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Jurisdiction: The French Supreme Court approves the Paris Court of Appeal's ruling recognizing the jurisdiction of the French courts in a dispute concerning the brutal termination of an established commercial relationship between a French plaintiff and a defendant located outside the European Union *(Eurofood / Tnuva Alternative)*

DISTRIBUTION, FRANCE, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, EXCLUSIVE DISTRIBUTION, EXCLUSIVITY CLAUSE, COMPETENCE, CONCURRENT JURISDICTIONS, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS

Fr. Supr. Court, April 13th, 2023, n° 22-15.689, Sté Eurofood / Sté Tnuva Alternative
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Facts. A French company had been granted exclusive distribution of its products in the EU and Switzerland by an Israeli company. The Israeli company terminated the contract on the grounds that the distributor had failed to meet its targets. The distributor sued the Israeli company before the Paris Commercial Court for breach of contract and wrongful termination. A reading of the judgment reveals claims based on article L. 442-6 I 5° of the French Commercial Code. The Israeli company raises a plea of lack of jurisdiction, claiming that the competent courts are those of Israel. The French company contests. The Paris Commercial Court declares itself territorially incompetent, but the judgment is overturned by the Paris Court of Appeal, which finds that the French courts have jurisdiction. The appeal against this ruling was rejected.

Problem. The question arose as to the territorial jurisdiction of the French courts, in this case the Paris Commercial Court, to rule in a dispute between a foreign company not domiciled in an EU Member State, defendant and, where applicable, perpetrator of a brutal breach of an established commercial relationship, and a French company, plaintiff and victim of the said breach.

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Solution. As a general solution, the Cour de cassation states that " *It follows from article 46 of the Code of Civil Procedure that, where there is neither an international convention nor a European regulation on jurisdiction, international jurisdiction is determined by extension of the rules of domestic territorial jurisdiction, so that the plaintiff may, in contractual matters, seize at his choice, in addition to the court of the place where the defendant lives, the court of the place of actual delivery of the thing or of the place of performance of the service* ".

On this basis, the Court ruled that " *having noted that Tnuva Alternative was located outside the European Union, and that successive deliveries of its products were governed by a framework contract which involved Eurofood in its commercial strategy and imposed binding sales targets on the latter, in return, it granted Eurofood exclusive personal distribution rights for the Kosher market in the European Union and Switzerland, and undertook not to compete with Eurofood in this market, that it undertook to contribute to promotional costs and to pass on to Eurofood all orders or requests for information it received from buyers in the territories concerned, and that these advantages had an economic value which could be considered as constituting remuneration, the Court of Appeal, by a sovereign assessment of the evidence submitted to it and without distortion, deduced exactly that the contract concerned the provision of a service and that the place of its performance was in France, so that the French courts had jurisdiction.* ".

Observations. This solution calls for two sets of observations. The first concerns the general solution given by the judgment (I), while the second relates to the specific solution in the context of international disputes concerning the brutal termination of established commercial relations (II).

I. - As far as the general solution is concerned, there is some doubt. The analysis carried out by the First Civil Chamber appears questionable from the point of view of the Union's private international law, and in particular the " *Brussels I bis* " Regulation (hereinafter the "Regulation") on jurisdiction in civil and commercial matters. It was recently discussed in a note on a recent case (L. Pailler, Dalloz actualité, le droit en débat, March 17 2023, under Cass. 1er civ., Feb. 1 2023, no. 20-15.703). Thus, the spatial applicability of the Regulation depends simply on the international nature of the dispute, the time at which the action is brought before the courts of a Member State, and the fact that it falls within the scope of civil and commercial matters, subject to the special exclusions set out in Article 1.2 of the Regulation. We are inclined to agree with this analysis, which seems to be in line with the content of other studies on the subject (D. Alexandre and A. Huet, Répertoire de Droit International, V° *Compétence judiciaire européenne*, pts 47 and 86). Indeed, the Regulation contains rules of jurisdiction set out in Chapter II. Except in the case of special jurisdictions, the solution of principle is directly expressed when the defendant is domiciled in a member state. As a reminder, Article 4.1 states that " *subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State* ". This is not a question of the applicability of the Regulation, but of international jurisdiction (see Dalloz actualité, op. *cit.*). However, article 6.1 of the said Regulation still provides, by way of general provisions, that " *If the defendant is not domiciled in a Member State, jurisdiction in each Member State shall be governed by the law of that Member State, subject to etc.* ". Recital (14) further states that "As a *general rule, a defendant not domiciled in a Member State should be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised* ". In so doing, the Regulation refers to national rules of international jurisdiction. Insofar as the EU text (art. 6.1 of the Regulation) specifically addresses the situation of defendants not domiciled in a Member State, as well as the method of settling jurisdiction according to the law of the Member State where the defendant is sued, it seems to us restrictive to consider that there is no European Regulation on jurisdiction in this case. According to the aforementioned author, " *the error committed is not anecdotal. The mere reference made by article 6.1 of the recast "Bruxelles" Regulation does not exhaust the legal effect of the text. This article plays a part in determining international jurisdiction. (...) Through the effect of renvoi, national rules of jurisdiction become part of the system of international jurisdiction established by the regulation.* To *apply them by renvoi is to apply Union law* ". And even if territorial jurisdiction was subsequently determined by application of article 46 of the CPC, the shortcut taken by the First Civil Chamber to enable the judge to perform his role in matters of jurisdiction, and which led to the denial of the application of " *Brussels I bis* ", may be disconcerting *(contra* F. Mélin, *Compétence internationale : extension des règles de compétence interne*, Dalloz actualité, April 21, 2023).

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II. - With regard to the specific solution arising from the above-mentioned general solution, we have three comments to make. Firstly, it is regrettable that this ruling, which is intended for publication, refers only to the abusive breach of contract, omitting to mention the problem, which is essential for practitioners, of the brutal breach of an established commercial relationship in an international relationship, even though it was referred to in the first judgment and the appeal judgment. This dimension of restrictive competition practices was, in fact, the main reason for the Letter's interest in this case, right from the first judgment (T. Com. Paris, Sept. 30, 2021, no. 2020037442, Lettre distrib. 01/2022, *our obs.*). Among other things, the latter had the merit of reminding us that in matters of brutal breach of contract, the jurisdiction of French courts is not automatic, and that the text in question, even if qualified as a "loi de police", does not in itself give rise to the jurisdiction of French courts (T. com. Paris, Sept. 30, 2021, aforementioned). But this is no consolation, as the solution is nonetheless of interest in practical terms for distribution contracts in general. Secondly, readers are invited to refer to the comments made on the appeal ruling (Paris, March 2, 2022, no. 21/17962, Lettre distr. 04/2022, *obs.* F. Leclerc). The latter deal with the specific question of jurisdictional competence in matters of sudden termination of an established international commercial relationship, depending on whether the relationship in question is classified as tortious or contractual, and, in the latter case, on the nature of the contract, i.e. sale or provision of services, under the background not of conventional private international law on international jurisdiction, but of common French private international law, i.e. the rules to be used by the French judge " *when no international jurisdiction claims its application* " or " *in the context of common PIL, i.e. outside the attraction of the Brussels 1 bis system* " (*rappr.* supra, I). In the present case, the Court approved the appellate judgment, which showed that the relationship at issue was contractual in nature and that the framework contract in question should be classified as a contract for the provision of services, with its place of performance in France. As a result, the French courts would have jurisdiction. Thirdly, it might be interesting to analyze the circumstances of the case in the light of article L. 444-1 A C. Com. resulting from the Law of March 30, 2023 aimed at reinforcing the balance in commercial relations between suppliers and distributors. This new rule, which is intended to counter certain legal evasion attempts by certain international buying groups to circumvent French law (Report by the Senate's Economic Affairs Committee, February 8, 2023, see pp. 11 and 27), serves as a reminder that the regulation of restrictive competition practices, by virtue of the generality of its terms, is once again intended to apply well beyond the situations that initiated it (*rappr.* T. com. Paris, Oct. 10, 2022, no. 2021000304, Lettre distr. 12/2022, our obs.).

To conclude, and in the interests of timeliness, the subject brings us back to the question of whether it is in the interest of a party who, in the event of litigation, prefers to litigate before the French courts, to contractually provide for a clause conferring jurisdiction and, to be sure, applicable law, which was apparently not the case in the case reported here (judgment of the Court of First Instance, point 9). Assuming a conviction by a French court, there will then remain - and this is no small matter - the question of enforcing the judgment on foreign territory and outside the EU, for which it will still be necessary, particularly in financial terms, for the stakes to be up to the task. To win or to be right? Here too, the question is one of strategy.

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