

## Anonymised version

Translation

C-707/21 – 1

### Case C-707/21

#### Request for a preliminary ruling

**Date lodged:**

24 November 2021

**Referring court:**

Cour de cassation (France)

**Date of the decision to refer:**

17 November 2021

**Appellant:**

Recamier SA

**Respondent:**

BR

...

JUDGMENT OF THE COUR DE CASSATION, PREMIÈRE CHAMBRE  
CIVILE (COURT OF CASSATION, FIRST CIVIL CHAMBER),  
OF 17 NOVEMBER 2021

Recamier, a public limited company, which has its registered office at ... Luxembourg (Luxembourg), has lodged ... an appeal on a point of law ... against the judgment given on 4 June 2019 by the cour d'appel de Versailles (Court of Appeal, Versailles) (12<sup>th</sup> Chamber), in the proceedings between it and BR, who resides at ... La Garenne-Colombes, respondent in cassation.

...

... [procedural details]

The first civil chamber of the Court of Cassation, ... [composition], after deliberation in accordance with the law, has given the present judgment.

### **Facts and procedure**

- 1 According to the judgment under appeal (Versailles, 4 June 2019), delivered following referral to it after cassation (1<sup>st</sup> Civil Chamber, 4 July 2018, appeal No 17-20.610), the Luxembourg company Recamier brought proceedings against BR before the Luxembourg courts for payment of certain amounts, pleading the misappropriation of assets by BR in the exercise of his duties as director. By a judgment of 11 January 2012, the cour d'appel de Luxembourg (Court of Appeal, Luxembourg) declared that application to be unfounded. It took the view that, since the alleged misconduct is misconduct by a director in the exercise of his duties, BR's liability was contractual in nature and, therefore, the application, which was expressly based on quasi-delictual liability, had to be declared inadmissible by application of the principle of the non-cumulation of contractual and quasi-delictual liability.
- 2 On 24 February 2012, Recamier brought proceedings against BR before the tribunal de commerce de Nanterre (Commercial Court, Nanterre) for payment of the same amounts, on the same facts, on the basis of the provisions of Luxembourg law relating to contractual liability.
- 3 By the judgment under appeal, the court of appeal declared the action brought by Recamier inadmissible on the grounds that the *res judicata* of decisions of the Luxembourg courts had to be assessed in the light of French procedural law, under which it is for the applicant to put forward, as early as the proceedings relating to the initial application, all the pleas in law which he considers capable of forming the basis of that action (the 'concentration of pleas' rule). It inferred from that fact that, since the parties, the capacities and the thing claimed are identical in the proceedings which culminated in the judgment of the Luxembourg court and in these proceedings, and since the claim for damages is based on the same cause of action, that is to say, the alleged misappropriation of assets by BR, Recamier could not be allowed to rely on a different legal basis from that which it had refrained from raising in good time.

### **Applicable law**

EU law

- 4 Article 33(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 'Brussels I', provides:

‘A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.’

National law

5 Article 480 of the code de procédure civile (Code of Civil Procedure) provides:

‘A judgment which decides in its operative part the whole or part of the main issue, or which rules upon a procedural plea, a plea of inadmissibility or any other incidental plea shall have, from the time of its delivery, the force of *res judicata* with regard to the dispute which it determines.

The main issue means the subject matter of the dispute as determined by Article 4.’

The first paragraph of Article 4 of the same code provides:

‘The subject matter of the dispute is determined by the respective claims of the parties.’

6 Article 1351 (now Article 1355) of the code civil (Civil Code) provides:

‘The force of *res judicata* applies only in regard to those matters which were the subject of the judgment. The thing claimed must be the same, the application must be based on the same cause of action and be between the same parties, and it must be brought by and against them in the same capacity.’

7 According to the case-law of the Court of Cassation following a judgment given by it in plenary session of 7 July 2006 (appeal No 04-10.672, Civil Bulletin No 8), it is for the applicant to put forward, as early as the proceedings relating to the initial application, all the pleas in law which the applicant considers capable of forming the basis of that action. An applicant cannot be allowed to challenge the identity of cause of two applications by relying on a legal basis which the applicant had refrained from raising in good time. A party which brings proceedings on the basis of contractual liability in order to obtain compensation for loss or damage, even though that party’s claim for reparation for the same loss or damage on a delictual basis has been rejected by a final decision of a court before which contractual liability had not been invoked, thus acts contrary to the force of *res judicata* (2<sup>nd</sup> Civil Chamber, 25 October 2007, appeal No 06-19.524, Bulletin 2007, II, No 241).

### **Position of the parties**

8 Recamier claims that the *res judicata* of the Luxembourg decision must be assessed not in the light of French law but either in the light of an autonomous interpretation of that concept under EU law or in the light of Luxembourg law, since the recognition of a foreign decision in the State in which enforcement is

sought cannot allow that decision to produce effects beyond those it has in its State of origin and Luxembourg law does not recognise the principle of the concentration of pleas.

- 9 BR contends that, under a rule of public international law, each State has exclusive competence in establishing its own domestic organisation, that it to say, in setting up the various bodies, dividing powers between them and drawing up the rules by which they operate, such that the procedural law is not necessarily that of the *lex fori*, and that the conflict-of-law rules do not apply in such matters.
- 10 The Advocate General finds, primarily, that Luxembourg law applies and, in the alternative, that a reference should be made for a preliminary ruling.

### **Grounds justifying the reference for a preliminary ruling**

- 11 First, the Court of Justice of the European Communities has ruled ‘that a foreign judgment which has been recognized by virtue of Article 26 of the [Brussels] Convention must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given’ (CJEC, judgment of 4 February 1988, *Hoffmann*, 145/86).
- 12 Second, the Court of Justice of the European Union laid down the principle of an autonomous definition of *res judicata* under EU law (CJEU, judgment of 15 November 2012, *Gothaer Allgemeine Versicherung and Others*, C-456/11, paragraphs 39 and 40) as follows:

‘The requirement of the uniform application of European Union law means that the specific scope of that restriction must be defined at European Union level rather than vary according to different national rules on *res judicata*.

Moreover, the concept of *res judicata* under European Union law does not attach only to the operative part of the judgment in question, but also attaches to the *ratio decidendi* of that judgment, which provides the necessary underpinning for the operative part and is inseparable from it (see, inter alia, Joined Cases C-442/03 P and C-471/03 P & O *European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845, paragraph 44, and Case C-221/10 P *Artegodañ v Commission* [2012] ECR, paragraph 87).’

- 13 The Court [of Cassation] asks whether the autonomous definition of *res judicata* covers all the conditions and effects of *res judicata* or whether certain conditions and effects of *res judicata* may be determined by the law of the court seised and/or the law of the court which gave the decision.
- 14 In the first scenario, it asks whether two applications made before the courts of two Member States must be regarded, in the light of the autonomous definition of *res judicata*, as having the same cause of action where the applicant pleads identical facts but relies on different pleas in law.

- 15 More specifically, it asks whether two applications, one founded in contractual liability and the other in liability in delict, but based on the same legal relationship, such as the performance of duties as a director, must be regarded as having the ‘same cause of action’ within the meaning of the case-law in *Gubisch Maschinenfabrik* (CJEC, 8 December 1987, 144/86).
- 16 In the second scenario, the Court [of Cassation] asks whether Article 33(1) of Regulation (EC) No 44/2001[,] pursuant to which it has been held that a judicial decision must move within the Member States with the same scope and the same effects as it has in the Member State in which it was given[,] requires that reference is made to the law of the court of origin or whether it allows, with regard to the procedural consequences attached to it, the law of the court in which enforcement is sought to be applied.

**ON THOSE GROUNDS**, the Court [of Cassation]:

Having regard to Article 267 of the Treaty on the Functioning of the European Union;

REFERS the following questions to the Court of Justice of the European Union;

‘1. Is Article 33(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels I’) to be interpreted as meaning that the autonomous definition of *res judicata* covers all the conditions and effects of *res judicata* or that certain conditions and effects may be determined by the law of the court seised and/or the law of the court which gave the decision?

2. In the first scenario, are applications made before the courts of two Member States to be regarded, in the light of the autonomous definition of *res judicata*, as having the same cause of action where the applicant pleads identical facts but relies on different pleas in law?

3. Are two applications, one founded in contractual liability and the other in liability in tort, but based on the same legal relationship, such as the performance of duties as a director, to be regarded as having the same cause of action?

4. In the second scenario, does Article 33(1) of Regulation (EC) No 44/2001, pursuant to which it has been held that a judicial decision must move within the Member States with the same scope and the same effects as it has in the Member State in which it was given, require that reference is made to the law of the court of origin or does it allow, with regard to the procedural consequences attached to it, the law of the court in which enforcement is sought to be applied?[']

...

... [staying of proceedings, national procedural matters]