

**FRENCH REPUBLIC**  
ON BEHALF OF THE FRENCH PEOPLE

**PARIS COURT OF APPEAL**

**Division 5 - 16**

(No 1, 9 pages)

**JUDGMENT OF 11 DECEMBER 2018**

**RULING ON JURISDICTION**

General Directory Entry Number : **RG 18/17723 — No Portalis 35L7-V-B7C-B6B7T**

Decision referred to the Court: Judgment of 15 May 2018 - LILLE Commercial Court - RG No 2017001859

**APPELLANT:**

**X**

Having its registered office: [...]

Represented by its legal representatives

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

*Having as litigator ..., member of the Bar of : [...]*

**RESPONDENT:**

**SARL 'Y'**

Having its registered office: [...]

Represented by its legal representatives

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

*Having as litigator ..., member of the Bar of : [...]*

**COURT COMPOSITION**

The case was heard on 9 October 2018 in open court, before the Court composed of:

President

Judge

Vice President

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: [...]**

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

## **STATEMENT OF FACTS AND PROCEDURE**

X (hereinafter referred to as "X"), presents itself as a company incorporated under German law whose business is the selection and breeding of new varieties of plant and cereal seeds for inclusion in the official catalogue of plant species and varieties and their marketing (the so-called "breeder's" role).

Y (hereinafter referred to as "Y") is a company incorporated under French law whose business is the research, production and marketing in France of seeds intended for agriculture. It thus resells certain seed varieties developed by various breeders on French territory.

The parties were in a commercial relationship since the 1980s for the distribution in France of certain seed varieties developed by X, in particular mustard and fodder radish, without this relationship having given rise to the conclusion of a master agreement but taking the form of sales by X to Y of various seed varieties.

A dispute between the parties arose after Mr. A, the director of Y, wished in 2011 to find a financial agreement with his partner, Y considering that it had built a partnership with X based on the sharing of skills and know-how and that it had had exclusive distribution rights in France of all varieties of multi-resistant fodder radish since 2003.

As this letter remained unanswered, and having noted that X had opened up the distribution of certain varieties of 'multi-resistant' radish to other competing companies, Y asked its partner by letter of 23 May 2014, to draw up a proposal for compensation and a contract reminding of the length and exclusivity of their commercial relations .

Faced with X's refusal to comply with this request, despite several repeated requests to this effect and most recently by letter dated February 17, 2016, Y, by bailiff's deed dated January 25, 2017, summoned X to appear before the Lille Commercial Court for the abrupt partial termination of their commercial relations pursuant to Article L. 442-6 of the French Commercial Code and for compensation for the "looting of know-how".

X raised, in limine litis, the lack of jurisdiction of the Commercial Court in favor of the Arbitral Tribunal of the International Seed Trade Federation (hereinafter referred to as "ISF" - "International Seed Federation") based on the arbitration clause included in the rules and practices of the Federation.

By judgment handed down on 15 May 2018, the Lille Commercial Court dismissed the plea of lack of jurisdiction and found it has jurisdiction to hear the dispute on the merits and then referred the parties to the trial on July 3, 2018.

This judgment was notified to X by registered letter with acknowledgement of receipt dated May 16, 2018 received on May 28, 2018.

X, which is headquartered in Germany, appealed against this judgment by notice of appeal dated July 2, 2018 before the Douai Court of Appeal, and after having been granted leave to appeal, Y was summoned before the same court by bailiff's writ dated July 13, 2018 for a hearing on a fixed date scheduled for October 24, 2018.

By letter dated 5 July 2018, the President of the Chamber of the Douai Court of Appeal requested the parties' observations on the plea alleging a lack of jurisdictional power of the Douai Court of Appeal in favour of the Paris Court of Appeal in the case of an appeal on a dispute falling within the scope of Article L. 442-6 of the French Commercial Code.

It is under these circumstances that X, by a notice of appeal dated July 23, 2018, appealed the same judgment before the Paris Court of Appeal and, after having been authorized to do so by order dated July 24, 2018, served a writ of summons on Y to appear on a fixed date by bailiff's deed dated July 31, 2018 for a hearing on September 26, 2018, and filed the said writ electronically on August 6, 2018.

At the hearing on 26 September 2018, the case was adjourned to 9 October 2018, the case initially assigned to Division 5-4 herein having been reallocated to Division 5-16.

During the hearing, the Court requested the parties to file a note concerning the proceedings pending before the Douai Court of Appeal in order to ascertain the outcome of these proceedings.

In a note sent electronically on 25 November 2018, the board of Y communicated the decision handed down by the Douai Court of Appeal on 15 November 2018, pursuant to which the court found inadmissible the X's appeal against the decision of 15 May 2018 handed down by the Lille Commercial Court, in so far as it had been lodged with the Douai Court of Appeal.

The Douai Court of Appeal considered that it resulted from the combination of Articles L. 442-6, III, paragraph 5, and D. 442-3 of the French Commercial Code that the Paris Court of Appeal alone was vested with the power to rule on appeals on the merits and jurisdiction brought against decisions handed down in disputes relating to the application of Article L. 442-6 of the same code.

### **CLAIMS AND PLEAS OF THE PARTIES**

**According to its latest submissions sent electronically on 8 October 2018**, X asks the court, under Articles 89, 96, 100, 1448, paragraph 1, 1465 and 1506 of the Code of Civil Procedure and articles D. 443 and L-442-6 of the Commercial Code, to :

- Find X admissible and that its appeal has merits;
  - Dismiss the plea of *lis pendens* raised by Y and its request for a stay of proceedings;
  - Rule it has exclusive jurisdiction to hear the appeal against the judgment;
- thereupon,
- Overturn the appealed judgment ;
  - Rule that the ISF arbitration clause is neither manifestly null and void nor manifestly inapplicable to the action brought by Y against X;
  - Direct Y to better lodge its claims
  - In any event, order Y to pay the costs of the proceedings and the sum of EUR 5,000 pursuant to

Article 700 of the Code of Civil Procedure;

- Rule that the costs of the appeal may be directly recovered by SELARL LEXAVOUE PARIS-VERSAILLES, pursuant to Article 699 of the Code of Civil Procedure.

**According to its latest submissions sent electronically on 24 September 2018,** Y, with reference to Articles 378 et seq. of the Code of Civil Procedure, asks the court to :

- In limine lis:

Order a stay of proceedings pending the decision to be taken by the Douai Court of Appeal on the appeal filed by X following the appeal dated July 2, 2018 (RG18/03607).

- On jurisdiction:

Uphold the judgment handed down by the Lille Metropole Commercial Court of dated 15 May 2018 in that it:

Said admissible but with no merits the plea of lack of jurisdiction,

Found it has jurisdiction to hear the dispute on the merits,

Consequently, refer the case to the Lille Metropole Commercial Court of.

- In any case:

Order X to pay Y the sum of EUR 10,000 on the basis of the provisions of Article 700 of the Code of Civil Procedure,

Order X to pay tall the costs of the proceedings.

## **REASONS FOR THE DECISION**

### ***On the plea of lis pendens***

Pursuant to Article 954 of the Code of Civil Procedure, the pleadings shall distinctly include a statement of the facts and procedure, a statement of the criticised heads of the judgment, a discussion of the claims and pleas in law and an operative part summarising the claims (...) and the court shall rule only on the claims set out in the operative part of the submissions and shall examine the pleas in law in support of these claims only if they are raised in the discussion.

While Y, in its pleas, states that it "*has merits in raising the plea of lis pendens*", it should be noted that it goes on to state that "*it appears that the conditions for lis pendens are not met*", and that this claim does not appear in the operative part of these submissions, so that it shall be held that the Court is not seised of this claim.

### ***On the request for a stay of proceedings ;***

Y considers that, for the proper administration of justice, a stay of proceedings should be ordered pending the decision to be issued by the Douai Court of Appeal, which is seized of an appeal

against the same judgment of the Lille Commercial Court, with the hearing to be held on 24 October 2018.

X requests that the application for a stay of proceedings be dismissed.

**Thereupon ;**

Except in cases where this measure is provided for by law, the court has discretionary power to assess the appropriateness of a stay of proceedings in the interest of the proper administration of justice.

In this case, the court having authorized the parties to inform it with a note pending deliberation, of the outcome of the proceedings pending before the Douai Court of Appeal, and the latter having found inadmissible X's appeal by decision of 15 November 2018 in that it had been brought before that court, the stay of proceedings is no longer necessary.

This application shall therefore be dismissed.

***On the plea alleging the inadmissibility of the request for referral to the arbitral tribunal for failure to comply with Article 75 of the Code of Civil Procedure;***

During the hearing, Y raised orally the inadmissibility of the plea of lack of jurisdiction raised by X, arguing that this plea disregarded the requirements of Article 75 of the Code of Civil Procedure because the appellant had failed to specify the court to be referred to.

In response, X concluded that this plea should be rejected since the competent arbitral tribunal is the one designated by the rules and customs of the ISF.

**Thereupon,**

Apart from the fact that the plea was raised orally at the hearing without having been presented in Y's submissions, it has in any no merit inasmuch as the requirement laid down in Article 75 of the Code of Civil Procedure is not intended to apply where referral to an arbitral tribunal is sought, so that it shall be dismissed.

***On the plea of lack of jurisdiction in favour of the arbitral tribunal ;***

In support of the claim that the Lille Commercial Court lacks jurisdiction, X argues in substance that:

- The sales concluded between X and Y are subject to the ISF Rules and Usages for the trade in seeds for sowing purposes published by the ISF ("the International Seed Federation"), as is apparent from the terms on the order confirmations according to which sales are made under the conditions of the ISF Rules and Usages ("*terms and conditions - ISF*"), Article 2.1 of which specifies that when the terms "ISF Rules" are incorporated in a contract or any other agreement, these rules apply in full and that the parties agree to submit their disputes to ISF arbitration;
- The mandatory submission of any dispute between the parties to the arbitration procedure also results from the specific procedural rules entitled "procedural rules for dispute settlement for the trade in seeds for sowing purposes" to which the ISF Rules and Practices expressly refer;

- The possibility of having recourse to a mediation or conciliation procedure beforehand does not have the effect of making recourse to arbitration optional, Article 87.1 taking care to recall that these alternative methods of dispute resolution do not call into question the principle of exclusion of ordinary judicial proceedings;
- The Lille Commercial Court was therefore obliged to decline jurisdiction unless it found that the ISF arbitration clause was manifestly null and void or manifestly inapplicable, which prevents the judge from carrying out a substantial and in-depth analysis of the clause and in particular from verifying the consent of Y to this arbitration clause;
- A clause may be applicable by reference to the document containing it, pursuant to Articles 1507 and 1508 of the Code of Civil Procedure, even if this document has not been materially transmitted to the other party so that this transmission is not a necessary condition for the validity or opposability of the arbitration clause by reference, its absence not being a ground for manifest inapplicability;
- An arbitration clause by reference to another document shall be valid if the party to which it is opposed has been aware of the content of that document at the time of the conclusion of the contract, such knowledge not necessarily implying either the signing of the clause or of the document incorporating it or its effective transmission, and if it has, even if by its silence, accepted the incorporation of the document into the contract;

As a response, Y essentially argues that it is not established that the ISF terms and conditions have been brought to its attention and that, in any event, it would be impossible to find a neutral arbitrator because of the international importance of X. It adds that, assuming that the ISF rules and usages are applied, Article 87.1 mentions that recourse to IFS mediation and/or arbitration is only an option and not an obligation for the parties so that the Lille Commercial Court could find that no jurisdiction clause was binding on the parties.

It considers that X has all the more no merit in seeking application of the clause allowing the parties, at their choice, to settle their dispute by mediation or arbitration, as it refused the confidential mediation proposed by the Lille Metropole Commercial Court of.

**Thereupon,**

Pursuant to articles 1448 and 1506 of the Code of Civil Procedure "Where a dispute arising out of an arbitration agreement is brought before a State court, the latter shall decline jurisdiction unless the arbitral tribunal is not yet seized and the arbitration agreement is manifestly null and void or manifestly inapplicable".

***On the existence of an arbitration clause binding on ALPHA ;***

It is common ground that the parties have had a commercial relationship for several years, particularly between 2003 and 2016, and that the order confirmation vouchers issued by Saaten Union for orders placed by Y to X, which are undisputedly executed and invoiced by Saaten Union on behalf of X, and which are produced in several copies by X between January 2011 and February 2016, contain the following statement: "terms and conditions : ISF - Incoterms 2010" followed by the statement that "The contract is considered approved if no objection is made immediately in written form".

According to Article 2.1 of the Rules and Usages of the International Seed Trade Federation which came into force on July 1, 2013 (and replaces those previously established) « When the words "ISF Rules" have been embodied in a contract or in any other agreement, including Terms and Conditions of Sales pertaining to seeds, the present Rules shall apply in full and parties agree to solve any kind of disputes by ISF arbitration as mentioned in Art. 87. »

Article 87.1 of the same Rules and Usages further provides that « *Any dispute, controversy or claim arising out of or in connection with transactions started or concluded on the basis of the present Rules, or the breach, termination or invalidity thereof, can be settled amicably or by mediation and conciliation as provided for in the ISF Procedure Rules for Dispute Settlement or by binding arbitration in accordance with the ISF Procedure Rules for Dispute Settlement, with the exclusion of ordinary judicial procedure.* »

Finally, the Procedure Rules for Dispute Settlement For the Trade in Seeds referred to in the aforementioned Rules and Usages stipulate in their Article 2.1 that « *Except otherwise agreed by the parties, when the words "ISF Rules" have been embodied in a contract, any dispute arising from that contract must be referred to ISF arbitration under the ISF Procedure Rules. Parties may also agree, without that clause in their contract, to refer any dispute among them relating to seed trade and/or production to ISF arbitration. In both cases the disputes will be settled in accordance with these Procedure Rules.* »

It appears from these elements that by providing proof of the systematic mention of the words "terms and conditions: ISF - Incoterms 2010" in the confirmations of orders placed by Y, which it does not dispute having received nor having challenged any of their content, the existence of an arbitration clause with reference to these rules and usages binding on that company is established, as is Y's knowledge, from whose own submissions it also emerges that it has been engaged in the research, production and marketing in France of seeds intended for agriculture for more than 30 years, so that it is clearly a knowledgeable professional in the sector who cannot be unaware of its usages .

#### ***On the interpretation and scope of the arbitration clause inserted in the ISF Rules and Usages***

In accordance with the aforementioned Articles 1448 and 1506 of the Code of Civil Procedure, in the absence of a finding on the nullity or manifest inapplicability of the arbitration clause, it is up to the arbitrators alone to rule on their jurisdiction.

In the present case, Y's argument that Article 87.1 of the ISF Rules and Usages must be interpreted as meaning that it does not require the parties to have recourse to arbitration but that recourse to that alternative means of resolving the dispute is merely optional in the light of the wording of that clause does not constitute a plea of nullity or manifest inapplicability of the arbitration clause authorising the court to refer the matter to it; only the arbitrators shall have jurisdiction to rule on that plea.

#### ***On the plea alleging the impossibility of implementing arbitration proceedings;***

The fact that Y maintains in its submissions that "Moreover, given the international importance of X, it is impossible to find a neutral arbitrator" is not such as to prevent the referral of the present dispute to arbitration, it being noted that this is a question relating to the modalities for appointing the arbitrator(s) and that, pursuant to Articles 1454 and 1506 of the Code of Civil Procedure, any

dispute relating to the constitution of the arbitral tribunal shall be settled, failing agreement by the parties, by the person responsible for organising the arbitration or, failing that, by the judge (« *juge d'appui* »).

This plea shall therefore be dismissed.

In the light of all these elements, it shall be held that the present case falls within the jurisdiction of an arbitral tribunal and, consequently, the judgment of the Lille Commercial Court shall be overturned and the parties should be directed to better lodge their claims, pursuant to Article 81 of the Code of Civil Procedure.

***On the other requests ;***

Y, the losing party, shall be ordered to pay the costs of the first instance and of the appeal proceedings, which, as regards the costs of the appeal, shall be recovered in accordance with Article 699 of the Code of Civil Procedure.

In addition, it shall be ordered to pay X, which had to incur irrecoverable costs in order to assert its rights, compensation under Article 700 of the Code of Civil Procedure, which which fair overall sum is set at EUR 3,000.

**ON THESE GROUNDS, THE COURT HEREBY**

OVERTURNS the judgment of the Lille Commercial Court handed down on 15 May 2018 in all its provisions;

Ruling again:

FINDS that there is no need to rule on the plea of *lis pendens* not included in the operative part of Y's submissions ;

DISMISSES the application for a stay of proceedings;

FINDS that the Lille Commercial Court has no jurisdiction ;

DIRECTS Y to better lodge its claim ;

ORDERS Y to pay X the sum of EUR 3,000 pursuant to Article 700 of the Code of Civil Procedure.

ORDERS Y to pay the costs of the first instance and the appeal proceedings, which, as regards the costs of the appeal, shall be recovered in accordance with Article 699 of the Code of Civil Procedure.

The Clerk

The President