

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16
International Commercial Chamber

(No 07 / 2020, 8 pages)

JUDGMENT OF 18 FEBRUARY 2020

General Directory Entry Number : **RG 19/19022 - No Portalis 35L7-V-B7D-CAZKW**

Decision referred to the Court: Judgment of 15 October 2019 – Commercial Court of Paris – RG No. 2018043443

APPELLANT:

SARL E-DOLEY FINANCE

Registered in the companies register of Libreville (Gabon) under the number 2011 B 11303
Having its registered office at Boulevard Georges Rawiri - La Sablière- BP 1643, LIBREVILLE,
GABON
Represented by its legal representatives,

*Represented by Mr [] of the SELARL [], member of the Paris Bar : [...]
Having as litigator (...), member of the Bar of PARIS, : [...]*

RESPONDENTS:

SA BGFI BANK GABON

Registered in the companies register of Libreville (Gabon) under the number 2010 B 09140- NIF
771 282 M
Having its registered office at 1295 boulevard de l'Indépendance - BP 2253 LIBREVILLE,
GABON
Represented by its legal representatives,
&

ITS BGFI BANK HOLDING CORPORATION

Registered in the companies register of Libreville (Gabon) under the number 2001 B 00771 - NIF
790 738 M
Having its registered office at Boulevard Georges Rawiri - La Sablière- BP 25200, LIBREVILLE,
GABON
Represented by its legal representatives,

*Represented by [] of the SELARL [], member of the Paris Bar : [...]
Having as litigator (...), member of the Bar of PARIS, : [...]*

COURT COMPOSITION

The case was heard on 2 December 2019 in public hearing, before the Court composed of:

Mr. François ANCEL, President
Ms. Fabienne SCHALLER, Judge
Ms. Laure ALDEBERT, Judge

who ruled on the case, a report was presented at the hearing by Ms. Fabienne SCHALLER in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing: Ms. Clémentine GLEMET

JUDGMENT

- ADVERSARIAL
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by Francois ANCEL, President and by Clémentine GLEMET, Clerk to whom the original was delivered by the signatory judge.

I. STATEMENT OF FACTS

Facts

1. E-Doley Finance (“E-Doley”), a company incorporated under Gabonese law, presents itself as carrying out mainly exchange and money transfer activities since 2011.
2. BGFH Holding Corporation SA (“BGFH Holding”) and BGFHBank Gabon SA (“BGFHBank Gabon SA”) are the two companies of the BGFHBank group whose head office is in Libreville, Gabon.
3. On October 21, 2013, E-Doley sent BGFHBank a proposal for a multiform partnership to set up banking services using the "E-DoleyCash by BGFHBank" application designed with the help of its technical partner, the French company Lemon Way, which allows withdrawals, money transfers and payments by mobile phone.
4. On July 30, 2014, BGFHBank launched a call for tenders with specifications related to the acquisition of an online banking solution and the launch of the "*mobile payment*".
5. E-Doley submitted its offer on 23 March 2015.
6. BGFHBank ultimately selected the Chaka Mobile group and launched in 2015 the “BGFH Mobile” application which enables users to perform several banking operations from their mobile phone.

Proceedings

7. Considering that the "BGFH Mobile" application was counterfeiting its application "e-Doley Cash by BGFHBank" and that the BGFH companies had abusively and abruptly terminated the contractual relations arising from the partnership which had, according to it, begun to be implemented, E-Doley summoned these companies to appear before the Paris Commercial Court on September 5, 2018, after several unsuccessful formal notices, for them to be ordered in solidum to pay the global sum of EUR 7,073,561 in compensation of its damage.

8. BGFIBank and BGFI Holding raised a defence of lack of jurisdiction in favour of the Gabonese courts.
9. By judgment dated 15 October 2019, the Commercial Court of Paris held under Article 46 of the Code of Civil Procedure that it had no jurisdiction, E-Doley having not proved to have suffered a damage in France and ordered it to pay BGFIBank and BGFI Holding, each of them, the sum of EUR 2,500 under Article 700 of the Code of Civil Procedure in addition to the costs.
10. E-Doley appealed this decision on 25 October 2019 and filed an application on the same day to be authorised to summon the companies BGFIBank and BGFI Bank Holding on a fixed date.
11. By order of 5 November 2019, E-Doley Finance was authorised to summon the parties for a hearing on 13 January 2020.

II. CLAIMS OF THE PARTIES

12. According to its latest submissions sent electronically on 6 January 2020, E-Doley requests the court, under Article 46 of the Code of Civil Procedure, to
 - FIND the appeal lodged by E-Doley admissible
 - OVERTURN in all its provisions the judgment handed down on 15 October 2019 by the Paris Commercial Court, ruling exclusively on jurisdiction,

Ruling again:

- DISMISS BGFI Bank Gabon and BGFI Bank Holding's plea of lack of jurisdiction, thereupon all their claims and submissions in this regard
- FIND and RULE that the Commercial Court of Paris has jurisdiction to rule on the merits of the dispute referred to it by writ of summons served on 5 September 2018 ;

In any event:

- ORDER BGFI Bank Gabon and BGFI Bank Holding in solidum to pay E-Doley the sum of EUR 30,000 under Article 700 of the Code of Civil Procedure
 - Order them to pay all costs, in addition to those ordered in first instance, including the legal fees of Maître Patricia HARDOUIN - SELARL 2H AVOCATS, in accordance with the provisions of Article 699 of the CPC.
13. According to their latest submissions sent electronically on 10 January 2020, BGFI HOLDING and BGFIBank request the Court, under Articles 42 and 46 of the Code of Civil Procedure and L. 615-17 of the Intellectual Property Code, to :
 - DISMISS the appellant's claims;
 - UPHOLD the judgment of the Commercial Court of October 15, 2019;

Adding to it,

- ORDER the appellant to pay the respondents the sum of EUR 20,000 each under Article 700

of the Code of Civil Procedure and to pay all costs, including the legal fees of SELARL LEXAVOUE PARIS-VERSAILLES.

III. PLEAS OF THE PARTIES

14. E-Doley claims in substance that the French court has jurisdiction irrespective of the contractual or tortious nature of its claims, pursuant to Article 46 of the Code of Civil Procedure.
15. E-Doley thus submits that the Commercial Court of Paris has jurisdiction to rule on the contractual breach it alleges since the essential part of the services was provided in France by its technical service provider, Lemon Way, which designed and developed the application « edoleyCash by BGFIBank », noting that the partnership proposed in October 2013 constitutes the contractual basis of its claim since performance of that contract had started notwithstanding the formal lack of signature.
16. It adds that the French court also has jurisdiction to rule on its claim based on the abrupt termination of commercial relations, whether it is contractual in nature, since part of the service was performed in France, or tortious in nature, since the harmful event caused by the breach results from the launch of the counterfeit "BGFI Mobile" solution and its operation in breach of its rights and commitments, and the damage occurred and was suffered on French territory since the launch of the counterfeit "BGFI Mobile" solution, which marked the end of the contractual relationship between the parties, was carried out both in Gabon and throughout the BGFI Bank Group, including in France, and that the investments were mainly made in France with its French technical service provider.
17. E-Doley finally maintains that, as regards the action for damages resulting from the infringement of the application developed and patented by it, the harmful event thus caused, as well as the consequent harm occurred and was suffered in France, at least in part, since the counterfeit solution "BGFI Mobile" is offered to all customers of the BGFI Bank Group and can be downloaded and used anywhere in the world from a mobile phone, including in France.
18. In response, BGFI HOLDING and BGFIBank argue that only the Gabonese courts have jurisdiction over the claim of E-Doley, since all the elements of the disputed situation relate exclusively to Gabon, whether as regards the nationality and domicile of the parties, the place where the disputed discussions took place, the place where the disputed industrial property title is protected, or the place of the alleged harmful event and damage.
19. They state that the contractual basis cannot be invoked to justify the jurisdiction of the French court where the draft contract has not been signed by the parties, only discussions having been entered into, and where the French company Lemon Way was not a party to that draft contract, it being specified that the purpose of that draft was not the development of the mobile banking solution by the latter but its disposal by the appellant to BGFI.
20. On the claim based on the abrupt termination of commercial relations, BGFI Holding and BGFIBank argue that, if that claim were to be deemed to be contractual, the jurisdiction of the French courts would have to be excluded for the above mentioned reasons and that if it were to be deemed to be tortious in nature, the alleged harmful event would be the brutality of the termination of the alleged commercial relations and that the consequent harm from the abrupt termination of established commercial relations results, not from the termination but from the brutality of the termination, and corresponds to the missed opportunity to continue

to receive the results of the business relationship. They state that the disputed 'relationship' never involved the slightest transaction and therefore did not generate any turnover, so that no damage could therefore have been suffered on French territory.

21. On the claim based on software infringement asserted by E-Doley, BGFI HOLDING and BGFIBank claim that the counterfeiting suit is tortious in nature, so that the competent court is, by application of Articles 42 and 46 of the Code of Civil Procedure, the court of the place where the defendant has its domicile or the one of the place where the harmful event arose or that in whose jurisdiction the damage occurred. They point out that their registered office is in Gabon, so that the jurisdiction of the French courts cannot be based on Article 42 of the Code of Civil Procedure. They argue that the harmful event, consisting in the infringement of software, is located in Gabon, the place of their registered office, and that the place where the damage occurred cannot be France, as the software is intended for Gabonese and Central African users, as E-Doley does not provide proof of the possible use of this software in France. Finally, they emphasise that, pursuant to Article L. 615-17 of the Intellectual Property Code, patent infringement actions fall within the exclusive jurisdiction of the courts of first instance, so that the Commercial Court cannot in any case be held to have jurisdiction over this claim.

IV. REASONS FOR THE DECISION

On the jurisdiction of the Paris Commercial Court to rule on the claim based on breach of contract;

22. Pursuant to Article 46 of the Code of Civil Procedure, the plaintiff may, in addition to the court of the place where the defendant has its domicile, bring an action before the court of his choice:
 - "In contractual matters, the court of the place of actual delivery of goods or of the place of performance of the service;
 - in tort or delict matters, the court of the place where the harmful event occurred or the court within whose jurisdiction the damage was suffered (...)"
23. Notwithstanding the opposition of the parties on the existence of the contract on the basis of which E-Doley is acting, it should be borne in mind that the option of jurisdiction provided for in the second paragraph of Article 46 is also intended to apply where the dispute concerns the existence of a contract, so that E-Doley may rely on that contractual basis in order to assert the jurisdiction of the French courts.
24. However, the Commercial Court of Paris may hear such a claim only if E-Doley can show, within the jurisdiction of that court, either that the goods have actually been delivered or that the implementation of the characteristic performance of the contract which it invokes occurred within the jurisdiction of that court.
25. E-Doley submits that most of the services were provided by Lemon Way, its French technical service provider, which designed, developed and hosted the solution "eDoleyCash by BGFIBank at its premises in Montreuil, France.
26. However, first, E-Doley cannot plead that the French court has jurisdiction over a service provided by a third party to the alleged contract. It should be noted that Lemon Way, which is not a party to the present dispute, is not mentioned either as a party to the draft multiform partnership contract which E-Doley invokes in support of its claim, which partnership was intended, as the draft was communicated, to bind only E-Doley and BGFIBank, even though

this partnership draft mentions the Lemon Way company as the "technical partner" of the former and in an annex to this draft it was considered to share the income resulting from the money transfer operations at a rate of 40% in favour of this technical partner.

27. Moreover, in view of the terms of the partnership draft cited by EDoley, it cannot be considered that the alleged service performance is the characteristic service of that partnership, even though it is expressly stated in that draft that the E-DoleyCash software "was designed and developed by E-Doley Finance and its technical partner", which tends to establish that the software existed prior to the alleged contractual relationship and that the partnership did not concern the design in France of the said software but, more specifically, its availability to BGFIBank, if need be with the necessary adaptations, so that the main part of the contractual relationship did not concern the design of this software in France.
28. This is also clear from the preamble to this partnership draft, which stipulates in the paragraph entitled "*Presentation of the considered service*" that "*BGFIBank declares that it has expressed an interest in acquiring this software, which is embedded on a mobile phone, installed on a computer or which could help it to offer an innovative, instantaneous and automated platform to its customers*"; that "*E-DoleyCash and BGFIBank have exchanged views on the terms and conditions for the use of the software and have agreed as follows (...)*" and that it is stipulated in paragraph 3 entitled "nature of the rights granted" that "*The purpose of the agreement is to define the conditions under which BGFIBank will acquire the rights to use the E-DoleyCash software under a co-branded brand, i.e. in its national and international network with the name E-DoleyCash By BGFIBank*".
29. While E-Doley argues that BGFIBank should contribute "to the software costs" in support of this claim, these costs are clearly not related to the design of the software, but more specifically, as established by Annex 1 of the draft contract, "the need to install a mobile payment platform in Gabon payable before making a money transfer", so that this service was also to be performed mainly in Gabon.
30. Finally, an e-mail exchange between the manager of E-Doley, Mr. [E] and BGFIBank in January 2014 shows that, in response to BGFIBank's question as to the location of E-Doley's technical infrastructure, he replied that "*the technical and IT infrastructure (servers and others) is located in the airport area of Libreville in the Quartier la Sablière for our foreign exchange and money transfer activities*" and that "*regarding the eDoleyCash product, we are not aware of the location of the technical infrastructure*", *the heavy infrastructure is currently operational in Monteuil, France with our technical partner Lemon Way, however, there is (the) necessary equipment in our branch in La Sablière allowing a permanent link with the engineers as well as access to the servers located in France*" so that the argument of proximity with the head office of BGFIBank and BGFI Holding was also put forward by E-Doley as a commercial argument to convince them to conclude this contract.
31. It is clear as it stands that, even if we assume the existence of the contract on which E-Doley relies, the service by E-Doley under the contract did not consist in the design of software but in making available to BGFIBank, whose registered office is in Gabon, software already designed with its technical partner and that it was to be performed in Gabon, so that the mere fact that Lemon Way has its headquarters in Montreuil is insufficient to satisfy the condition laid down in Article 46 cited above and to rule in favour of the jurisdiction of a French court.
32. The judgment of the Paris Commercial Court will therefore be upheld on this count.

On the jurisdiction of the Commercial Court of Paris to rule on the action for the damage allegedly resulting from the abrupt termination of commercial relations;

33. It should be noted that, assuming that this action is contractual in nature, as suggested by E-Doley, this definition cannot, for the reasons set out above, ground the jurisdiction of a French court.
34. Likewise, assuming that the action can be deemed to be tortious in nature, the alleged abrupt termination did indeed take place in Gabon, since E-Doley, in order to attest to that termination, had drawn up a statement recording the official launch by BGFIBank of the "BGFIBANK MOBILE" products and thus the choice of BGFIBank and BGFIBANK Holding not to pursue the considered partnership between the parties by joining forces with another company for the development of a "mobile" banking service.
35. Furthermore, the alleged harm arising from the abruptness of the relations' termination, which cannot be assimilated to the damage suffered as a result of the break in itself, was indeed suffered at the headquarters of E-Doley, which claims to be the victim of such conduct, in this case in Libreville, Gabon.
36. It follows from the foregoing that, even if deemed to be tortious in nature, this claim cannot fall within the jurisdiction of the Commercial Court of Paris, so that the judgment of 15 October 2019 will also be upheld on that ground.

On the jurisdiction of the Commercial Court of Paris to hear the infringement action brought by E-Doley against BGFIBank and BGFIBANK Holding;

37. It should be noted that, although it states that a patent for the E-Doley application is owned by E-Doley, the infringement action brought by E-Doley before the Commercial Court is based more precisely on the provisions of Articles L. 122-6 and L. 335-3 of the French Intellectual Property Code, which protect the exploitation rights belonging to the author of a software program, and whose action is of a tortious nature, which authorises the plaintiff to bring the action at his choice, in addition to the jurisdiction of the place where the defendant resides (...). "the jurisdiction of the place of the harmful event or the jurisdiction in which the damage was suffered".
38. Thus, Article L. 122-6 of the Intellectual Property Code provides that "Subject to the provisions of Article L. 122-6-1, the exploitation rights belonging to the author of software includes the right to perform and authorize:
 - 1° The permanent or temporary reproduction of a software program in whole or in part by any means and in any form. Insofar as the loading, display, execution, transmission or storage of this software requires reproduction, these acts are possible only with the authorization of the author;
 - 2° The translation, adaptation, arrangement or any other modification of software and the resulting reproduction of the software;
39. Regarding the determination of the place where the alleged damage was suffered, in order to assert the jurisdiction of a Parisian court, E-Doley filed a report made on 8 November 2019 according to which a bailiff having his office in Paris noted that by connecting to the URL address <https://groupebgfibank.com/bgfimobile-2> the Internet user is redirected to a page on the BGFIBANK website that presents the "new version of BGFIBANK Mobile" as an application that gives the customer the possibility of managing his bank account (Mobile banking),

associated with a mobile payment solution (Mobile money) and which, under the heading "where to find us", mentions France among other countries as being in the areas where BFGIBank is located.

40. E-Doley also produces another bailiff's report drawn up in Paris on January 2, 2020 in which the bailiff notes the possibility for the internet user going to the site accessible at the URL address [https:// groupebgfibank .com /](https://groupebgfibank.com/) to download on the Google Play and Microsoft platforms the BGFI Mobile application even if it is indicated that "to access your BGFIMobile, an identification number and a password you will be awarded".
41. Finally, if it results from a certified report dated 10 January 2020 from Mr. Le Marec, bailiff in Paris, filed by BGFIBank and BGFI Holding, that the bailiff has been able to download the BGFIMobile application from his mobile phone via the Apple platform, and in particular those entitled 'bgfimobile gabon', 'bgfimobile congo', 'bgfimobile cameroun', and 'bgfimobile equatoriale', he stresses that he was not able to access the services offered; however, this impossibility results from the fact that the user is requested to give a 'client code and a secret code' and not from the fact that these applications cannot operate from France.
42. In this respect, if the bailiff also states that the space in which he is asked to fill in his "telephone number" is "pre-filled by default" with a telephone code corresponding to the various countries concerned that cannot be changed or deleted, this circumstance does not make it possible to conclude that it is impossible for a customer with an account number and a telephone number with the required code to use the allegedly infringing application from France.
43. Thus, the fact that this application can be downloaded from France, and in particular from Paris, and that it thus offers the possibility for account holders having the appropriate codes with the BFGIBank, from which it emerges that it has an international activity, is sufficient to establish a potential use in France of the said application and therefore to ground the jurisdiction of the Parisian court to hear E-Doley's claim of alleged infringement of the copyright, that court being taken as that of the place of potential materialization of the alleged damage, even though the jurisdiction of that court shall be limited to damage suffered on French territory.
44. Therefore the judgment of the Commercial Cour shall be revered on this count.
45. In accordance with Article 86 of the Code of Civil Procedure, according to which the court refers the case to the court "which it considers competent" and as BGFIBank and BGFI Holding have rightly pointed out with regard to the rules of special jurisdiction to deal with intellectual property matters, it is appropriate to refer the examination of this application not to the Commercial Court of Paris, but to the Paris Court of First Instance, which has sole jurisdiction to hear an action for infringement of intellectual property rights, and not to the Commercial Court of Paris pursuant to Articles L. 211-10 and D. 211-6 of the Judicial Organization Code.

Costs and expenses

46. The fate of the costs and expenses and the procedural indemnity has been precisely settled by the Commercial Court.
47. As each of the parties was partially unsuccessful, they should be dismissed from their

respective claims based on Article 700 of the Code of Civil Procedure and BGFIBank and BGFI Holding shall be ordered to pay the costs of the appeal.

V. ON THESE GROUNDS

The court hereby :

1- Upholds the judgment of the Commercial Court of Paris handed down on October 15, 2019 in that it found itself to have no territorial jurisdiction to rule on E-Doley Finance's claims for breach of contract and abusive and brutal termination of commercial relations and directed the parties to better lodge their claims, and on costs and expenses ;

Furthermore, ruling again :

2- Refers the examination of the software infringement action brought by E-Doley Finance against BGFIBank Gabon and BGFI Holding Corporation to the Paris Court of First Instance;

3- Dismisses the parties' claims based on Article 700 of the Code of Civil Procedure;

4- Orders BGFIBank Gabon and BGFI Holding Corporation to pay the costs of the appeal, which shall be recovered in accordance with the provisions of Article 699 of the Code of Civil Procedure.

Clerk
G. GLEMET

President
F. ANCEL