FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

International Chamber of Commerce Division 5 – Chamber 16

JUDGEMENT OF 10 JUNE 2020

(No 26 /2020, 8 pages)
General Directory Entry Number: **No RG 19/10808 - No Portalis No 35L7-V-B7D-CAANR**

Decision referred to the Court: Judgement of 26 March 2019 - Commercial Court of MEAUX - RG No 2016009922

APPELANTS:

MMA IARD SA
A French public limited company *(société anonyme)* registered in the Paris Commercial and Companies Registry under the number 440 048 882
Having its registered office: 14 boulevard Marie et Alexandre Oyon- 72030 LE MANS
Represented by its legal representatives,
&
SOSTMEIER SARL
A French limited-liability company *(société à responsabilité limitée)* registered in the Paris Commercial and Companies Registry under the number 350 979 407
Having its registered office: Zone Industrielle Actival rue du Général de Gaulle- 57730 VALMONT
Represented by its legal representatives,

Both represented by (…), member of the Bar of Paris,

RESPONDENT:

MANNHEIMER VERSICHERUNG AG
A German public limited company registered with the County Court of Mannheim (Germany) under the number HRB 7501
Having its registered office: Augustaanlage 66, 68165 MANNHEIM (GERMANY)

Represented by (…), member of the Bar of Paris; *with litigating attorney (...), member of the Bar of Paris:*

COURT COMPOSITION:

Under:

- Article 4 of Emergency Law No 2020-290 of 23 March 2020 to deal with the Covid-19 epidemic;
- Order No 2020-304 of 25 March 2020 adapting the rules applicable to ordinary courts ruling in non-criminal matters and to the contracts of condominium management companies, in particular Articles 1 and 8;
- Order No 2020-306 of 25 March 2020, as amended, relating to the extension of time limits during the public health emergency period and the adaptation of procedures during this period;

The procedure without hearing was adopted for this case, the lawyers having expressly agreed to the use of said procedure or not having objected to it within 15 days of the proposal to use it;

The court, composed as follows, deliberated:

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

Court Clerk, during the arguments: Clémentine GLEMET

JUDGEMENT:

- ADVERSARIAL
- judgement made available at the Clerk's office of the Court, the parties having been notified in advance pursuant to the terms stipulated 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 original was handed by the signatory judge.

I- THE FACTS:

1. On 28 April 2015, the company Sostmeier, a shipping agent, was hired by the manufacturer MKM MANSFELDER UND MESSING GmbH (hereafter "MKM") to organise the carriage of 19,352 kg of copper from its warehouses in Germany to the site of one of its French customers, FRITEC SAS, located in Serris (Postcode: 77 700).

2. According to transport order No 648108 of 29 April 2015 and CMR waybill No 8433301, Sostmeier entrusted the performance of this service to the haulage contractor Harz Express, a German company insured by the German insurance company Mannheimer Versicherung AG.

3. Harz Express subcontracted this transport service to Ludovit Vitko, a Slovak

company, through a freight exchange. The goods were collected from the MKM warehouses on 4 May 2015 but were not delivered to Serris on 6 May 2015 and they disappeared.

4. The companies Sostmeier and Harz Express filed a complaint in Germany for this misappropriation of goods and informed their respective insurers.

5. On 20 July 2015, Sostmeier indemnified MKM for EUR 111,145.05 corresponding to the original value of the goods sold to Fritec. Sostmeier's insurer, the company COVEA FLEET (whose rights are represented by MMA Iard SA) indemnified Sostmeier for the sum of EUR 100,030.55, after deduction of a deductible of EUR 11,114.50 remaining at the expense of the latter.

6. Sostmeier and MMA Iard tried and failed to negotiate amicable settlements with Harz Express and its insurance company, Mannheimer Versicherung AG.

II- PROCEEDINGS:

7. In a deed dated 23 December 2016, MMA Iard and Sostmeier brought an action against the German insurance company Mannheimer Versicherung AG before the Meaux Commercial Court for payment of:

- EUR 100,030.55 to MMA Iard in respect of insurance indemnities paid to Sostmeier;
- EUR 2,024.42 euros in respect of expert appraisal costs;
- EUR 11,114.50 € to Sostmeier in respect of the contractual deductible to the company Sostmeier with an interest rate of 5% from 20.07.2015 and a sum of EUR 8,500.00 under Article 700 of the French Code of Civil Procedure.

8. In a judgement dated 26 March 2019, the Commercial Court of Meaux ruled that the action brought by the companies MMA Iard and Sostmeier against the insurer of Harz Express, Mannheimer Versicherung AG, was inadmissible.

9. In a declaration dated 22 May 2019, MMA Iard and Sostmeier lodged an appeal against this judgement before the Paris Court of Appeal.

10. The case was prepared for preliminary investigation and hearing in accordance with the protocol for proceedings before this chamber dated 7 February 2018, accepted by the parties pursuant to Article 4.1 thereof.

11. The closure of proceedings was declared on 3 March 2020 and the parties agreed that the proceedings would be followed without a hearing, in accordance with the measures taken pursuant to Emergency Law No 2020-290 of 23 March 2020 to deal with the Covid-19 epidemic and Article 8 of Order No 2020-304 of 25 March 2020.

12. The date on which the decision would be made available was conveyed to the lawyers on 27 May 2020.

III- CLAIMS OF THE PARTIES:

13. In their latest submissions dated 27 January 2020, MMA Iard and Sostmeier asked the court to:

Pursuant to Articles 3, 17-1, 27, 29 and 32 of the Geneva Convention of 19 May 1956, known as the CMR Convention, the Rome I Regulation, Articles L 132-6 and L 133-8 of the Commercial Code, and Articles L 124-3 and L 121-12 of the Insurance Code, together with Article 3 of the Civil Code,
- Overturn the judgement issued on 26 March 2019 by the Commercial Court of Meaux,

And, ruling again:

- Find the claims of the companies MMA Iard (representing the rights of COVEA FLEET) and Sostmeier admissible and valid;
- Order the German company Mannheimer Versicherung AG to reimburse MMA Iard the sum of EUR 100,030.55 in respect of the insurance compensation paid to Sostmeier;
- Order the German company Mannheimer Versicherung AG to reimburse MMA Iard the sum of EUR 2,024.42 for the costs of the insurance appraiser's fees;
- Order the German company Mannheimer Versicherung AG to pay to Sostmeier SARL the sum of EUR 11,114.50 for the contractual deductible which remained at its expense;
- Find and rule that the sums due will bear interest at the rate of 5% as of 20/07/2015,
- Find and rule that the interest accruing per whole year must be capitalized pursuant to Article 1154, now Article 1343-2 of the Civil Code;
- Order the German company Mannheimer Versicherung AG to pay the company MMA Iard the sum of EUR 8,500 pursuant to Article 700 of the Code of Civil Procedure;
- Order Mannheimer Versicherung AG to pay all the costs and expenses of the proceedings, including the costs of translation of the summons and the judgement to be issued, in addition to the costs of enforcement;
- Reject any plea and/or claim contrary to these submissions.

14. In its latest submissions dated 11 February 2020, Mannheimer Versicherung AG asks the court to:

Pursuant to the Rome I Regulation, in particular Articles 3 and 7, and the CMR Convention of 1956 regarding the international carriage of goods by road, in particular Articles 5, 9, 17-4-c-d, 18-2 and 32;

First and foremost:
- UPHOLD the judgement issued by the Commercial Court of MEAUX dated 26/03/2019;
- Dismiss the claims, pleas, and submissions of the companies MMA Iard SA and Sostmeier SARL;

On a secondary basis:
- Find and rule that the risk of subcontracting was only covered by the insurance

policy of the company Mannheimer Versicherung AG under the condition that the insured party use German hauliers, and that the theft that occurred on 04 May 2015 during the collection of the goods from the MKM site by a Slovak haulier was therefore not covered by the insurance policy. Mannheimer Versicherung AG is entitled to enforce this exclusion clause.
- Find and rule that Mannheimer Versicherung AG is entitled under German law to decline cover on the grounds of a breach of the reporting obligations of the insured, Harz Express, and to cite this breach against the appellants.
- RULE that the appeal of companies MMA Iard SA and Sostmeier SARL is unfounded;
- Dismiss the claims, pleas, and submissions of the companies MMA Iard SA and Sostmeier SARL;

On a very secondary basis:
-Find and rule that the company Harz Express GmbH and the insurance company Mannheimer Versicherung AG must be exempted from all liability and the payment of any compensation because, pursuant to Article 17.2 CMR, the harmful event occurred outside the bounds of their responsibility, due to the existence of circumstances that the company Harz Express GmbH could not avoid and the consequences of which it could not obviate;
- Find and rule that the insurance company Mannheimer Versicherung AG is justified in its claim that the appellants' cover should be forfeited in the event that the insured is found to be at fault for a violation of its contractual obligations;
- Dismiss the claims, pleas and submissions of MMA Iard SA and Sostmeier SARL;

In any case:
- Order MMA Iard SA and Sostmeier SARL to each pay the insurance company Mannheimer Versicherung AG the sum of EUR 19,000.00 pursuant to Article 700 of the Code of Civil Procedure;
- Order MMA Iard SA and Sostmeier SARL to pay all the costs of the proceedings at first instance and on appeal.

IV- ARGUMENTS OF THE PARTIES

15. **The companies Sostmeier and MMA Iard** argue that the Slovak haulier is *ipso jure* liable for the disappearance of the goods, that because of the fraudulent actions of the said haulier substituted for Harz Express, Harz Express is liable for the acts of its substitute pursuant to Article 3 of the Geneva Convention of 19 May 1956, known as the "CMR" Convention and Article L.132-6 of the Commercial Code, that the acts thus committed constitute wilful misconduct under the provisions of Article 29 of the CMR, and an inexcusable fault pursuant to Article L.133-8. of the French Commercial Code, without any possible exclusion of liability; that the company Harz Express and its insurer must therefore be held liable; that having indemnified the intended recipient of the goods, and the company MMA Iard having itself indemnified the company Sostmeier, after deduction of the deductible remaining at the expense of the latter, they are admissible to bring direct action against the liability insurer of the company Harz Express, on the basis of Article L.124-3 of the Insurance Code.

16. They argue that French law is applicable, since it is, firstly, the law of the place of

the damage and, secondly, the law of the contract of carriage.

17. They argue that a French victim may bring a direct action under French law against a foreign insurer when the damage occurred on French territory, that in this case the victim of the theft (Fritec) had its registered office in France (Eckbolsheim – Alsace) and that the place of delivery was in France (Serris).

18. They state further that, to found his/her action against the insurer of the liable person, the victim of a contractual non-performance can choose between the law applicable to the contractual obligation that was breached and the law applicable to the insurance contract of which he/she is claiming the benefit. In this case, they argue that the direct action against the company Mannheimer Versicherung AG can be founded on the law applicable to the contract of carriage, as the company Harz Express is the guarantor of its Slovakian subcontractor Ludovit Vitko. They claim that, since the CMR does not contain provisions for direct action, the law applicable to the direct action must be determined in the light of Article 5(1) of the Rome I Regulation, which in this case designates French law because the place of delivery is in France, or alternatively, of Article 5(3) of the aforementioned Regulation because of the closer links with France, the relevant criteria being, according to them, the fact that Sostmeier is a French company, as is its client (Fritec), that the place of delivery was in France and that the damage was suffered in France.

19. In the alternative, they argue that their action is not time-barred as the inexcusable fault committed by the Slovak haulier entitles them not to a year but to a three-year statute of limitations to sue in court, the fact of having sub-chartered the carriage notwithstanding the absence of a formal authorization to do so also constituting an intentional fault prohibiting the opposing company from availing itself of the statute of limitations of one a year.

20. On the merits, they contest the opposability of the general terms and conditions of the insurance policy and object to any lapse of warranty, as well as to the existence of a deductible or exemption for absence of fault, or exclusion of warranty.

21. The German insurance company Mannheimer Versicherung AG asks the Court to uphold the judgement insofar as it held that the direct action against the haulier's insurance company is inadmissible on the grounds that German law is applicable and that under German law, direct action is not possible.

22. It argues that French law, and in particular Article L. 124-3 of the French Insurance Code establishing a right of direct action against the insurer, is not applicable to this dispute.

23. It states that whatever the conflict rule chosen, German law applies, whether it is because of the place of the damage, or because of the law applicable to the contract of carriage concerned or to the haulier's insurance contract.

24. It points out that the disputed contract of carriage concluded between the companies Sostmeier and Harz Express is subject to the CMR, that the CMR does not contain any provision on direct action and that German law applies in a suppletive way on this point, in the absence of a choice of law by the parties, pursuant to Article 5(1) of the Rome I Regulation, which refers to the law of the country in which the

haulier has his habitual residence, provided that the loading or delivery is also located in that country, or that the consignor resides there, that in this case the haulier, the company Harz Express, has its registered office in Germany which is also the place of loading and the consignor's registered office, that it is therefore German law that applies.

25. It contests the application of Article 5(3) of the Rome I Regulation in the absence of closer links with France for this dispute.

26. It argues, however, that since the Rome I Regulation does not contain any provision on direct action, the general rules of private international law should be applied, according to which the applicable law is that of the place of the damage, i.e., Germany.

27. Concerning the insurance contract between the companies Harz Express and Mannheimer Versicherung AG, it argues that pursuant to Article 7(2) of the Rome I Regulation on the agreement of the parties, the contract is governed by German law as provided for in the general conditions of the contract and that in any event, paragraph 2 of the same article provides for the application of the law of the place of the insurer's habitual residence, in this case Germany.

28. It infers therefrom that German law is applicable and that the direct action is therefore inadmissible.

29. The Court refers, for a more comprehensive presentation of the parties' facts and assertions, to the decision rendered and the aforementioned submissions, under the provisions of Article 455 of the French Code of Civil Procedure.

V- REASONS FOR THE DECISION:

Concerning the admissibility of the direct action against the haulier's insurer

30. The admissibility of the direct action brought by the company Sostmeier and his insurer MMA Iard, companies incorporated under French law, against the haulier's insurer, the German insurance company Mannheimer Versicherung, depends on the applicable law, it being observed that German law does not recognize such direct action against the insurer, be it in tort or contract, whereas French law does recognize it, Article L 124-3 of the Insurance Code providing that "*the injured third party has a direct right of action against the insurer covering the civil liability of the person responsible*".

31. In this case, the dispute relating to the road carriage of goods collected in Germany and scheduled to be delivered to France, the international nature of the carriage is established and leads to the application of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which is a matter of public policy and which excludes the application of national law except on the points where it refers to national law or on those which it does not regulate.

32. Nevertheless, the CMR is silent on the direct action of an injured party against the haulier's insurer and, as such, in order to determine the admissibility of the direct action, it is appropriate to seek the applicable law according to the conflict of laws

rules which result either from Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("Rome I") or from Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") and, in the absence of rules derived from these texts, according to the rules of French private international law.

33. In this regard, Sostmeier having concluded a contract of carriage with the company Harz Express, a German company insured by the German insurance company Mannheimer Versicherung AG, it is appropriate to apply the Rome I Regulation in order to assess the admissibility of direct action against Mannheimer Versicherung AG.

34. On this point, contrary to "Rome II" Regulation, which provides that "*The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides*.", the Rome "I" Regulation makes no provision for the admissibility of a direct action against a life and health insurer for damages arising from a contractual obligation.

35. Consequently, in accordance with the conflict of laws rule of ordinary French law in matters of contractual liability, the injured party may act directly against the insurer of the person liable for damages if the law applicable to the contractual obligation or the law applicable to the insurance contract so provides, this rule being, moreover, consistent with the above-mentioned Article 18 of the "Rome II" Regulation.

About the Law applicable to contractual obligations

36. Pursuant to Article 5(1) of the Rome I Regulation, applicable to determine the law applicable to the disputed contractual obligation, "*To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the haulier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.*"

37. Article 5(3) of the same regulation provides that, "*Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, 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.*"

38. In this case, the place of habitual residence of the haulier Harz Express as well as the place of loading of the goods are Germany, irrespective of whether the company Harz Express carried out the transport itself or subcontracted it.

38. Thus, the appraisal of the admissibility of the direct action by Sostmeier against the insurer must be made in the light of German law, without the application of Article 5(3) of the "Rome I" Regulation, since the dispute is not closely connected with France. Though the company Sostmeier and the place of delivery were located in France, it should be noted that the consignor, the company MKM, which has been

compensated for its loss, is a company incorporated under German law with its registered office in Germany and that the theft of the goods took place in Germany.

About the law applicable to the insurance contract.

40. The law applicable to the insurance contract is determined by the provisions of the "Rome I" Regulation, which contains provisions specific to the insurance contract in its Article 17, in the absence of a law chosen by the parties.

41. However, in this case, it is not disputed that the company Harz Express took out insurance policy n° M0001 F-TH004521993 with the company Mannheimer Versicherung, with Article 15.1 of the General Terms and Conditions of said policy providing that the contract shall be governed by German law.

42. The choice of the parties shall prevail and German law shall therefore apply to this contract.

43. By virtue of the foregoing and of the application of German law, both to the contract of carriage and to the contract of insurance, the companies Sostmeier and MMA Iard cannot base their direct action against the insurance company Mannheimer Versicherung AG on Article L.124-3 of the French Insurance Code, since French law is not applicable to decide this question of admissibility.

44. However, as mentioned above, and not disputed, German law does not recognize a direct action against the insurer.

45. Since the direct action by the companies Sostmeier and MMA Iard against the insurance company Mannheimer Versicherung AG is not permitted under German law, their claims against Mannheimer Versicherung AG are not admissible.

46. Without the need to rule on the claims in the alternative, the decision of the first judges will therefore be upheld in all its provisions.

47. It Is appropriate to grant Mannheimer Versicherung AG's request for indemnification under Article 700 of the French Code of Civil Procedure, within the overall limit of EUR 15,000, based on the information included in the file.

ON THESE GROUNDS

The Court

- Upholds the judgment rendered by the Meaux Commercial Court dated 27 March 2019 which declared the claims of companies Sostmeier and MMA Iard inadmissible.
  And,
- Orders the companies Sostmeier and MMA Iard to pay the company Mannheimer Versicherung AG the amount of EUR 15 000 under Article 700 of the French Code of Civil Procedure.
- Dismisses all the claims of the companies Sostmeier and MMA Iard.
- Orders the companies Sostmeier and MMA Iard to pay the costs of the proceedings.

The Court clerk ***The President of the Court***

C. GLEMET ***F. ANCEL***