

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 — 16

JUDGMENT OF 12 FEBRUARY 2019

(No 02/2019, 9 pages)

General Directory Entry Number: **18/21818**

Decision referred to the Court: Judgment of 20 September 2018 -Paris Commercial Court — RG No 2018006628

APPELLANT:

Company (A)

Having its registered office []

Registered in the Commercial and Companies Register of Versailles under the number []

Represented by its legal representatives,

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

RESPONDENT:

Company (B)

Having its registered office []

Represented by its legal representatives,

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

COURT COMPOSITION

The case was heard on 08 January 2019, in open court before the Court-composed of:

M. 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: Mrs (...)

The case was submitted to the Public Prosecutor, not attending the hearing, who filed electronically

his written opinion on 30 November 2018, the parties having been notified of it ;

JUDGMENT:

— Adversarial

— judgment made available at the Clerk's office , the parties having been notified in advance under the conditions provided 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.

Facts and procedure:

1. (B) (hereinafter (B)) is a company incorporated under Ghanaian law and operating in construction. It signed a cooperation agreement on 11 August 2011 with (C) incorporated under Swiss law (hereinafter (C)), a subsidiary of the Italian group (D), the international investments of which it was responsible for.

2. The cooperation agreement related to the construction and operating of a cement plant in Ghana, which was to take place in several stages and to lead to the creation of a joint cement company in which (B) would have had a shareholding.

3. This contract provides for the application of French law and conferred jurisdiction on the competent courts in Paris.

4. The French company (A), a member of group (D), is a holding company involved in the legal and financial arrangements of the project.

5. In April 2016 the construction project was put on hold.

6. By registered letter dated 29 November 2016 (C) informed (B) that it withdrew from the project.

7. Pleading the wrongful termination of the cooperation agreement and its defective performance, (B) had (C) and (A) summoned by a bailiff's deed dated 8 January 2018 to appear before the Paris Commercial Court, seeking pursuant to the former Articles 1134, 1135, 1147 and 1382 of the Civil Code that they be ordered jointly and severally to pay damages and interests in compensation of its loss which it estimates at over USD 7 million.

8. Before any discussion on the merits, (A) raised the lack of territorial jurisdiction of the Paris Commercial Court in favour of the Versailles Commercial Court , the court within whose jurisdiction its registered office is located.

9. By judgment handed down on 20 September 2018, the Paris Commercial Court ruled out the plea of lack jurisdiction, found that it has jurisdiction to hear the case on the merits, holding that there was no doubt as to the opportunity to hear and decide on the various claims together, on the basis of Article 8 of the European Regulation No 1215/2012 of 12 December 2012 and the cooperation agreement in which (A) was mentioned, even if it was not a signatory.

10. The court dismissed (B)'s claim for abuse of procedure and ordered (A) to pay (B) the sum of EUR10,000 under Article 700 of the Code of Civil Procedure, reserving the costs and referred the parties to be heard on the merits.

11. On 5 October 2018, (A) lodged an appeal against the judgment in the Paris Court of Appeal against (B) and, after it had been authorised to do so by order of 19 October 2018, had (B) summoned by bailiff's deed of 29 October 2018 for a hearing on 20 November 2018.

12. At that hearing the case was remitted to 4 December 2018 and then to 8 January 2019, the date on which it was withheld.

II Claims of the parties:

13. **According to its final submissions sent electronically on 28 December 2018, (A)** pursuant to Articles 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.1, 8 and 63.1 of Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Articles 75 and 96 of the Code of Civil Procedure, requests the court to overturn the judgment of the Paris Commercial Court of 20 September 2018 in all its provisions, including the order on the basis of Article 700 of the Code of Civil Procedure and in limine litis, to decline its jurisdiction over (A).

14. It requests that the Paris Commercial Court be found as having no jurisdiction over (A), to direct (B) to better lodge its claims in favour of the Versailles Commercial Court and to dismiss all its claims, including its claim for abuse of procedure, and that it be ordered to pay EUR 20,000 on the basis of Article 700 of the Code of Civil Procedure and to pay all the costs.

15. **According to its final submissions sent electronically on 20 November 2018, (B)** asks the Court to uphold the judgment of the Paris Commercial Court of 20 September 2018 and to overturn it in that it has dismissed its claim for damages and interest for abuse of procedure.

16. It requests that all the claims of (A) be dismissed and that it be ordered to pay damages in the sum of EUR 20,000 for abuse of procedure pursuant to Article 32-1 of the Code of Civil Procedure and the additional sum of EUR 10,000 for the appeal proceedings pursuant to Article 700 of the Code of Civil Procedure and to pay all the costs of the proceedings of the first instance and of the appeal, including the legal fees of (...) represented by..., in accordance with the provisions of Article 699 of the Code of Civil Procedure.

III Pleas of the parties

17. **In support of its plea of lack of jurisdiction of the Paris Commercial Court, (A)** claims that the jurisdiction of the court must be determined in accordance with Regulation No 1215/2012 of 12 December 2012 (Brussels I Regulation (recast)), which lays down the principle that the courts of the place where the defendant is domiciled have jurisdiction and that the conditions for prorogation of jurisdiction provided in Article 25 of that regulation in the case of a jurisdiction clause are not satisfied in the present case as it has not agreed to this clause.

18. It claims that it is a third party to the cooperation agreement signed between (C) and (B), that is not binding on it.

19. It claims that, since there is no other European provision to designate the Parisian court, it is proper to apply the internal rules of territorial jurisdiction, which designate the Versailles Commercial Court pursuant to Articles 42 and 43 of the Code of Civil Procedure, the court of the

place where it has its registered office.

20. According to (A), the commercial court mistakenly referred to Article 8 of Regulation No 261/2004 to find it has jurisdiction, which confers special jurisdiction in case of plurality of defendants and does not apply in the present case, since the court is not seised on the ground of the domicile of one of the defendants, none of them residing within the jurisdiction of the Paris Court of Appeal, but pursuant to a jurisdiction clause.

21. It adds that while it is aware of the standard of proper administration of justice, that standard cannot be asserted against the fundamental rights of defence of (A) guaranteed by the ECHR and the Charter of Fundamental Rights.

22. It challenges the application of Article 333 of the Code of Civil Procedure, relied on by the public prosecutor's office to rule for the Parisian jurisdiction, as this is concerning the compulsory intervention of a third party in proceedings which is not presently the case.

23. **In response, (B)** argues principally that (A) is bound by the jurisdiction clause of the agreement of 11 August 2011, which is valid under Article 23 of the Regulation (EC) No 44/2001 of 22 December 2000 preceding the Brussels I Regulation (recast), as it agreed to its terms by performing the obligations under the cooperation agreement.

24. It highlights to that end that (A) was heavily involved in the early stages of the project, pointing out that it was precisely identified and designated in the contract under various articles (3.2.1; (3.2.3) and that it participated in the different stages of the project by taking part in the purchase of the land and by becoming the sole shareholder of the cement company [] which made the various proposals for the transfer of shares to (B) in accordance with the contractual provisions.

25. It claims that A's plea of lack of jurisdiction on the basis of Articles 4.1 and 8 of the Brussels I Regulation (recast) is inoperative since it is sued in the French courts of the Member State in which it is domiciled and that it is a principle that the jurisdiction clause shall supersede the special jurisdiction rule of Article 8 of that regulation when there are multiple defendants.

26. In the alternative, it considers, in the lights of the recital n°21 of the preamble to the Regulation that it would be contrary to the principle of the proper administration of justice to rule separately on the case, stressing that the claims derive from the same contract and relate to the same project and are manifestly connected.

27. Lastly, it points out that bringing part of the case before the Versailles Commercial Court would expose to the risk of giving rise to conflicting or irreconcilable judgments and that this situation would be contrary to the rule of jurisdictional divestiture provided for in that case in domestic law by the provisions of Article 101 of the Code of Civil Procedure.

IV — Opinion of the Public Prosecutor:

28. According to its written submissions notified on 30 November 2018, the Public Prosecutor is of the opinion that the court shall uphold the decision.

29. It considers that the lack of jurisdiction raised by (A) is a purely internal conflict of courts and that the jurisdiction of the Parisian court is justified by the jurisdiction clause by which (A) is bound

insofar as it has taken part to the contract. If (A) were to be held to be a third party to the contract, it relies on Article 333 of the Code of Civil Procedure to found the Parisian jurisdiction, that requires the third party called into the proceedings to appear before the court seized of the original proceedings.

30. In the alternative, the public prosecutor submits that, where there is an international dispute, the decision must be upheld on the basis of Article 8 of the European Regulation No 1215/2012 in so far as there are more than one defendant and it is in the proper administration of justice that the same court rules on all the claims that are clearly connected.

V- Reasons for the decision

On the international nature of the dispute:

31. In the present case, (B) is suing two companies, (C), a company incorporated under Swiss law, and (A), a company incorporated under French law, against which it claims joint and several liability in the performance of the cooperation agreement concluded on 11 August 2011 for the construction of a cement plant in Ghana, a project which was abandoned in 2016 at the initiative of (C).

32. The appeal seeks to refer back to the Versailles Commercial Cour only the claims of the (B) against (A), the Paris Commercial Court having jurisdiction to hear and rule on the same dispute between (B) and (C).

33. The court has thus to rule on 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, which is applicable to the case, in the case of a legal action brought after 10 January 2015 before a French court.

34. 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.*”

35. However, Article 25 (1) of that regulation provides that ‘ *if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves;
or;

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned (...).”

36. Paragraph 5 of that article provides that an agreement conferring jurisdiction forming part of a

contract shall be treated “*as an agreement independent of the other terms of the contract.*”.

37. In the present case, Article 11.1 of the cooperation agreement made between (C) and (B) entitled ‘Governing law-jurisdictions’ provides for the application of French law and confers jurisdiction on the competent courts of Paris according to the following provisions: ‘*if an amicable solution cannot be found within 30 calendar days following a written notice from one Party to the other, it is agreed that all disputes arising in connection with this Agreement shall be settled under the jurisdiction of the competent Court of Paris (France)*’ translated as follows ‘*A défaut d'accord amiable dans un délai de trente jours calendaires après un avis écrit d'une partie à l'autre partie, il est convenu que tout différend relatif au présent contrat sera soumis au tribunal compétent de Paris (France).*’

On the issue whether (A) is bound by the jurisdiction clause:

38. It is for the court to examine, first, whether clause 11.1 of the cooperation agreement which confers jurisdiction on the Paris courts has actually been agreed to by the parties, what must be clearly and precisely demonstrated.

39. In that regard, it should be recalled that a jurisdiction clause in a contract can, in principle, only produce its effects in the relations between the parties who have given their agreement to the contract. For a third party to be bound by such a clause, it is, in principle, necessary that the latter has given its consent to this effect.

40. In the present case, the validity of the disputed clause, which determines the international jurisdiction of the Paris court, has not been challenged by (C) and is not called into question by the parties.

41. (B) claims that (A) is bound by that clause as it shall be deemed to have agreed to it when taking part in the project for the construction of the cement plant in Ghana, what is disputed by (A).

42. It is common ground that (C) had planned to involve (A) in the project and that this company is mentioned in the contract to act of its participation at certain stages of the project in which it actually took part in the purchase of the land and the creation of the cement plant's operating company.

43. However (A) did not sign the written contract that was agreed between the (B) and (C) and there is no evidence that it has given effective consent to this clause under the formal conditions laid down in Article 25 of Regulation No 1215/2012.

44. It follows that (A) is not bound by the jurisdiction clause agreed in the contract between (B) and (C) so that this clause cannot found the jurisdiction of the Paris Commercial Court over (A) and that it is necessary to determine that jurisdiction under the general rules laid down in Regulation No 1215/2012, in particular under Article 4.1, cited above, which confers jurisdiction on the French courts, as being the State in which (A) has its registered office.

45. However, since Article 4.1 designates the French legal order in general with jurisdiction to hear the dispute, it is necessary to take into account the internal rules of the designated State, in this case the French rules, in order to determine the court which has material and territorial jurisdiction for this dispute, without reference to Article 8.1 of the said regulation.

On the specially competent court within the French legal system:

46. (A) does not dispute the jurisdiction of the commercial court but refers to the ordinary rules of territorial jurisdiction, Article 42 (1) of the Code of Civil Procedure, that provides that *‘the court having territorial jurisdiction shall, unless otherwise specified, be the court of the place where the defendant is domiciled’*.

47. However, the jurisdiction of the court of the place of domicile is not exclusive. The plaintiff in case of plurality of defendants may sue the co-defendants before the same court, as long as the choice of court is not arbitrary and that there is a close connection between the claims justifying their being judged together according to the general principle of the proper administration of justice in order to avoid that conflicting or irreconcilable decisions be given.

48. This solution, which requires an assessment of the circumstances of the case, is consistent with the objective of the harmonious administration of justice and the requirement of and the principle of centralisation of the proceedings laid down in the European Regulation No 1215/2012, in accordance with recitals 16, 21 and 24, which state that *‘in addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice’*, that *‘in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States’* and that *‘when taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it’*.

49. In the present case, at the end of its summons (B) blames (C) and (A) for having in a concerted manner, jeopardized the project for the construction of the cement, by failing to comply with their undertakings under the cooperation agreement and by wrongfully terminating their relations.

50. It claims that they are jointly and severally liable for its loss caused by the same factual situation arising from the same project pursuant to the former Articles 1134, 1135 and 1147 and 1382 of the Civil Code.

51. The court observes that the international jurisdiction of the Parisian courts to deal with the dispute between (B) and (C) was objectively chosen, in consideration of a jurisdiction clause which is not challenged by (A) with regard to (‘C’), it being observed that it did not bring this co-defendant into the case.

52. If (A) disputes the existence of facts found against it, it must be held that the assessment of that company’s involvement is a matter for the court ruling on the merits of the case and does not call into question the identity of the facts and the claims for payment in respect of which the court is initially seised.

53. It follows from the foregoing that the close connection between the claims of the dispute is established and that there is an obvious interest in the fact that (C) and (A), which are also part of the same group, should be judged together and that the Parisian Court, already seized, should know of the all case in the interest of a proper administration of justice.

54. The opposite solution would in fact be to dissociate the knowledge of an international dispute between two commercial courts which might hand down conflicting or irreconcilable decisions,

which would be contrary to the harmonious functioning of the courts and the principle of centralisation of the proceedings mentioned above.

55. It follows that (B) could sue (A) in the Paris Commercial Court, both by application of the criterion of sound administration of justice and on the basis of the undisputed close connection between the claims, and that it is appropriate to uphold the judgment of the Paris Commercial Court which dismissed the plea of lack of jurisdiction and stated that it was appropriate to judge together the actions brought against (C) and (A).

On the violation of Article 6 of the European Convention on Human Rights:

56. (A) does not establish that for the Paris Commercial Court to keep dealing with the case would deprive it of access to a court allowing it to exercise its rights.

57. Nor does it establish that it would be contrary to the provisions of the European Convention on Human Rights and in particular to Article 6 thereof, according to which everyone is entitled to have his case heard by an independent and impartial tribunal established by law, to rule for the jurisdiction of the Paris Commercial Court and not that of Versailles.

58. The violation of Article 6 of the European Convention on Human Rights is therefore not established.

On the claim for damages for abuse of procedure

59. Article 32-1 of the Code of Civil Procedure provides that a person who acts in a dilatory or abusive manner may be sentenced to a civil fine –of a maximum of EUR 10,000, without prejudice to any damages claimed.

60. The exercise of legal action is, as a matter of principle, a right and turns into an abuse of rights which may give rise to damages only where there is a fault that may engage the civil liability of its author.

61. (B) does not claim any circumstances characterizing a fault likely to engage the liability of (A), so that the judgment shall be upheld on this account.

On the other claims:

62. The court made a fair application of Article 700 of the Code of Civil Procedure and justified of Article 696, so that the appealed judgment shall be upheld.

63. The costs for the first instance and the appeal proceedings are to be charged on (A).

64. It shall also be ordered to pay to (B) the sum of EUR 7,000 pursuant to Article 700 of the Code of Civil Procedure, in addition to the indemnity already awarded by the judges.

IV ON THESE GROUNDS, THE COURT HEREBY

65. Upholds the judgment of the Commercial Court of 20 September 2018 in all its provisions.

66. Orders (A) to pay (B) the sum of EUR 7,000 under Article 700 of the Code of Civil Procedure.

67. Orders (A) to pay the costs of the proceedings of the first instance and of the appeal, including the legal fees of (...) represented by (...), pursuant to Article 699 of the Code of Civil Procedure.

Clerk,

President

...