

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE
PARIS COURT OF APPEAL
INTERNATIONAL COMMERCIAL CHAMBER

Division 5 - 16

JUDGMENT OF March 17th, 2020

Ruling in interlocutory proceedings

(N° 17/2020, 9 pages)

General Directory Entry Number: N° **RG 19/12913** - N° **Portalis 35L7-V-B7D-CAGNK**
Decision referred to the Court: summary judgment of July 4th, 2019 – President of the Paris
Commercial Court - RG No 2019012185

APPELLANTS

BANQUE POUR LE COMMERCE ET L'INDUSTRIE - MER ROUGE, a company
incorporated under Djiboutian law

Registered in the trade and companies registry under n° 952/B/SA

Having its registered office at Place Lagarde - DJIBOUTI (République de Djibouti)

Represented by its legal representatives

BRED - BANQUE POPULAIRE (SA)

Registered in the trade and companies registry of Paris under n° 552 091 795

Having its registered office at 18 quai de la Rapée -75012 PARIS

Represented by its legal representatives

Represented by ..., member of the Paris Bar: [...] Having as litigator [...] member of the Paris Bar

RESPONDENT:

DP WORLD DJIBOUTI (FZCO)

Registered in the trade and companies registry under n° 02159

Having its registered office at Jebel Ali Free Zone, Dubaï - United Arab Emirates

Represented by ..., member of the Paris Bar: [...] Having as litigator [...] and [...] members of the Paris Bar

COURT COMPOSITION

The case was heard on February 3rd, 2020, in open court, before the Court, composed of :

Mr François ANCEL, President

Mr Thomas VASSEUR, Judge

Mr Marc BAILLY, Judge

who ruled on the case. A report was presented at the hearing 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 François ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I- STATEMENT OF FACTS AND PROCEDURE

Facts

1. DP World Djibouti FZCO (hereinafter referred to as DP World) is a company incorporated under Emirati law and part of the DP World Limited group, which is one of the largest maritime terminal operators in the world.
2. BRED Banque Populaire ("BRED") is a company incorporated under French law with registered office in Paris and Banque pour le Commerce et l'Industrie - Mer Rouge ("BCIMR") is a company incorporated under Djiboutian law, a 51% subsidiary of BRED (33% owned by the Republic of Djibouti).
3. On June 21st, 2006, DP World and the Government of Djibouti set up the company, Doraleh Container Terminal S.A., ("DCT") to construct, manage and operate the Doraleh Container Terminal in the Port of Djibouti. DP World states that it is a minority shareholder in DCT with 33.34%, while the remaining 66.66% are held by a majority government shareholder, the commercial company Port of Djibouti S.A. ("PDSA").
4. Several contracts were signed in 2006 governing relations between the parties (in particular a shareholders' agreement signed on May 22nd, 2007) under the terms of which DP World stated that it held the majority within the board of directors of DCT and was responsible, together with the majority governmental shareholder, for administering DCT's bank accounts.
5. DCT holds three bank accounts in the books of BCIMR numbered 000057114284000146, 000057114226200169 and 10003095905708030015908.
6. The State of Djibouti adopted on November 8th, 2017 the Act No. 202/AN/17/7, which gave the Government the possibility of renegotiating or terminating all contracts relating to the management or operation of strategic infrastructure "*where it considers that the provisions of such contracts are contrary to the fundamental interests of the Republic of Djibouti*".

7. By decree of the Head of Government dated February 22nd, 2018, following DCT's refusal "to enter into negotiations", the concession contract concluded between the Republic of Djibouti, t DCT and Dubai International was terminated and the management of the Doraleh container terminal was taken over by the State and then transferred to another management company.
8. By order of September 27th, 2018, the President of the Court of First Instance of Djibouti, having noted the disagreement between DCT's partners , appointed a provisional administrator.
9. Considering that it had been the victim of a disguised expropriation by the State of Djibouti and suspecting the existence of embezzlement and collusion between the State of Djibouti on the one hand, BRED and its subsidiary on the other hand, DP World requested BRED by letter dated October 25th, 2018 to give it access to the bank statements of the three above-mentioned DCT accounts opened in the books of the BCIMR as of the beginning of 2018; BRED indicated that it was unable to respond and invited it to contact the BCIMR.

Proceedings

10. It is in these circumstances that, following an unsuccessful formal notice dated January 11th, 2019, DP World filed an application with the President of the Paris Commercial Court on March 5th, 2019 seeking, pursuant to Article 145 of the French Code of Civil Procedure, a communication measure concerning the three bank accounts held by DCT with BCIMR.
11. By order rendered on July 4th, 2019, the President of the Paris Commercial Court granted DP World's requests "pursuant to Articles 872 and 873 of the French Code of Civil Procedure" and ordered BRED and BCIMR, subject to a penalty of EUR 1,000 per day of delay starting fifteen days after the notification of this order, to forward DP World:
 - the bank statements of the three bank accounts of DCT opened in the books of BCIMR for the period from February 1st, 2018 to June 30th, 2019;
 - in the event of any unauthorized movements on the three accounts over the period from February 1st, 2018 to June 30th, 2019, the names of the persons who gave the transfer order, the person who executed the order and the beneficiary of the related transfer.
 - And ordered BRED and BCIMR *in solidum* to pay EUR 10,000 to DP World pursuant to Article 700 of the Code of Civil Procedure in addition to the costs of the proceedings.
12. BRED and BCIMR appealed this order on July 10th, 2019.
13. DP World requested, by writ of summons dated August 13th and 26th, 2019, the striking off of the roll of the appeal filed by BRED and BCIMR. The delegate of the First President of the Court of Appeal dismissed DP World's claim by an order dated November 28th, 2019 after having found that for "reasons relating to the particular circumstances of the decision", the disclosure of the exhibits prior the ruling of the Court on BRED and BCIMR's appeal "has the *de facto* effect of questioning the concrete reality of the exercise of the right of appeal".

II- CLAIMS OF THE PARTIES

14. **According to their latest submissions sent electronically on January 29th, 2020**, BRED and BCIMR ask the court, in accordance with articles 31, 32, 42, 145 and 700 of the Code of Civil Procedure, to:

- FIND BRED Banque Populaire and BCIMR's appeals admissible ,

Granting the claims

- REVERSE the order undertaken in all its provisions,

And ruling again:

In limite litis:

- EXONERATE BRED Banque Populaire for lack of standing in these proceedings,

- GRANT the plea of lack of jurisdiction raised by BRED Banque Populaire and BCIMR in favour of the Djiboutian jurisdictions,

In any case:

- DISMISS all DP WORLD DJIBOUTI's claims

- ORDER DP WORLD DJIBOUTI to pay to BRED and BCIMR an indemnity of EUR 50,000 each on the basis of Article 700 of the Code of Civil Procedure,

- ORDER DP WORLD DJIBOUTI to pay all the costs of the proceedings, including the fees of the law firm GUIZARD ET ASSOCIES which made advance payments, under the conditions of article 699 of the Code of Civil Procedure.

15. **According to its latest submissions sent electronically on December 3rd, 2019**, , DP World Djibouti asks the Court, pursuant to articles 11, 42, 142, 145, 872 and 700 of the Code of Civil Procedure, to :

Mainly, with regard to BRED Banque Populaire and Banque pour le Commerce et l'Industrie - Mer Rouge :

- UPHOLD the order issued by the President of the Paris Commercial Court on July 4th, 2019 in all its provisions;

And, adding thereto,

- ORDER BRED Banque Populaire and Banque pour le Commerce et l'Industrie - Mer Rouge, subject to a penalty payment of EUR1,000 per day starting fifteen days from the date of the notification of the forthcoming judgment , to send DP World Djibouti the bank statements of the three bank accounts for the period from July 1st, 2019 to the date of the judgment ;

- ORDER BRED Banque Populaire and Banque pour le Commerce et l'Industrie - Mer Rouge, subject to a penalty of 1,000 euros per day of delay, starting fifteen days from the date of notification of the judgment, to communicate to DP World Djibouti in the event of any unauthorised movements on the three bank accounts over the period from July 1st, 2019 to the date of the judgment, the names of the persons who gave the transfer order, the person who executed the order and the beneficiary of the transfer

concerned;

In the alternative, as regards BRED Banque Populaire :

- ORDER BRED Banque Populaire to obtain from its subsidiary, Banque pour le Commerce et l'Industrie - Mer Rouge, the bank statements of bank accounts for the period from February 1st, 2018 to the date of the decision to be issued;

- ORDER BRED Banque Populaire to obtain from its subsidiary, Banque pour le Commerce et l'Industrie Mer Rouge, any other information concerning any unauthorised movements on the bank accounts (date of the transaction, person who gave the transfer order, person who executed the order, beneficiary) for the period from February 1st, 2018 to the date of the decision to be issued;

- ORDER BRED Banque Populaire subject to a penalty payment of EUR 1,000 per day of delay, starting fifteen days from the date of notification of the judgment, to disclose to DP World Djibouti the bank statements of the accounts and other information obtained from the Banque pour le Commerce et l'Industrie - Mer Rouge;

In any case,

- DISMISS all of BRED Banque Populaire and Banque pour le Commerce et l'Industrie - Mer Rouge's claims ;

- ORDER in solidum BRED Banque Populaire and Banque pour le Commerce et l'Industrie - Mer Rouge to pay to DP World Djibouti the sum of EUR 50,000 under Article 700 of the Code of Civil Procedure;

- ORDER *in solidum* BRED Banque Populaire and Banque pour le Commerce et l'Industrie - Mer Rouge to pay all costs.

16. The Court refers to the decision undertaken and to the aforementioned submissions for a detailed statement of the dispute and the parties' claims, in accordance with Article 455 of the French Code of Civil Procedure

III- PLEAS OF THE PARTIES AND REASONS FOR THE DECISION

On BRED's exoneration and the plea of lack of jurisdiction;

17. **The appellants** argue that BRED was brought to the proceedings by DP World on the sole ground that it is the parent company of BCIMR, the bank in which books the bank accounts of DCT are opened, and for the sole purpose of artificially creating a forum of jurisdiction in France, even though it has no contractual link with DCT and no access to bank accounts and information concerning that company. In this respect, they challenge any interference by BRED in the affairs of its subsidiary and stress that the criteria used in this respect in the appealed order , and in particular BRED's shareholding, its membership of the board of directors of BCIMR, the holding of BCIMR meetings at BRED's head office, the existence of common managers and the use of the services of the same lawyer for both companies, are not relevant and cannot call into question the autonomy of legal persons.
18. The appellants add that in the context of prudential obligations and the fight against money laundering and terrorist financing, BRED is required to implement policies for the supervision, control and management of risks, particularly credit risks, on a consolidated group-wide basis and to exchange certain information necessary for this

purpose with its subsidiaries, from which no interference of any kind can be inferred, so that the elements retained in this respect in the order undertaken are not relevant, in particular the procedures for opening joint accounts, BRED's audit within BCMIR, the validation of BCMIR credits by BRED's Credit Committee, and the validation of BCMIR's credit policy by BRED's Commitments and Risks Department.

19. The appellants argue that the judge that shall have territorial jurisdiction to rule on a claim based on Article 145 of the Code of Civil Procedure is the president of the court likely to hear the case on the merits or the president of the court within whose jurisdiction the requested measures of *in futurum* investigation must, even partially, be carried out.
20. They state that in the present case the French court is not likely to hear the potential future proceedings on the merits on the ground that there is no connection with France, since DP World, DCT and BCMIR are all foreign companies, the contractual relations between DP World and DCT being subject to Djibouti law and enforced in Djibouti, and the alleged contractual or tortious violations would necessarily have taken place in Djibouti. They add that the investigative measures are to be carried out in Djibouti and that only the BCMIR has a right of access to the accounts held by DCT and, more generally, to its banking information. Lastly, they challenge the connection to French courts on the basis of article 42 of the Code of Procedure on the grounds that BRED does not have standing to defend itself and has been artificially brought into the proceedings and that none of the measures requested can be executed in France.
21. They point out that in the event of a plurality of defendants domiciled within different jurisdictions, the court hearing a claim based on Article 145 of the Code of Civil Procedure has jurisdiction to order the measures requested against all the persons concerned by the claim, if at least one of them is domiciled within its jurisdiction, on condition that one of the measures requested must be executed within its jurisdiction. They specify that none of the measures requested is intended to be executed on French territory, since all of the banking documents relating to the disputed accounts are kept by BCMIR in Djibouti.
22. They thus consider that the only connection between the dispute and France is the unjustified presence of BRED, which has been brought to the proceedings in a perfectly artificial and opportunistic manner in order to create a forum of jurisdiction on French territory.
23. **In reply, DP World** argues that it is not required at this stage of the procedure to prove with certainty the existence of BRED's interference in the affairs of BCMIR and that it is sufficient to prove that, on the basis of the information available to it, such interference is plausible.
24. It stresses that it reports this possible interference in view of the close links between the two banks and in particular the fact that BRED's managers hold directorships in BCMIR and that BRED is a member of the board of directors of BCMIR, that numerous meetings of the Board of Directors and general meetings of BCMIR have been held at BRED's head office in Paris and that the minutes of BCMIR's Boards of Directors establish that there are joint commercial policies for opening accounts for certain clients between BRED and its subsidiary, that audits within BCMIR are presented by BRED's Audit Director, that BCMIR's credit policy is subject to review and approval by BRED's Commitments and Risks Department and that credit files are validated by BRED's Credit Committee.
25. It adds that the witness statement of one of its former employees, Mr. (S), reports the

words of a BCIMR Managing Director according to which he had received instructions from the bank in Paris not to disclose any information concerning DCT bank accounts w.

26. DP World thus considers that the provisions of Article 42 of the Code of Civil Procedure allow to act in France on the grounds that one of the defendants, BRED, is domiciled on French territory and that investigative measures are indeed intended to be carried out, even partially, at BRED's head office, it being specified that the majority of meetings of the Board of Directors and general meetings of BCIMR were held at BRED's head office in Paris, which suggests that relevant information is present, even though there are joint policies between the two banks for opening accounts for certain clients, that BCIMR's audits are presented by BRED's audit director and that BRED validates the credit files and BCIMR's credit policy.

Thereupon,

27. It shall be reminded that a party may seek to be exonerated for any reason before the examination of the merits of the claim, only where it justifies that it cannot be concerned by the legal proceedings brought by the applicant, without it being necessary to examine the merits of the case in order to assess the merits of the claims made against it.
28. Thus, unless it is rejected outright, BRED's claim to be exonerated cannot be assessed without ruling at the same time on the seriousness of its status as co-defendant in the context of the plea of lack of jurisdiction, it being noted that the claim for exoneration and the plea of lack of jurisdiction, raised *in limine litis* by BRED and BCIMR, are indeed dealt with together in their submissions.
29. In interlocutory proceedings, the judge with territorial jurisdiction may be the president of the court likely to hear the case on the merits, whose jurisdiction is determined by articles 42 et seq. of the Code of Civil Procedure, or the president of the court within whose jurisdiction the measures of *in futurum* investigation requested must be carried out, even partially.
30. In the present case, DP World justifies the jurisdiction of the judge of the Paris Commercial Court on the basis of Article 42(2) of the Code of Civil Procedure and the place of execution of the requested measures.
31. It shall be reminded, however, that the prorogation of jurisdiction provided for by Article 42(2), applicable in the international order, does not allow a defendant residing abroad to be sued before a French court when the claim brought against it and a co-defendant domiciled in France is not serious in nature, even if it is related to another claim against the same defendants.
32. Similarly, while it is true that DP World is under no obligation at the stage of its interlocutory action under Article 145 of the Code of Civil Procedure to prove with certainty the existence BRED's interference in BCIMR's affairs in order to justify the merits of a measure of inquiry against it, proof of such interference must be adduced in a sufficiently substantiated manner where, as in the present case, the territorial jurisdiction of the court addressed to order it must first be assessed.
33. In the present case, the conflict at the origin of the dispute has no connection with France, since it involves two shareholders of a company governed by Djiboutian law - DCT - and is not connected with France; These two shareholders are themselves companies under foreign law, one being governed by Djiboutian law (PDSA) and the

other by Emirati law (DP World), the latter alleging that the other one, which is controlled by the State of Djibouti, voluntarily and illegally excluded it from the management of DCT in February 2018.

34. This conflict between shareholders led to the appointment by order of September 27th, 2018 by the President of the Djibouti Court of First Instance of a provisional administrator for DCT after the Djiboutian judge found that the disagreement between the partners risked "hindering the proper functioning" of that company.
35. Furthermore, it appears from the writ of summons issued before the president of the Paris Commercial Court, which is part of the proceedings, that two proceedings are pending before the courts of Djibouti, one relating to the conditions for appointing this provisional administrator and the other relating to the articles of association and a resolution of the board of directors of DCT.
36. In addition, the investigation measures requested from the President of the Paris Commercial Court concern the access to the bank statements of the three accounts of DCT opened in the books of BCIMR, those numbered 000057114284000146, 000057114226200169 and 10003095905708030015908, the first two accounts being denominated in USD and Djiboutian francs respectively.
37. Lastly, as is clear from its own records, DP World justifies this investigative measure precisely on the basis of the disputes between it and the State of Djibouti over the latter's 33% stake in BCIMR, and the fear that irregular movements of funds - because they were carried out without its authorization - were made by BCIMR for the benefit of the State of Djibouti, so that it indicated that it needed access to the accounts in order to confirm or not the existence of fraudulent acts and "to assess any civil and/or criminal offences (for example, breach of trust) that may have been committed by PDSA - the majority shareholder of DCT - to the detriment of DP World with the active or passive assistance of BCIMR and/or BRED".
38. It is clear from all these elements that the dispute has close, even exclusive, links with BCIMR and the sole territory of Djibouti, and that the action brought as co-defendant against BRED was clearly aimed solely at artificially creating a jurisdictional criterion for the benefit of the French court, even though two proceedings are under way before the courts of Djibouti.
39. In this regard, the mere connections and relations invoked between BRED and BCIMR, which is undisputed to be its subsidiary and not a mere branch abroad, cannot suffice to make it a serious co-defendant within the meaning of article 42 cited above and to justify the territorial jurisdiction of the interim relief judge of the Paris Commercial Court, when, moreover, the measures sought relate exclusively to the bank accounts opened in the books of its subsidiary.
40. The existence of executives holding corporate offices in both companies, the presence of BRED's Chief Executive Officer on BCIMR's board of directors, the holding of meetings of the boards of directors and general meetings of BCIMR in France at BRED's head office, the definition of a common commercial policy for opening accounts, and BRED's supervision of BCIMR's credit policies or risk prevention, are not in themselves such as to call into question the tightness resulting from the separate legal personality between a parent company and its subsidiary and the ability of the former to have access to client accounts opened in its subsidiary's books.
41. Similarly, the DP World employee's statement whereby the Director General of BCIRM informed it on February 4th, 2019 that he had received instructions from

BRED not to transmit information to DP World on DCT's bank accounts, apart from the fact that it emanates from an employee of DP World and must therefore be admitted with circumspection, relates in any event an indirect fact (the instruction allegedly given by BRED to the Director General of BCIMR) so that its probative force cannot be sufficient to support the allegations of interference by DP World against BRED.

42. It is clear from these elements that the location of BRED's registered office in Paris cannot be taken into account in the criteria for the jurisdiction of the judge in interlocutory proceedings within the meaning of Article 42(2) of the Code of Civil Procedure.
43. Likewise for the place of execution of the measure, which, since it concerns access to the opened bank accounts in the books of BCIMR, whose head office is in Djibouti, cannot justify the jurisdiction of President of the Paris Commercial Court.
44. The plea of lack of jurisdiction raised shall therefore be upheld, the order issued shall be reversed and DP World shall be directed to better lodge its claim.

Costs and expenses

45. DP World, the losing party, shall pay the costs of the proceedings which shall be recovered in accordance with the provisions of Article 699 of the Code of Civil Procedure.
46. In addition, DP World shall be ordered to pay BRED and BCIMR each, which had to pay costs of proceedings in order to assert their rights, an indemnity under Article 700 of the Code of Civil Procedure which it is equitable to fix at the global sum of EUR 5,000.

IV- ON THESE GROUNDS, THE COURT HEREBY

- 1- Reverses the order of the President of the Commercial Court of July 4th, 2019 in all its provisions,

Ruling again,

- 2- Finds that the President of the Commercial Court of Paris has no territorial jurisdiction;
- 3- Directs the parties to better lodge their claim;
- 4- Orders DP World Djibouti FZCO to pay to BRED Banque Populaire and t Banque pour le Commerce et l'Industrie - Mer Rouge each the total sum of EUR 5,000 under Article 700 of the Code of Civil Procedure;
- 5- Orders DP World Djibouti FZCO to pay the costs of the proceedings in accordance with Article 699 of the Code of Civil Procedure.

The Clerk
Clémentine GLEMET

The President
François ANCEL