

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

International Commercial Chamber

DIVISION 5 – CHAMBER 16

JUDGEMENT OF 30 APRIL 2024

(no. **40** /2024, 7 pages)

General directory entry number: **RG no. 22/20791 - Portalis no. 35L7-V-B7G-CG232**

Decision referred to the Court: judgement of the Commercial Court of Melun rendered on 17 October 2022, in the case registered under reference RG 2021F00310.

APPELLANT

S.A.S.U. EXO CASH Company, formerly CHEF KEBAB,
a simplified joint stock company,
entered into the Register of Commerce and Companies (RCS) of MELUN under no. 830 270 138
having its registered office at [Address 1] (France),
in the person of its legal representatives,

Represented by Ms. Fimoline NAGARADJANE, as counsel with right of audience and as trial counsel at the Bar Council of PARIS, bar number: P074

RESPONDENT

DAMAK FOOD SP Z.O.O. Company
Commercial company incorporated under Polish law,
having its registered office at [Address 2] (POLAND),
in the person of its legal representatives,

Represented by: Mr. Matthieu BOCCON GIBOD of SELARL LX PARIS-VERSAILLES-REIMS, a counsel with right of audience at the Bar Council of PARIS, bar number: C2477

Assisted by: Ms. Judith ADAM-CAUMEIL, as trial counsel at the Bar Council of PARIS, bar number: D830.

COMPOSITION OF THE COURT:

The case was heard on 27 February 2024, in open court, before the Court composed of:

Mr. Daniel BARLOW, President of the Chamber
Ms. Fabienne SCHALLER, President of the Chamber
Ms. Laure ALDEBERT, Judge

who ruled on the case.

A report was presented at the hearing by Ms. Laure ALDEBERT under the conditions provided for by Article 804 of the French Code of Civil Procedure.

Court Clerk at the hearing: Ms. Najma EL FARISSI

JUDGEMENT:

- adversarial

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

- signed by Mr. Daniel BARLOW, President of the Chamber, and by Ms. Najma EL FARISSI, Court Clerk to whom the minute of the judgement's original was handed down by the judge signatory.

I/ FACTS AND PROCEEDINGS

1. An appeal has been lodged before the Court against a judgement handed down on 17 October 2022 by the Commercial Court of Melun in a dispute between SAS CHEF KEBAB (hereinafter "Chef kebab"), now known as EXO CASH (hereinafter "Exo cash"), and DAMAK FOOD, a company incorporated under Polish law and specialising in the production of doner kebab meat.

2. DAMAK FOOD claims that Chef kebab, which at the time was specialised in the sale of doner kebab-based preparations and sandwiches, before changing ownership and becoming EXO CASH, owes it the principal sum of 23,940 euros in respect of unpaid invoices for meat-based products delivered in 2018 and 2019 to the company's registered office at [Locality 3].

3. By application for payment order dated 5 May 2021, it referred the matter to the President of the Commercial Court of Melun.

4. By order dated 11 May 2021, the President of the Commercial Court ordered Chef kebab to pay the sum of 23,940.50 euros corresponding to the amount of unpaid invoices.

5. The order was served on 1 July 2021. By a notice submitted to the Clerk's office, Chef kebab lodged a statement of opposition on 2 August 2021.

6. In an adversarial judgement dated 17 October 2022, the Commercial Court of Melun ruled as follows:

Having deliberated in accordance with the law,

- DECLARES the opposition lodged by SAS CHEF KEBAB against the payment order issued on 11 May 2021 admissible but groundless,

- DISMISSES SAS CHEF KEBAB of all its claims and applications,

DECLARES that this judgement supersedes the payment order in accordance with the provisions of Article 1420 of the French Code of Civil Procedure, which it renders null and void,

- ORDERS SAS CHEF KEBAB to pay DAMAK FOOD SP Z.O.O. the sum of TWENTY THREE THOUSAND NINE HUNDRED AND FORTY EUROS AND TWENTY CENTS (€23,940.20) including all taxes, with interest at the legal rate from 23 March 2021,

- ORDERS SAS CHEF KEBAB to pay DAMAK FOOD SP Z.O.O. the sum of ONE THOUSAND EUROS (€1,000) in damages for manifestly wrongful obstruction,

- RECALLS that provisional enforcement is required,

- ORDERS SAS CHEF KEBAB to pay DAMAK FOOD SP Z.O.O. the sum of TWO THOUSAND EUROS including all taxes (€2,000) pursuant to Article 700 of the French Code of Civil Procedure,

- ORDERS SAS CHEF KEBAB to pay all costs, including court fees, in the sum of ONE HUNDRED AND THIRTY-THREE AND SEVENTY-FIVE CENTS (€133.75) including all taxes.

- DISMISSES the parties' further or opposing claims,

7. Chef kebab, now EXO CASH, lodged an appeal against this decision in a statement dated 9 December 2022.

8. The proceedings were closed on 19 December 2023 and the case was called for oral argument on 27 February 2024.

II/ CLAIMS OF THE PARTIES

9. In its latest submissions, notified electronically on 17 October 2023, Exo cash asks the Court, under Article 1353 of the French Civil Code and Article 9 of the French Code of Civil Procedure, to rule as follows:

Primarily, to

- QUASH the judgement insofar as it ordered Chef kebab, now Exo cash, to pay the sum of 23,940.20 euros,

In a further hearing, to DISMISS DAMAK FOOD's claim for payment of the invoices amounting to 23,940.20 euros,

- QUASH the judgement insofar as it ordered Chef kebab, now Exo cash, to pay damages of 1,000 euros,

In a further hearing, to DISMISS DAMAK FOOD's claim for damages on the grounds of wrongful obstruction,

In the alternative, to

RULE that the amount claimed by DAMAK FOOD shall be limited to the sum of 9,528 euros,

- GRANT the broadest possible payment periods to Exo cash in order to pay the sum of 9,528 euros,

In any event, to

- ORDER DAMAK FOOD to pay Exo cash the sum of 2,500 euros under Article 700 of the French Code of Civil Procedure,

- ORDER DAMAK FOOD to pay all the costs of the proceedings.

10. In its latest submissions, notified electronically on 7 April 2023, DAMAK FOOD asked the Court, on the basis of Articles 1353 and 1199 of the French Civil Code and Article 110-3 of the French Commercial Code, to:

- DISMISS the decision insofar as it ordered Chef kebab, now Exo cash, to pay DAMAK FOOD the sum of €1,000 in damages for wrongful obstruction,

- UPHOLD the remainder,

and, in a further hearing on the overturned head, to

- ORDER Chef kebab, now Exo cash, to pay DAMAK FOOD the sum of €2,500 for damages for wrongful obstruction,

Adding,

- ORDER Chef kebab, now Exo cash, to pay all the costs of the appeal proceedings, which will be awarded to Selarl Lexavoue Paris-Versailles,

- ORDER Chef kebab, now Exo cash, to pay DAMAK FOOD the sum of €2,500 under Article 700 of the French Code of Civil Procedure.

III/ GROUNDS OF THE RULING

11. In support of its appeal, Exo cash argues that the invoices and waybills produced by DAMAK FOOD are not sufficient to prove the debt of the respondent, which it is contesting.

For this purpose, it points out that:

- The invoices and waybills written in a foreign language with a short and partial English translation, not sworn, are devoid of probative value and should have been set aside by the first judges,

- As the successor to Chef Kebab, the new manager of the company, now called Exo cash, which changed its business, was never aware of any debt. None of the accounting documents submitted when the shares were transferred mention these invoices, DAMAK FOOD's name being not even mentioned among the suppliers,

- The signatures differ on the waybills, which were not signed by the manager, and two of them dated 29 August 2018 and 13 October 2018 (5,997 and 8,415.50 euros), which were not stamped by Chef Kebab, do not establish that the products were delivered.

12. Alternatively, Exo cash requests that the owed amount be limited to the sum of 9,528 euros to take account of two past doubtful deliveries, and in view of its financial situation requests the longest possible period in which to pay the said sum.

13. Finally, it argues that there is no wrongful obstruction in view of its disputes and the age of the invoices.

14. In reply, DAMAK FOOD argues that it is not compulsory to have translated documents, pointing out that the Villers-Cotterêts order only refers to procedural documents.

15. Nevertheless, it pointed out that on appeal, it had translated all the documents that were partially translated into French during the first instance.

16. It concludes that the request for a sworn translation is dilatory and serves no useful purpose, given that a standard form is used for waybills.

17. It argues that its debt is established by the exhibits produced and that the transfer of the shares of Chef kebab cannot be set up against it in order to defeat its claim.

18. It seeks upholding of the decision requesting an increase in damages for wrongful obstruction.

THEREUPON

On the applicable law

19. The dispute concerns the performance of an international contract for the sale of based-meat products between two contracting parties, one of whom, the supplier, is established in Poland and the other, the purchaser, in France.

20. The parties did not claim the application of any applicable law clause.

21. It is clear from the decision of the first instance that the Polish company DAMAK FOOD chose to apply French domestic law from the outset of the dispute, without referring to the rules of international law which would lead to the application of a foreign law.

22. The appellant, who did not appear at first instance, seeks application of domestic national law.

23. The Court concludes from these findings that the parties, being aware of the international nature of the sale, voluntarily placed the resolution of their dispute under the regime of French domestic law by alleging and discussing the provisions of the French Civil Code, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods concluded in Vienna on 11 April 1980, so that, in accordance with their express wishes, domestic national law will be applied.

On Damak Food's debt

24. Under the terms of Article 1353 of the French Civil Code, a person who claims the performance of an obligation must prove it. Reciprocally, a person who claims to be discharged must justify the payment or the fact which produced the extinction of his obligation.

25. It is common ground that the burden of proving delivery of the thing sold falls to the seller. It has also been held that, since delivery is a fact, it may be proved by any means.

26. In the present case, Exo cash maintains that, as the successor to the former manager, the company was not aware of the existence of these invoices, which are therefore not enforceable against it.

27. The fact that a transfer of shares of the appellant company took place on 12 March 2021 between the former manager and the new manager, Mr. [X], even if he had not been informed of the debts previously contracted by the company, does not release Chef kebab, now Exo cash, from its liability.

28. In other words, Exo cash, which has not become a separate legal entity as a result of its change in ownership, is required to pay the invoices that Chef kebab may owe to DAMAK FOOD, which is responsible for proving its debt.

29. In support of its claim, DAMAK FOOD submits the following documents to the court:

Invoice (1a) + waybill (1b) of 29 august 2018

Invoice (2a) + waybill (2b) du 13 october 2018

Invoice (3a) + waybill (3b) du 05 april 2019

Invoice (4a) + waybill (4b) du 19 november 2019

Invoice (5a) + waybill (5b) du 13 december 2019

A formal notice of 10/11/2021 + Acknowledgement of receipt of DAMAK FOOD to SASU CHEF KEBAB (6a) + proof of submission (6b) + post office sticker indicating that the recipient is unknown to the address (6c)

A formal notice of 22/03/2021 + Acknowledgement of receipt of DAMAK FOOD to SASU CHEF KEBAB (7a) + Proof of submission (7b) + post office sticker indicating that the recipient is unknown to the address (7c)

30. It results from the examination of these exhibits, the contents of which, translated into French, are not disputed by the appellant, that they corroborate each other and provide sufficient evidence of the existence and value of the goods ordered and delivered to Chef kebab in accordance with its agreement.

31. Indeed, each of the waybills, which corroborate the invoices issued by DAMAK FOOD, is dated and signed by the sender, the carrier and the recipient, none of which calls into question the signature of its representative, which appears on each transport document.

32. The appellant company disputes the probative value of two waybills dated 29 August and 13 October 2018, which do not bear the company's stamp like the other transport documents produced.

33. However, if the stamp of the Chef kebab company does not appear on these two waybills, each contains a handwritten signature in the place of the recipient designated Chef kebab, it

being noted that the receipt of the invoices relating to these deliveries was not the subject of any protest.

34. It is also clear from the reminders that DAMAK FOOD took into account a deposit paid on invoice no. FUE/0026/08/18 relating to the waybill of 29 August 2018, which confirms the effective nature of the delivery.

35. For these reasons and those found by the first judges, DAMAK FOOD's claim should be recognised as well-founded and, consequently, the order made by the first judges in respect of the balance outstanding on the unpaid invoices should be upheld.

ON THE OTHER CLAIMS

36. Exo cash opposed the payment order without appearing at first instance and then appealed the judgement on grounds that were groundless.

37. It results from these considerations that the decision upholding the claim based on the debtor company's wrongful obstruction will be upheld in its entirety to the extent of the damages that the Commercial Court rightly set at the sum of 1,000 euros.

38. There is no reason to grant payment periods to Exo cash, which has not provided any evidence of its financial situation in the proceedings and which has already had a long time to pay, given the age of the invoices.

39. Exo cash's claim will therefore be dismissed.

On the costs and Article 700 of the French Code of Civil Procedure

40. Exo cash, which is unsuccessful in its claims, shall be ordered to pay the costs and dismissed in its claim under Article 700 of the French Code of Civil Procedure.

41. It will be ordered to pay the sum of 2,500 euros to DAMAK FOOD on this basis, which it has once again forced to incur costs in the context of these proceedings.

IV/ OPERATIVE PART OF THE JUDGEMENT

On these grounds, the Court:

1) Upholds the judgement handed down by the Melun Commercial Court on 17 October 2022 in all its provisions submitted to the Court;

2) Dismisses EXO CASH's request for payment periods;

3) Dismisses the parties' other claims;

4) Orders EXO CASH to pay the costs, which may be recovered directly by Selarl Lexavoue Paris-Versailles for those that it has advanced without having received provision for them;

5) Orders EXO CASH to pay DAMAK FOOD the sum of 2,500 euros (two thousand five hundred euros) under Article 700 of the French Code of Civil Procedure.

THE COURT CLERK,

THE PRESIDENT,