COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-027718-188
(500-11-046106-148)

DATE: June 7, 2022

CORAM: THE HONOURABLE ROBERT M. MAINVILLE, J.A.
STEPHEN W. HAMILTON, J.A.
CHRISTINE BAUDOUIN, J.A.

EUROBANK ERGASIAS S.A.
APPELLANT – Defendant
v.

BOMBARDIER INC.
RESPONDENT – Plaintiff
and

THE GENERAL DIRECTORATE FOR DEFENSE ARMAMENTS AND INVESTMENTS OF THE HELLENIC MINISTRY OF NATIONAL DEFENSE
NATIONAL BANK OF CANADA
RESPONDENTS – Defendants

JUDGMENT

---

[1] The appellant, Eurobank Ergasias S.A., appeals the June 21, 2018 judgment rendered by Mr. Justice André Wery of the Superior Court, District of Montreal, rejecting its demand for payment under a Letter of Counter-Guarantee issued by respondent National Bank of Canada at the behest of respondent Bombardier Inc.

[2] For the reasons of Mainville, J.A., with which Baudouin, J.A. concurs, **THE COURT**:

[3] **GRANTS** the motion for new evidence submitted by the appellant during the hearing of the appeal and **AUTHORIZES** the filing of the certified translation of decision number 597/2021 of the Athens Court of Appeal dated December 8, 2020, and released February 2, 2021;

[4] **ALLOWS** the appeal only in part so as to strike paragraph 245 from the trial judgment; and

[5] **CONFIRMS** in all other aspects the conclusions of the trial judgment set out in its paragraphs 241-244, 246 and 247;

[6] **THE WHOLE** with legal costs throughout in favour of respondent Bombardier Inc.

[7] For other reasons, Hamilton, J.A. would have allowed the appeal and set aside in part the judgment rendered in first instance and he would propose to dismiss the action instituted by Bombardier against Eurobank and National Bank, the whole with costs in both instances in favour of Eurobank.

ROBERT M. MAINVILLE, J.A.

STEPHEN W. HAMILTON, J.A.

CHRISTINE BAUDOUIN, J.A.

Mtre Karim Renno
RENNO VATHILAKIS
For Eurobank Ergasias S.A.

Mtre Michel Sylvestre
Mtre Jérémy Boulanger-Bonnelly
NORTON ROSE FULBRIGHT CANADA
For Bombardier Inc.

Mtre Basile Angelopoulos
ANGELOPOULOS, AVOCATS
For The General Directorate for Defense Armaments and Investments of the Hellenic Ministry of National Defense

Mtre Laurence Rousseau-Dumont
WOODS
For National Bank of Canada

Date of hearing: May 4, 2021
Date of advisement: July 14, 2021

REASONS OF MAINVILLE, J.A.

[8] This appeal raises the issue of whether a bank letter of counter-guarantee may be enforced when the principal banking letter of guarantee was paid without right. For the reasons that follow, I conclude that the trial judge committed no reviewable error in finding that the bank letter of counter-guarantee is not enforceable in the circumstances of this case.

CONTEXT OF THE LITIGATION

[9] The factual and procedural contexts are addressed at length in the trial judgment of the Superior Court.[1] The following summary suffices for the purposes of the appeal.

[10] Bombardier Inc. ("Bombardier") is a large Canadian corporation which, among other activities, manufactures aircraft for sale nationally and internationally. In 1998, it entered into a procurement contract (the "Procurement Contract") with respondent the General Directorate for Defense Armaments and Investments of the Greek Ministry of National Defense ("Greek Ministry of National Defense"), a branch of the Greek Government, for ten Bombardier CL-415 firefighting amphibious aircraft for a total value of US $252,151,899. The performance of this contract is not in dispute.

[11] The litigation rather arises from the related Offsets Contract, concluded at the same time as the Procurement Contract, under which Bombardier undertook to attempt to subcontract some of the work related to the construction of the aircraft to Greek suppliers. Under the Offsets Contract, Bombardier committed itself to implement eligible offset programs inviting such Greek suppliers as subcontractors for a total credited value equal to 110% of the Procurement Contract. Bombardier further agreed to pay up to 10% of this amount as liquidated damages should it not fulfill its undertakings under the Offsets Contract. The Offsets Contract stipulates that the potential liquidated damages must be secured by a letter of guarantee from a bank operating in Greece. It further stipulates that all disputes relating to it are to be submitted to binding arbitration according to the rules of the International Chamber of Commerce ("ICC") in Paris.

[12] The liquidated damages were thus secured by a letter of guarantee (the "Letter of Guarantee") in favour of the Greek Ministry of National Defense issued by ANZ Grindlays Bank Limited, which was later replaced by New TT Hellenic Postbank S.A., and then finally by the appellant, Eurobank Ergasias S.A. ("Eurobank").

---

1 *Bombardier Inc. v. General Directorate for Defense, Armaments and Investments of the Hellenic Ministry of National Defense (HMOD)*, 2018 QCCS 2127, paras. 12-68 ("Trial judgment").

[13] Eurobank is itself the beneficiary of a letter of counter-guarantee (the "Letter of Counter-Guarantee") issued by respondent National Bank of Canada ("National Bank").

[14] The Greek Ministry of National Defense was to progressively reduce the amount of the Letter of Guarantee as soon as it received evidence of the fulfillment of Bombardier's offsets obligations. It was ultimately reduced to US $13,868,354.

[15] In 2008, a dispute arose between Bombardier and the Greek Ministry of National Defense with respect to the Offsets Contract. Bombardier claimed that it was unable to fulfill some of its obligations because it was impossible to subcontract to Greek companies while meeting the standards imposed by the Procurement Contract. On December 30, 2008, Bombardier filed a request for arbitration by a panel appointed under the rules of the ICC in Paris (the "ICC Arbitral Tribunal"), as provided for under the applicable binding arbitration clause set out in the Offsets Contract.

[16] During the arbitration proceedings, by a letter dated April 20, 2012, the Greek Ministry of National Defense formally represented to Bombardier and the ICC Arbitral Tribunal that it would not seek payment under the Letter of Guarantee for as long as the arbitration process was ongoing.

[17] Sometime in mid-2012, Bombardier added a second issue to its arbitration request, arguing that the Offsets Contact violated the principle of the free movement of goods under the laws governing the European Union.

[18] Contrary to its previous written undertaking, on August 5, 2013, the Greek Ministry of National Defense requested Eurobank to immediately pay the amount of US $13,868,354 under the Letter of Guarantee. After being informed by the National Bank of the pending arbitration proceedings before the ICC Arbitral Tribunal, Eurobank refused to pay on the ground that the terms of the Letter of Guarantee had not been complied with.

[19] Bombardier also applied for relief before both the ICC Arbitral Tribunal and the Quebec Superior Court. On August 13, 2013, the ICC Arbitral Tribunal issued an interim order enjoining the Greek Ministry of National Defense from demanding any payment under the Letter of Guarantee until its final award (the "Final Award") was issued.[2] Moreover, on August 16, 2013, Justice André Prévost of the Quebec Superior Court granted Bombardier's provisional interlocutory injunction and enjoined Eurobank from paying any amount pursuant to the Letter of Guarantee, enjoined the National Bank from paying any amount pursuant to the Letter of Counter-Guarantee and ordered the Greek Ministry of National Defense to withdraw its demand for payment under the Letter of Guarantee.

---

[2] Exhibit P-23, Procedural Order No. 11 in case No. 160321/GZ, dated August 13, 2013, issued by the ICC Arbitral Tribunal, p. 5 (the "Interim Order").

[20] In parallel proceedings in Greece initiated by Eurobank, on August 22, 2013, a Greek judge, Chrysoula Pana, further granted a provisional or preliminary injunction authorizing Eurobank not to pay under the Letter of Guarantee until a further determination of the issue by the Greek courts.

[21] On December 5, 2013, the ICC Arbitral Tribunal informed Bombardier and the Greek Ministry of National Defense that it had submitted its Final Award in the arbitration dispute for final approval under the ICC process.

[22] On December 16, 2013, another Greek judge, Panayiotis Kostis, dismissed Eurobank's injunctive application on its merits.

[23] On December 18, 2013, the Greek Ministry of National Defense issued to Eurobank another demand for payment under the Letter of Guarantee. Eurobank again did not pay.

[24] On December 19, 2013, Bombardier filed an amended motion for provisional interlocutory and permanent injunction before Justice Thomas Davis of the Superior Court. On December 20, 2013, Davis, J.S.C. handed down his ruling, which essentially provided for the same orders as those Prévost, J.S.C. had issued earlier on August 16, 2013.

[25] On December 23, 2013, the Chairman of the ICC Arbitral Tribunal informed the parties that the Final Award had been approved and that it would be communicated to the parties on December 30, 2013.

[26] That same day, the Greek Ministry of National Defense served an "Extrajudicial Invitation Protest" on Eurobank, ordering it, under penalty of law, to proceed without any further delay or recalcitrance to the payment of the Letter of Guarantee. The threat was understood by Eurobank as meaning that if it did not comply, 50% of its assets and that of its officers and principal employees would be frozen, its tax certification would be in jeopardy, it would be subject to criminal sanctions, including imprisonment of its representatives, it would be subject to compulsory enforcement and collection, and it would owe interest on the amount at a rate of 1% a month.[3]

[27] Faced with this threat, on December 24, 2013, Eurobank released the funds under the Letter of Guarantee. That same day, the National Bank notified Eurobank that it refused to pay under the Letter of Counter-Guarantee.

[28] On December 30, 2013, the Final Award of the ICC Arbitral Tribunal was released. It was a total victory for Bombardier. It ruled that the Offsets Contract, including its terms

---

[3] Trial judgment, para. 54.

pertaining to the liquidated damages and to a letter of guarantee, violated EU law and was null and void *ab initio.*

[29] On January 8, 2014, Schrager, J.S.C. (as he then was), issued a safeguard order which enjoined the National Bank not to pay pursuant to the Letter of Counter-Guarantee until a final determination on the matter by the courts of Quebec. This ruling was upheld by this Court.

[30] On April 14, 2015, the Court of Appeal of Paris dismissed the proceedings of the Greek Ministry of National Defense seeking to annul the Final Award of the ICC Arbitral Tribunal and thereby confirmed that award in all its aspects.[4]

[31] On June 21, 2018, Justice Wery of the Superior Court rendered the judgment now under appeal.

TRIAL JUDGMENT

[32] The trial judge concluded that the Superior Court holds jurisdiction over the Letter of Counter-Guarantee because (1) the National Bank is domiciled in Quebec and has an establishment in Quebec; (2) Bombardier would suffer damages in Quebec if the Letter of Counter-Guarantee were paid; and (3) the obligations arising out of the Letter of Counter-Guarantee are to be performed in Quebec.

[33] The trial judge also concluded that the Superior Court had jurisdiction over the homologation of the ICC Arbitral Tribunal Final Award. He thus homologated that award and concluded that once homologated, its conclusions should take effect and, consequently, that the Greek Ministry of National Defense should be ordered to comply with it.

[34] Addressing the issue of the validity of the Letter of Counter-Guarantee, the trial judge first set out the legal principles that apply to such instruments, notably their autonomous nature and their enforceability irrespective of any underlying dispute concerning the obligations they guarantee, save in the case of fraud.

[35] As a matter of fact, the trial judge found that the actions of the Greek Ministry of National Defense amounted to fraud. It had threatened Eurobank with severe consequences if the latter did not comply with its payment demand, and the trial judge found that its conduct possessed “some measure of impropriety, dishonesty and of legal bullying that could not be qualified other than having the colour of fraud” and that it “utilized what appears to be nothing short than legal blackmail and extortion in order to

---

[4] Exhibit P-62: Decision rendered by the *Cour d’appel de Paris* on April 14, 2015, in file No. 14/07043.

force Eurobank to pay just a few days before it would be officially announced that it did not have the right to that payment".[5]

[36] The trial judge also found that Eurobank was well aware of this fraudulent conduct.[6] He further found that "Eurobank was the last rampart before the realization of the fraud" and that it had failed to resist that fraud "after considering the risks that resistance would have entailed".[7] He added that:[8]

> [204] Eurobank did not play its role under the exception rule. Its decision to pay enabled *the beneficiary [the Greek Ministry of National Defense] to obtain the benefit of the credit as a result of fraud*. In a way, what Eurobank wants to be spared the effects of the very rule it was supposed to uphold and protect.
>
> [205] Eurobank may not have conceived the fraudulent plot, it may not have supplied the weapons, but it surely participated in pulling the trigger. It had a choice albeit a difficult one, but still a choice, of abiding to Justice Davis's Order or to submit to [the Greek Ministry of National Defense]'s Extrajudicial Invitation Protest. In choosing the latter, it knowingly enabled fraud to produce its fruits.
>
> (Italics in original)

[37] The trial judge further found that since the ICC Arbitral Tribunal had concluded that the Offsets Contract was invalid *ab initio*, the Letter of Guarantee and the Letter of Counter-Guarantee had also become null and void.

[38] The binding conclusions of the trial judgment are as follows:

> [241] **DECLARES** the Counter-Guarantee issued by National Bank of Canada on January 29, 1999, originally in favor of ANZ Grindlays Bank Limited referenced as L/G204892A/00011 (Exhibit (P-5) null and void;
>
> [242] **ENJOINS** the defendant National Bank of Canada from paying out any amount pursuant to the Counter-Guarantee issued by it on January 29, 1999, originally in favor of ANZ Grindlays Bank Limited referenced as L/G204892A/00011 (Exhibit (P-5);
>
> [243] **HOMOLOGATES** the ICC Arbitral Tribunal Final Award in case bearing number 16032/GZ/MHM rendered on December 30th, 2013 (Exhibit P-44);
>
> [244] **DECARES** that any payment by New TT Hellenic PostBank S.A. (now Eurobank Ergasias S.A.) to the Hellenic Ministry of National Defense pursuant to the Letter of Guarantee issued by ANZ Grindlays Bank Limited issued on February

---

5 Trial judgment, paras. 175 and 182.
6 *Id.*, para. 187.
7 *Id.*, para. 203.
8 *Id.*, paras. 204-205.

> 5th, 1999 (Exhibit P-4), was not due and cannot form the basis of a demand for payment under the Counter-Guarantee (Exhibit P-5) or produce any legal consequences against plaintiff Bombardier Inc. or defendant National Bank of Canada;
>
> [245] **ORDERS** the defendant Hellenic Ministry of National Defense to comply with the ICC Arbitral Tribunal Final Award in case bearing number 16032/GZ/MHM rendered on December 30th, 2013 (Exhibit P-44);
>
> [246] **ORDERS** the execution of this Order notwithstanding appeal;
>
> [247] **THE WHOLE** with the judicial costs.

ISSUES IN APPEAL

[39] Though Eurobank raises many issues in appeal, these can be summarized in two propositions: (1) the Superior Court has no jurisdiction over the matter, and (2) the judge erred in concluding that the Letter of Counter-Guarantee was not enforceable.

ANALYSIS

(a) Jurisdictional Issue

[40] Eurobank submits that the conclusions of the trial judge with respect to the Letter of Counter-Guarantee issued by the National Bank depend, for the most part, on the trial judge's conclusions with respect to the Letter of Guarantee. Accordingly, since the Letter of Guarantee is governed by Greek law, the subsidiary issue of the Letter of Counter-Guarantee should also be governed by Greek law and be subject to the jurisdiction of Greek courts.

[41] This argument must be rejected in light of the clear provisions of articles 3134 and 3148 *C.C.Q.*

[42] Article 3134 *C.C.Q.* sets out that in the absence of any special provision, Quebec authorities have jurisdiction when the defendant is domiciled in Quebec. Article 3148 para. (1) *C.C.Q.* adds that in personal actions of a patrimonial nature, Quebec authorities have jurisdiction when the defendant has his domicile or his residence in Quebec. In this case, Bombardier sought an order preventing the National Bank from paying any amount to Eurobank pursuant to the Letter of Counter-Guarantee. This is a personal action of a patrimonial nature, and since the National Bank is domiciled in Quebec, the Superior Court of Quebec clearly has jurisdiction to hear and to determine the matter. Since articles 3134 and 3148 para. (1) *C.C.Q.* suffice to confirm the jurisdiction of the Superior Court, it is not necessary to consider the other grounds of jurisdiction identified by the trial judge.

[43] Eurobank tries to defeat the application of articles 3134 and 3148 *C.C.Q,* by resorting to article 3139 *C.C.Q.*, which sets out that where a Quebec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand. Eurobank interprets this article *a contrario* in order to sustain the proposition that when the principal demand (in its view the performance of the Letter of Guarantee) is subject to a foreign jurisdiction, then the incidental demand (in its view the performance of the Letter of Counter-Guarantee) must then also be subject to that foreign jurisdiction. This is a distorted and unacceptable interpretation of article 3139 *C.C.Q*.

[44] The rules of private international law under the *Civil Code of Quebec* determine whether Quebec authorities have jurisdiction over legal actions, not specific factual or legal issues which arise in the context of such an action. Consequently, article 3139 *C.C.Q.* is not concerned with what are principal and secondary factual or legal issues that must be determined in an action, but whether there is a principal and incidental demand and whether jurisdiction over the principal demand extends to the incidental demand. In this case, there is only one principal demand: to declare the Letter of Counter-Guarantee unenforceable. As a result, article 3139 *C.C.Q.* does not apply in this case.

[45] Moreover, article 652 of the *Code of Civil Procedure* grants jurisdiction to the Superior Court to homologate the Final Award of the ICC Arbitral Tribunal. Bombardier, as a party to that award, is entitled to seek and obtain its homologation in Quebec and to invoke that homologated award in support of its claims with respect to the unenforceability of the Letter of Counter-Guarantee from the National Bank.

[46] That being stated, the Quebec Superior Court has no jurisdiction with respect to the specific conclusion sought by Bombardier against the Greek Ministry of National Defense, namely the order made against that party to comply with the Final Award of the ICC Arbitral Tribunal. Indeed, that defendant is neither domiciled nor resident in Quebec and though the Superior Court may indeed homologate the Final Award, that homologation is for the purpose of rendering it legally binding in Quebec, not in Greece. As a result, the order set out in paragraph 245 of the trial judge's judgment should be set aside insofar as it purports to have an extraterritorial application.

(b) <u>Enforceability of the Letter of Counter-Guarantee</u>

(i) <u>General Legal Principles Governing Documentary Letters of Credit</u>

[47] The fundamental legal principle governing documentary letters of credit is their autonomous nature.[9] Consequently, a letter of credit constitutes a contract between the

[9] *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59, para. 10 ("*Angelica-Whitewear*").

issuer (usually a bank) and the beneficiary that is independent from the underlying obligation or contract which it is intended to guarantee.[10]

[48] In *Angelica-Whitewear*, a leading case with respect to letter of credits in Canadian law, Le Dain, J. summarized the principle of autonomy and its *raison d'être* in the following fashion:[11]

> The governing principle for documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy is that the obligation of the issuing bank to honour a draft on a credit when it is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the credit is independent of the performance of the underlying contract for which the credit was issued. Disputes between the parties to the underlying contract concerning its performance cannot as a general rule justify a refusal by an issuing bank to honour a draft which is accompanied by apparently conforming documents. This principle is referred to as the autonomy of documentary credits.

[49] An elaborate commercial system, both national and international, has been built on the idea that letters of credit impose upon the issuing party a quasi-absolute obligation to pay when the documents presented by the beneficiary strictly comply with those required by the terms of the letter of credit, irrespective of any ongoing dispute between the parties to the underlying contracts or obligations the letters of credit serve to guarantee.[12]

[50] However, an exception to the principle can be raised in cases of fraud, as the Supreme Court noted in *Angelica-Whitewear*,[13] in which Le Dain, J. defined the exception of fraud as "fraud by the beneficiary of the credit which has been sufficiently brought to the knowledge of the bank before payment of the draft or demonstrated to a court called on by the customer of the bank to issue an interlocutory injunction to restrain the bank from honouring the draft".[14]

[51] The scope of the exception of fraud is subject to caution. Interpreted too broadly, the exception could result in a loss of confidence in banking institutions and counterparties and thus affect the efficiency of international banking transactions. However, an exception of fraud construed in a strict and rigid manner could defeat the

---

10 *JetsGo Corporation (Syndic de)*, 2006 QCCA 1521, para. 12. See also: *Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc.,* [1993] O.J. No. 112 (QL), para. 21 (*"Cineplex Odeon")*.

11 *Angelica-Whitewear*, para. 10.

12 *Malas v. British Imex Industries Ltd.*, [1958] 2 Q.B. 127, p. 129; *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd*., [1978] 1 All E.R. 976.

13 *Angelica-Whitewear*, para. 16. See also: *Banque de Montréal c. Européenne de condiments S.A.,* 1988 CanLII 1350 (QC CA), p. 6.

14 *Angelica-Whitewear*, para. 11.

purpose of the fraud exception, which is to discourage or suppress fraud in letter of credit transactions. As Le Dain, J. stated in *Angelica Whitewear*:[15]

> Differences of view or emphasis with respect to these issues, particularly the kind of fraud and proof required, reflect the tension between the two principal policy considerations: the importance to international commerce of maintaining the principle of the autonomy of documentary credits and the limited role of an issuing bank in the application of that principle; and the importance of discouraging or suppressing fraud in letter of credit transactions. The potential scope of the fraud exception must not be a means of creating serious uncertainty and lack of confidence in the operation of letter of credit transactions; at the same time, the application of the principle of autonomy must not serve to encourage or facilitate fraud in such transactions.

[52] It was established in *Angelica-Whitewear* that the exception of fraud can be invoked in cases of "fraud in the tendered documents"[16] (documentary fraud strictly speaking) and in cases of "fraud in the underlying transaction of such a character as to make the demand for payment under the credit a fraudulent one".[17] According to Le Dain, J., the fraud exception to the autonomy of documentary credits "should extend to any act of the beneficiary of a credit the effect of which would be to permit the beneficiary to obtain the benefit of the credit as a result of fraud".[18] The Supreme Court also established that the exception of fraud should be confined solely to fraud committed by the beneficiary of a credit and not fraud perpetrated by a third party when the beneficiary is innocent.[19]

[53] *In Cineplex Odeon,* a case widely referred to in Quebec jurisprudence,[20] Blair, J. defined "fraud" for this purpose as follows:[21]

> [30] Fraud is a straightforward five-letter word, meaning just what it says: "fraud". Fraud is not simply a legitimate dispute or disagreement over the interpretation of a contract, however one-sided that dispute may appear. While the notion of fraud may elude precise definition, it is a concept well-known to the law, and it must, in my view, import some aspect of impropriety, dishonesty or deceit. In *Washburn v. Wright* (1913), 31 O.L.R. 138 (App. Div.), Mr. Justice Riddell said, at p. 147:

---

15 *Ibid*.
16 *Id.*, para. 17.
17 *Ibid.*
18 *Ibid*.
19 *Id*., para. 18.
20 *SNC-Lavalin Polska SP. ZOO v. BNP Paris Canada*, 2017 QCCS 3694, para. 40; *Bombardier Inc. v. Hermes Aero*, 2004 CanLII 7014 (QC CS), para. 35; *Banque Nationale du Canada c. CGU Cie d'assurance du Canada*, 2004 CanLII 49434 (QC CS), para. 49.
21 *Cineplex Odeon*, paras. 30-31.

> But, suppose the defendant was wrong in this or in any other respect, there is absolutely no evidence of fraud. Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is ... done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" Ex p. Watson (1888), 21 Q.B.D. 301, per Wills, J., at p. 309.
>
> [31] Cases where the demand on the letter of credit can be said to be "clearly untrue or false", or "utterly without justification", or where it is apparent there is "no right to payment", all fall within the foregoing principles and must be read in the context of those "fraud" principles: see *C.D.N. Research & Development Ltd. v. Bank of Nova Scotia* (1980), 18 C.P.C. 62 (Ont. H.C.), at p. 65; *Henderson v. Canadian Imperial Bank of Commerce et al.* (1982), 40 B.C.L.R. 318 (B.C.S.C.), at p. 320; *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.*, *supra*, at p. 169.

[54] The standard of proof for establishing the fraud exception varies depending on whether it is raised when a party is seeking to prevent payment under a letter of credit or if it is raised after the issuing bank has already paid the letter of credit. In the first case, a strong *prima facie* case of fraud is sufficient to prevent payment. When a draft has already been paid by the issuing bank, it must also be shown that the fraud was clear and obvious to the issuing bank before payment was made.[22]

(ii) Did the Trial Judge err in finding that the actions of the Greek Ministry of National Defense amounted to fraud?

[55] Eurobank does not directly challenge the finding of fraud on the part of the Greek Ministry of National Defense and it confirmed this at the hearing of this appeal. Eurobank's position is consistent with the evidence of its own conduct, which clearly establishes that it would not have paid under the Letter of Credit had it not been for the threats made by Greek officials. Eurobank's challenge to the trial judgment rather pertains to the judge's conclusion that it acted itself in a fraudulent and improper manner when it decided to pay, a matter which will be dealt with below.

[56] Consequently, the challenge to the finding of fraud on the part of the Greek Ministry of Defense is largely brought by that Ministry itself. However, that party does not recognize the jurisdiction of the Quebec courts and has consequently not filed an appeal against the trial judgment. Nevertheless, in its appeal brief it attempts to challenge that finding. Having failed to file an appeal, it submissions in this matter in its appeal brief are improperly before the Court and should be dismissed on this basis alone.[23]

[57] Be that as it may, these submissions should nevertheless be dismissed on the merits.

---

[22] *Angelica-Whitewear*, para. 19.
[23] *BPR inc. c. Mécanique Ducro inc.*, 2020 QCCA 130, paras. 14-18.

[58] Indeed, the trial judge wrote that "[t]he Court finds it hard to accept that [the Greek Ministry of National Defense]'s conduct, in the circumstances we have seen, did not possess some measure of impropriety, dishonesty and of legal bullying that could not be qualified other than having the color of fraud".[24] He noted that the Greek Ministry of National Defense had given an undertaking not to draw on the Letter of Guarantee until the arbitration process had been exhausted, but decided nevertheless to renege on its commitment and demand payment under that instrument.[25] The trial judge also observed that while the Greek Ministry of National Defense had fully acknowledged the jurisdiction of the ICC Arbitral Tribunal over the dispute with Bombardier, it did not respect the Interim Order that Tribunal had made on August 13, 2013, ordering it to "abstain from demanding payment under the Letter of Guarantee issued pursuant to Offsets Benefit Contract 27/98, and this until issuance of the Final Award in the present case".[26] Finally, the trial judge considered that the behaviour of the Greek Ministry of National Defense was "nothing short than legal blackmail and extortion in order to force Eurobank to pay just a few days before it would be officially announced that it did not have the right to that payment".[27] It is principally for those reasons that the trial judge concluded that the conduct of the Greek Ministry of National Defense amounted to fraud.

[59] The Greek Ministry of National Defense recognizes that it had agreed, on April 20, 2012, to suspend its request for payment under the Letter of Guarantee during the arbitral process.[28] It emphasizes that at that time, the arbitration was anticipated to be held in June 2012.[29] However, Bombardier subsequently sought to add a second issue to its arbitration request, arguing that the Offsets Contact violated the free movement of goods under European Union law. This, according to the Greek Ministry of National Defense, explains why it changed its mind and requested payment from Eurobank under the Letter of Guarantee.[30]

[60] The trial judge was aware of this submission, but rejected it in light of the circumstances, including both the curious timing of the request for payment and the terms of the ICC Arbitral Tribunal Final Award (entirely favorable to Bombardier), with which the Greek Ministry of National Defense has to date utterly failed to comply.[31] There is no reviewable error here since the actions of the Greek Ministry of National Defense clearly amount to a bad faith and fraudulent attempt to circumvent the Interim Order and the Final Award of the ICC Arbitral Tribunal by any and all means, no matter how repugnant they may be.

---

24 Trial judgment, para. 175.
25 Trial judgment, paras. 176-177.
26 Exhibit P-23, p. 5.
27 Trial judgment, para. 182.
28 Appeal Brief of the Greek Ministry of National Defense, para. 6.
29 *Id.*, paras. 7-9.
30 *Id.*, paras. 37-39.
31 *Id.*, paras. 172-173.

[61] Moreover, it is further submitted that since the Court of Appeal for Athens has found that the conduct of the Greek Ministry of National Defense was consistent with Greek law, the trial judge's conclusion with respect to fraud cannot stand. This submission should also be rejected for the following reasons.

[62] After the trial judge issued his judgment, on November 29, 2019, a Greek court of first instance ruled on the merits of an action brought by Eurobank; that court concluded that the Greek Ministry of National Defense had to reimburse Eurobank the amount it had paid under the Letter of Guarantee, plus interest.[32] However, that ruling was subsequently overruled by the Court of Appeal of Athens in a decision dated December 8, 2020, and issued February 2, 2021. Eurobank sought leave to submit a certified translation of this Greek appellate decision as new evidence, but its motion for this purpose was contested by Bombardier. The Court must now rule on the admissibility issue. In light of the fact that the decision of the Greek appellate court pertains directly to the matters at issue in this appeal, this decision may form part of the record in this case.

[63] The Court of Appeal of Athens essentially concluded that the Greek State was not bound (a) by its prior written commitment not to seek the performance of the Letter of Guarantee as long as the arbitration proceedings before the ICC Arbitral Tribunal were pending,[33] (b) by the Interim Order of the ICC Arbitral Tribunal not to seek payment under the Letter of Guarantee until a final arbitral ruling,[34] or (c) by the Final Award of the ICC Arbitral Tribunal.[35]

[64] There is little doubt that the decision of the Court of Appeal of Athens is binding and executory as between Eurobank and the Greek Ministry of National Defense. However, it does not necessarily bind Bombardier, the National Bank or this Court. Indeed, when foreign judgments are received in evidence without being formally recognized in Quebec, they are *prima facie* proof of the reported facts, of the good

---

32 Affidavit of John C. Kyriakides sworn June 24, 2021 in support of Bombardier's contestation of the Motion for New Evidence, para. 3a.

33 Certified Translation of the Ruling of the Court of Appeal for Athens, pp. 22-24.

34 *Id.*, p. 24.

35 *Id.*, pp. 26-27. Though the Court of Appeal for Athens' reasons are in part based on the refusal to extend the doctrine of unjust enrichment to a third party (Eurobank), it also adds that (at p. 27): "With said facts, if the Appellant [the Greek State] contributed for obtainment of said enrichment, the Appellant is entitled to keep it […]. Consequently, if the unjust enrichment of the Appellant, the Greek State, was not proved either by payment of the amount of the [Letter of Guarantee] as undue – existing for payment of the legitimate, as per the above cause – or for an immoral cause, the lawsuit should be dismissed as unfounded as far as the ancillary basis for unjust enrichment it concerned". In essence, the decision of the Court of Appeal for Athens largely relies on the immunity of the Greek State from compulsory compliance with the ICC arbitration process, including the Interim Order and the Final Award of that body.

application of the foreign law and of the foreign court's jurisdiction on the matter.[36] They are not, however, necessarily binding on Quebec courts.[37]

[65] In this case, the trial judge decided to place no weight upon the decision of the Greek court of first instance presided by Judge Kostis which, on December 16, 2013, dismissed Eurobank's injunction proceedings in Greece. The trial judge was of the view that this decision was not consistent with the conduct of the Greek Ministry of National Defense as had been established before him at the hearing of this case. In the trial judge's view, this conduct clearly amounted to fraud since it sought to circumvent, through clumsy and obvious means, both the Interim Order and the Final Award of the ICC Arbitral Tribunal.[38] Likewise, no weight should be given to the decision of the Court of Appeal of Athens.

[66] Although it appears from the decision of the Court of Appeal for Athens that, under Greek law, the written commitments of the Greek Ministry of National Defense as well as binding arbitration proceedings involving that Ministry are unenforceable within Greek territorial jurisdiction, Quebec courts are not bound to recognize and enforce such foreign laws and decisions within Quebec with respect to Quebec when the result of doing so is manifestly inconsistent with public order as understood in international relations. A minimal degree of international business morality and fair play can prevail and be enforced outside the ambit of Greek territorial jurisdiction. This is, moreover, the case where, as here, no formal request for recognizing this foreign judgment has been made by any party.

[67] In this context, though the principle of international comity is a guiding principle for Quebec courts when considering or enforcing foreign judgments,[39] this principle must be applied with regard to other values, including those of order and fairness so as to avoid injustice[40] and that of reciprocity.[41] This is why public policy considerations may compel a Quebec court to disregard a foreign law or a foreign judgment,[42] more particularly when

---

36 Catherine Piché, *La preuve civile*, 5th ed., Montreal, Yvon Blais, 2020, p. 259; Gérard Goldstein and Ethel Groffier, *Traité de droit civil – Droit international privé*, vol. 1, Cowansville, Yvon Blais, 1998, para. 155.

37 *Canadian Forest Navigation Co. Ltd. v. Canada*, 2017 FCA 39, paras. 19-20; J.-G. Castel, *Droit international privé québécois*, Toronto, Butterworths, 1980, p. 846.

38 Trial judgment, paras. 189-191.

39 *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, paras. 15-19 ("*Spar Aerospace*"); *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, paras. 27-28 ("*Beals*").

40 *Spar Aerospace*, para. 20; *Beals*, paras. 39-41.

41 *Beals*, para. 29.

42 *R.S. v. P.R.,* 2019 SCC 49 (CanLII), [2019] 3 SCR 643, paras 52-53; *Beals*, paras. 71-72; *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, paras. 12, 26-27; *Smart Systems Technologies Inc. v. Domotique Secant inc.*, 2008 QCCA 444; Claude Emmanuelli, *Droit international privé québécois*, 3rd ed., Montreal, Wilson & Lafleur, 2011, paras. 298-299; Gérard Goldstein and Ethel Groffier, *Traité de droit civil – Droit international privé*, vol. 1, Cowansville, Yvon Blais, 1998, para. 165.

the outcome of that law or that judgment is inconsistent with public order as understood in international relations.[43]

[68] In this case, in clear contravention of the principle of reciprocity, the Court of Appeal of Athens decided to place no weight whatsoever on the prior judgments and orders of the Quebec courts. It would be curious indeed if this Court were to enforce a foreign decision which is in complete contradiction with binding judgments of the Superior Court and which has chosen to both disregard and discard those judgments.

[69] Moreover, and perhaps even more significant from an international public order perspective, the decision of the Court of Appeal for Athens essentially stands for the proposition that the Greek State may ignore with impunity both the Interim Order and the Final Award of the ICC Arbitral Tribunal even if it formally undertook to abide by the arbitration process, and even if the Final Award was confirmed in all its aspects by the Court of Appeal for Paris. In these circumstances, it stands to reason that the public order exception set out in articles 3081 and 3155 para. (5) *C.C.Q.* applies here.

(iii) Did the Trial Judge err in finding that the National Bank was not bound to honour the Letter of Counter-Guarantee?

[70] The fact that the Greek Ministry of National Defense fraudulently obtained payment under the Letter of Guarantee is insufficient to conclude that the National Bank is not obliged to honour the Letter of Counter-Guarantee. As already noted, it must also be shown that the fraud was clear and obvious to Eurobank before it paid under the Letter of Guarantee.

[71] It is clear in this case that Eurobank had sufficient knowledge of the fraud prior to paying. Dimitri Koustatopoulos, who testified at trial, was the General Director of Corporate Banking of Eurobank at the pertinent time. He acknowledged that Eurobank knew, before releasing the funds, that the ICC Arbitral Tribunal had issued the Interim Order prohibiting their release, that the Quebec Superior Court had issued similar orders and that the Final Award of the ICC Arbitral Tribunal was imminent.[44] Athanasios Danis, a Greek lawyer, was Director of the legal department of Eurobank at the pertinent time. He testified that Eurobank asked for an injunction in the Greek courts because it had concerns about the good faith of the Greek Ministry of National Defense in seeking payment.[45]

[72] However, the pertinent issue here is not whether Eurobank knew of the fraud (it clearly did) but rather whether the fact it paid as a result of sanctions threatened by the

---

43 Articles 3081 and 3155 para. (5) *C.C.Q.*
44 Testimony of Dimitri Konstantopoulos, Hearing of October 11, 2017, p. 50, lines 8-17.
45 Testimony of Athanasios Danis, Hearing of October 11, 2017, p. 64, lines 7-10.

Greek State absolved it of any responsibility and entitled it to nevertheless claim under the Letter of Counter-Guarantee. The trial judge rightfully concluded that it did not.

[73] While recognizing the difficult situation in which Eurobank had been placed by the Greek State,[46] the trial judge found that overriding judicial policy considerations had to prevail in order to maintain the integrity of both the Canadian judicial system and the ICC arbitral system, as well as to ensure the continued credibility of the rules governing letters of credit. These considerations reflect the very essence of the exception of fraud, which is to maintain the stability and efficiency of international banking transactions with respect to the principle of autonomy of documentary credits while discouraging or suppressing fraud.[47]

[74] He noted that the decision to pay was made contrary to two orders of the Quebec Superior Court and a similar order of the ICC Arbitral Tribunal. As a result, judicial policy and, ultimately, public order required that those orders he upheld.[48] Moreover, the very credibility of the system of letters of credit would be placed into question should Eurobank's submission be accepted. He expressed the following judicial policy considerations: [49]

> [220] Another important policy consideration justifies that we put aside Eurobank's argument that the Court should forgive its payment to [the Greek Ministry of National Defense] and order [the National Bank] to reimburse it. Finding against Eurobank would not have the effect to hinder the efficiency of commercial letters of credit but, on the contrary, it would enhance its security and efficiency by making sure this kind of conduct does not spread. Bombardier's counsel put it eloquently, in his written argument, by saying that making [the National Bank] reimburse Eurobank "would encourage fraud in documentary credit. Indeed, guarantor banks would then be at full liberty to pay beneficiaries in full knowledge of the fraud committed by them, while being assured of being reimbursed by the instructing banks, provided the latter did not actively participate in the fraud."
>
> […]
>
> [227] The efficiency of the letters of credit system rests on the premise that credit providers will refrain from disbursing when they are confronted with fraud. Paying in spite of fraud could possibly be viewed by some as more efficient, but such a system would soon collapse under the weight of its own illegitimacy.

[75] The trial judge committed no error of law in so finding.

---

46 Trial judgment, para 196.
47 *Angelica-Whitewear,* para. 11.
48 *Id.*, para. 213.
49 *Id.*, paras. 220 and 227.

[76] As the trial judge found, in the circumstances of this case, ordering the National Bank to pay under the Letter of Counter-Guarantee would be to condone the evasion of a binding arbitration process by means of fraud and threats. This would essentially render meaningless the Interim Order and the Final Award of the ICC Arbitration Tribunal, as well as the decision of the Court of Appeal for Paris confirming that Final Award.

CONCLUSION

[77] For these reasons, I would (a) grant the motion for new evidence and authorize the filing of the certified translation of decision number 597/2021 of the Athens Court of Appeal dated December 8, 2020, and released February 2, 2021; (b) allow the appeal only in part so as to strike paragraph 245 from the trial judgment; and (c) confirm in all other aspects the conclusions of the trial judgment set out in its paragraphs 241-244, 246 and 247, the whole with legal costs throughout in favour of Bombardier.

ROBERT M. MAINVILLE, J.A.

REASONS OF HAMILTON, J.A.

[78] This appeal raises issues with respect to the enforceability of international letters of credit. The Respondent Bombardier inc. is seeking an injunction from the Quebec Superior Court ordering the Respondent National Bank of Canada not to pay the Appellant Eurobank Ergasias S.A. (with its predecessors, hereinafter "Eurobank")[50] under a counter-guarantee, after Eurobank has paid the Respondent the Hellenic Ministry of National Defense ("HMOD") under the principal letter of credit, which was issued at National Bank's request. The principal issues are the jurisdiction of the Quebec courts and the applicability of the fraud exception or some other exception in light of HMOD's conduct and Eurobank's knowledge of that conduct.

[79] In first instance, Justice André Wery held that the Superior Court had jurisdiction to issue the injunction and that the fraud exception applied, with the result that he issued the injunction.[51]

[80] Eurobank appeals from that judgment and seeks the dismissal of Bombardier's action.

[81] HMOD, which is not an Appellant, invites the Court to quash the findings of fact of the trial judge that its conduct and behaviour in this matter amounted to blackmail, extortion or fraud.

CONTEXT

[82] Bombardier is an international manufacturer of airplanes based in Quebec. HMOD is a branch of the Greek government.

[83] On November 20, 1998, Bombardier and HMOD entered into a procurement contract (the "Main Contract") for ten Bombardier CL-415 firefighting amphibious aircraft for a total price of US $252,151,899.

---

50 ANZ Grindlays Bank Limited was the original signatory of the Letter of Guarantee. It was replaced by New TT Hellenic Postbank S.A. and finally by Eurobank Ergasias S.A. It is important to note that although Eurobank has replaced ANZ Grindlays and Postbank, it is not Eurobank's conduct that is discussed in this judgment. Eurobank was not involved when the payment to HMOD under the Letter of Guarantee was made in December 2013. It only inherited this litigation.

51 *Bombardier Inc. c. General Directorate for Defense, Armaments and Investments of the Hellenic Ministry of National Defense (HMOD)*, 2018 QCCS 2127.

[84] At the same time, Bombardier and HMOD entered into the Offsets Contract, under which Bombardier undertook to subcontract some of the work related to the manufacture of the aircraft to Greek suppliers. The total value of the offset obligations was 110% of the value of the Main Contract, or US $277,367,089, based on the value of the subcontracts awarded and a multiplier of 4, 8 or 10. The Offsets Contract provided for the payment of liquidated damages to HMOD of 10% of any offset obligations which remained unfulfilled by Bombardier after ten years. The Offsets Contract required that this obligation be secured by an irrevocable letter of guarantee in favour of HMOD in the amount of US $27,736,710 issued by a bank having a branch in Greece. HMOD was to progressively reduce the amount of the letter of guarantee as soon as it received evidence of the fulfillment of Bombardier's offset obligations. Both the Main Contract and the Offsets Contract provided that any disagreement was to be resolved by a panel of arbitrators appointed by the International Chamber of Commerce (the "ICC").

[85] In order to fulfill its obligation under the Offsets Contract, Bombardier had National Bank request that Eurobank issue the required letter of guarantee. Eurobank issued the Letter of Guarantee in favour of HMOD in the agreed form and in the amount of US $27,736,710 on February 2, 1999. National Bank had provided Eurobank with its Counter-Guarantee in the same amount on January 29, 1999.

[86] In 2008, a dispute arose between Bombardier and HMOD in relation to the Offsets Contract. Bombardier took the position that it was entitled to a reduction in the Letter of Guarantee in the amount of US $13,868,354 for the offset obligations it had performed, and that it was unable to fulfill its remaining offset obligations because it was impossible to subcontract to Greek companies while meeting the standards imposed by the Main Contract. HMOD refused any reduction.

[87] On December 30, 2008, Bombardier filed a Request for Arbitration with the ICC, in which it asked the Arbitral Tribunal to declare that it had fulfilled all of its obligations under the Offsets Contract and to order HMOD to return the Letter of Guarantee to Bombardier. HMOD contested the arbitration proceedings.

[88] The arbitration proceedings took some time. In June 2010, while the proceedings were ongoing, HMOD agreed to reduce the Letter of Guarantee to US $13,868,354.60.

[89] The first hearing was set for June 2012. In April 2012, HMOD declared that it intended to impose the remaining penalty on Bombardier and to call on the Letter of Guarantee. Bombardier responded that unless HMOD confirmed that it would refrain from doing so until the dispute was resolved by the Arbitral Tribunal, it would make an urgent request for provisional measures to the Arbitral Tribunal. In response, HMOD sent a letter dated April 20, 2012 to Bombardier and the Arbitral Tribunal stating that it would not impose any penalties "for as long as the arbitration procedure is ongoing." HMOD confirmed this position during the hearing on June 29, 2012. As a result of these

representations, Bombardier did not request any provisional order from the Arbitral Tribunal at that time.

[90] In the course of the June 2012 hearing, Bombardier realized that it had an additional argument to the effect that the Offsets Contact was null because it violated the free movement of goods under Article 34 of the *Treaty on the Functioning of the European Union*. Bombardier sought permission to raise this new issue on August 15, 2012. It was authorized to do so, and it filed a brief on that issue on December 3, 2012. A further evidentiary hearing on that issue was held in June 2013.

[91] Following the June 2013 hearing, the parties were given the opportunity to file post-hearing briefs by September 27, 2013. The time limit for the Arbitral Tribunal to issue its award was December 31, 2013.

[92] Without waiting for the final award to be issued, HMOD began the process for calling on the Letter of Guarantee. It appears that the process may have been started as early as March 2013.

[93] The formal decision to call on the Letter of Guarantee was taken on July 17, 2013. HMOD put Bombardier in default on July 31, 2013 and made a formal demand to Eurobank for the immediate payment of the outstanding amount on the Letter of Guarantee of US $13,868,354.60 on August 5, 2013. Eurobank advised National Bank of the demand and its intention to pay HMOD in one week.

[94] The following day, Bombardier filed an urgent application to the Arbitral Tribunal asking it to issue an urgent *ex parte* order that HMOD withdraw its demand for payment and not make any further demand until the Arbitral Tribunal had issued its final award. The Arbitral Tribunal decided it had no jurisdiction to issue an *ex parte* order, but invited HMOD to respond to the application so that it could render its decision on the application on August 13. On August 8, Bombardier applied for a provisional injunction against HMOD, Eurobank and National Bank before the Quebec Superior Court.

[95] Meanwhile, Eurobank determined that HMOD's demand for payment was "ineffective (not in conformity with all the terms and conditions of [the] Guarantee)" and indicated that no payment would be issued until it received a new demand from HMOD.

[96] The Arbitral Tribunal issued Procedural Order No. 11 on August 13, 2013, whereby it ordered HMOD to abstain from demanding payment under the Letter of Guarantee until a final award was issued in the arbitration process. Despite requests from Bombardier, HMOD did not confirm that it would comply with this order.

[97] Bombardier therefore proceeded on August 14, 2013, with its application for a provisional injunction before Justice André Prévost of the Quebec Superior Court.

Eurobank received earlier that day a new demand for payment from HMOD dated August 12, 2013, and it informed the court and the parties during the hearing that it considered the new demand for payment to be in conformity with the terms and conditions of the Letter of Guarantee and that payment would in principle be made on August 20, 2013.

[98] Justice Prévost issued his judgment on August 16, 2013, in which he granted Bombardier a provisional injunction until August 26, 2013, enjoining Eurobank from paying out any amount pursuant to the Guarantee, enjoining National Bank from paying out any amount pursuant to the Counter-Guarantee, ordering HMOD to withdraw its demand for payment on the Guarantee and ordering Eurobank not to make a demand for payment under the Counter-Guarantee.[52]

[99] Following the granting of the order by the Arbitral Tribunal and the provisional injunction by the Superior Court, Eurobank petitioned the Court of First Instance of Athens on August 20, 2013, to order HMOD to withdraw the request for payment of the Letter of Guarantee and not proceed with a new request for payment until the issuance of a final arbitration award, or alternatively, to order HMOD not to receive payment from Eurobank and order Eurobank not to pay the amount of the Letter of Guarantee until the issuance of a final arbitration award.

[100] Justice Chrysoula Pana rendered judgment on the preliminary injunction on August 22, 2013, allowing Eurobank not to "liquidate" the Letter of Guarantee until the hearing of the petition for the interim measures on November 22, 2013.

[101] In the face of those orders, HMOD suspended its attempt to collect on the Letter of Guarantee. Because the situation appeared to be under control, Bombardier did not seek the renewal of Justice Prévost's provisional injunction and did not present its motion for an interlocutory injunction in Superior Court.

[102] Justice Panayiotis Kostis of the Court of First Instance of Athens heard the petition on November 22, 2013 and continued the preliminary injunction pending his judgment on the merits of the petition.

[103] On December 5, 2013, the Arbitral Tribunal informed Bombardier and HMOD that it had submitted its final award to the ICC Court for approval.

[104] On December 16, 2013, Justice Kostis rendered his judgment and dismissed Eurobank's injunctive application on the merits. It appears that there was no possibility of appealing that ruling.

---

[52] *Bombardier inc. c. General Directorate for Defense Armaments and Investments of the Hellenic Ministry of National Defense*, 2013 QCCS 6892.

[105] Then things quickly unraveled.

[106] On December 18, 2013, HMOD made a new demand for payment to Eurobank. Eurobank notified National Bank that it intended to issue payment to HMOD on December 23, 2013 and demanded payment by National Bank.

[107] On December 19, 2013, Bombardier filed a Re-Re Amended motion for provisional interlocutory and permanent injunction before Justice Thomas M. Davis of the Superior Court. On December 20, 2013, Justice Davis issued a provisional injunction with the same conclusions as the injunction issued by Justice Prévost in August.[53] The hearing on the interlocutory injunction was set for December 27 to 30, 2013.

[108] On December 23, 2013, the Chairman of the ICC Arbitral Tribunal informed the parties that the ICC Court had approved the final award and that it would be communicated to the parties on December 31, 2013.

[109] Eurobank wrote HMOD on December 23, 2013 asking if HMOD insisted on payment, given the injunction issued by the Superior Court, the provisional order issued by the Arbitral Tribunal and confirmation by the Arbitral Tribunal that it had submitted its final decision to the secretariat for review HMOD responded the same day by serving an "Extrajudicial Invitation Protest" on Eurobank, ordering it, under penalty of law, "to proceed without any further delay or recalcitrance, to the payment of the above letter of guarantee". On the same day, National Bank advised Eurobank that it would not pay under the Counter-Guarantee.

[110] On December 24, 2013, Eurobank paid the outstanding amount of the Letter of Guarantee to HMOD.

[111] On December 27, 2013, Eurobank put National Bank on notice to pay that sum under the Counter-Guarantee.

[112] On December 27, 2013, the hearing on the interlocutory injunction in Superior Court was postponed to January 7, 2014, before Justice Mark Schrager, then of that court. National Bank agreed not to make any payment under the Counter-Guarantee until January 8, 2014, at 5 p.m.

[113] On December 31, 2013, Bombardier and HMOD received the Arbitral Tribunal Final Award, which ruled that the Offsets Contract, its articles pertaining to the liquidated damages and the Letter of Guarantee were null and void *ab initio*. A motion to annul that ruling was dismissed by the *Cour d'appel de Paris* on April 14, 2015.

---

[53] *Bombardier inc. c. General Directorate for Defense Armaments and Investments of Hellenic Ministry of National Defense*, 2013 QCCS 6896.

[114] On January 8, 2014, Justice Schrager granted Bombardier's request for a safeguard order and enjoined National Bank from paying out any sums pursuant to the Counter-Guarantee.[54] Eurobank filed a motion for leave to appeal, which was granted.[55] On June 10, 2014, the Court of Appeal dismissed the appeal without prejudice to Eurobank's right to assert a properly framed written declinatory exception that could be presented on the merits of the case.[56]

[115] On June 13, 2014, the Safeguard Order was renewed until judgment on the merits and the declinatory exception was also referred to the hearing on the merits.

[116] The hearing on the merits proceeded before Justice Wery for four days beginning October 11, 2017. He rendered judgment on June 21, 2018, in favour of Bombardier, as more fully set out in the next section of these reasons. Eurobank appealed from this decision and we heard the appeal on May 4, 2021.

[117] We were informed at the hearing of the following developments in the case.[57]

[118] On December 24, 2018, Eurobank sued the Greek state before the Court of First Instance of Athens to recover the amount it had paid under the Letter of Guarantee. Judgment was rendered in first instance on November 29, 2019, whereby the Greek state was ordered to repay Eurobank the amount it had received, but the appeal was granted by the Court of Appeal of Athens on December 8, 2020. A certified translation of the judgment of the Court of Appeal of Athens was produced after the hearing. The action was dismissed on the basis that HMOD had the right to call upon the Letter of Guarantee when it did so and that Eurobank did not have standing to argue unjust enrichment as it was not a party to the Offsets Contract.

[119] As a result, eight years after the payment was made, HMOD still has US $13,868,354.60 that was paid under an agreement which has been conclusively determined to be null and void *ab initio*, and Eurobank is still out of pocket for the same amount.

TRIAL JUDGMENT

[120] The trial judge considered six issues:

---

54 *Bombardier inc. c. General directorate for Defense Armaments and Investments of the Hellenic Ministry of National Defense*, 2014 QCCS 181.

55 *New TT Hellenic Postbank, s.a. c. Bombardier Inc*., 2014 QCCA 409 (Marie St-Pierre, J.A.).

56 *New TT Hellenic Postbank, s.a. c. Bombardier Inc*., 2014 QCCA 1197.

57 Eurobank made a motion for new evidence after the hearing on June 29, 2021, which was modified on July 5, 2021. The motion will be granted as part of the conclusions of this appeal.

- Do the Quebec courts have jurisdiction over any or all of the issues?
- Should the Court homologate the ICC Arbitral Tribunal Final Award?
- Should the Court order HMOD to comply with the ICC Arbitral Tribunal Final Award?
- Should the Court declare National Bank's Counter-Guarantee null and void?
- Should the Court declare that any payment made by Eurobank to HMOD pursuant to the Letter of Guarantee was not due and cannot form the basis of a demand for payment under the Counter-Guarantee?
- Should the Court enjoin National Bank from paying out any amount pursuant to the Counter-Guarantee?

[121] The trial judge concluded that the Superior Court had jurisdiction over the Counter-Guarantee because (1) National Bank is domiciled in Quebec and has an establishment in Quebec (Article 3148, subparagraphs 1(1) and 1(2) *C.C.Q.*), (2) because if National Bank paid Eurobank, Bombardier would have to reimburse National Bank and would suffer damages in Québec (Article 3148, subparagraph 1(3) *C.C.Q.*), and (3) because more than one of the obligations arising out of the Counter-Guarantee are to be performed in Quebec (Article 3148, subparagraph 1(3) *C.C.Q.*).

[122] The trial judge also concluded that the Superior Court had jurisdiction over the homologation of the Arbitral Tribunal's final award "and incidentally on the issues pertaining to the Letter of Guarantee"[58]. He held that, because the Quebec courts have jurisdiction over the obligations that stem from the Counter-Guarantee and over its validity, they have jurisdiction over the homologation of the Final Award under Article 3139 *C.C.Q.*, which sets out that where a Quebec authority has jurisdiction to rule on the principal demand (the Counter-Guarantee), it also has jurisdiction to rule on an incidental demand or a cross demand. He stated that, should the Superior Court have jurisdiction to issue an injunction against National Bank, "it is only logical and proper that it would have jurisdiction to dispose of the legal grounds relied upon in support of the injunction application, which include the annulment of the counter-guarantee".[59] The trial judge also stated that it seems contrary to the objectives of proportionality, efficiency and the economy of judicial resources to force Bombardier to sue both in Quebec and in Greece on these questions, particularly since all parties, except HMOD, agree that the judicial process before Greek courts is "to say the least, challenging"[60].

---

58 Trial judgment, para. 144.
59 *Id.,* para. 139.
60 *Id.*, para. 142. See also paras. 130 and 133.

[123] The trial judge proceeded to homologate the Arbitral Tribunal's final award under Articles 645 and 646 *C.C.P.* He concluded that, once homologated, the conclusions of the final award should take effect and, consequently, HMOD should be ordered to comply with its legal effect.[61]

[124] The trial judge then considered Bombardier's demand to have the Superior Court declare the Counter-Guarantee null and void and to order National Bank not to make payment under the Counter-Guarantee. He stated that the principle governing those letters is their autonomy from the underlying contracts for which they are issued and the only exception to this principle is that of fraud.[62]

[125] The trial judge found that in the present case, the evidence established that HMOD had threatened Eurobank with legal consequences, that its conduct possessed "some measure of impropriety, dishonesty and of legal bullying that could not be qualified other than having the colour of fraud"[63] and that "HMOD utilized what appears to be nothing short than legal blackmail and extortion in order to force [Eurobank] to pay just a few days before it would be officially announced that it did not have the right to that payment".[64]

[126] The trial judge also concluded that Eurobank was well aware of this: the conduct of HMOD sent a message that it did not expect a favourable judgment from the ICC Arbitral Tribunal.[65] Also, all judges who were informed of HMOD's conduct came to the conclusion that it constituted fraud: Justices Prévost and Davis of the Superior Court of Quebec, Justice Pana of the Court of First Instance of Athens and the Arbitral Tribunal by way of its interim order. The only judge who did not come to that conclusion was Justice Kostis of the Court of First Instance of Athens. The trial judge criticized Eurobank for doing nothing before the Superior Court of Quebec or the Greek courts after it received HMOD's demand for payment or not going back before the Greek courts as soon as the Arbitral Tribunal's final award was issued. He concluded on the responsibility of Eurobank by saying that it "did not play its role under the exception rule. Its decision to pay enabled the beneficiary [HMOD] to obtain the benefit of the credit as a result of fraud."[66]

[127] The trial judge finally decided that National Bank should be enjoined not to pay Eurobank under the Counter-Guarantee, because of the homologation of the Arbitral Tribunal's final award, which concluded that the Offsets Contract was null *ab initio*. Therefore, the Guarantee and the Counter-Guarantee had also become null and could not form the basis of Eurobank's demand for payment.[67]

---

61 Trial judgment, paras. 145-154.
62 *Id.*, paras. 160-161.
63 *Id.*, para. 175.
64 *Id.*, para. 182.
65 *Id.*, para. 187.
66 *Id.*, para. 204, citing *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59.
67 *Id.*, paras. 232-240.

ISSUES

[128] The Appellant presents four issues :

1. The Judgment erred in law by concluding that Quebec courts had jurisdiction to rule on matters pertaining to the Letter of Guarantee between Eurobank and HMOD.

2. The Judgment erred in fact and law by concluding that Eurobank acted in a fraudulent manner.

3. The Judgment erred in its interpretation and criticism of Justice Kostis' ruling.

4. The Judgment erred in criticizing Eurobank for not seeking a new injunction of the final ruling of the ICC.

[129] I will analyze the first issue on its own, and then the other three together.

ANALYSIS

1. Jurisdiction

[130] There were several conclusions in Bombardier's Re-Re-Re-Re-Amended Motion for Homologation and Permanent Injunction :

> **ENJOIN** the Defendant National Bank of Canada from paying out any amount pursuant to the Counter-Guarantee issued by it on January 29, 1999, originally in favour of ANZ Grindlays Bank Limited referenced as L/G204892A/00011;
>
> **DECLARE** that any payment made by New TT Hellenic Postbank S.A. (now Eurobank Ergasias S.A.) to Hellenic Ministry of National Defense pursuant to the Letter of Guarantee issued by the ANZ Grindlays Bank Limited on February 5, 1999, was not due and cannot form the basis of a demand for payment under the Counter-Guarantee or produce any legal consequences against Bombardier Inc. or National Bank of Canada;
>
> **DECLARE** the Counter-Guarantee issued by the National Bank of Canada on January 29. 1999, originally in favour of ANZ Gridnlays Bank Limited, referenced as L/G204892A/000111, to be null and void;

> **HOMOLOGATE** the final arbitration award of the Arbitral Tribunal of the International Chamber of Commerce in ICC Case No. 16032/GZ/MHM dated December 30, 2013;
>
> **ORDER** the Defendant Hellenic Ministry of National Defence to comply with the final arbitration award rendered by the Arbitral Tribunal *of* the International Chamber of Commerce in !CC Case No. 16032/GZ/MHM;
>
> **ORDER** the execution of this Order notwithstanding appeal;
>
> **THE WHOLE,** with costs.

[131] In principle, Bombardier has the burden to establish that the Superior Court had jurisdiction for each conclusion sought.

[132] The conclusions can be grouped together as follows:

- The first conclusion seeks to enjoin National Bank from paying out any amount pursuant to the Counter-Guarantee
- The second conclusion relates to the validity of the payment under the Letter of Guarantee and the effect of that payment on the enforceability of the Counter-Guarantee between Eurobank and National Bank
- The third conclusion relates to the validity of the Counter-Guarantee between Eurobank and National Bank
- Finally, the fourth and fifth conclusions relate to homologation of and compliance with the Final Arbitration Award.

[133] The trial judge concluded that the Superior Court had jurisdiction over each of the conclusions.

[134] Eurobank does not contest the jurisdiction of the Quebec courts with respect to the first, third, fourth and fifth conclusions, but submits that the trial judge erred in law by concluding that the Quebec courts have jurisdiction to determine whether the payment made by Eurobank to HMOD was fraudulent.

[135] Eurobank bases its argument on Article 3139 *C.C.Q*. It submits that the issues pertaining to the Guarantee are central to the dispute between the parties, while those pertaining to the Counter-Guarantee are incidental. It argues that since the Guarantee is governed by Greek law and is subject to the jurisdiction of the Greek courts and since the

Counter-Guarantee is incidental to the Guarantee, Article 3139 *C.C.Q.* gives the Greek courts jurisdiction over the Counter-Guarantee.

[136] Bombardier argues that Article 3139 *C.C.Q*. has no application in the present matter.

[137] Article 3139 *C.C.Q*. states:

3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand.	**3139.** L'autorité québécoise, compétente pour la demande principale, est aussi compétente pour la demande incidente ou reconventionnelle.

[138] This provision *extends* the jurisdiction of the Quebec courts over an incidental demand where it has jurisdiction to rule on the principal demand. In *GreCon Dimter Inc. v. J. R. Normand Inc*., the Supreme Court states:

> This provision accordingly establishes an exception to the principle that the jurisdiction of the Quebec court is determined on a case-by-case basis: Talpis and Castel, at p. 56. It also expands considerably the potential scope of the jurisdiction of the Quebec authority, since it could be applied to a host of incidental demands that have no connection with Quebec: Goldstein and Groffier, at p. 337. This expanded scope suggests that art. 3139 C.C.Q. must be interpreted narrowly so as not to indirectly enlarge the international jurisdiction of the Quebec authority contrary to the specific provisions relating to the definition of its jurisdiction and the general principles that underlie that jurisdiction: Talpis and Castel, at p. 57; Goldstein and Groffier, at p. 339.[68]

[139] The Supreme Court adds that "there must be some connexity between the principal action and the incidental action" to apply Article 3139 *C.C.Q*.[69] It is the counterpart of Article 47 *C.C.P*., which provides that "[i]ncidental applications, such as recourses in warranty and applications for additional damages for bodily injury, must be brought before the court before which the principal application was brought." These provisions seek the unicity of litigation, although Article 3139 *C.C.Q*. does not limit the

---

68 *GreCon Dimter inc. v. J. R. Normand inc*., 2005 SCC 46, para. 29.
69 *Id.*, para. 31.

autonomy of the parties to submit any disputes between them, on an exclusive basis, to a foreign authority.[70]

[140] Eurobank uses Article 3139 *C.C.Q*. *a contrario*, in order to reduce the jurisdiction of the Quebec courts. That argument does not work. Article 3139 *C.C.Q*. is clearly intended to *extend* the jurisdiction of the Quebec courts to an incidental demand or a cross demand. If the Quebec courts have jurisdiction over the Counter-Guarantee, they do not lose jurisdiction under Article 3139 *C.C.Q.* because the Counter-Guarantee is incidental to a matter subject to the jurisdiction of the Greek courts. If there is a provision equivalent to Article 3139 *C.C.Q*. in Greek law with the result that the Greek courts have jurisdiction over the Counter-Guarantee, then the result is that both the Quebec courts and the Greek courts have jurisdiction. In those circumstances, if Bombardier sues before the Quebec courts and Eurobank wants to proceed in the Greek courts, its recourse is to make a motion to the Quebec court in *forum non conveniens* as codified by Article 3135 *C.C.Q*., which gives a Quebec authority the discretion to "decline jurisdiction if it decides that the authorities of another jurisdiction are in a better position to decide the dispute"[71]. However, since no one made such a motion, I will not comment further.

[141] Eurobank also focusses on "issues", arguing (1) that "the issue of the Guarantee is incidental to that of the Counter-Guarantee", (2) that the "principal issue before the Court is the nature of the payment" made under the Guarantee, and (3) that "the Counter-Guarantee, the incidental issue at hand, should also be governed by Greek law" (emphasis added). However, the Civil Code does not assign jurisdiction over issues. It assigns jurisdiction over "actions". If the Quebec courts have jurisdiction to grant the conclusions of the action, then they have jurisdiction to decide each factual or legal issue that is necessary in order to decide the action.

[142] The trial judge decided that the issue of whether the payment was properly made under the Guarantee is a factual issue that needs to be decided in the context of deciding the action relating to the Counter-Guarantee. Eurobank does not demonstrate any reviewable error on the trial judge's part with regards to his conclusion.

[143] In his reasons, my colleague concludes that the Superior Court did not have jurisdiction to order HMOD to comply with the Arbitral Tribunal's final award. Given that the HMOD did not appeal from that order, I prefer not to comment.

[144] The first ground of appeal should be dismissed.

---

[70] *GreCon Dimter inc. v. J. R. Normand inc*., paras. 35-37; Sylvette Guillemard. "Règles générales de compétence des tribunaux québécois" in Pierre-Claude Lafond, ed, *JurisClasseur Québec — Droit international privé*, (Montréal: LexisNexis, 2012), (loose-leaf, December 2019), p. 8-19, p. 8-21.

[71] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 67.

[145] At this point, it is useful to mention another jurisdictional issue, namely the jurisdiction of the Quebec courts to issue the provisional injunctions against HMOD and Eurobank ordering HMOD to withdraw its demand for payment and ordering Eurobank not to pay HMOD under the Letter of Guarantee. This was a live issue when Justices Prévost and Davis granted the injunctions, but by the time the parties were before Justice Wery, Bombardier no longer sought injunctions against HMOD and Eurobank because Eurobank had paid HMOD on December 24, 2013 and he did not consider the issue.

[146] The jurisdiction of the Superior Court to issue the injunctions remains relevant, because Bombardier is arguing that the breach of those injunctions is one of the elements constituting fraud by HMOD. I will come back to this issue.

2. Enforceability of the Counter-Guarantee

a. The law governing letters of credit

[147] The leading case in Canada regarding the autonomy of letters of credit and the fraud exception is *Angelica-Whitewear*.[72]

[148] Justice Le Dain, speaking for the Supreme Court, stated in the following terms the fundamental principle governing letters of credit:

> The fundamental principle governing documentary letters of credit and the characteristic which gives them their international commercial utility and efficacy is that the obligation of the issuing bank to honour a draft on a credit when it is accompanied by documents which appear on their face to be in accordance with the terms and conditions of the credit is independent of the performance of the underlying contract for which the credit was issued. Disputes between the parties to the underlying contract concerning its performance cannot as a general rule justify a refusal by an issuing bank to honour a draft which is accompanied by apparently conforming documents. This principle is referred to as the autonomy of documentary credits.[73]

[149] The principle of the autonomy of letters of credit means that the beneficiary of the letter will receive payment from the bank on production of documents which appear on their face to be in accordance with the terms and conditions of the letter of credit, even if the other party is contesting the contractual right of the beneficiary to receive payment. As stated by Justice Le Dain, this principle gives letters of credit their international commercial utility and efficacy.[74]

---

72 *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59.
73 *Id.*, p. 70.
74 *Id.*, p. 70.

[150] The courts have developed an exception to this rule in cases of "fraud by the beneficiary of the credit which has been sufficiently brought to the knowledge of the bank before payment of the draft or demonstrated to a court called on by the customer of the bank to issue an interlocutory injunction to restrain the bank from honouring the draft".[75] Justice Le Dain underlined the two competing policy considerations at play:

> Differences of view or emphasis with respect to these issues, particularly the kind of fraud and proof required, reflect the tension between the two principal policy considerations: the importance to international commerce of maintaining the principle of the autonomy of documentary credits and the limited role of an issuing bank in the application of that principle; and the importance of discouraging or suppressing fraud in letter of credit transactions. The potential scope of the fraud exception must not be a means of creating serious uncertainty and lack of confidence in the operation of letter of credit transactions; at the same time the application of the principle of autonomy must not serve to encourage or facilitate fraud in such transactions. The relative emphasis on the one or other of these two considerations tends to explain what have been characterized as the strict and more liberal approaches to the availability of the fraud exception, each of which has had its judicial and academic adherents.[76]

[151] Bradley Crawford also describes the "inherent conceptual tension between the principle of independence or autonomy of credits, on the one hand, and the law that enables a court to examine the underlying transaction for evidence of fraud, on the other".[77]

[152] In *Angelica-Whitewear*, Justice Le Dain concluded in favour of a broader test of fraud:

> In my opinion the fraud exception to the autonomy of documentary letters of credit should not be confined to cases of fraud in the tendered documents but should include fraud in the underlying transaction of such a character as to make the demand for payment under the credit a fraudulent one. … In my view the fraud exception to the autonomy of a documentary credit should extend to any act of the beneficiary of a credit the effect of which would be to permit the beneficiary to obtain the benefit of the credit as a result of fraud.[78]

[153] It is clear that a contractual dispute between the parties to the underlying contract is not sufficient to activate the exception of fraud. In an oft-quoted passage, Justice Blair of

---

75 *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59, p. 71.
76 *Id.*, p. 72.
77 Bradley Crawford, *The Law of Banking and Payment in Canada*, vol. 2, (Aurora: Canada Law Book, 2008) (loose-leaf, December 2018), p. 13-124.
78 *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59, p. 83.

the Ontario Court of Justice, explains that the notion of fraud concerns some aspect of impropriety, dishonesty or deceit:

> In the eyes of the party seeking to prevent payment on the letter of credit, almost any conduct or position of the beneficiary which does not accord with the aggrieved party's view of the universe may appear to be fraud, and therefore justify non-payment. Such, of course, cannot be the case, given the recognized characteristics of a letter of credit. One may be sympathetic towards the plaintiff's position, and the operation of the principle of autonomy may even appear unfair at times. The question, however, is not whether the plaintiff has the better of the argument on the facts or at law. The question is whether there is a strong prima facie case of fraud in what the beneficiary of the letter of credit has done or is seeking to do.
>
> Fraud is a straightforward five-letter word, meaning just what it says: "fraud". Fraud is not simply a legitimate dispute or disagreement over the interpretation of a contract, however, one-sided that dispute may appear. While the notion of fraud may elude precise definition, it is a concept well-known to the law, and it must, in my view, import some aspect of impropriety, dishonesty or deceit. In *Washburn v. Wright* (1913), 31 O.L.R. 138 (App. Div.), Mr. Justice Riddell said, at p. 147.
>
> But, suppose the defendant was wrong in this or in any other respect, there is absolutely no evidence of fraud. Fraud is not mistake, error in interpreting a contract; fraud is "something dishonest and morally wrong, and much mischief is ... done, as well as much unnecessary pain inflicted, by its use where 'illegality' and 'illegal' are the really appropriate expressions:" Ex p. Watson (1888), 21 Q.B.D. 301, per Wills, J., at p. 309.
>
> Cases where the demand on the letter of credit can be said to be "clearly untrue or false", or "utterly without justification", or where it is apparent there is "no right to payment", all fall within the foregoing principles and must be read in the context of those "fraud" principles: see *C.D.N. Research & Development Ltd. v. Bank of Nova Scotia* (1980), 18 C.P.C. 62 (Ont. H.C.), at p. 65; agree with Mr. Sternberg in this respect, and I have approached my decision in that fashion.[79]
>
> [Emphasis added]

[79] *Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc*., [1993] O.J. No. 112, citing *Washburn v. Wright*, 31 O.L.R. 138, 1914 CanLII 525 (ON CA).

[154] The British Columbia Court of Appeal decided in *430872 B.C. Ltd. v. KPMG Inc*. that it could be considered fraudulent to draw upon a letter of credit where there is absolutely no right to draw down on the letter of credit.[80] The majority of the Court stated :

> [31] Undoubtedly the fraud exception must be constrained. However, this case falls within even a narrow conception of that exception. Implicit in paragraph 1(d) of the Contract with a Builder is a commitment by NHW not to draw down letters of credit supplied by the appellant as security for its obligations absent a breach of those obligations. In light of that commitment, as well as the nature of the commercial relationship between the appellant and NHW, it is clear that a draw by the respondent on the Letter of Credit would be without justification and an abuse of the autonomy principle of the type against which Le Dain J. cautioned in *Angelica-Whitewear*, *supra*. To put it another way, the drawing down of the Letter of Credit by the respondent would involve a breach of the Contract with Builder going to the very reason why the appellant caused the Letter of Credit to be issued and to the circumstances in which the Letter of Credit could be drawn down – that is, "fraud in the underlying transaction of such a character as to make [a] demand for payment under the credit a fraudulent one" (*Angelica-Whitewear*, *supra* 17).[81]
>
> [Emphasis added]

[155] John F. Dolan has sharply criticized this decision, explaining that it "corrode[s]" the autonomy principle by promoting a contractual dispute of the underlying contract into a finding of fraud.[82] However, Crawford is of the view that since the agreement between the parties called for a letter of credit as security for an obligation and that no obligation remains unfulfilled, it is more than a contractual dispute: "it would clearly be unlawful and fraudulent for the secured party to draw the proceeds of the credit".[83]

[156] Finally, Justice Le Dain drew a distinction between what must be shown on an application for an interlocutory injunction to restrain payment under a letter of credit and what must be shown to establish that a draft was improperly paid by the issuing bank after notice of alleged fraud by the beneficiary. He recognized that in the second case, the issuing bank is in a difficult position of forming an opinion as to whether there has been fraud or not when confronted with the strict obligation to honour a draft efficiently. For an interlocutory injunction, "a strong *prima facie* case of fraud would appear to be a sufficient test" to restrain payment. When a draft had been paid by the issuing bank, it must be shown that the "fraud

---

80 *430872 B.C. Ltd. v. KPMG Inc*., 2004 BCCA 186.

81 *Id.*, para. 31.

82 John F. Dolan, "Tethering the Fraud Inquiry in Letter of Credit Law" (2005-2006), 21 B.F.L.R. 479, p. 490-493.

83 Bradley Crawford, *The Law of Banking and Payment in Canada*, vol. 2, (Aurora: Canada Law Book, 2008) (loose-leaf, December 2018), p. 13-186.

was so established to the knowledge of the issuing bank before payment of the draft as to make the fraud clear or obvious to the bank".[84]

b. The Letter of Guarantee and the Counter-Guarantee

[157] In the present matter, the Letter of Guarantee is clear:

> 2. PURSUANT TO THE ABOVE, WE, ANZ GRINDLAYS BANK LIMITED, ATHENS SUPPLY THE REQUIRED LETTER OF GUARANTEE FOR THE SUPPLIER AND THUS UNDERTAKE THE OBLIGATION TO PAY YOU AFTER YOUR PREMIER AND SIMPLE REQUEST IRREVOCABLY AND UNCONDITIONALLY WITH NO ADDITIONAL PROOFS EXCEPT YOUR STATEMENT THAT THE SUPPLIER DID NOT CORRECTLY FULFILL HIS OBLIGATIONS TO PROVIDE THE AFOREMENTIONED OFFSETS WITHIN THE TIME LIMIT PROVIDED BY ARTICLE 5 PARAGRAPH 5.1 AND ARTICLE 19 OF THE ABOVE OFFSETS CONTRACT, THE WHOLE AMOUNT OF THE LETTER OF GUARANTEE WITHIN (3) THREE WORKING DAYS AFTER THE DATE OF RECEIVING YOUR DEMAND, REGARDLESS OF ANY OBJECTION AND/OR ANY KIND OF ARGUMENTS OF THE SUPPLIER, ANY LEGAL ACTION TAKEN BY THE SUPPLIER BEFORE ANY COURT OF LAW IN ANY COUNTRY AND WITHOUT YOU HAVING TO RESORT TO A COURT OF LAW OF ARBITRATION.

[158] The Counter-Guarantee given by National Bank to Eurobank is equally clear:

> IN CONSIDERATION OF YOU ISSUING AT OUR REQUEST THE ABOVEMENTIONED GUARANTEE, WE, NATIONAL BANK OF CANADA HEREBY IRREVOCABLY UNDERTAKE TO REIMBURSE YOU ALL AMOUNT(S) CLAIMED BY THE BENEFICIARY OF YOUR GUARANTEE UP TO BUT NOT EXCEEDING USD 27,736,709.00 (TWENTY-SEVEN MILLION SEVEN HUNDRED THIRTY-SIX THOUSAND SEVEN HUNDRED AND NINE…00/100 UNITED STATES DOLLARS) PLUS COSTS, STAMP DUTIES AND VALUE ADDED TAX AS APPROPRIATE, WITH SAME VALUE DATE AS OF THE DATE OF YOUR PAYMENT, AFTER RECEIPT OF YOUR TESTED TELEX/AUTHENTICATED SWIFT INDICATING THAT YOU HAVE RECEIVED FROM THE BENEFICIARY OF YOUR GUARANTEE A DEMAND FOR PAYMENT IN CONFORMITY WITH THE TERMS AND CONDITIONS OF YOUR GUARANTEE.

[159] Both fall within the language and the policy considerations expressed by Justice Le Dain in *Angelica-Whitewear*. The Letter of Guarantee is intended to ensure that HMOD

---

[84] *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59, p. 71.

will be paid the amount that it claims is due under the Offsets Contract. HMOD is required only to give Eurobank "YOUR STATEMENT THAT [Bombardier] DID NOT CORRECTLY FULFILL HIS OBLIGATIONS TO PROVIDE THE AFOREMENTIONED OFFSETS WITHIN THE TIME LIMIT PROVIDED BY ARTICLE 5 PARAGRAPH 5.1 AND ARTICLE 19 OF THE ABOVE OFFSETS CONTRACT". Eurobank is then required to make the requested payment, "REGARDLESS OF ANY OBJECTION AND/OR ANY KIND OF ARGUMENTS OF [Bombardier], ANY LEGAL ACTION TAKEN BY [Bombardier] BEFORE ANY COURT OF LAW IN ANY COUNTRY AND WITHOUT YOU HAVING TO RESORT TO A COURT OF LAW OF ARBITRATION".

[160] In turn, the Counter-Guarantee is intended to ensure that, if Eurobank makes a payment on a demand made in conformity with the Letter of Guarantee, it will be reimbursed by National Bank. The role of Eurobank in the transaction and the risk that it undertakes are limited – it pays when it receives a request for payment and it is immediately reimbursed in full by the National Bank. This limited role and risk is reflected in the commission of 0.35% *per annum* that it receives. This commission represents US $97,000 *per annum* when the Letter of Guarantee is first issued, and it drops by half when the Letter of Guarantee is reduced.

[161] The demand for payment issued by HMOD to Eurobank on December 18, 2013 is also clear:

> […] we request you to pay, within the specified deadline, the remaining part of the existing Letter of Guarantee, as per the relevant documents under (a) and (b) above, i.e. the amount of US $ 13.868.354,40 by reason that the Supplier did not successfully perform with its obligations to provide the aforementioned Offsets Benefits (AΩ), within the deadline provided under article 5 paragraph 5.1. and article 19 of the above Offsets Benefits (AΩ) Contract.
>
> It is particularly stressed that, pursuant to the terms of the said letter of guarantee your payment has to occur without any objection on behalf of the bank *("regardless of any objection and/or any kind of arguments of the Supplier, any legal action taken by the Supplier before any Court of Law in any country"),* within three (3) days upon receipt of this present. Therefore, we demand that you proceed to the immediate payment of the aforementioned amount in the account […] for the benefit of the MoND.
>
> [Emphasis added]

[162] Eurobank informed Justice Prévost and the parties during the hearing on August 14, 2013 that it considered the demand for payment from HMOD dated August 12, 2013 to be in conformity with the terms and conditions of the Letter of Guarantee and that payment would in principle be made on August 20, 2013. The conclusion that the August 12, 2013 demand for payment was, on its face, in compliance with the terms of

the Letter of Guarantee was never contested. The same is true of the December 18, 2013 demand. Bombardier does not seriously contest this issue.

[163] Bombardier argues that the demand for payment was fraudulent. Even though this matter comes before the Court as a request for an injunction to prevent National Bank from paying Eurobank on the Counter-Guarantee, the focus must be on whether Eurobank improperly paid HMOD with notice of alleged fraud by HMOD. Following Justice Le Dain in *Angelica-Whitewear*, we must therefore proceed in two steps, and first examine whether the conduct of the HMOD amounted to fraud, and then assess whether "fraud was so established to the knowledge of the issuing bank before payment of the draft as to make the fraud clear or obvious to the bank".

c. Conduct of HMOD

[164] The conduct of HMOD in this matter was, in a word, deplorable.

[165] I make no comment on whether it was appropriate for the HMOD to enter into the Offsets Contract, which was ultimately found to be null and void *ab initio* because it violated the free movement of goods under Article 34 of the *Treaty on the Functioning of the European Union*. There is no evidence that the HMOD had knowledge of this issue when it entered into the Offsets Contract.

[166] I will not comment either on HMOD's refusal to reduce the amount of the Letter of Guarantee to give Bombardier credit for the partial performance of its obligations under the Offsets Contract. That was a live issue when Bombardier instituted its arbitration proceedings on December 30, 2008, but HMOD conceded the issue and reduced the amount of the Letter of Guarantee by half on June 4, 2010. The record does not indicate why the amount of the Letter of Guarantee was not reduced sooner.

[167] Finally, I will abstain from any comment on the demand made on July 31, 2013 in conjunction with the first demand for payment under the Letter of Guarantee, that Bombardier pay an additional amount of US $3,420,715.71 to the Pension Fund of the Hellenic Air Force Mutual Benefit Fund.

[168] I will focus instead on the issues relating to the demand for payment under the Letter of Guarantee.

[169] Justice Wery concluded that HMOD's conduct amounted to fraud:

> [175] The Court finds it hard to accept that HMOD's conduct, in the circumstances we have seen, did not possess some measure of impropriety, dishonesty and of legal bullying that could not be qualified other than having the color of fraud.

[176] HMOD, a few days before the ICC Arbitral Tribunal Final Award would be delivered to the parties, decided to go against its word, against a ruling of the ICC Arbitral Tribunal and against a Court Order from this Court and demanded payment of the Letter of Guarantee.

[…]

[179] It is also disturbing that HMOD, after accepting the jurisdiction of the ICC Arbitration Tribunal over this dispute, did not consider consistent to abide by the Order that the ICC Arbitral Tribunal had handed down on August 13th, 2013 which held that […]

[180] As we know, Justice Davis' Order was to the same effect: […]

[181] It is true that the Letter of Guarantee provided that payment would be due "regardless of any objection and/or any kind of arguments of the supplier, and any legal action taken by the supplier before any court of law in any country and without you having to resort to a court of law of (sic) arbitration". But it does not say that payment must be made regardless of any court order.

[182] Moreover, HMOD utilized what appears to be nothing short than legal blackmail and extortion in order to force Eurobank to pay just a few days before it would be officially announced that it did not have the right to that payment.

[183] This was done in a particularly hasty way which is not the usual pace of governmental action during the Holidays Season in Greece.

[184] It is difficult not to think that HMOD might have had a sense of things to come with regard to the ICC Arbitral Tribunal Final Award. Bombardier had submitted five expert reports from three experts on its submissions that the Offsets Contract was contrary to EU law. HMOD had not produced any expert reports to contradict this evidence. In that context, HMOD probably realized that it would not have had the possibility to use its Extrajudicial Invitation Protest option once its Offsets Contract had been declared null and void by the ICC Arbitral Tribunal. Hence its conduct.

[185] In the Court's view, this conduct constituted fraud.

[Reference omitted]

[170] In concluding that HMOD's conduct constituted fraud, Justice Wery considered several issues:

1. In making the demand for payment, HMOD "decided to go against its word";

2. The demand went "against a ruling of the ICC Arbitral Tribunal";

3. The demand also went "against a Court Order from this Court";

4. "HMOD utilized what appears to be nothing short than legal blackmail and extortion in order to force Eurobank to pay";

5. The demand was made "in a particularly hasty way", "a few days before the ICC Arbitral Tribunal Final Award would be delivered to the parties";

6. "HMOD might have had a sense of things to come with regard to the ICC Arbitral Tribunal Final Award".

[171] It is important to analyze each of these issues, with the background that HMOD's demand was in accordance the Letter of Guarantee.

- ***HMOD's undertaking not to demand payment***

[172] First, Justice Wery noted that, in demanding payment, HMOD "decided to go against its word". HMOD had in fact given an undertaking in April 2012, which it confirmed in June 2012, that it would not call upon the Letter of Guarantee "for as long as the arbitration procedure is ongoing". However, it is important to review the circumstances in which that undertaking was given and was later withdrawn.

[173] In April 2012, shortly before the first hearing scheduled for June 2012, HMOD threatened to unilaterally impose the remaining penalty on Bombardier and call on the Letter of Guarantee. Bombardier sought assurances that HMOD would refrain from doing so, failing which it would make an urgent request to the Arbitral Tribunal for provisional measures preserving the *status quo* until a final award was rendered. On April 20, 2012, HMOD formally represented to Bombardier and the Arbitral Tribunal that it would not impose any penalties "for as long as the arbitration procedure is ongoing":

> 8. In any case, given that the Hearing before the International Arbitration Court has been set for the 25th-29th of June 2012, and therefore trial termination :is anticipated, our office explicitly declares that we shall wait for the decision of the International Arbitration Court which has the power to settle in a manner that is binding for the parties, the substantial matters that have: arisen from disputes that are subject to its jurisdiction, and that we shall not proceed to imposing any

> penalties against your client, for as long as the procedure is ongoing, which (procedure) has in any case been initiated according to the law and the contract
>
> [Emphasis added]

[174] At the hearing before the Arbitral Tribunal on June 29, 2012, Bombardier took the position that "[i]t is not at all clear that the undertaking not to liquidate the penalty clause [given at the end of April] would continue" beyond the hearing, and it asked for an order preserving the *status quo* in respect of the Letter of Guarantee. HMOD responded at that hearing that it "has no intention until you award as an Arbitral Tribunal in this case imposing penalty clauses, and has assumed a written certification about that. This letter has been forwarded to your Arbitral Tribunal and the other party."

[175] Notwithstanding that undertaking, HMOD put Bombardier in default on July 31, 2013 and made a formal demand to Eurobank for the immediate payment of the outstanding amount on the Letter of Guarantee on August 5, 2013.

[176] When HMOD gave the undertaking in April 2012, it specified, "given that the Hearing before the International Arbitration Court has been set for the 25th-29th of June 2012, and therefore trial termination is anticipated". Instead, Bombardier raised a new issue (the validity of the Offsets Contract under EU law) after the June 2012 hearing, which resulted in new briefs and expert opinions and a further hearing from June 3 to 6, 2013, one year after the hearings were supposed to have been completed. HMOD argues that it was no longer bound by its undertaking.

[177] The undertaking did not have a specific duration. However, that does not mean that it continues forever and cannot be withdrawn. In my view, HMOD was entitled to withdraw its undertaking at any time after the hearing in June 2012 if the final award was not forthcoming. Because the undertaking was given so that Bombardier would not seek a provisional order preserving the *status quo* until a final decision was rendered and because Bombardier acted in reliance on the undertaking, HMOD had the obligation to give Bombardier sufficient notice before calling on the Letter of Guarantee to allow Bombardier to present its request for a provisional order. Bombardier was notified by letter on July 31, 2013 that HMOD intended to call on the Letter of Guarantee, and Bombardier did in fact have sufficient time to present requests for injunctive relief to the Arbitral Tribunal and to the Superior Court. As a result, in my view, the undertaking given in April 2012 and repeated in June 2012 was validly withdrawn by HMOD in July 2013.

- ***HMOD's breach of the provisional orders***

[178] The next two issues raised by Justice Wery are that the demand for payment was "against a ruling of the ICC Arbitral Tribunal and against a Court Order from this Court".

[179] The context of the orders is important.

[180] When HMOD initially demanded payment on the Letter of Guarantee in August 2013, Bombardier responded by obtaining Procedural Order No. 11 from the Arbitral Tribunal (August 13, 2013) and a provisional injunction from the Superior Court (August 16, 2013). At the same time, Eurobank obtained a provisional injunction from the Athens Court of First Instance (August 22, 2013). In the face of those orders, HMOD suspended its attempt to collect on the Letter of Guarantee.

[181] However, when the Athens Court of First Instance refused the interlocutory injunction on December 16, 2013, HMOD moved aggressively, sending a notice to Eurobank on December 18, 2013, demanding payment on the Letter of Guarantee within three days. Bombardier responded by reviving its injunction proceedings in Quebec Superior Court (it had allowed the initial provisional injunction to lapse on August 26, 2013). It obtained a new provisional injunction on December 20, 2013.

[182] HMOD's demand for payment was contrary to the Arbitral Tribunal's Procedural Order No. 11 and the December 20, 2013 Superior Court provisional injunction.

[183] Eurobank argues that the orders of the Arbitral Tribunal and the Quebec Superior Court were not binding on HMOD, particularly since the Greek court dismissed a request for a similar order.

[184] HMOD had agreed with Bombardier that the Arbitral Tribunal would have jurisdiction over any dispute that might arise between them, so the orders of the Arbitral Tribunal are contractually binding on HMOD and Bombardier, but they are not legally enforceable until a court declares them enforceable. It is acknowledged by all parties that the provisional orders of an arbitration tribunal cannot be declared enforceable by a court. Bombardier sought an injunction in Quebec for that reason. The breach of the order by HMOD is therefore a contractual breach, but not a legal one.

[185] Further, there is a serious question as to whether HMOD was bound by the provisional injunctions issued by the Quebec Superior Court. Justices Prévost and Davis concluded that they had jurisdiction to issue the provisional inunctions under Articles 940.4 of the former *Code of Civil Procedure*, which allows a judge to grant provisional measures during arbitration proceedings, and Article 3138 *C.C.Q.*, which provides that a Quebec court may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute. However, there is a further question of whether they should have exercised that jurisdiction and issued injunctions against HMOD and Eurobank, parties located in Greece with no presence in Quebec, in relation to a letter of credit issued in Greece.

[186] In addition, neither the order issued by the Arbitral Tribunal nor the Superior Court provisional injunctions are judgments on the merits of HMOD's dispute with Bombardier. If there was a final judgment declaring that HMOD was not owed anything by Bombardier, then a demand for payment by HMOD would clearly be fraudulent. The orders here are only provisional judgments ordering HMOD not to make a demand for payment prior to the final award of the Arbitral Tribunal.

[187] More importantly, there is no allegation by Bombardier and no finding by the Arbitral Tribunal or the Superior Court that HMOD had no right to call on the Letter of Guarantee or that it was acting in a fraudulent manner. Rather, the order and the provisional injunctions are all based on the breach by HMOD of its undertaking not to call on the Letter of Guarantee before the final award and all purport to enforce that undertaking. As set out above, I have concluded that the undertaking was validly withdrawn by HMOD. It follows that the undertaking should not be a valid basis for an order or an injunction.

[188] In my view, HMOD acted contrary to an order issued by the Arbitral Tribunal and a provisional injunction issued by the Superior Court, but in all of the circumstances of the case, I do not conclude that HMOD acted fraudulently.

- ***Legal bullying***

[189] Justice Wery's fourth point is that "HMOD utilized what appears to be nothing short than legal blackmail and extortion in order to force Eurobank to pay". He also used the expression "legal bullying". When Eurobank wrote to HMOD on December 23, 2013, reminding it of the injunction issued by the Superior Court and the order issued by the Arbitral Tribunal and asking if it insisted on its demand for payment, HMOD responded the same day with a demand entitled "Extrajudicial Invitation- Protest", which again demanded payment and ended with the following:

> **11. In the case of non-payment of the letter of guarantee until tomorrow, Tuesday 24 December 2013, the Hellenic Republic will take not only civil but also criminal legal measures, against the competent-responsible officers and employees of the N.T.T.- for the fraudulent misappropriation of the amount embodied in the letter of guarantee and for any other offense.**
>
> [Bold and underlining in the original]

[190] In other words, HMOD threatened individuals at Eurobank with criminal measures if Eurobank failed to pay. Justice Wery summarized the evidence as to the nature of those measures as follows:

> [54] The Parties differ on the possible penalties associated with this Extrajudicial Invitation Protest, but there is an admission that Eurobank acted upon the belief that if it did not submit to the demands contained in that notice, it could possibly expose itself and its officers and employees to:
>
> - Freezing of 50% of its assets and that of its officers and employees;
> - Withholding of tax certifications;
> - Criminal sanctions, namely imprisonment for a period of at least 3 years for the representatives of the bank;
> - Compulsory enforcement and collection;
> - A 1% per month interest rate on amounts owed.

[191] The threat was effective: Eurobank paid the next day.

[192] However, if those are in fact the sanctions available under Greek law for the failure to pay an amount owing to the government, then there is nothing fraudulent about threatening to apply them. They are simply a risk of doing business in Greece.[85]

- ***Timing of the demand for payment***

[193] Justice Wery's fifth point is the haste and the timing of the demand. The timing is indeed problematic. HMOD did not immediately withdraw its undertaking when Bombardier first raised the new issue or when the Arbitral Tribunal authorized Bombardier to do so. By the time HMOD started the process of demanding payment in July 2013, the final arbitration award was only 5 months away, and it is difficult to understand why HMOD, which could have called on the Letter of Guarantee at any time in the 4½ years since December 30, 2008, suddenly became impatient about the delay five months from the finish line. A reasonable person would have waited for the final arbitration award.

[194] The timing of the demand for payment is unreasonable and raises doubts. However, this does not in and of itself make the demand for payment fraudulent.

---

[85] There is no argument put forward by any party that enforcing the Counter-Guarantee is contrary to public order because it amounts to enforcing a foreign penal or public law.

- ***Expectation that it would lose***

[195] The timing issue ties in with Justice Wery's final point. It is useful to repeat paragraph 184 of his judgment:

> [184] It is difficult not to think that HMOD might have had a sense of things to come with regard to the ICC Arbitral Tribunal Final Award. Bombardier had submitted five expert reports from three experts on its submissions that the Offsets Contract was contrary to EU law. HMOD had not produced any expert reports to contradict this evidence. In that context, HMOD probably realized that it would not have had the possibility to use its Extrajudicial Invitation Protest option once its Offsets Contract had been declared null and void by the ICC Arbitral Tribunal. Hence its conduct.

[196] This in my view is the key issue: if HMOD believed that it was going to lose the arbitration proceedings with the result that the Letter of Guarantee was null and void, then it was wrong for it to call on the Letter of Guarantee and pressure Eurobank to pay in the days preceding the final award. In my view, that conduct would amount to fraud.

[197] The judge does not, however, conclude that HMOD believed that it was going to lose. He says only that HMOD "might have had a sense of things to come" and "probably realized". He also notes that Bombardier had submitted five expert reports from three experts on the issue of whether the Offsets Contract was contrary to EU law, while HMOD had not produced any expert reports in response.

[198] Is this enough to conclude that HMOD acted fraudulently?

[199] The standard of proof is the civil standard of proof on the balance of probabilities. While "might have had a sense of things to come" falls short of that standard, "probably realized" is sufficient. The whole argument is somewhat speculative, so I will add one final element.

- ***Intention to repay***

[200] The final element is that, one week after receiving payment, HMOD received the final arbitration award declaring the Letter of Guarantee null and void. HMOD challenged the arbitration award and lost. Nevertheless, it has not repaid the amount that it received. This suggests that it never intended to do so. That, in my view, is indicative of fraud.

- ***Conclusion***

[201] In my view, the accumulation of events, and in particular the urgent demands for payment made in the days preceding the final arbitration award which HMOD expected

to lose and HMOD's intent to keep the money regardless of the final arbitration award, are sufficient to conclude that HMOD's demand for payment on December 18, 2013 was fraudulent.

d. Knowledge of Eurobank

[202] If this was an action against HMOD, it would be easy. Assuming that we have jurisdiction, we would simply order HMOD to reimburse the amount that it received.

[203] However, the defendant in this proceeding is National Bank. Bombardier is seeking an injunction to prevent National Bank from reimbursing Eurobank, on the basis that Eurobank should not have paid HMOD because HMOD's request was fraudulent and Eurobank had knowledge of the fraud.

[204] Justice Wery concluded as follows:

> [196] It is true that Eurobank had done a lot in order to avoid paying. It is also clear from the evidence submitted by Eurobank's representatives that the Bank did not collude in any way with HMOD's deceitful conduct. Be that as it may, one cannot escape the harsh reality that Eurobank did indeed *voluntarily* make the payment knowing that HMOD's conduct constituted clear fraud. It did not act *involuntary*.
>
> [197] It also did so in contravention of not one but two orders. One from the ICC Arbitral Tribunal and another from Justice Davis of the Quebec Superior Court.
>
> [198] Moreover, the Judgment rendered by Justice Kostis of the Greek Court had not ordered Eurobank to pay. […]
>
> […]
>
> [203] Eurobank was the last rampart before the realization of the fraud. It did not resist after considering the risks that resistance would have entailed.
>
> [204] Eurobank did not play its role under the exception rule. Its decision to pay enabled *the beneficiary [HMOD] to obtain the benefit of the credit as a result of fraud*. In a way, what Eurobank wants to be spared the effects of the very rule it was supposed to uphold and protect.
>
> [205] Eurobank may not have conceived the fraudulent plot, it may not have supplied the weapons, but it surely participated in pulling the trigger. It had a choice albeit a difficult one, but still a choice, of abiding to Justice Davis's Order or to

> submit to HMOD'S Extrajudicial Invitation Protest. In choosing the latter, it knowingly enabled fraud to produce its fruits.
>
> [Reference omitted]

[205] In my view, this puts too heavy a burden on Eurobank.

[206] The Letter of Guarantee provides that Eurobank must pay, "REGARDLESS OF ANY OBJECTION AND/OR ANY KIND OF ARGUMENTS OF THE SUPPLIER, ANY LEGAL ACTION TAKEN BY THE SUPPLIER BEFORE ANY COURT OF LAW IN ANY COUNTRY AND WITHOUT YOU HAVING TO RESORT TO A COURT OF LAW OF ARBITRATION".

[207] This language is aimed at legal proceedings whose objective is to determine what if anything Bombardier owes to HMOD. The letter of Guarantee is clear that (1) HMOD is not required to get a judgment confirming that it is owed money before it can call on the Letter of Guarantee, and (2) Eurobank cannot refuse to pay because Bombardier has instituted an action contesting the debt claimed by HMOD. In this last case, however, if Bombardier obtains a judgment that maintains its contestation, it would be fraudulent for HMOD to demand payment of that amount.

[208] That applies here. The fact that Bombardier has commenced arbitration proceedings in which it seeks a decision that it does not owe anything to HMOD under the Offsets Contract does not prevent HMOD from demanding payment of the amount that it claims is owing, provided that Bombardier has not obtained a judgment. This means that HMOD was in principle entitled to demand payment before the Arbitral Tribunal's final judgment on December 31, 2013, and Eurobank was obliged to pay.

[209] It should be possible to obtain an injunction to prevent a demand or a payment under a letter of credit pending a final judgment. The clause in the Letter of Guarantee cannot mean that it is impossible to stop payment under a letter of credit by injunction.

[210] However, it is important that the injunction be sought from the right court and for the right reason. It goes against the underlying principles governing letters of credit in the international context if the party at whose request the letter was issued can go to the courts in its home country and obtain an injunction preventing the beneficiary from calling on the letter or preventing the bank from paying. Further, the Arbitral Tribunal does not have jurisdiction over the relationship between HMOD and Eurobank, because Eurobank is not a party to the arbitration agreement.

[211] When HMOD initially attempted to collect on the Letter of Guarantee in August 2013, Bombardier responded by obtaining provisional injunctions from the Arbitral

Tribunal (August 13, 2013) and the Superior Court (August 16, 2013). Bombardier did not attempt to obtain an injunction from the Greek courts.

[212] Eurobank had notice of these orders. It was rightly concerned it would find itself in exactly the position it is now in: HMOD would take the position that the orders were not enforceable in Greece and would demand payment, and National Bank would invoke the orders as the basis for refusing to reimburse Eurobank. Eurobank therefore took the right procedural step and sought a provisional injunction from the Athens Court of First Instance, which was granted on August 22, 2013. In my view, it is that injunction that caused HMOD to suspend its attempt to collect on the Letter of Guarantee in August 2013.

[213] The Greek court is clearly competent to rule on the dispute between HMOD and Eurobank on the Letter of Guarantee. It ultimately refused to issue the injunction sought by Eurobank. Bombardier and the trial judge criticize Justice Kostis's judgment, but that does not seem to me to be appropriate. The fact is that the Greek court refused the injunction, and it is difficult to criticize Eurobank for not having followed the order issued by the Arbitral Tribunal and the injunctions issued by the Quebec Superior Court when the Greek court refused to issue a similar injunction.

[214] It is also important that the injunction be issued for the right reason. If the injunction was issued because the party at whose request the letter of credit was issued made a strong *prima facie* case that it did not owe anything to the beneficiary such that the demand for payment was fraudulent, then the bank takes a tremendous risk if it disregards the injunction and pays. However, that was not the case here. The order and the injunctions were not based on a strong *prima facie* case on the merits of the dispute, but rather on the undertaking.

[215] It is also difficult to criticize Eurobank for giving into the "legal bullying" to which it was subject. These were serious sanctions and Eurobank, as a Greek bank, was exposed to them.

[216] The final issue is my finding that HMOD acted fraudulently in that it made the final demand for payment on the eve of the final arbitration award which it expected to lose, with the intention of keeping the funds regardless of whether it won or lost.

[217] Eurobank obviously knew that the demand was being made on the eve of the final arbitration award, but it did not know that HMOD expected to lose or intended to keep the funds regardless of the outcome. At that stage, Eurobank only had suspicions.

[218] I believe that these suspicions, as strong as they were, should not be assimilated to knowledge of fraud.

[219] In *Angelica-Whitewear*, Justice Le Dain stated that "[a] strong *prima facie* case of fraud would appear to be a sufficient test on an application for an interlocutory injunction."[86] I note again that Bombardier did not seek or obtain Procedural Order No. 11 and the provisional injunctions on that basis. Justice Le Dain went on to write:

> Where, however, no such application was made and the issuing bank has had to exercise its own judgment as to whether or not to honour a draft, the test in my opinion should be the one laid down in *Edward Owen Engineering*—whether fraud was so established to the knowledge of the issuing bank before payment of the draft as to make the fraud clear or obvious to the bank. The justification for this distinction, in my view, is the difficulty of the position of the issuing bank, in so far as fraud is concerned, by comparison with that of a court on an application for an interlocutory injunction. In view of the strict obligation of the issuing bank to honour a draft that is accompanied by apparently conforming documents, the fact that the decision as to whether or not to pay must as a general rule be made fairly promptly, and the difficulty in many cases of forming an opinion, on which one would hazard a lawsuit, as to whether there has been fraud by the beneficiary of the credit, it would in my view be unfair and unreasonable to require anything less of the customer in the way of demonstration of an alleged fraud. [87]
>
> [Emphasis added]

[220] In *Bank or Montreal v. Mitchell*, Justice Farley added that the "test for the issuer is not whether a court will or may eventually determine that there was fraud, but rather when the issuer looked at the situation, was it clear and obvious to him acting reasonably that there had been a fraud".[88]

[221] In our case, Eurobank had suspicions as to the validity of the demand for payment. It acted reasonably in the circumstances. It took steps to investigate. It sought an injunction from the Greek court, which ultimately refused to issue an injunction that would require HMOD to withdraw its demand for payment or allow Eurobank not to pay HMOD under the Letter of Guarantee. No appeal of this decision was possible.

[222] Faced with the judgment of the Greek court, it would not be reasonable for Eurobank to refuse to pay.

[223] Therefore, I conclude that, while Eurobank may still have had suspicions about the validity of HMOD's demand for payment, it was not clear and obvious that the request was fraudulent.

---

86 *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59, p. 84.

87 *Bank of Nova Scotia v. Angelica-Whitewear Ltd*., [1987] 1 S.C.R. 59, p. 84-85.

88 *Bank of Montreal v. Mitchell*, 1997 CanLII 12306 (ON SC), par. 8, confirmed by *Bank of Montreal v. Mitchell*, 1997 CanLII 14484 (ON CA), para. 23.

[224] Since Eurobank did not pay with knowledge of the fraud, it is entitled to payment from National Bank on the Counter-Guarantee.

***

[225] I realize that this outcome may seem unfair to Bombardier. I assume that it has the obligation to reimburse National Bank what it will have to pay Eurobank, such that Bombardier will suffer a loss of US $13,868,354.60, unless it can recover this amount from HMOD.

[226] In my view, that is exactly the right outcome.

[227] It is obviously wrong for HMOD to keep the money. It has absolutely no right to this money, which was paid to it under a letter of credit which has been found to be null and void *ab initio*. If HMOD reimburses the amount to Bombardier, then everything is as it should be.

[228] Eurobank took proceedings in Greece to recover that amount. Its action was dismissed on the basis that it is not the right party. Obviously, that recourse becomes even more difficult if Eurobank is reimbursed its loss by National Bank. I recognize that it may be difficult for Bombardier to recover the amount from HMOD because of the way the Greek courts seem to operate and also because Bombardier has done nothing for eight years to try to recover it.

[229] There is as a result a very real possibility that HMOD will keep the money and someone will suffer a loss of US $13,868,354.60. The question is who should suffer that loss if it proves impossible to recover the money from HMOD.

[230] In my view, the answer is clear. Bombardier initially adopted the strategy of getting orders from the Arbitral Tribunal and from the Quebec Superior Court and not from the Greek court. It did not make a strong *prima facie* case of fraud, but rather argued that the Arbitral Tribunal and from the Quebec Superior Court should enforce the undertaking. That strategy was ill-conceived and forced Eurobank to institute proceedings in Greece. When that failed, Bombardier took the position that this was Eurobank's problem and not Bombardier's. That was grossly unfair. Bombardier entered into a US $252,151,899 contract with HMOD. Bombardier knew or should have known that there were risks involved in dealing with a branch of the Greek government and it assumed those risks in light of the profit it hoped to gain under the Main Contract. Eurobank, on the other hand, issued the Letter of Guarantee at the request of National Bank on the basis of the Counter-Guarantee from National Bank. The transaction was supposed to be risk-free for Eurobank, and its fee for issuing the Letter of Guarantee to accommodate Bombardier was the relatively small commission of 0.35% *per annum*, which represented US $97,000

per annum when the Letter of Guarantee was first issued, and dropped by half when the Letter of Guarantee was reduced. The risk was Bombardier's and it must assume it.

[231] For all of these reasons, I would propose to allow the appeal and set aside in part the judgment rendered in first instance. I would propose to dismiss the action instituted by Bombardier against Eurobank and National Bank, the whole with costs in both instances in favour of Eurobank.

STEPHEN W. HAMILTON, J.A.