that the bank wrongfully transferred on 20 May 2009 the sum of USD 50 million from the bank account No. [...] of SAAD INVESTMENTS COMPANY LIMITED opened in its books to the bank account of DELMON DANA;
- FIND AND RULE that this fault directly caused SAAD INVESTMENTS COMPANY LIMITED a harm evaluated at the sum of USD 50 million, subject to adjustment;

Consequently,
- ORDER IFA to refund SAAD INVESTMENTS COMPANY LIMITED the equivalent in Euros of the sum of USD 50 million with legal interest from the date of the writ of summons.

In any event,
- FIND that IFA's cross-appeal has no merits and DISMISS IFA's claims,
- ORDER IFA to pay the sum of EUR 30,000 under Article 700 of the Code of Civil Procedure;
- ORDER IFA to pay all the costs of the proceedings.

18. **According to its latest respondent's submissions including cross-appeal, sent electronically on 19 December 2018,** IFA requests the court, with reference in particular to Article 2 of the Constitution of 4 October 1958 and Article 6 of the European Convention on Human Rights, of the de Villers-Cotterêts Order of August 1539, and Articles 906 and 909 of the Code of Civil Procedure, Articles 15, 132 and 135 of the Civil Code, in addition to Articles 1984 et seq. of the Civil Code, in particular Article 1991 of the Civil Code, Article 1147 of the Civil Code, to :

- Dismiss exhibits Nos. 1 to 11, 13, 16, 20, 35, 43, 44, 49 to 55, 57 to 60, 62, 64, 66 and 67 filed by SICL in English on 21 September 2018, the French translations of which were communicated on 5 and 21 November 2018 ;

Accordingly,
- Find and rule that SICL has failed to adduce evidence of the facts relied upon;

Primarily,
- Overturn the judgment of the Paris Commercial Court of February 22, 2018 in that it dismissed IFA SA's application for dismissal of the action of Saad Investments Company Limited;
- Overturn the judgment of the Commercial Court of Paris of February 22, 2018 in that it dismissed IFA's claim for payment of the sum of EUR 10,000 for damages on the basis of the abusive exercise of the right of action;

And granting IFA's cross-appeal,
- FIND SICL's appeal inadmissible ;
- ORDER SICL to pay IFA damages in the sum of EUR 10,000 on the basis of the abusive exercise of the right to institute legal proceedings;

Subsidiarily,
- Adopt the reasons of the judgment of the Paris Commercial Court of 22 February 2018;
- Uphold the said judgment in that it dismissed all of Saad Investments Company Limited's claims;

More subsidiarily,
- Find and rule that SICL does not prove any loss ;

- In the further alternative, find and rule that the harm alleged by SICL is the loss of the chance of non-execution of the disputed transfer ordered by the appellant; find and rule that this harm cannot be borne by the agent for the benefit of the principal;

In any event,
- Dismiss the appellant's claims and submissions ;
- Uphold the judgment in so far as it ordered Saad Investments Company Limited to pay IFA the sum of EUR 5,000 under Article 700 of the Code of Civil Procedure;
- Uphold the judgment in so far as it ordered Saad Investments Company Limited to pay the costs of the proceedings at first instance;

Adding,
- Order SICL to pay IFA the sum of EUR 30,000 under Article 700 of the Code of Civil Procedure;
- Order SICL to pay the costs of the appeal, including the legal fees of (M) in accordance with Article 699 of the Code of Civil Procedure.

III — Reasons for the decision

A. On the claim for dismissal of the exhibits filed in the proceedings by SICL

20. IFA requests the court under Article 135 of the Code of Civil Procedure to dismiss from the proceedings foreign-language exhibits Nos 1 to 11, 13, 16, 20, 35, 43, 44, 49 to 55, 57 to 60, 62, 64, 66 and 67 which it considers were not communicated in due time. IFA argues that SICL lodged its exhibits partially on 5 November 2018 and fully on 21 November 2018, whereas its submissions were sent on 26 September 2018. IFA argues that this filing was late and considers that it has reduced its deadline for replying. It alleges that this constitutes unfair conduct and a violation of its right to a fair trial.

21. As a response, SICL asserts, first, that this request is exactly the same as that which was decided against IFA by the pre-trial judge in his order of 20 November 2018 and that IFA does not bring any new elements. Secondly, it points out that the exhibits at issue (with the exception of Exhibit 67) are exactly the same as those filed at first instance, without a certified translation but with a free and accurate translation, and that IFA did not make any incident at first instance. It points out that the failure to serve exhibits at the same time as the appellant's submissions is not sanctioned by the inadmissibility of the exhibits, the only possible sanction being that a late communication deprived the other party of sufficient time to examine the opposing exhibits and reply to them within the time allowed by the timetable for the appeal proceedings. It submits on that point that the submissions filed by IFA on 19 December 2018 show that IFA was able to respond to all the pleas raised by SICL on the basis of the contested exhibits.

Thereupon,

22. Under article 135 of the Code of Civil Procedure, the judge may dismiss from the debate exhibits that have not been filed in due time.

23. In the present case, it is clear from the pleadings that the disputed exhibits which had already been filed at first instance were submitted on appeal with a free translation and then a sworn' translation, by 21 November 2018 at the latest, so that IFA, which was already aware of the existence of most of those exhibits which had already been filed at first instance, was also given sufficient time to examine them and prepare its written submissions, which were sent electronically on 19 December 2018.

24. In the light of these elements, this claim shall be dismissed.

B. On the SICL's right of action

25. IFA claims under Article 32 of the Code of Civil Procedure that SICL's claim is inadmissible on the ground that it is deprived of the right to act in so far as IFA complied with the banker's duty of non-involvement by executing the disputed transfer order given by SICL, which remains the same person, despite the initiation of the insolvency proceedings, and cannot therefore invoke its own turpitude.

26. SICL replies that the reasoning of IFA stems from a confusion between the issue of which legal person has the possibility, within the meaning of Article 31, of bringing an action (that issue being that of the interest in bringing proceedings) and that of whether the action duly brought has merits or not (that issue being a matter for assessment on the merits of the action). It argues that, in the present case, it has an interest in bringing proceedings against its bank in order to establish its liability in connection with a transaction affecting its assets recorded in the IFA's books. As regards the common law rule of estoppel, it states that that principle is applicable as a ground of inadmissibility only where a party makes claims which are contradictory and irreconcilable with each other, which, in its view, is not the case here.

Thereupon,

27. Under article 32 of the Code of Civil Procedure, any claim made by or against a person without the right of action is inadmissible.

28. However, the assessment of the right of the liquidators of a company to pursue the liability of the bank in whose books it held an account, for the execution of a transfer order which had nevertheless been requested by the managers of that company, is not a question of admissibility of the action but a question of merits, the liquidators being, in any event, admissible to act on behalf of the company in liquidation with regard to the powers conferred on them by the judgment of 18 September 2009 of the Grand Chamber of the Cayman Islands.

29. Furthermore, as the liquidators have been given the mission of recovering the assets of the liquidated company, no turpitude can be invoked against them on the grounds of admissibility on account of the acts of the former directors of that company, in particular with regard to a funds transfer order executed by a bank which they claim was executed in breach of its duty of care.

30. The plea of inadmissibility shall therefore be dismissed.

C. On the breach by IFA of its duty of care

31. SICL explains that in law, credit institutions are bound by an obligation of vigilance which moderates the principle of non-interference by the bank in the customer's affairs and which imposes the obligation to detect transactions of an abnormal or unusual nature, the obligation not to assist in manifestly illicit transactions and compliance with obligations with regard to the fight against money laundering and the financing of terrorism, in accordance with Articles L.561-1 et seq. of the Monetary and Financial Code.

32. SICL specifies in particular that the breach of the duty of care is to be assessed in accordance with the law in concreto with regard to the suspicious nature of the operation and the behaviour expected of a normally prudent and diligent banker in the same circumstances. It adds that the banker may refuse to proceed with a transaction in the presence of an apparent anomaly, which may

take the form, for example, of a transfer that is unusual in relation to the normal operation of the account and is not in line with the amount of the share capital of the company holding the account and with its corporate purpose.

33. SICL submits that, in the present case, IFA failed in its duty of care by authorising a manifestly abnormal and suspicious transfer, the unlawful nature of which it could not have been unaware. It argues that the abnormal nature of the transfer at issue is apparent, in particular, from the amount of the sums transferred, the identity of the recipient of the funds, the lack of economic justification and consideration for the transfer, the existence of a previous transfer at issue and the precarious economic situation of SICL at the material time.

34. As a response, IFA, which points out that it had precisely executed a transfer order from SICL, submits that the duty of care derogates from the principle of non-interference, since only the appearance of an irregular transaction obliges the banker to derogate from the principle of neutrality, and that the anomalies justifying the banker's intervention are interpreted strictly by the case-law.

35. It points out that the abnormality resulting from the balance of SICL's account in IFA's books was rightly dismissed by the first judges, who held that the balance of SICL's account with IFA, namely USS 78 054 on 31 October 2008, alone cannot suffice to characterise the transaction as abnormal having regard to the size, nationality, value of the plaintiff's assets and the geographical location of its centres of activity, which alone demonstrate the need to have several bank accounts.

36. IFA points out that Delmon Dana was already identified in the bank's books as a company whose corporate purpose is the import-export of goods, trade and real estate investments and that the immediate economic justification for the operation by an imminent real estate investment in Saudi Arabia suggests prima facie a transaction in line with the corporate purpose of the two companies.

37. IFA further explains that the plea based on the banker's failure to comply with his duty of vigilance with regard to the fight against money laundering and terrorist financing is ineffective because this mechanism is exclusively intended to protect the public interest and cannot be a source of rights or obligations in civil matters in accordance with the case law of the Court of Cassation (Com. 28 April 2004 No. 0215054).

38. It adds that the transfer of funds had the characteristics of a usual transaction, it being observed that there is no dispute as to the origin and reality of the transfer order, its beneficiary and the perfect execution of the instruction, in full compliance with it.

39. It states that SICL was not in financial difficulty on the date of the transfer, as the cessation of payments was subsequent to the disputed transfer, and that it was not in a position to anticipate the collective proceedings of SICL opened on 18 September 2009.

Thereupon,

40. If the banker is bound by a duty of non-interference which requires him not to interfere in the affairs of his customers and if this duty implies that the bank does not have to carry out research, nor to demand justifications, to ensure that the operations requested of it by a customer are lawful and not contrary to the customer's interests, this duty finds its limit in the duty of vigilance and supervision which is incumbent on him to detect apparent anomalies.

41. Thus, account transactions that are by their nature, amount or frequency unrelated to the

customer's habits are likely to engage his liability.

42. In the present case, it emerges from the exhibits submitted in the proceedings that, on 18 May 2009, SICL made a bank transfer in the sum of USD 50,000,000 from another account which it held in a bank in Zurich (Citi Private bank) to an account which it held in the books of BSI Ifabanque, now IFA.

43. On the basis of a "cash transfer swift approval" signed by Mr (A), manager of SICL, IFA transferred the same amount in debit from that account to another account also opened in its books in the name of Delmon Dana, a company registered in the State of Bahrain whose capital is held, inter alia, by the company BSI Ifabanque, now IFA.

44. The sum of USD 50,000,000 is thus debited from the account of SICL opened in the books of IFA on May 22, 2009 (with a value date of May 20, 2009).

45. In this respect, the bank statement dated 29 May 2009 of SICL's account in the books of IFA shows that the balance of this account was USD 78,054.60 as at 31 October 2008 and that the only movements that occurred in 2009 concerned the transaction involving the sum of USD 50,000,000 as from 22 May 2009, so that this account remained inactive for almost 7 months, making the May 2009 transaction of a particularly large amount, unusual in view of the normal operation of this account, it being observed that no previous bank statement allowing, where appropriate, to corroborate that similar movements would have been recorded in the past and on a regular basis, is produced.

46. Furthermore, whereas IFA recalls that Delmon Dana, the recipient of the funds, is a company with a capital of BHD 1,000 billion (Bahraini Dinar) and that several movements were credited to its account No AA3080 opened in the books of IFA bank in 2009, those movements remained few in number, since they were (excluding the disputed transfer) GBP 36 392 093.67 (pounds sterling) on 9 January 2009, GBP 401 883.87 on 26 January 2009, USD 2,061,500 on 10 February 2009 and USD 2 101 137.02 on 5 May 2009, i.e. only four transactions credited to that account between January and May 2009, apart from the transfer of USD 50,000,000.

47. Moreover, while relying on an internal memo produced by SICL, the first recalls that such flows are proportionate to the amount of the company's assets, which at the end of 2008 amounted to USD 8.7 billion, or even USD 9.1 billion according to an article by Moody's Investor Service, it emerges from the exhibits submitted to the proceedings that, as early as January 2009, certain managers within IFA had clearly questioned the economic justification for a previous transfer to the credit of Delmon Dana in the sum of GBP 36 392 093.67 from Mr. (A) and Mrs (B).

48. On 20 January 2009, IFA's internal control and compliance department drew up an information memorandum after having noted on 5 January 2009 the transfer of the sum of GBP 36,390,000 from the account of Markant Properties Limited belonging to Mr (A) to the IFA account of Mr (A) and his wife and then on 9 January 2009, a transfer of the same amount plus interest (of GBP 2,093.67) to Delmon Dana in the books of IFA. At the end of the same note, the internal control department of this bank indicated that it did not have sufficient information on Markant Properties Limited and Delmon Dana, nor a "*detailed note on the economic justification of these movements*".

49. As a reply, the Tracfin correspondent at IFA (Mr (C)) indicated that Mr (A) and his wife were "*wealthy clients whom we have known for many years*" and that "*these transactions seem to be in line with their assets" but that "in view of the amount of the transactions, the lack of documentation on Delmon Dana Company and Markant Properties Limited and in accordance with the recommendations of the banking commission in its last inspection report, we are compiling an*

information file and advising senior management". The Deputy General Manager of IFA bank (Mr (D)) mentioned on this note on 19 February 2009 in reply that *"Mr (E), General Manager, is in regular contact with these clients, important shareholders of the bank*" (emphasis added).

50. It is clear from the above that, as early as January 2009, certain IFA officials had expressed doubts as to the regularity of certain money transfers to Delmon Dana and requested that additional information be provided to justify those transactions and that, secondly, its Deputy General Manager had justified the transaction by the regular contacts maintained by the General Manager of IFA with Mr (A), bearing in mind that Mr (A) was also a major shareholder of the bank.

51. It is, however, established that the disputed movement of UDS 50,000,000 five months later clearly did not give rise to any increased vigilance on the part of the IFA bank even though it was from the same issuer - Mr A - and was intended for the same recipient, Delmon Dana. The exhibits submitted show that, following the transfer order issued by Mr (A), Mr (F), IFA's investment manager, simply requested by e-mail dated 20 May 2009 Mr (E)'s authorisation, Managing Director, to credit *"Saad Investments' account and then transfer the funds to Delmon Dana's account"* after indicating that he had been informed that the request for authorisation to transfer the funds had been made by Mr (A) *"because of an imminent real estate investment in Saudi Arabia"* and stated that *"the transfer from Saad to Delmon Dana is a free transfer between sister companies. Delmon Dana's only bank account being with BSI Ifabank, is the reason why the transfer passes through us"*. Following this exchange, and on the basis of this particularly summary information alone, Mr. (E) agreed to the bank's execution of the transfer of funds.

52. The lack of any other steps on the part of IFA or requests for explanations, even though its directors had been alerted by its internal department in January 2009, on the occasion of a similar request for a transfer of funds, of the insufficiency of information on Delmon Dana, is likely to engage the bank's liability, whereas, moreover, the justification given for a "*free contribution between sister companies"* should at the very least have led the bank to be more suspicious of the legitimacy of this motive, since such a free act without consideration from one company to another is likely to characterise an abnormal act of management, or even an illegal operation contrary to the interests of the company whose account was thus debited with a large sum.

53. Moreover, IFA's internal department confirmed these doubts in an Internal Information Notice No. 2009-04 issued on May 26, 2009 under the terms of which it acknowledges that it has "*no precise information on the economic justification of the movements of funds between the accounts of Saad Investment Company and Delmon Dana and the accounts of the members of the family (A)*" and specifies that "*Based on the information available to us, it does not appear that these are sister companies*", so that the justification given by Mr. (F) was not supported by any precise element.

54. The memorandum also concludes that it is necessary to "*gather recent exhibits on this company [Delmon Dana] and additional information on the economic justification for these transactions*".

55. Following this note, the Tracfin correspondent of IFA (M. (C)) wrote on 17 June 2009 that the bank should remain vigilant on "*the movements made on these accounts and on the evolution of the group's situation. In order to monitor the movements, we have proceeded to a technical blocking of the accounts*". To this measure, Mr. (E), Managing Director of IFA, replied the same day that *"the last operations (USD 50,000,000) were the subject of an explanatory note based on exchanges of letters and telephone calls, they have been validated by the head of compliance of BSI (unreadable) ... ».*

56. These elements show that, clearly aware of the potentially suspicious nature of the movements of funds to the benefit of Delmon Dana, given the lack of information on the activities of the latter

company and not ignoring the close and personal links between the shareholders of the two companies, IFA had to be particularly vigilant since a few months earlier a similar operation had been carried out for the benefit of the same company Delmon Dana and its internal departments had indicated the need to gather more information, which it clearly did not do between January and May 2009, given the very fragmentary information gathered to authorise a new large transfer of funds on that date, and in addition that the exhibits paid confirm a very close link between the managers of IFA and M. (A), who was also a "major shareholder" of IFA.

57. It should also be noted that the events which affected both Mr A, the Saad Group and SICL in the days following the disputed transfer confirm that SICL did not exercise its duty of care.

58. According to an article in the Financial Times dated 31 May 2009, that is to say, in the days following the disputed transfer, the Saudi central bank ordered the Kingdom's banks to freeze the accounts of Mr A, Chairman and CEO of the Saad Group, which held 96.2% of the capital of SICL, which was itself chaired by Mr A.

59. Similarly, several banks, including Arab Bank LTD, Citigroup Global Market Limited, Credit Suisse, UBS and BNP Paribas, notified the termination of the financing contracts concluded with Saad Group, and in particular SICL, as of 29 May 2009 and during the month of June 2009 due to payment defaults.

60. In addition, Moody's Investor Service downgraded SICL's rating as of June 2, 2019 and the article filed in the proceedings relating to this information states that this measure followed public reports according to which the Saudi monetary authority had ordered the freezing of the accounts of Saad's majority owner and its chairman. This article states, inter alia, that *"Moody's emphasizes the close integration between the shareholder and the various beneficiaries of the group at strategic, managerial and financial level"*. It is also added that *"Moody's last rating action on Saad Investissements Company Limited was taken on January 28, 2009, when the outlook changed from positive to stable (...). Saad Investissements Company Limited, incorporated in the Cayman Islands, is a privately owned international investment fund focused on various financial asset classes. At the end of 2008, it had total assets of USD 9.1 billion."*

61. The same decline was noted by Standard & Poors, which states that "*the measures taken against the Saad Group follow a regulatory freeze of certain personal bank accounts in Saudi Arabia of the group's owners*".

62. In this respect, IFA cannot reasonably maintain that it was unaware of the delicate financial situation of SICL and the Saad Group, even though its managing director sent an internal e-mail on 1 June 2009 with the subject line "(A) group and (B) group" indicating that "*In view of the delicate situation of the two groups as it emerges (in) the financial information, please do not make any external or internal transfer without my agreement and/or that of Jean*".

63. Ultimately, it appears from a decision of 9 April 2013, that the Grand Court of the Cayman Islands (Financial Services Division) sentenced M. (A) for breach of his fiduciary duties towards SICL by having made several transfers of sums to the benefit of controlling and/or related companies, including the disputed transfer of USD 50,000,000 to the Delmon Dana company, confirming, if need be, the abnormal nature of this transfer under Cayman Islands law, inspired by Common Law, which, as it appears from a legal consultation produced by SICL from the law firm (. ...) and the Harneys legal guide, from which an excerpt is produced, enshrines the fiduciary duties of the officers and directors of a corporation to the corporation ("*Fiduciary duties*"), including a *"duty to act in what the directors acting in good faith consider to be in the best interests of the company"*.

64. Thus, in the days preceding the official announcement of the freezing of Mr (A)’s assets by the Saudi Arabian banking authorities and at a time when the Saad group and the company SICL were to be the subject of several letters notifying the cessation of credit, Mr A instructed IFA, of which he was also a shareholder and member of the board of directors, to transfer the sum of USD 50, 000,000 to the benefit of a company with which the company SICL could not prove any previous regular business relationship but whose directors, being in particular the wife of Mr (A), had close family ties with the principal.

65. It is clear from all those circumstances contemporaneous with the transfer at issue, as illuminated by the events preceding and following it, that the transfer order had all the characteristics of an anomaly in the operation of the account which was to lead IFA, already alerted by a previous similar suspicious transfer a few months earlier, to refuse to execute that order without gathering further information so that, by merely executing the disputed transfer order, the bank had clearly not exercised its duty of due diligence with full knowledge of the facts and had therefore incurred liability.

D. On the harm to SICL

66. SICL submits that the damage arising from IFA's failure to fulfil its duty to provide the necessary USD 50,000,000 , corresponding to amounts that should not have been subtracted from its assets.

67. As a response, IFA argues that SICL does not demonstrate its harm and argues, in the very alternative, that the harm could only be the loss of chance that the transfer was not made. It further considers that the circumstances of the present case would justify the loss of chance being wiped out through the fault of the appellant, who was the author of the instruction to make the transfer.

Thereupon
;

68. As explained above, the abnormal nature of the transfer in question should have led IFA to refuse to execute it so that, by complying, without exercising its duty of care, it directly and personally contributed to the loss suffered of USD 50,000,000, a loss which was not random and cannot therefore be equated with loss of chance.

69. However, if the bank's fault contributed to that loss, it does not exonerate the own fault of SICL which was at the origin, through the intermediary of its manager - Mr. (A) - of the disputed transfer request.

70. It is apparent from the exhibits submitted that the High Court of the Cayman Islands, by judgment of 9 April 2013, ordered Mr. (A) to pay damages to SICL for breach of his fiduciary duties towards that company by requesting the transfer of several sums which constitute a misappropriation of that company's assets, including precisely the disputed transfer of $50 million to Delmon Dana.

71. Thus, SICL's director, Mr. (A), contributed at the time to the damage suffered by that company, which IFA is entitled to raise against the liquidators in order to seek, not a total exemption from liability since that fault was not the exclusive cause of the damage which could be realised only with the assistance of the bank, because of its fault resulting from failure to fulfil its duty of care, but a sharing of liability which, in the circumstances of the case, should be fixed at 50%.

72. In the light of the foregoing, the bank's liability should be assessed at 50% of the loss suffered, so that it shall be ordered to pay damages of USD 25,000,000 or its equivalent in euros at the exchange rate on the date of this decision, with interest at the legal rate as from the date of this decision, constituting the right to compensation, and not from the date of the writ of summons as requested by the appellant, and SICL's other claims shall be dismissed.

E. On IFA's claim for damages for abusive proceedings

73. Since IFA lost, it is not entitled to consider that SICL's action is abusive such that its claim for damages shall be dismissed.

F. Costs and expenses

74. SICL requests that IFA be ordered to pay the sum of EUR 30,000 under Article 700 of the Code of Civil Procedure and to pay all the costs.

75. IFA requests that SICL be ordered to pay the sum of EUR 30,000 under Article 700 of the Code of Civil Procedure and to pay all the costs.

Thereupon ;

76. IFA, the losing party, shall be ordered to pay the costs.

77. In addition, IFA shall be ordered to pay to SICL, taken in the person of its liquidators, 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 30,000.

IV. ON THOSE GROUNDS, THE COURT

Overturns the judgment of the PARIS Commercial Court of 22 February 2018 in all its provisions;

Ruling again,

Dismisses IFA's request that certain exhibits be dismissed from the proceedings;

Dismisses IFA's plea of inadmissibility;

Orders IFA to pay SICL, taken in the person of its liquidators, the sum of USD 25,000,000 or its equivalent in euros at the exchange rate on the date of this Decision, with interest at the legal rate as from the date of this Decision;

Orders IFA to pay SICL, taken in the person of its liquidators, the sum of EUR 30,000 pursuant to Article 700 of the Code of Civil Procedure;

Orders IFA to pay costs.

Clerk ***President***
Clémentine GLEMET ***François ANCEL***