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FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16

International Commercial Chamber

JUDGMENT OF 22 JUNE 2021

(N° , 6 pages)

Proceedings for the setting aside of an arbitral award

General Directory Entry Number: **RG 21/07623 - N° Portalis**
35L7-V-B7F-CDQZJ

Decision referred to the Court: Judgment of the Paris judicial court of (...)

CLAIMANT IN THIS

Company SAAD BUZWAIR AUTOMOTIVE CO

Registered under Qatari law,

Having its offices at PO BOX 59220 DOHA QATAR

Represented by its legal representatives,

Represented by Counsel (...), lawyer at the PARIS bar.

RESPONDENT IN THIS ACTION

Mr. G.

Domiciled (...)

Germany

Represented by Counsel (...), lawyer at the PARIS bar.

COMPOSITION OF THE COURT

In accordance with Articles 805 and 907 of the French Code of civil procedure, the case was heard on 10 May 2021, in open Court, after the lawyers were informed of the court's composition and did not object, before Mr. François ANCEL, President, in charge of the report and Ms. Fabienne SCHALLER, judge.

Taking into consideration the pleadings in their deliberation, before the Court composed of:

Mr. François ANCEL, President

Ms. Fabienne SCHALLER, Judge

Ms. Laure ALDEBERT, Judge

Clerk at the hearing: Ms. Inès VILBOIS

ON THESE GROUNDS

JUDGMENT:

- ADVERSARIAL

- presented in open Court 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 French Code of civil procedure.

- Signed by François ANCEL, President and by Inès VILBOIS, Clerk present when the decision was delivered.

I- STATEMENT OF FACTS AND PROCEEDINGS

1- On 1st July 2007, the Qatari law company, Saad Buzwair Automotive Co (hereinafter SBA) concluded with the Emirati law company Audi Volkswagen Middle East Fze (hereinafter AVME) two contracts containing arbitration clauses designating Paris as the seat of the arbitration under the aegis of the ICC.

2- On 14 March 2011, AVME notified its decision not to renew these two contracts after 30 June 2012.

3- Objecting to the nonrenewal of the contracts, SBA started on 8 February 2013 arbitral proceedings.

4 –By an award handed down on (...), the arbitral tribunal ruled that AVME was entitled not to renew these contracts, dismissed SBA's request for damages based on the wrongful termination of commercial relationships, and ordered the latter to pay the arbitration costs as well as all the costs and fees exposed by AVME.

5- Considering that one of the arbitrators, Mr. G. had omitted to disclose the existing relationship between the law firm where he is a partner and the Volkswagen group to which AVME is part, SBA filed on 20 April 2016 a request to set aside the arbitral award of (...).

6- By decision of 27 March 2018, the Paris court of appeal set aside the award on the ground that the arbitral tribunal was irregularly composed due to Mr. G.'s failure to disclose and ordered AVME to pay to SBA the

amount of 100.000 euros in application of article 700 of the Code of civil procedure.

7- By decision of 3 October 2019, the first chamber of the Cour de cassation dismissed the appeal filed against the 27 March 2018 decision.

8- By writ of 30 October 2018, SBA summoned Mr. G. to be declared contractually liable and ordered to pay certain sums for the fees exposed for its defense as well as arbitrators' and counsel's fees incurred in the proceedings for setting aside the arbitral award.

9- By decision of (...), the Paris judicial court found that it had no jurisdiction to rule on the action in liability brought against Mr. G. on the grounds of article 7.1 of Regulation n°1215/2012 of 12 December 2012 (hereinafter "Brussels Recast Regulation") and ordered SBA to pay to Mr. G. the amount of 100.000 euros in application of article 700 of the Code of civil procedure.

10- By Notice of 26 April 2021, SBA appealed the decision seeking the "ground of jurisdiction" to be overturned. After being authorized by order of the 21 April 2021, SBA, by deed, assigned on 4 May 2021 Mr. G. before the international commercial chamber of the Paris court of appeal for a hearing on 10 May 2021.

II – CLAIMS OF THE PARTIES

11- According to its latest submissions sent electronically on 7 May 2021, SAAD BUZWAIR AUTOMOTIVE CO requests the Court, under Article 46 of the French Code of civil procedure, to :

- Overturn the decision of the judicial court of (...) between SBA and Mr. G.;
- Rule that the judicial court has jurisdiction to hear SBA's requests and reject Mr. G's requests on that ground;
- Refer the parties to the Paris judicial court to hear the case on the merits;
- Order Mr. G. to pay to SBA 10.000 euros in application of article 700 of the Code of civil procedure, and the entire costs of proceedings.

12- According to its submission of 10 May 2021, Mr. G. requests the Court to :

- Uphold the decision of the judicial court of (...);
- Order Saad Buzwair Automotive Co to pay the entire costs of the proceedings and to pay the amount of 30.000 euros to Mr. G. in application of article 700 of the Code of civil procedure for the appeal procedure and the entire costs to the benefit of the Selarl (...) Paris-Versailles.

III – CLAIMS OF THE PARTIES

13- **SBA** claims that Brussels Recast Regulation should not be applicable to the case according to its article 1.2(d) that excludes "arbitration" from its scope. It adds that the action in liability in this case finds its origin in the violation by the arbitrator of his obligation to disclose which results from the arbitrator's contract and French arbitration law, and that it necessarily falls under the scope of arbitrable matters according to article 1.2(d) of the Regulation, contrarily to what was found by the judicial court.

14- SBA considers that it would be pertinent to refer to the national rules on territorial jurisdiction which are applicable to international situations and claims that the judicial court's jurisdiction shall be determined on the grounds of article 46 of the Code of civil procedure, which gives, in contractual matters, jurisdiction to the court of "the place where the services are supplied", which in this case is Paris, on the grounds that the arbitration seat is the place of execution of the contract's characteristic performance, which is to arbitrate.

15- SBA adds that the arbitration seat is the only place that can be considered as the location of the provision of services in the case of an arbitrator's contract and that the locations raised by Mr. G. before the judicial court relating to the arbitrators' nationality or their place of residence are unsupported. SBA also challenges Mr. G.'s argumentation whereby the only place "that should be considered is where the services are effectively supplied by arbitrators".

16- In the alternative, SBA claims that, if Brussels Recast Regulation is applicable, the Paris judicial court's jurisdiction should be recognized pursuant to article 7.1. which states that the court which has jurisdiction to hear a dispute on the provision of services is the place where, under the contract, the services were provided or should have been provided. SBA argues that in this case, the arbitrator has or should have provided his services in Paris. SBA states that establishing the seat has major legal implications and that the Terms of Reference signed by both SBA and Mr. G. specified that the arbitration was to take place in Paris. SBA emphasizes that by accepting their mission, arbitrators agree to their obligation to arbitrate in a procedure having its seat in France and, consequently, confirmed that their obligations were to be executed in accordance with the parties' agreement, namely to have arbitral proceedings with its seat in France.

17- **In reply, Mr. G.** claims that jurisdiction must be determined in application of Brussels Recast Regulation, which is binding for the judge when the defendant is, as in this case, "domiciled on a Member State's territory", and its article 7.1. establishes the applicable jurisdiction rules for an action of a "contractual nature", as is the one engaged by SBA.

18- He adds that the exclusion established by article 1.2(d) does not exclude every dispute linked more or less closely to arbitration but only the ones that aim at executing and finalizing arbitral proceedings, especially the recognition and enforcement of awards, by releasing national courts from challenges that could result from the Regulation's jurisdictional rules. He believes that the exclusion does not apply to procedural rules that support the achievement of arbitration or could affect it, in its existence (constitution of the arbitral tribunal), in motions during the proceedings or even in the challenge of the award, which is not the case of an action in liability against the arbitrator.

19- Mr. G. considers that in relation to provision of services, the court with jurisdiction shall be the court where the disputed obligation was executed, meaning "in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided" (article 7.1b), and by exercising his intellectual office as arbitrator mostly in Germany, in application of article 7.1.b) of the Regulation, SBA's action gives jurisdiction to German courts even though the parties had established the seat of arbitration in Paris.

20- He specifies that it is effectively in Germany that the services were supplied since it is where he worked, he was established, where hearings were held, and where the arbitral tribunal deliberated, due to the three arbitrators' German nationality and domicile.

21- Mr. G. adds that in any case, Article 46 of the Code of civil procedure also leads to dismissing French courts' jurisdiction in favor of German courts', this text giving jurisdiction to the place where the services were effectively provided and that the place of the arbitrator's contract execution is therefore not identified by the seat of the arbitration which is a legal fiction.

IV – REASONS FOR THE DECISION

On the application of Regulation (EU) n°1215/2012 of 12 December 2012 to determine the court with jurisdiction:

22- The subject matter of this dispute is a liability action brought by a Qatari company, party to arbitration proceedings with a seat in Paris, against one of the arbitrators, resident in Germany, who is alleged to have breached his contractual obligations under an arbitrator's contract. The court is seized with a dispute of an international nature that raises the question of the application of Regulation (EU) n°1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

23- In application of article 1.2 (d) of Brussels Recast Regulation, "this Regulation shall not apply to: (...) d) arbitration (...)".

24- In accordance with Recital 12 of this Regulation, which is a non-exhaustive list, "A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question".

25- Moreover, it results from the Court of Justice of the European Union, interpreting the disposition of Brussels Convention of 27 September 1968, equivalent to article 1.2 (d) of the Regulation n°1215/2012, that “by excluding arbitration from the scope of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, by virtue of Article 1(4) thereof, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts” (ECJ, C-190/89, case Rich, decision of 25 July 1991 point 18 and also ECJ case Van Uden of 17 November 1998, paragraph 31).

26- The liability action against an arbitrator once an award has been set aside due to his failure to comply with his obligation to disclose is tightly linked to the constitution of the arbitral tribunal and the conduct of the arbitral proceedings since its purpose is to establish if the arbitrator has, in accordance to his obligations set in the arbitrator's contract, performed his mission, which forms part of implementing arbitration.

27- In this sense, this action, even if it could be governed by the general law of civil liability on the merits, is arbitrable matter.

28- Consequently, it shall be held that this action is covered by the exclusion of article 1.2 (d) of the Regulation, which is therefore not applicable to designate the court with jurisdiction.

On the designation of the court with jurisdiction;

29- In application of article 46 of the French Code of civil procedure, extended to the international order, the plaintiff can seize, besides the jurisdiction of the defendant's domicile, in contractual matter, the jurisdiction of “the place where the services are supplied”.

30- In the presence of international arbitration, and unless requested otherwise by the parties, the judge of the place where the services are supplied to rule on an action in liability against the arbitrator for his execution of the arbitrator's contract is the jurisdiction where the arbitration seat is located.

31- The arbitrator's contract forms part of the ambivalent nature of arbitration, contractual by its source and judicial by its object, and results from the arbitration clause to which it is strictly linked.

32- Therefore, to supply his services, an arbitrator must accomplish his mission to rule on the dispute submitted by the parties and hand down an award at the arbitration seat chosen or agreed on by the parties.

33- Consequently, due to the particular nature of the arbitrator's contract, which is closely linked to the arbitration agreement, it should be considered that the place where the services are supplied by the arbitrator is located at the arbitration seat, even if the arbitration proceedings and the arbitrators' reasoning, could, with the parties' agreement, happen in other locations.

34- In this case, it is well-established that the arbitration seat was Paris, France.

35- It is therefore appropriate to consider that the judicial court of Paris has jurisdiction to rule on the claim and overturn the decision.

On the costs and expenses ;

36- Mr. G., the losing party, shall be ordered to pay the costs of the proceedings.

37- In addition, he shall be ordered to pay to SBA, which had to incur unrecoverable costs in order to assert its rights, damages under Article 700 of the French Code of civil procedure, which it is fair to set at the total sum of 10.000 euros.

V- FOR THESE REASONS

The Court,

1- Overturns the decision of the Paris judicial court of 31 March 2021;

Ruling again,

2- Rules that the Paris judicial court has jurisdiction;

- 3- Rules that the clerk will transfer the case file to the Paris judicial court with a copy of the referral decision in order for the proceedings to diligently proceed before this judicial court;
- 4- Orders Mr. G. to pay the total sum of 10.000 euros to SaadBuzwair AutomotiveCo under Article 700 of the Code of civil procedure;
- 5- Orders Mr. G to pay the costs;

The Clerk

Inès VILBOIS

The President

François ANCEL