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

PARIS COURT OF APPEAL

International Commercial Chamber

Division 5 - 16

JUDGMENT OF 6 JULY 2021

(No , 10 pages)

General Directory Entry Number: **RG No 21/03597 – Portalis No 35L7-V-B7F-CDFKQ**

Decision referred to the Court: Judgment of the Paris Commercial Court dated 19 January 2021 (RG No 2019047090)

APPELLANT:

Simplified joint-stock company NOVACID

Registered with the Trade and Companies Register of Lyon under the number 420 609 968
Having its registered office at 21 Chemin De la Sauvegarde 21 Ecully Parc Cs 33167 – 69134 ECULLY
Represented by its legal representatives,

Simplified joint-stock company SEQENS

Registered with the Trade and Companies Register of Lyon under the number 444 465 736
Having its registered office at 21 Chemin De la Sauvegarde Cs 33167 21 Ecully Parc – 69134 ECULLY
Represented by its legal representatives,

Simplified joint-stock company FERACID

Registered with the Trade and Companies Register of Nanterre under the number 522 023 100
Having its registered office at 158 Avenue de Stalingrad 92700 COLOMBES
Represented by its legal representatives,

Represented by Counsel (), member of the Paris Bar, mailing box: . Having as pleading lawyer Counsel ()

RESPONDENT:

Simplified joint-stock company RHODIA OPERATIONS

Registered with the Trade and Companies Register of Bobigny under the number 622 037 083
Having its registered office at 90 boulevard National - 92250 LA GARENNE COLOMBES
Represented by its legal representatives,
Represented by Counsel (), member of the Paris Bar , mailing box:

Simplified joint-stock company RHODIA CHIMIE

Registered with the Trade and Companies Register of Bobigny under the number 642 014 526

Having its registered office at 52 rue de la Haie Coq - 93300 AUBERVILLIERS
Represented by its legal representatives,
Represented by Counsel (), member of the Paris Bar mailing box: L0010. Having as pleading Counsel ()

COMPOSITION OF THE COURT:

In accordance with the provisions of Articles 805 and 907 of the Code of Civil Procedure, the case was heard on 25 May 2021 in open Court, the lawyers, informed of the composition of the court for the deliberation, not having objected, before Mr. François ANCEL, President, in charge of the report and Mrs. Laure ALDEBERT, Judge.

The judges reported the oral arguments in the Court deliberation, composed of:
Mr. François ANCEL, President
Mrs. Fabienne SCHALLER, Judge
Mrs. Laure ALDEBERT, Judge

Clerk at the hearing: Inès VILBOIS

JUDGMENT:

- ADVERSARIAL

- publicly delivered by François ANCEL, President

- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.

- signed by François ANCEL, President and by Inès VILBOIS, Clerk in charge to whom the minute of the decision was delivered by the signatory judge.

I – STATEMENT OF FACTS

1-The Rhodia group, which operated the Pont de Claix chemical platform (Isère) for the manufacture of chlorine and its derivatives, divested part of its activities in 2002.

2-In this context, Rhodia Chimie proceeded, under the terms of a Division Deed by volumes dated 17 and 18 June 2002, to the division of the plots of this chemical platform, providing in particular that the surface of mine-heads I1 and J1 was allocated to Rhodia Intermédiaire (now Rhodia Opérations), with the underground (subsoil) remaining the property of Rhodia Chimie.

3-By a Share and Purchase Agreement (SPA) issued on 31 October 2002, Seqens (successor in law to the rights of Fève 1 and then Novacap) acquired the shares of Rhod L (now Novacid) from Rhodia Intermédiaire, which became Rhodia Opérations.

4-In a partial asset contribution agreement issued on 13 November 2002, Rhodia Opérations (formerly Rhodia Intermédiaire), in exchange for the allocation of 458,476 new shares in Rhod L, contributed to Rhod L (now Novacid, a subsidiary of Seqens) of the branch of activity specialized in the research, manufacture, purchase and sale of hydrochloric acid and derived products, these activities being carried out from several establishments located in particular at Le Pont de Claix on the chemical platform.

5-In 2009, Novacid and Feralco Environnement undertook to operate a ferric chloride production activity, within the company Feracid created for this purpose.

6-The new production unit was to be installed on the J1 mine-head of the Pont de Claix chemical platform. In this context, the construction of the new workshop involved the excavation of materials located in the subsoil of J1 mine-head, belonging to Rhodia Chimie .

7-In June 2010, following a request from Novacid, Rhodia Opérations gave to Novacid permission to store on the neighboring I1 mine-head, which it owned, the soil excavated from J1 mine-head for a period of two months, time needed to allow the company to analyze this soil.

8-On 19 August 2010, a bailiff's certified report was drawn up at the request of Novacid on the disputed site, attesting the presence of tar galette and "very ancient" barrels.

9-In a letter dated 27 October 2014, Rhodia Opérations gave Novacid formal notice to evacuate the soil stored on its land (I1 mine-head) within 30 days and to restore it.

10-In a letter dated 24 November 2014, Novacid, considering that the waste and barrels excavated and stored on I1 mine-head were produced and stored by Rhodia Chimie, owner of the subsoil of J1 mine-head, refused this request, as it did not wish to bear the cost of treating this waste.

II - PROCEEDINGS

11-Rhodia Opérations summoned Novacap (now SEQENS), Novacid and Feracid in interim proceedings, and then for a substantive examination of the case, before the Lyon Commercial Court on 19 June 2015 and 28 September 2015 respectively, in order to obtain the evacuation of the soil.

12-In a summons issued on 15 September 2015, Novacap, Feracid and Novacid summoned Rhodia Opérations and Rhodia Chimie before the Paris Commercial Court in order to obtain damages in the amount of €119,745.91 corresponding to the costs related to the environmental situation of the excavated materials, to the costs of laboratory analysis and to those related to the implementation of a protection and monitoring system for the storage of materials.

13-The parties then discontinued the proceedings and tried to reach an amicable agreement, but without success.

14-Rhodia Opérations summoned Novacid, Seqens and Feracid before the Lyon Commercial Court on the same claims on 21 June 2019.

15-According to a summons issued on 2 August 2019, Novacid, Feracid and Seqens summoned Rhodia Opérations and Rhodia Chimie before the Commercial Court of Paris in order to have their liability acknowledged for the pollution noticed on the J1 mine-head, and to recover damages in the amount of €177,508.19.

16-In a judgment dated 15 December 2020, the Lyon Commercial Court stayed the proceedings pending the outcome of the proceedings before the Paris Commercial Court.

17- Before the Paris Commercial Court, Rhodia Opérations and Rhodia Chimie, under Articles 75 et seq. and 1448 of the Code of Civil Procedure, raised an objection to jurisdiction in favor of an arbitration court designated pursuant to Article 11.10 of the SPA for the purposes of an arbitration governed in accordance with the arbitration rules of the International Chamber of Commerce.

18-In a judgment dated 19 January 2021, the Paris Commercial Court held, particularly, that the arbitration clause invoked was not manifestly unenforceable and thus referred the parties to better lodge their claims.

19-Novacid, Seqens and Feracid appealed this judgment on 25 February 2021, and after being authorized to do so by an order dated 9 March 2021, these companies summoned Rhodia Opérations and Rhodia Chimie on 11 March 2021 to appear at a hearing on 4 May 2021 before the International Commercial Chamber.

20 At this hearing, the case was remitted to 25 May 2021.

III – CLAIMS OF THE PARTIES

21-Under the terms of their latest submissions signified on 12 March 2021, NOVACID, SEQENS and FERACID ask the Paris Court of Appeal to:

Principally, in limine litis,

- SET ASIDE the judgment rendered by the Commercial Court on 19 January 2021;

In the alternative,

- OVERTURN, the judgment handed down by the Paris Commercial Court dated 19 January 2021 in that it:
 - Declared the simplified single shareholder company RHODIA OPÉRATIONS and the simplified single shareholder company RHODIA CHIMIE admissible in merits in their objection to jurisdiction;
 - Held that the arbitration clause stipulated in Article 11.10 of the SPA is not manifestly inapplicable to the requests made by NOVACID, SEQENS and FERACID;
 - Referred the parties to better lodge their claims;
 - Ordered SEQENS (formerly NOVACAP), NOVACID and FERACID in solidum to pay the costs of the proceedings;

Accordingly, and in any event, in a further hearing,

- DISMISS the objection to jurisdiction of RHODIA OPÉRATIONS and RHODIA CHIMIE;
- REFER the case to the Paris Commercial Court;
- ORDER in solidum RHODIA OPÉRATIONS and RHODIA CHIMIE to pay ten thousand (10,000) euros to SEQENS (formerly NOVACAP), NOVACID and FERACID under Article 700 of the Code of Civil Procedure and to full costs of the proceedings.

22 - Under the terms of their latest submissions notified on 28 April 2021, RHODIA OPÉRATIONS and RHODIA CHIMIE request the Paris Court of Appeal, pursuant to Articles 75 et seq., 455 and 458, 1445 et seq. of the Code of Civil Procedure, to:

- DISMISS NOVACID, SEQENS and FERACID from their request to have the judgment set aside;
- UPHOLD the judgment handed down by the Paris Commercial Court on 19 January 2021 in all its provisions;
- ORDER jointly Seqens (formerly Novacap), Novacid and Feracid to pay five thousand (5,000) euros to RHODIA OPÉRATIONS and five thousand (5,000) euros to RHODIA CHIMIE under Article 700 of the Code of Civil Procedure and to pay full costs of the proceedings.

IV – REASONS FOR THE DECISION

On the request to set aside the judgment

23- Novacid Seqens and Feracid request that the appealed judgment be set aside for lack of reasons under Articles 455 and 458, 1st paragraph, of the Code of Civil Procedure, on the ground that the court did not

respond to at least two pleas they had raised, then failing to comply with its obligation to state reasons. On the one hand, they argue that the judgment did not respond to their plea to preclude the application of the SPA, which includes the arbitration clause, simply stating, without reasoning, that it applies to the litigation. On the other hand, they argue that the judgment does not respond to the plea of tortious liability of Rhodia Opérations and Rhodia Chimie in relation to their legal obligations resulting from their official capacity as last operators of a classified facility for the protection of the environment.

24- Moreover, they argue that the reasons of the judgment of the Paris Commercial Court contradict its operative part as the Court ruled on the extension of the arbitration clause to FERACID without justification.

25- In response, Rhodia Opérations and Rhodia Chimie request the dismissal, on the ground that the Court responded to the appellants' pleas, judging that the guarantees provided by the SPA covered all types of pollution, whether or not it is linked with the transferred activities and even if it affected non-transferred assets. Furthermore, they argue that the Court gave reasons for its decision regarding the fact that the excavated products came from the subsoil of the mine-head belonging to Rhodia Chimie, third party to the SPA, as well as regarding the issue of tortious liability, and contest any inconsistency between the reasons and the operative part of the judgment.

THEREUPON,

26- In this case, it results from the judgment handed down on 19 January 2021 by the Paris Commercial Court that, to respond to the pleas raised by Novacid, Seqens and Feracid according to which the assets involved have not been transferred to Rhod L (which became Novacid), the pollution has not been caused by the activity transferred to Rhod L under the SPA and the contentious materials belong to a third party to the SPA, the Paris Commercial Court did not "*simply state*", as the appellants claim, that "*the elements of the dispute are closely related to the activity transfer operation, notwithstanding the fact that the excavations' products might not be directly linked to the transferred activities, the fact that the pleas of the action deal with the defendants' quasi-tortious liability, not with the direct application of the SPA, lastly the fact that RHODIA CHIMIE is not directly a party to the SPA*".

27- Indeed, the Commercial Court, which noted that the SPA "included environmental compensation provisions for pollutions caused by the transferred activities but also for releases of pollutants other than those used in these activities", stated reasons for its decision on the indivisibility of the set made of the Division Deed in volume, the asset contribution agreement and the SPA concluded between June and October 2002.

28- For this purpose, the Court noted that "the parties do not contest that the SPA binding Seqens and Rhodia Opérations, and the partial asset contribution agreement binding Rhodia Intermédiaire which became Opérations, and Rhodia L which became Novacid, form an indivisible contractual unit concluded for a single transfer operation". The Court added that "in this context, the transfer of volume 519 (mine-head J1) is concerned, as well as its attached easements, and this transfer has been confirmed by a complementary deed dated 1st October 2003; that consequently Novacid's right of scouring, of the subsoil owned by Rhodia Chimie, defined in the Division Deed, is part of the transfer operation". Lastly, the Court noted that "Rhodia Chimie is part of the Rhodia group and the activity transfer it undertook was an essential component to the activity transfer process".

29- On these grounds, the Court concluded that "the set made of the Division Deed by volume, the asset contribution agreement and the SPA concluded between June and October 2002 forms an indivisible complex transfer operation of the activity and the assets related to it".

30- The Commercial Court then judged, responding to the plea raised, that Rhodia Chimie, "although not a signatory of the SPA" was "a stakeholder to the transfer operation", adding that this company was also "favourable towards a litigation process within the arbitration framework provided for in the SPA".

31- Thus, after having noted the close links between "*the elements of the litigation*" and the activity transfer

operation, the Court was able to dismiss the arguments based on the fact that the excavation products *“cannot be in direct link with the transferred activities, the fact that the pleas of the action deal with the defendants’ quasi-tortious liability and not with the direct application of the SPA, finally the fact that RHODIA CHIMIE is not directly a party to the SPA”*.

32- Lastly, there is no contradiction between the reasons and the operative part of the judgment, the Court having simply drawn the consequences of the indivisibility of the recorded operation, to state in its operative part that the arbitration clause was not manifestly inapplicable to rule on “the requests” made by the companies Novacid, Seqens and Feracid.

33- According to all these elements, the judgment of the Commercial Court does not show lack or contradiction of reasons so that the request to have this judgment set aside shall be dismissed.

On the competent forum to hear the dispute;

35-Novacid, Seqens and Feracid argue that the arbitration clause stipulated in Article 11.10 of the SPA is inapplicable on the ground that the asset of the subsoil of the J1 mine-head from which the disputed materials originate is outside the scope of the SPA, that the pollution in question is historical and thus unrelated to the activities transferred under the SPA and with the 2002 transfer operation and that the removed materials come from a subsoil which belongs to Rhodia Chimie, a third party company to the SPA.

36-They also argue that the arbitration clause is manifestly inapplicable in so far as their claims are based on Rhodia Operations and Rhodia Chimie’ tortious liability. They add that those companies are subject to the compulsory obligation of the last operator to restore an installation classified for the protection of the environment, which defeats the principle according to which contractual liability excludes tortious liability.

37-They deny the indivisible nature of the operation, as held by the Commercial Court, on the ground that the SPA, the asset contribution agreement and the Division Deed by volume do not have the same purpose or cause and follow different implementation conditions in their temporalities.

38-Lastly, they argue that the disputed arbitration clause cannot be invoked against Feracid since it did not accept it and did not succeed to the rights and obligations of a party who initially accepted it, under Article 2061 of the Civil Code.

39-In response, Rhodia Opérations and Rhodia Chimie maintain that the compensation for the prejudice linked to historical pollution is governed by the SPA, which is part of an indivisible contractual unit consisting of the Division Deed, the contribution Agreement and the SPA. To this end, they argue that the division by volume was necessary for the contribution agreement signing and that the overall operation was completed by the SPA, which covers the partial asset contribution Agreement and all the assets linked to the acid distribution and storage activity. They added that the environmental guarantees stipulated in Article 9.2 of the SPA cover both pollution resulting from the transferred activity and historical pollution that is unrelated to the transferred activity.

40-They argue that it is irrelevant that the subsoil belongs to a third party to the SPA, Rhodia Chimie, since the latter is a party to the Division Deed, which is part of the indivisible contractual unit/ whole, and that it is in favor of dealing with the dispute in the arbitration framework provided in the SPA.

41-They also argue that Feracid has no interest to initiate an action against them because it had no right to excavate land from the subsoil belonging to Rhodia Chimie, so that it is irrelevant whether or not Feracid was a party to the transfer operation and whether or not it accepted the arbitration clause.

42-Lastly, they exclude the tort basis of the appellants' action on the ground that the SPA is applicable, since Article 8.7 of the SPA provides that any claim for compensation can only be made on the basis of the SPA itself, and that cumulative actions in contract and in tort is prohibited. They also emphasize that the dispute does not concern compliance or non-compliance with an obligation to restore ceased industrial activities, but rather the liability associated with the excavation.

THEREUPON,

43-According to Article 1448 of the Code of Civil Procedure "*When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable*".

44-In this case, the action initiated before the Paris Commercial Court by Novacid, Seqens and Feracid seeks to engage the tortious liability of Rhodia Opérations and Rhodia Chimie for the pollution of the J1 mine-head located on the Pont de Claix chemical platform and to obtain compensation for the damage they claim to have endured.

45-In this respect, it is clear from the information submitted that the industrial activities conducted by Novacid, Seqens and Feracid on this platform, and in particular on the J1 mine-head, were the result of the transfer by Rhodia Opérations (then called Rhodia Intermédiaire) of its research branch, the manufacture, purchase and sale of hydrochloric acid and its derivatives products to Novacid (then called as Rhod L) from several facilities located on this chemical platform, under the terms of a partial asset contribution agreement issued on 13 November 2002, in exchange for the allocation to its profit of 458,476 new shares in Rhod L.

46-This contribution followed a Deed initiated by Rhodia Chimie on 17 and 18 June 2002 dividing the plots of this same chemical platform into volumes, which particularly assigned to Rhodia Opérations (at the time Rhodia Intermédiaire) the surface area of mine-head I1 (volume 516) and J1 (volume 519), the subsoil, in contrast, remaining the property of Rhodia Chimie and an article entitled "*Scouring*" stipulates that "*the owners of the volumes covered by this description shall have the right to excavate the ground and to carry out any excavation subject to observing the procedures and rules applicable on the PONT DE CLAIX Site and to obtaining the necessary administrative authorizations. Consequently, the owner of the subsoil volume lots shall bear the presence of the installations or equipment that would be carried out in this respect by the owner of the upper volume lot as an easement*".

47-It is not disputed that the aforementioned volume 519 is part of the assets transferred under the aforementioned partial asset contribution agreement of 13 November 2002 to Novacid.

48- Lastly, it is undisputed that by share and purchase agreement (SPA) dated 31 October 2002, effective 31 December 2012, which refers in its preamble to the partial contribution agreement, Rhodia Opérations transferred its shares in Rhod L (now Novacid) to Seqens.

49-It is not disputed that this contract contains provisions to guarantee the purchaser against possible environmental damage and that Article 9. 2 (c) of the SPA also deals with "*Release of Contaminants other than those used in, produced by or derived from the conduct of the Hel Business, the Soda Product Business or the Phenol Business*", so that this guarantee could concern pollution other than those linked to the transmitted activity.

50-Furthermore, under Article 11.10 of this SPA, an arbitration clause is inserted which states that "*Subject to the provisions of Articles 2.3.2 (Financial Statements), 2.7 (Earnout), 4.1.5 (Non-Competition), 4.3.9 (Establishment of a Joint Study), 8.1(g) (vii), 8.3(b) ("When payable"), 9.2(e) (Vendors' Environmental Warranty), 9. 4 (Allocation of Joint Liability), and 10.1(a) (Lenoncourt Mine), any dispute, claim or controversy (hereinafter, a "Dispute"), in connection with this Agreement that is not resolved by the Parties shall be finally settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce [....]*". (Emphasis added by the Court).

51-These elements show that there is no obvious absence of any link between the litigation initiated by Novacid, Seqens and Feracid before the Commercial Court and this arbitration clause, which is inserted in a contract that is part of a larger operation involving the transfer of a branch of activity by Rhodia Opérations, in conjunction with Rhodia Chimie, to Novacid, irrespective of the tortious or contractual nature of the action taken by the former.

52 Furthermore, although Feracid is not a party to the SPA, it is not disputed that this company was created by Novacid and Feralco Environnement for the purpose of operating the branch of activity thus transferred by Rhodia Opérations and carried out on the disputed site.

53-Considering that Feracid is directly involved in the operation of this activity on the site from which the disputed products were excavated and potentially concerned by the consequences of pollution, it cannot be concluded from the outset that Feracid has no connection with the dispute and the arbitration agreement.

54-According to all these elements, from which it is not clear that the arbitration agreement is inapplicable either because of the subject matter or because of the parties to the dispute, it is primarily for the arbitration Court to decide on its jurisdiction.

55. Consequently, the judgment of the Paris Commercial Court shall be upheld.

Costs and expenses of the proceedings:

56- Novacid, Seqens and Feracid, the losing parties, shall be ordered to pay the costs of the proceedings.

57- In addition, they shall be ordered in solidum to pay to Rhodia Opérations and Rhodia Chimie, which had to incur unrecoverable costs in order to assert their rights, damages under Article 700 of the Code of Civil Procedure, which it is fair to set for each one at the sum of €3,500.

V- OPERATIVE PART

For these reasons, the Court:

- 1- Dismisses Novacid, Seqens and Feracid of their request to set aside the judgment;
- 2- Upholds the judgment handed down by the Paris Commercial Court on 19 January 2021;

Adding,

- 3- Orders in solidum Novacid, Seqens and Feracid to pay to each of the companies Rhodia Opérations and Rhodia Chimie the sum of €3,500 under Article 700 of the Code of Civil Procedure.
- 4- Orders in solidum Novacid, Seqens and Feracid to pay the costs of the proceedings.

The Clerk
Inès VILBOIS

The President
François ANCEL