According to the French Cour de Cassation, the law applicable to the sub-purchaser's direct action against the original seller depends on who brings the claim!



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In two rulings dated 28 May 2025, the French Cour de cassation (Supreme Court) ruled on the issue of the law applicable to a sub-purchaser's direct action in a chain of contracts transferring ownership, under European private international law. The issue is sensitive. The contractual classification under French law —an outlier in comparative law— had not been upheld by the Court of Justice of the European Union (CJEU) to determine international jurisdiction under the Brussels system (CJEU, 17 June 1992, C-26/91, *Jakob Handte*). Despite CJEU's position, the Cour de cassation had consistently refused to adopt a tort-based qualification to determine the applicable law (esp. Civ. 1st, 18 dec. 1990, n° 89-12.177 ; 10 oct. 1995, n° 93-17.359 ; 6 feb. 1996, n° 94-11.143 ; Civ. 3rd, 16 janv. 2019, n° 11-13.509. See also, Civ. 1st, 16 jan. 2019, n° 17-21.477), until these two rulings rendered under the Rome II Regulation.

The proceedings

In the first case (No. 23-13.687), a Luxembourgian company made available to a Belgian company certain equipment it had obtained through two lease contracts. The lessor had acquired the equipment from a French intermediate seller, who had purchased it from a French distributor, who had sourced it from a Belgian manufacturer (whose rights were ultimately transferred to a Czech company).

Following a fire that destroyed the equipment, the Dutch insurer — subrogated in the rights of the Luxembourgian policyholder — brought proceedings against the French companies before the French courts on the basis of latent defects. The manufacturer's general terms and conditions included a choice-of-law clause in favour of Belgian law. The Belgian and Luxembourg companies sought various sums based on latent defects, lack of conformity, and breach of the selller's duty to advise. The manufacturer voluntarily joined the proceedings.

Applying French law, the Court of Appeal held the insurer's subrogated claims admissible and dismissed the French intermediary seller's claims. The Court ordered the Czech manufacturer and French companies jointly and severally liable to compensate the Luxembourg company for its uninsured losses and to reimburse the French intermediary seller for the insured equipment. The manufacturer appealed to the Cour de cassation, and the French distributor lodged a cross appeal.

In the second case (No. 23-20.341), a French company was in charge of designing and building a photovoltaic power plant in Portugal. The French company purchased the solar panels from a German company. The sales contract included a jurisdiction clause in favour of the courts of Leipzig and a choice-of-law clause in favour of German law. In 2018, the Portuguese company, as assignee of the original contract, brought proceedings against the French and German companies seeking avoidance of the successive sales and restitution of the purchase price. Alternatively, the Portuguese final purchaser invoked the contractual warranty granted by the German manufacturer and sought damages. The Court of Appeal dismissed the purchaser's claim under German law, which was applicable to the original contract. The Court of Appeal also declined jurisdiction over the French company's claims against the German company due to the jurisdiction clause. The purchaser appealed to the Cour de cassation.

The legal question

Both appeals raised the question of the determination of the law applicable to the sub-purchaser's direct action in a chain of contracts transferring ownership under European private international law, especially where a choice-of-law clause is included in the original contract.

The rulings of 28 May 2025

The Cour de cassation adopted the reasoning of the *Jacob Handte* judgment. The Court held that, in conflict of laws, the sub-purchaser's action against the manufacturer does not qualify as a "contractual matter" but must be classified as "non-contractual" and therefore be governed by the Rome II Regulation (§§ 16 seq n° 23-13.687 ; §§ 18 seq n° 23-20.341).

The Court concluded that: "*A choice-of-law clause stipulated in the original contract between the manufacturer and the first purchaser, to which the sub-purchaser is not a party and to which they have not consented,* ***does not constitute a choice of law applicable to the non-contractual obligation within the meaning of Article 14(1) of that Regulation***." (§ 20, n° 23-13.687 ; § 22, n° 23-20.341).

This solution should be also supported by the *Refcomp* ruling (§ 18, n° 23-13.687 ; § 16, n° 23-20.341), in which the Court held that a jurisdiction clause is not enforceable against the sub-purchaser, "*insofar as the sub-purchaser and the manufacturer must be regarded, for the purposes of the Brussels I Regulation, as not being bound by a contractual relationship*" (CJEU, 7 Feb. 2013, C-543/10, para. 33).

According to the Cour de cassation, the law applicable to sub-purchaser's claims against the manufacturer is the law of the place where the damage occurred, pursuant to Article 4 of the Rome II Regulation.

Comments

Firstly, the rejection of the contractual classification does not necessarily entail a tortious classification. To do so, it must also be established that the action seeks the liability of the defendant, in accordance with the definition adopted in the *Kalfelis* judgment (ECJ, 27 Sept. 1988, Case 189/87). It was not the case here, where the claims were based on latent defects and avoidance of contract.

Secondly, the choice of a non-contractual classification appears contrary to the developments in CJEU's recent case law (H. Meur, *Les accords de distribution en droit international privé*, Bruylant, 2024, pp. 325 seq.), For the CJEU, it is sufficient to establish that the action could not exist in the absence of a contractual link for it to qualify as a "contractual claim" under Brussels I

Regulation (CJEU, 20 Apr. 2016, C-366/13, para. 55, *Profit Investment*). The European Court further held that the identity of the parties is irrelevant to determine whether the action falls within the scope of contractual matters ; only the cause of the action matters (CJEU, 7 Mar. 2018, *Flightright*, joined cases C-274/16, C-447/16, C-448/16; and CJEU, 4 Oct. 2018, *Feniks*, C-337/17). Thus, the Court has moved away from its *Jacob Handte* case law.

Thirdly, limiting the effect of the choice-of-law clause to the contracting parties alone is inappropriate, as it will lead to the applicable law to the contract to vary depending on who invokes it (H. Meur, *Dalloz actualité*, 16 June 2025). This solution is also contrary to the European regulations. It is in contradiction with Article 3.1 of the Rome I Regulation, which states that "*a contract shall be governed by the law chosen by the parties*." It is also incompatible with Article 3.2 of the Regulation. This article provides that "*any change in the law to be applied that is made after the conclusion of the contract shall not […] adversely affect the rights of third parties*," from which it must be inferred *a contrario* that the original choice-of-law clause is enforceable against third parties (see the report by Reporting Judge S. Corneloup, pp. 21 seq.; also see the Report on the Convention on the Law Applicable to Contractual Obligations, OJEC, C 282, 31 Oct. 1980, para. 7 under the commentary on Article 3). For the sake of consistency, this understanding of the principle of party autonomy should also apply to Article 14 of the Rome II Regulation. Finally, Article 12 of the Rome I Regulation confirms that it is for the law applicable to the contract to determine the persons entitled to invoke it and the conditions under which they may do so (by contrast, the Vienna Convention on the International Sale of Goods and the Hague Convention do not apply to the question of the effect of the contract on third parties – see in particular Hague Convention, 1955, Art. 5.4; Civ. 1st, 12 July 2023, No. 21-22.843).

Thus, the law applicable to the sub-purchaser's direct action should be the one chosen by the parties to the original contract (regardless of the claiming party), provided that this choice is intended to govern the contract. In the absence of a chosen law, the law of the habitual residence of the seller, as the debtor of the characteristic performance, should apply. If the designated law recognises, in principle, that a third party may invoke the rights available to the original contracting purchaser, the Vienna and Hague Conventions, which are applicable before the French courts, may regain their relevance in determining the content

of those rights (see V. Heuzé, *RCDIP*, 2019, p. 534; E. Farnoux, *AJ Contrat*, 2020, p. 521).

Unfortunately, this is not the path taken by the Cour de cassation in its rulings of 28 May 2025. In practice, the original seller may be bound in respect of certain sub-purchasers, particularly those established in France, even though it may have had no knowledge of the successive sales. Such a solution increases legal uncertainty.