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PARIS COURT OF APPEAL
International Commercial Chamber

Division 5 – Chamber 16
RULING DATED MARCH 29, 2022
(no.37 /2022, 8 pages)



Registration no. on the general roll: **RG no. 20/18196 – Portalis no. 35L7-V-B7E-CCZTG**
Ruling deferred before the Court: Judgment dated [XXX], 2020 – Paris Commercial
Court –RG no. [...]

APPELLANT:

S.A.R.L. [V]

With its registered office: [Adresse 1]

Represented by its managing director,

Vu ne varietur
Traduction conforme à l'original en langue française

100977.

Represented by Me [...] of the [...] attorney at the PARIS Bar (submissions), [...] Assisted by Me [...], litigating attorney at the PARIS Bar, [...]

RESPONDENT

MCC NON-FERROUS TRADING LLC

A company governed under American law

With its registered office: Suite 401 White Plaines 222 Bloomingdale Riad Suite 401 – 10 605
NEW YORK (UNITED STATES)

Represented by Me [...] of the [...] attorney (submissions) at the PARIS Bar, [...] Assisted by Me [...] of the [...] litigating attorney at the PARIS Bar, [...] substituted by Me [...] litigating attorney at the HAUTS-DE-SEINE Bar

COMPOSITION OF THE COURT:

In accordance with the provisions of Articles 805 and 907 of the French Code of Civil Procedure, the matter was heard on January 31, 2022, in a public hearing, with the attorneys not objecting thereto, before Mr. François ANCEL, President and Mrs. Fabienne SCHALLER, the reporting Judge.

These judges reported on the pleadings in the Court deliberations, comprised of:

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

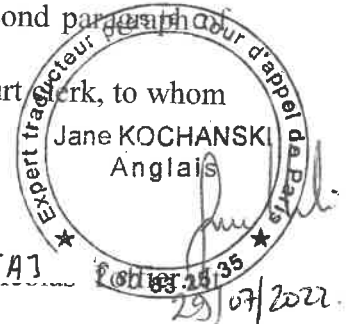
Court clerk: during the proceedings: Najma EL FARISSI

Paris Court of Appeal
Division 5 – Chamber 16

Ruling dated March 29, 2022
RG no 20/18196 – Portalis no 35L7-V-BZE-CCZTG

RULING:

- in adversarial proceedings
- upon issuance of the ruling before the clerk's office at the Court, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Najma EL FARISSI, court clerk, to whom the minutes of the ruling were issued by the signatory judge.



1 – THE FACTS AND PROCEEDINGS

- 1- [V] is a company governed under French law managed by M. [A] carries out the activity of the commercialization of non-ferrous metals.
- 2- MCC Non-Ferrous Trading LLC is a company governed under American law, which is substituted in the right of MCC Non-Ferrous Trading Inc. (hereafter “MCC”). Its activity includes the trade of mining products, ferrous and non-ferrous metals and the recycling of electronic waste. It holds a subsidiary in France, formerly called Weee Metallica, which is specialized in the collection and recycling of metals and electronic waste.
- 3- In January 2015, an agreement called “Agency Agreement” was entered into between MCC and [V], the purpose of which was the exclusive representation of MCC in Europe and, more particularly, in France, and in North Africa by [V], for the sale and purchase of its products. This agreement made reference to its choice of the law of the State of New York.
- 4-On January 1, 2017, a second agreement entitled “Agency Agreement” was entered into between [V] and MCC under the same conditions.
- 5-On November 12, 2019, the parties signed a confidentiality agreement with a non-compete commitment.
- 6-By registered letter with acknowledgment of receipt dated January 9, 2020, MCC informed [V] of the termination of the agreement for [V]’s non-compliance with its obligations, which [V] contested by registered letter with acknowledgment of receipt dated February 4, 2020, requesting the payment of a notice period of 90 days, provided under Article 6 of the agreement and the payment of its commissions due for the years 2018 and 2019.
- 7- Asserting that the agreement was a commercial agency agreement subject to the French and European provisions unifying the protective status of commercial agents, [V], by deed of bailiff dated May 7, 2020, referred the matter before the Paris Commercial Court to obtain various amounts and, in particular, the end-of-agreement indemnities, resulting from such status. It also contested the validity of the non-compete clause and requested indemnification in this regard.
- 8-By judgment dated November 12, 2020, the Commercial Court:
 - declared itself competent and stated that the law applicable to this dispute is the law of the State of New York and
 - Dismissed SARL [V]’s claim for a compensatory indemnity of 520,000 euros;
 - Dismissed SARL [V]’s claim for an indemnity of 110,000 euros;

- Dismissed SARL [V] 's claim for an indemnity of 250,000 euros;
- Held that SARL [V] , in accordance with the provisions of the agency agreement entered into on January 1, 2017, was due to pay MCC NON-FERROUS TRADING LLC the amount of 14,801.19 USD for the commissions due, following the conversion rate applicable on the date of this judgment;
- Ordered MCC NON-FERROUS TRADING LLC to pay SARL [V] the amount of 60,000 euros as a notice period indemnity;
- Ordered that a set-off be made for the amounts due between the parties;
- Pronounced the invalidity of the non-compete clause;
- Ordered MCC NON-FERROUS TRADING LLC to pay SARL [V] the amount of 10,000 euros under Article 700 of the Code of Civil Procedure;
- Ordered the provisional enforcement of this judgment;
- Ordered MCC NON-FERROUS TRADING LLC to pay the costs of the proceedings, including those to be recovered by the clerk's office, settled at 74.50 euros, including 12.20 euros of V.A.T.

9-On December 14, 2020, [V] lodged an appeal on the ruling.

10-By interim submissions notified on December 14, 2021, MCC referred the matter before the pre-trial judge with a claim to have declared the submissions notified on August 3, 2021 by [V] inadmissible under Articles 960 and 961 of the Code of Civil Procedure, on the grounds that it was no longer domiciled at [Adresse 2] on the date of such submissions without such change being mentioned in its submissions.

11-By submissions in response to the interim submissions notified on January 17, 2022, [V] requested of the pre-trial judge to dismiss the inadmissibility claim filed, as the company's registered office had been transferred on September 8, 2021, and the formalities with the clerk's office were pending. It emphasized, in response to [V] 's query, that its registered office is currently located at [adresse 1] and undertook to communicate an updated Kbis during the deliberations.

12- The interim submissions were pended to the merits of the case.

13- The close of the proceedings was pronounced on January 18, 2022.

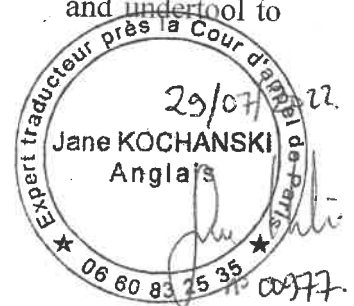
11/ THE PARTIES' PLEAS

14-**During its latest submissions notified by RPVA (attorneys' electronic communication network) on August 3, 2021 and communicated electronically, [V] requested of the Court as follows:**

- Overturn** the judgment handed down insofar as it held the law of the State of New York applicable to the dispute.
- Dismissed** Metallica Commodities Corp, non-ferrous trading of all its grounds, pleas and submissions.

And, deciding in a further hearing,

-**Declared** the clause included in Article 9 of the commercial agency agreement dated January 1, 2017, signed between [V] and Metallica Commodities Corp. non-ferrous trading,



contrary to the mandatory provisions of the Council directive no. 86/653/EEC dated December 18, 1986 and EC public policy.

-Declared that [V] benefited from the commercial agency status defined under Articles L.134-1 *et seq.* of the Commercial Code.

Accordingly,

-Ordered Metallica Commodities Corp. non-ferrous trading to pay [V] a compensatory indemnity.

-Fixed the compensatory indemnity due to [V] at the amount of 520,000 euros, in addition to a complementary indemnity of 250,000 euros due to unlawful circumstances concerning the termination of the agency agreement.

In addition,

-Ordered Metallica Commodities Corp. non-ferrous trading to pay [V] the amount of 110,000 euros in damages for its unlawful conduct during the performance of the commercial agency agreement.

-Overturned the judgment handed down insofar as it ordered the set-off of invoices for the commissions nos. 20.003 and 20.004 by [V] with the negative commissions declared by Metallica Commodities Corp. non-ferrous trading given the discretionary nature of the clause for the calculation of remuneration.

-Ordered Metallica Commodities Corp. non-ferrous trading to pay [V] the commissions invoiced for the fiscal years 2018 and 2019 amounting, as the euro counterpart, at the amount of 64,445.97 USD following the conversion rate applicable on the date of this ruling.

-Approved the additional claims.

Adding as follows,

-Ordered Metallica Commodities Corp. non-ferrous trading to pay [V] the amount of 200,000 euros as damages resulting from the implementation by the principle of a non-compete clause judged null and unlawful with regard to the public policy applicable *lex fori*.

-Ordered Metallica Commodities Corp. non-ferrous trading to pay [V] a supplementary amount of 20,000 euros to the appellant under Article 700 of the Civil Procedure Code and all the costs of the proceedings.

15 – Pursuant to its latest submissions notified electronically on December 9, 2021, MCC NON-FERROUS TRADING LLC. requested of the Court as follows:

In the principal:

- **Hold and Judge** that the contractual relation established between MCC NON-FERROUS TRADING LLC and [V] (the Agreement entitled “Agency Agreement” entered into on January 1, 2017 and the confidentiality and non-compete agreement signed on November 12, 2019) is subject to the law of the State of New York;
- **Declare** inadmissible and ill-founded the claims filed by [V];

Accordingly,

-Approve the judgment handed down insofar as it holds that the law applicable to this dispute was the law of the State of New York;

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Ruling dated March 29, 2022
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1. Concerning the claims for indemnities filed by VELMA

- Approve** the judgment handed down insofar as it dismissed [V] 's claim for a compensatory indemnity of 520,000 euros;
- Approve** the judgment handed down insofar as it dismissed [V] 's claim for an indemnity of 110,000 euros;
- Approve** the judgment handed down insofar as it dismissed [V] 's claim for an indemnity of 250,000 euros;
- Overturn** the judgment handed down insofar as it ordered MCC Non-Ferrous Trading LLC to pay [V] the amount of 60,000 euros as a notice period indemnity;

Deciding in a further hearing,

- Declare** inadmissible and ill-founded the claim filed by [V] on the basis of alleged "unlawful circumstances concerning the termination" of the Agreement;
- Declare** inadmissible and ill-founded the claim filed by [V] on the basis of allegedly unlawful conduct by MCC Non-Ferrous Trading LLC during the performance of the Agreement;
- Accordingly, **dismiss** [V] of all its claims filed;

2. Concerning the payment of the invoices requested by [V]

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- Approve** the judgment handed down insofar as it holds that [V] was due to pay the amounts of 19,742.69 and 7,018.46 dollars for the years 2018 and 2019;

But

- Overturn** the judgment handed down insofar as it holds [V] 's claim on MCC Non-Ferrous Trading LLC for the invoice 19001 certain, liquid and due;

Accordingly:

- Overturn** the judgment handed down insofar as it holds that [V] was due to pay MCC Non-Ferrous Trading LLC the amount of 14,801.19 dollars;

Deciding in a further hearing,

- Judge** that in accordance with the Agreement entitled "Agency Agreement" entered into on January 1, 2017, [V] is due to pay the amount of 26,761.15 dollars, according to the euro conversion rate applicable on the date of this ruling;
- Accordingly **order** [V] to return to MCC the amounts that the latter paid in performance of the judgment handed down;
- Accordingly **dismiss** [V] of all its claims that it filed.

Alternatively, whilst the Court were to accept certain claims filed by [V], **judge** that these amounts shall be duly set-off with the amount due by [V] under the Agreement entitled "Agency Agreement" entered into on January 1, 2017;

3. Concerning the non-compete clause

- Overturn** the judgment handed down insofar as it pronounced the invalidity of the non-compete clause; Deciding in a further hearing,
- Accordingly **dismiss** [V] of all its claims that it filed in this regard;

Alternatively,



- Judge** that no indemnification is due to [V] on this count;
- Accordingly, **dismiss** [V] of all its claims filed in this regard;

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In the alternative,

If, in the unlikely event, the Court judged that the provisions of French law relating to the compensatory indemnity should be applied:

- Judge** that the faults committed by [V] deprive it of any right to a compensatory indemnity;

In the further alternative,

If it were to be assumed that the Court considered [V] well-founded in its compensatory indemnity claim, hold and judge that the maximum amount of indemnity to which [V] could claim, would amount to 21,388 dollars, according to the conversion rate applicable on the date of this ruling;

- Judge** that the faults committed by [V] in the performance of the agreement and the particularly brief duration of the contractual relation justify the limitation of the amount of the compensatory indemnity;

If the Court were to accept [V]'s compensatory indemnity claim, even in part, hold and judge that such indemnity shall be duly set-off with the amount due by [V] under the Agreement entitled "Agency Agreement" entered into on January 1, 2017;

- Dismiss** [V] of all its other claims or claims to the contrary;

In any event,

-**Overturn** the judgment handed down insofar as it ordered MCC Non-Ferrous Trading LLC to pay [V] the amount of 10,000 euros under Article 700 of the Code of Civil Procedure;

-**Overturn** the judgment handed down insofar as it ordered MCC Non-Ferrous Trading LLC to all the costs of the proceedings;

Deciding in a further hearing and adding:

-**Order** [V] to pay MCC NON-FERROUS TRADING LLC the amount of 50,000 euros under Article 700 of the Code of Civil Procedure;

-**Order** [V] to pay the costs before the lower court and on appeal, including the fees paid to [...], who may recover such fees under the provisions of Article 699 of the Code of Civil Procedure.

III/THE GROUNDS OF THE DECISION

Interlocutory measures on the merits,

- **Concerning the interlocutory measure on the inadmissibility of submissions**

16 – It results from the elements provided by [V] that the decision to transfer the registered office was made by a decision of the general meeting of its shareholders dated September 8, 2021 and that the minutes for the issuance of a deed to [V] transformed into an unsuccessful attempted location report of the latter is subsequent to such date, i.e. on October 14, 2021.

17- Accordingly, on August 3, 2021, date of notification of the submissions, the address of the former registered office mentioned in the submissions was accurate and no inconsistency with regard to Articles 960 and 961 was established.

18- Consequently, the inadmissibility claim filed should be dismissed. Nevertheless, [V] should justify the publication of its new registered office and provide an updated KBIS, as per its commitments.

• **Concerning the foreign law content**

19- The dispute concerns a French and an American company bound by an agreement entitled “Agency Agreement”, including a clause to determine the law, with reference made to the law of the State of New York, with the missions granted by the principal to the agent being specified in the agreement.

20- The parties did not agree upon the qualification of the agreement, with [V] asserting that it concerned a commercial agency agreement and MCC asserting that it concerned a service provision agreement with missions including the development and representation of MCC on the European market but without the negotiation, with [V] not being authorized to sign the agreements and having to request prior approval from MCC.

21- Without prejudice to the legal nature of such relation, whether it concerned a commercial agency agreement or as an intermediate to represent its principal, and the rules applicable to such agreement, its performance, and the consequences of its termination, and without prejudice to the mandatory or non-mandatory nature of the provisions asserted, the content of the foreign law must be verified, for which the provisions may be applicable thereto, in order to compare the applicable provisions and verify the compatibility with the public policy provisions.

22- With regard to the provisions of the law of the State of New York and given the elements already produced in the proceedings by the parties, the court considered it necessary to order the parties to produce elements enabling a description of the content of this law with regard to the questions raised by the dispute, stipulated in the operative part of the ruling hereafter.

23- For the proper functioning of the justice, and to enable the parties to provide these elements, the proceedings should be re-opened and the closing order should be rescinded.

24- Furthermore, it results from the elements of the dispute that a judicial mediation could be proposed.



25-According to Article 131-1 of the Code of Civil Procedure, the judge referred to on a dispute may, after having obtained the parties' approval, appoint a third party in order to hear the parties and obtain their points of view, to enable them to reach a confidential and negotiated solution to their dispute.

26- In view of the elements produced in the proceedings, the court, considering that a mediation measure could enable a solution to be reached for the dispute, intended to request the parties to communicate their position concerning the setup of such a measure.

27- Accordingly, the parties should communicate their approval concerning the mediation.

IV/THE OPERATIVE PART OF THE RULING

The interlocutory measures,

- 1-Dimiss the claim for the inadmissibility of the submissions dated 08/08/2021,
- 2-Rescind the closing order dated January 18, 2022,
- 3-Pronounce the re-opening of the proceedings,
- 4-Invite the parties to inform of their approval to start a mediation procedure in accordance with Article 131-1 of the Code of Civil Procedure,
- 5-Refer the matter to a pre-trial hearing dated **May 10, 2022 at 1:00 p.m.** in order to obtain the parties' opinion on a mediation procedure and to set a new procedural schedule.
- 6-Order the parties to produce in the proceedings, according to the established schedule, the elements of the law of the State of New York, on the following questions:

- Concerning the law governing the commercial agents and/or intermediates:

Specific legal/case law provisions (regulatory, legal and case law corpus), relating, in particular, to the following:

-Does the termination of the commercial agency/intermediate agreement need to be substantiated?

-Is the agent/intermediate entitled to a compensatory indemnity in the event of termination? If so, according to what criteria and how is it calculated?

-What faults are considered as depriving the right to a compensatory indemnity?

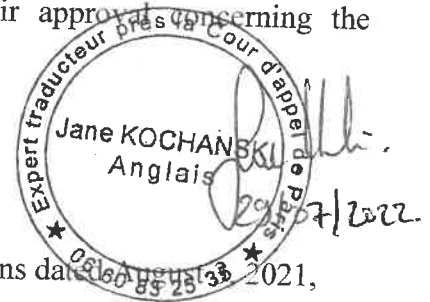
- With regard to the notice period:

-Is there a legal/statutory/case law obligation with regard to notice periods for an agent/intermediate? What are the regulatory conditions, if they exist (duration, amount) for a notice period, or is it entirely at the parties' discretion? What faults cause a deprivation of this right?

- With regard to fault committed by the principal contractor/principal:

-What faults committed by the principal contractor/principal ("Principal") entitle compensation by virtue of the law of the State of New York?

- With regard to the obligations of the agent/intermediate:



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- What is the content of the agent's "fiduciary duty" to the principal?
- What is the definition of the conditions of loyalty and good faith required under the laws of New York, in particular in the commercial relations?

➤ Concerning the non-compete clause:

- What are the conditions of validity of a non-compete clause in commercial relations?
- According to the laws of the State of New York should the non-compete clause be geographically limited? In time? If so, to what extent?
- What is the sanction of an invalid clause? Invalidity? Unenforceability?
- If the non-compete clause is invalid, do the laws of the State of New York provide for liability (abusive clause)? If so, to what extent and under what conditions.

7- Reserve for any other claim.

The Court Clerk

Najma EL FARISSI

The President

François ANCEL

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