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Court of Cassation – First Civil Chamber (Cour de cassation) Public hearing, 19 November 2014, No. of final appeal: 13-13405 – Brenneke –

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Procedural History

Preceding judgment: Cour d'appel de Colmar, 3 May 2011

Facts

On the sole ground of appeal:

Considering that – according to the judgments under appeal (Court of appeal Colmar, 3 May 2011 and 31 October 2012) – the Brenneke and Wilhelm Brenneke companies (the Brenneke companies), established in Germany and whose business is to manufacture and sell hunting bullets and munitions, have been accused of failing to fulfil their contractual obligations by the Franco-Badoise company, established in Strasbourg. The Franco-Badoise company has invoked its exclusive distribution rights on Brenneke hunting bullets for smooth-bore weapons on French territory; on 4 July and 21 November 2007, they summoned the Brenneke companies before a French court, requesting the rescission of the contract, an interim payment relating to the compensation of its losses and the appointment of an expert to evaluate said losses; the Brenneke companies have challenged the court's jurisdiction on the basis of article 5-1,a of the EC regulation no. 44/2001 of 22 December 2000 (Brussels I);

Rationale

Considering that the Brenneke companies criticise the second judgment for having rejected the plea of lack of jurisdiction, whereas, according to the ground of appeal:

1/ the place of performance of the obligation on which the claim is based – according to article 5-1,a of the regulation (CE) no. 44/2001 of 22 December 2000 – must be determined in accordance with the law which governs the obligation in question according to the rules of conflict of the laws of the court before which the matter is brought; therein, Section 269 (1) of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB) –which is claimed to be applicable by the Brenneke companies – states that "where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the debtor had his domicile at the time when the obligation arose."; as the applicants emphasised, according to German case law pertaining to this provision, in terms of negative obligation – such as the obligation to respect a distributor's exclusive rights relied on by the Franco-Badoise company to justify its request for compensation –, the place of performance is to be the debtor's domicile rather than where the alleged breach of contract took place; in stating that the possible breach of the obligation of exclusivity denounced by the Franco-Badoise company was committed in the granted area, that is to say in France, after deciding to apply Section 269 of the German Civil Code, the court confirmed that the commitment to deal only with this company applies in France, so that the French courts had jurisdiction. This means that the Court of Appeal denatured Section 269 (1) of the German Civil Code, thus violating Sections 3 and 1134 of the Civil Code (*code civil*), as well as Articles 4 and 5 of the Code of Civil Procedure (*code de procédure civile*);

2/ pursuant to Section 269 (1) of the German Civil Code which, according to the court of appeal's judgment, applies to the contractual relations between parties: "where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the debtor is domiciled at the time when the obligation arose." The Wilhelm Brenneke and Brenneke GmbH companies asserted – based on a case law commentary under Section 269 and 270 of the German Civil Code – that in German law, the obligation to ensure the Franco-Badoise company's exclusive distribution rights of Brenneke products on French territory – which the Franco-Badoise company relied on to request compensation – is analysed as a negative obligation ("*Unterlassungspflicht*"), the place of performance of which shall not be determined according to the place of the breach of contract but to the debtor's domicile. In the present case the statutory seat of the Wilhelm Brenneke and Brenneke GmbH companies is located in Germany; by confining itself to hold that pursuant to Section 269 of the German Civil Code, "locating the place of performance at the debtor's place of domicile is a subsidiary policy which only comes into play in the absence of a choice made by the parties or in the absence of particular circumstances" and that, in order to determine which court had jurisdiction, the place where the alleged violation of the exclusive rights by the Wilhelm Brenneke and Brenneke GmbH companies – located in the granted area – took place must be taken into account, without replying to the applicants' arguments asserting that, according to the German case law and doctrine pertaining to the aforementioned article, a negative obligation's place of performance is the debtor's domicile and not the place of the contractual breach. And by not

examining the supporting documents submitted during the proceedings, the court of appeal has violated Article 455 of the Code of Civil Procedure;

3/ according to Article 5 no. 1 lit. a of the EC regulation no. 44/2001 of 22 December 2000 (Brussels I Regulation), the place of performance of the obligation on which the claim is based must be determined in accordance with the law which governs the obligation in question according to the rules of conflict of the laws of the court before which the matter is brought; when it is a foreign law, it is the role of the French judge – with the parties' assistance and, if need be, personally – to investigate and analyse its exact contents; in the present case, after having decided that, according to Section 269, paragraph 1 of the German Civil Code – which has been held by the Court of Appeal to apply to the contractual relation between the parties –, "where no place of performance has been specified or is evident from the circumstances, in particular from the nature of the obligation, performance must be made in the place where the debtor had his domicile at the time when the obligation arose," the Court of Appeal held that pursuant to this article, "locating the place of performance at the debtor's place of domicile is a subsidiary policy which only comes into play in the absence of a choice made by the parties or in the absence of particular circumstances" and that, in order to determine which court had jurisdiction, the place where the alleged violation of the exclusive rights by the Wilhelm Brenneke and Brenneke GmbH companies took place had to be taken into account; by ruling as it did without indicating on which German legal sources the court relied on to decide that in the case of an alleged violation of exclusive rights the place of performance must be located where the alleged violations took place, that is to say, on the granted area , the court of appeal deprived its decision of a legal basis, according to Article 1134 of the Civil Code and Article 5 no. 1 lit. a of the EC Regulation no. 44/2001 of 22 December 2000;

According to the case law of the European Court of Justice (judgment of 19 December 2013, Corman-Collins, C-9/12), the rule of jurisdiction stated in Article 5 no. 1 lit. b, second indent, of the Brussels I Regulation (for disputes arising out of contracts for the supply of services) applies in proceedings in which the claimant – domiciled in a Member State – claims his rights as stipulated in a concession contract against a defendant domiciled in another Member State. This implies that the contract binding the two parties contains special terms regarding the distribution of the goods to be sold by the licensee who has been chosen by the grantor after selection; under this case law, the characteristic performance provided by the licensee consists in distributing the grantor's products and to partake in their further diffusion; pursuant to the particulars of the challenged judgment, the rights claimed by the Franco-Badoise company come from a distribution contract concluded after a selection process and which features special terms relating to the distribution of Brenneke products on French territory, so that the rule of jurisdiction stated in Article 5 no. 1 lit. b, second indent, of the Brussels I Regulation should apply, which prevents the rule of jurisdiction stated in Article 5 no. 1 lit. a of the same regulation – invoked by the Brenneke companies – from applying, thus justifying the jurisdiction of the French court before which the matter was brought, as it is the court for the place of performance of the supplier's characteristic provision of services; for these reasons strictly of

law that – in the conditions stated by Article 1015 of the Code of Civil Procedure – replace the reasons criticised, the appealed decision is legally justified;

Holding

FOR THESE REASONS:

the appeal is DISMISSED.