

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

**PARIS COURT OF APPEAL  
INTERNATIONAL CHAMBER  
Division 5 – 16**

**JUDGMENT OF June 3<sup>rd</sup>, 2020**  
(N° 19/2020, 10 pages)

General Directory Entry Number: **RG 19/03758**– N° Portalis 35L7-V-B7D-B7KZU  
Decision referred to the Court: judgment of January 21<sup>st</sup>, 2019 – Paris Commercial Court - RG n° 2018026845

**APPELLANTS**

**SODMILAB**, a company incorporated under Algerian law  
Represented by its legal representatives  
Having its registered office at : 6 a Chemin Doudou Mokhtar, Ben-aknoun, Alger (ALGERIA)

**SARL KARSMAN**, a company incorporated under French law  
Registered in the trade and companies registry of Paris under the n° 519 147 623  
Having its registered office at : 140 Bis Rue de Rennes -75006 Paris  
Represented by its liquidator SELARL FIDES, represented by Me (...),

**SELARL FIDES**, represented by Me (...),  
Acting as KARSMAN's liquidator of ,  
Having its registered office at : 5 Rue de Palestro - 75002 Paris

*All represented by ..., member of the Paris Bar: [...]*  
*Having as litigator [...] and [...] member of the Paris Bar*

**RESPONDENT:**

**SAS WATERS**, a company incorporated under French law  
Registered in the trade and companies registry of Versailles under the n° 394 68 9 9 70  
Having its registered office at : 5 rue Jacques Monod -Rond Point des Sangliers- 78280 GUYAN-  
COURT  
Represented by its legal representatives

*Represented by..., member of the Paris Bar : [...]*  
*Having as litigator [...] and [...] member of the Paris Bar*

**COURT COMPOSITION**

The case was heard on February 10<sup>th</sup>, 2020 in open court, composed of:

Mr François ANCEL, President  
Ms Laure ALDEBERT, Judge  
Ms Fabienne SCHALLER, Judge

who ruled on the case.

A report was presented at the hearing in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing: Ms. Clémentine GLEMET

## **JUDGMENT**

- Adversarial
- judgment made available at the Clerk's office of the Court, initially scheduled on October 24<sup>th</sup>, 2020 and then postponed until June 3<sup>rd</sup>, 2020, 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 Ms. Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

### **I- Facts**

- 1- Sodmilab is an Algerian company specialised in import, resale and service activities related to laboratory equipment.
- 2- Waters is a French company specialised in the marketing and development of scientific instruments, particularly chromatographic analysis for laboratories.
- 3- In 1997, Waters, wishing to develop the sale of its products on the Algerian market, entered into commercial relations with Sodmilab to market its products in Algeria.
- 4- On February 25<sup>th</sup>, 2010, Waters and Sodmilab formalised their commercial relations by concluding a contract entitled "*contract for the distribution of Waters products on the Algerian territory*".
- 5- In January 2010, the son of the manager of Sodmilab created in France Karsman, a company specialised in the import-export of goods, which became the intermediary for the purchase and delivery in Algeria of Waters' products company ordered by Sodmilab.
- 6- By letter dated April 1<sup>st</sup>, 2016, Waters terminated the contract concluded on February 25<sup>th</sup>, 2010 with Sodmilab, giving 6 months' notice as provided for in the contract.
- 7- Considering that they suffered harm as a result of this termination, Sodmilab and Karsman informed Waters by letter dated March 23<sup>rd</sup>, 2017 of their intention to claim compensation on the basis of the legal provisions governing the termination of the commercial agency contract and at the very least the abrupt termination of established commercial relations under Articles L. 134-12 and L. 442-6 I 5° of the French Commercial Code.
- 8- In response by letter dated June 15<sup>th</sup>, 2017, Waters contested the claims on the grounds that Sodmilab could not claim the application of French law but only Algerian law and that Karsman did not meet the conditions required for compensation.

### **II- Proceedings**

- 9- It is in this context that Sodmilab and Karsman have served a writ of summons on Waters by bailiff's act dated April 17<sup>th</sup>, 2018 for the payment of damages before the Paris Commercial Court, on the basis of Articles L 442-6 I 5° of the Commercial Code, L. 134-1 and L.134-12 of the Commercial Code and 1240 of the Civil Code, requesting the application of French law to all their claims and, subsidiarily, Algerian law.
- 10- By judgment dated September 18<sup>th</sup>, 2018, the Paris Commercial Court pronounced the judicial liquidation of Karsman and appointed SELARL FIDES as liquidator, represented by Me (...) authorised liquidator.
- 11- During the proceedings, Waters challenged the application of French law to its relations with

Sodmilab, considering that Algerian law was applicable.

- 12- By judgment dated January 21<sup>st</sup>, 2019, the Paris Commercial Court found Algerian law applicable to the commercial relations between Sodmilab and Waters, referred the case to a future pre-trial hearing and postpone its decision on Article 700 of the Code of Civil Procedure and costs.
- 13- Sodmilab and Me. (...), as Karsman's liquidator , appealed the decision in all its provisions by a notice of appeal on February 18<sup>th</sup>, 2019.
- 14- During the proceedings, Waters challenged the admissibility of an immediate appeal against a decision ruling solely on the applicable law.
- 15- By order dated October 1<sup>st</sup>, 2019, the pre-trial judge rejected the claim and declared the appeal admissible.

### **III- CLAIMS OF THE PARTIES**

16- **According to their latest submissions sent electronically on January 7<sup>th</sup>, 2020, Sodmilab and Me. (...) ) as Karsman's liquidator**, request the court, in accordance with Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), the Convention of 14 March 1978 on the Law Applicable to Agency, signed in The Hague (Articles 4, 5 and 16), Article L.442-6, I, 5° and L.134-12 et seq. of the French Commercial Code, as well as articles 84 et seq. of the French Code of Civil Procedure, to :

- Find their appeal admissible and with merit
- Overturn the judgment undertaken in that it "*finds the Algerian law applicable to commercial relations between tSodmilab and Waters* ".  
and ruling again,
- Rule that Sodmilab was contractually bound by a commercial agency contract, on the one hand, and by a distribution contract, on the other hand.
- Rule that French law is applicable to the claims brought by Sodmilab against and for the breach of the commercial agency contract, on the one hand, and the distribution contract, on the other hand.  
Accordingly,
- Direct the case and the parties to the Paris Commercial Court
- Order Waters to pay them the sum of EUR 15,000 pursuant to Article 700 of the Code of Civil Procedure and to pay all the costs of the proceedings, which shall be directly recovered by (...) in accordance with the conditions of Article 699 of the Code of Civil Procedure.

17- **According to its latest submissions sent electronically on January 17<sup>th</sup>, 2020, Waters asks the court**, under the terms of Article 6 of the Hague Convention of 14 March 1978, Article 4.1 of the Rome I Regulation of 17 June 2008, Article 4.1 et seq. of the Rome II Regulation of 11 July 2007, to:

- Uphold all of the judgment of January 21<sup>st</sup>, 2019 ;  
Accordingly,
- Rule that Algerian law is applicable to the commercial relations between Sodmilab and Waters;
- Rule that French law is applicable to the commercial relations between Karsman and Waters ;

- Dismiss the all of the appellants' claims ;  
In any case,
- Direct the parties back to the Paris Commercial Court for an exchange of submissions on the merits;
- Order jointly and severally the claimants to pay the sum of EUR20,000 under Article 700 of the Code of Civil Procedure, as well as the entire costs of the first instance and of the appeal, including, as far as it concerns the appellant, the costs of the fees of Me (...), in accordance with the provisions of Article 699 of the Code of Civil Procedure.

18- The closing order was issued on January 21<sup>st</sup>, 2020.

#### **IV- PLEAS OF THE PARTIES**

- 19- Sodmilab maintains that it carried on the dual activity of exclusive distribution and exclusive commercial agent on Algerian territory for Waters' products and criticises the first judges for finding Algerian law applicable without having recognised the existence of the two commercial relations.
- 20- With regard to the commercial agency activity, the appellants argue with reference to Article 5 § 2 of the Hague Convention of 14 March 1978, on the basis of a body of evidences that it follows from the contractual agreements concluded since 1997 that the parties wished, in the context of their commercial relations, to connect the contract to France and to French law.
- 21- For this purpose, they argue that the contract of February 25<sup>th</sup>, 2010 includes a clause conferring jurisdiction to a French court, that all exchanges and contractual documents were drafted in French, that France was the place of payment of commissions, the origin of products, orders, letters sent by Waters.
- 22- They point out that the general conditions of sale (GCS) of the products purchased by Algerian customers through the intermediary of Sodmilab acting on behalf of Waters provided that "*the contracts concluded by Waters are governed by French law*" (Article 10.1).
- 23- They add that as of 2010, Karsman's creation, at the request of Waters, for the export of its products to Algeria, demonstrates Waters' willingness to have a French interlocutor between it and Sodmilab to subject its relations to French and not to Algerian regulations.
- 24- In alternative the appellants argue on the grounds of Article 6§3 of the Hague Convention that it is the law of the professional establishment of Sodmilab, in the present case, Karsman located in France, that compels to apply French law.
- 25- With regard to the distribution activity, the appellants argue that, whatever the considered legal basis, whether contractual or tortious in view of doubts hanging over case-law as regards the nature of the action for abrupt termination of established commercial relations, the implementation of the Rome I and Rome II Regulations lead to the application of French law, which is the law impliedly chosen by the parties, and that in any event, the situation is manifestly more closely connected with France, justifying the exception clause provided for in the Rome I and Rome II Regulations.
- 26- They add that, in any case, the provisions of Article L.442-6, I, 5° of the Commercial Code are overriding mandatory provisions in the private international order and evict the application of Algerian law.
- 27- They explain that, in accordance with numerous national decisions, the provisions of Article

L. 442-6, I,5° of the Commercial Code, which not only protect the interests of the victim of the breach but also pursue the objective of protecting French companies in the context of their commercial activity, are a matter of public policy and that, by contributing to the proper functioning of competition, they impose themselves as overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation.

- 28- In response, Waters replies that the Court was only seized within the limits of a plea on the applicable law and that the legal classification of the commercial relations between Waters and Sodmilab could only be determined once the question of the applicable law had been settled.
- 29- With regard to the determination of the applicable law, in the event that the contract concluded between Waters and Sodmilab is qualified as a commercial agency contract, Waters challenges the application of Article 5 of the Hague Convention of 14 March 1978, since it cannot be deduced from the contract or from the factual circumstances that the parties have agreed to apply French law.
- 30- It argues that the use of the French language in contracts, emails and invoices is not a determining factor since it is commonly used in Algeria in the field of business and that in determining the applicable law the essential elements to be taken into account are the nationality of the agent and the place of establishment and performance of the mandate which are located in Algeria, and that it is appropriate to confirm the decision of the first judges who applied Article 6 §1 of the said Convention by ruling for the law of the place of establishment of Sodmilab , i.e. Algerian law.
- 31- It challenges the connection to French law by application of Article 6 §3 of the aforementioned Convention, pointing out that Karsman is distinct from Sodmilab and is not its French establishment.
- 32- As regards the determination of the applicable law in the event the contract between Waters and Sodmilab is deemed to be a distribution contract, it argues that the conflict of law rules defined by the Rome I and Rome II Regulations according to the nature of the action, leads to the application of Algerian law as ruled by the first judges.
- 33- It maintains that there is no evidence of an agreement on French law and the existence of closer links with France and that, consequently, Article 4 of the Rome I Regulation shall apply, which provides that the distribution contract is governed by the law of the country in which the distributor has its habitual residence, that is to say, Algerian law, the place of the registered office of Sodmilab .
- 34- With reference to the Rome II Regulation (non-contractual action), Waters argues that the law of the place where Sodmilab suffers from the termination of the commercial relations, i.e. Algerian law, is applicable according to Article 4(1) of the Rome II Regulation, without any adjustment being applicable.
- 35- It challenges the analysis according to which the former provisions of Article L. 442-6, I,5° of the Commercial Code are overriding mandatory provision within the meaning of Article 9 of the Rome I Regulation and claims that the first judges were right to deny it this nature since its provisions are not necessary for the economic safeguard of the country.
- 36- It points out that overriding mandatory provisions have a territorial application and that it does not have to apply to the situation insofar as the consequences of the termination arise exclusively in Algeria and the French market is not affected.
- 37- The Court refers, for a fuller account of the facts and claims of the parties, to the decision

taken and the submissions referred to above, in application of the provisions of Article 455 of the Code of Civil Procedure.

## **V- REASONS OF THE DECISION**

- 38- It should be noted beforehand that the parties do not dispute that French law is applicable to the commercial relations which took place between Waters and Karsman, now represented by its liquidator.
- 39- On the other hand, the parties disagree on the law applicable to the commercial relationship established between Sodmilab and Waters for the marketing of Waters' products in Algeria.
- 40- Sodmilab claims the application of French law and not Algerian law as held by the first judges and the recognition of its dual activity as a commercial agent and exclusive distributor of Waters in Algeria.
- 41- It should be noted in this respect that it will be for the Commercial Court in first instance, ruling on the merits of the dispute, to qualify the nature of this commercial relationship so that, at this stage, the question of the applicable law will be decided by considering the two qualifications submitted for discussion, namely according to whether this commercial relationship is deemed to be a commercial agency contract or a distribution contract.

### ***On the law applicable to the contractual relationship which may be qualified as a commercial agency contract:***

- 42- In order to determine the applicable law to the dispute concerning the commercial agency contract, the parties agree that the Convention of 14 March 1978 on the Law Applicable to Agency (hereinafter referred to as the Convention) shall apply.
- 43- Article 5 of the Convention states that "*The internal law chosen by the principal and the agent shall govern the agency relationship between them.*
- This choice must be express or must be such that it may be inferred with reasonable certainty from the terms of the agreement between the parties and the circumstances of the case. »*
- 44- In the present case, it is common ground that Algerian customers were canvassed and approached by Sodmilab, which acted as an intermediary or representative of Waters, and that the sale of Waters' products took the form of a contract concluded directly between the company and its customers.
- 45- Sodmilab was paid on commission fixed according to the terms of the contract dated February 25<sup>th</sup>, 2010.
- 46- However, the parties did not formalise any express choice on the applicable law in the contract to which they refer to govern their commercial relations.
- 47- In the absence of an express choice by the parties, the determination of the applicable law can only result from the existence of the conditions provided for cumulatively by Article 5 paragraph 2, i.e. the provisions of the contract and the circumstances of the case.
- 48- In this respect, it follows from the provisions of the contract that they have agreed in the event of a dispute to refer the matter to a French court by the insertion of a jurisdiction clause drafted as follows: "*in the event of a dispute and in the absence of agreement*

*between the signatory parties, the Versailles Commercial Court to which jurisdiction is conferred shall have sole jurisdiction", demonstrating their willingness to submit any dispute regarding the performance of their commercial relations to the French legal system.*

- 49- Moreover, it follows from the circumstances of the case that if the use of French in the contract and trade is not in itself significant with regard to the working language commonly used in the economic sector in Algeria, it constitutes an indication that can be taken into account and which is in this case corroborated by the circumstances that France is the country of the place of signature and registration of the official documents designating Sodmilab for the representation of Waters products, the place of the contract formalising their relations, as well as the place of origin of the products and the payment of commissions.
- 50- It also emerges from the exhibits produced, and in particular from the content of the agreements between the parties dated June 2<sup>nd</sup>, 1997 and March 15<sup>th</sup>, 1999, that the prices were denominated in French francs, that Sodmilab had to report periodically to Waters, in France, on commercial visits to Algeria, and that under the terms of the contract dated February 25<sup>th</sup>, 2010, the quotes were validated by Waters in France.
- 51- Moreover, the general terms and conditions of sales made through Sodmilab in Algeria on behalf of Waters expressly provided that "*sales concluded by Waters are governed by French law*", which is an additional indication that the contractual relationship is linked to national law.
- 52- It thus follows with reasonable certainty from the provisions of the contract and the circumstances of the case that the parties intended to subject their contractual relations to French law.
- 53- It is therefore appropriate, for this reason, to reverse the judgment on this ground and to rule that French law is applicable.

***On the law applicable to the contractual relationship which may be qualified as a distribution contract :***

- 54- Sodmilab is seeking the liability of Waters for the abrupt termination of established commercial relations on the basis of Article L. 442-6,I,5 of the French Commercial Code, which it claims to apply under national law or overriding mandatory provisions in the private international order, regardless of the nature of the action that could be retained, tortious or contractual.

*On the qualification of Article L. 442-6 I 5 of the Commercial Code as a overriding mandatory provisions*

- 55- It is necessary to determine whether the aforementioned text is applicable as overriding mandatory provisions and, if not, to implement the conflicting method provided for by the Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) or the Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
- 56- The parties refer to Article 9 of the Rome I Regulation, which defines overriding mandatory provision as follows:

*"1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or eco-*

*conomic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

*2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum”.*

57- The Rome I Regulation thus implements a definition based on the public interest criterion and emphasises the "crucial" nature of compliance with overriding mandatory provisions.

58- According to recital 37 of this Regulation, overriding mandatory provisions are not only mandatory provisions within the meaning of national law: "*Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively*".

59- In this case, if the provisions of Article L. 442-6, I, 5 of the Commercial Code, which imply that a company established in France does not cause damage by abruptly terminating an established commercial relationship, contribute to the moralisation of business life and are also likely to contribute to the better functioning of competition, they are aimed more at safeguarding the private interests of a party, so that they cannot be regarded as so crucial to the safeguarding of the economic organisation of the country as to require their application to any situation falling within their scope.

60- Consequently, these provisions are no overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation.

61- It is therefore necessary to determine the law applicable to the present dispute by applying the conflict-of-law rules resulting from the Rome I and Rome II Regulations.

*On the determination of the applicable law by application of the Rome I Regulation,*

62- According to Article 3§1 of the Rome I Regulation, "*A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.*". In the absence of a choice made in accordance with Article 3, Article 4 provides that "*To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:*

*(...)*

*(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence; (...)*

*Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. ».*

63- In the present case, in the event of a distribution contract under which Sodmilab purchased the products directly from Waters on its behalf, French law is the law of the contract, since the general terms and conditions of sale of Waters reproduced on the back of the invoices provide that "*sales concluded by Waters are governed by French law*".

64- This finding is corroborated by the circumstances referred to above, supported by the



documents produced, from which it is sufficiently certain that the parties intended to submit their relations to French law and to the expressly designated French legal system.

65- It follows that the choice of French law is thus certain to result from the provisions of the contract or the circumstances of the case and that, consequently, the decision to apply Algerian law shall be reversed on this ground, and it shall be ruled that French law is applicable.

***On the determination of the applicable law by application of the Rome II Regulation:***

66- Article 4 of the said Regulation provides that:

*" 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..*

*( ...)*

*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 preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question. »*

67- According to Article 14(1) of the Rome II Regulation, *" The parties may agree to submit non-contractual obligations to the law of their choice: (...)/ b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties. »*

68- For the reasons set out above, it is clear from the circumstances of the case that the parties intended that French law applies to disputes arising out of their commercial relations brought before the French courts.

69- The judgment shall therefore be entirely reversed and French law shall be found as applicable.

**Costs and expenses**

70- Waters, which is unsuccessful, shall be dismissed in its claim under Article 700 of the Code of Civil Procedure and ordered to pay the costs of the proceedings and to pay Sodmilab, pursuant to the latter provisions, the sum indicated in the operative part of the judgment.

71- Fairness dictates that that claim should not be granted in favour of Me (...) acting as Karsman's liquidator .

**VI- ON THESE GROUNDS, THE COURT HEREBY**

1- Overturns the judgment of the Commercial Court of January 21<sup>st</sup>, 2019;

*Ruling again,*

2- Finds that French law is applicable to Sodmilab's claims against Waters,

3- Orders Waters to pay Sodmilab the sum of EUR 8,000 on the basis of Article 700 of the Code of Civil Procedure,

- 4- Rules that there shall be no payment of any sum on the basis of Article 700 of the Code of Civil Procedure, to the benefit of Me (...) in his capacity as Karsman's liquidator of the,
- 5- Orders Waters to pay the costs of the appeal proceedings, in accordance with the provisions of Article 699 of the Code of Civil Procedure, for the benefit of (...), members of the Paris Bar.

***The Clerk***  
***Clémentine GLEMET***

***The President***  
***François ANCEL***