Neutral Citation Number: [2024] EWHC 114 (Comm)

Case No: CL-2022-000432

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Date: 26/01/2024

Before :

MR JUSTICE FOXTON

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Between :

MACQUARIE BANK LIMITED	**Claimant**
– and –	
BANQUE CANTONALE VAUDOISE	**Defendant**

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Yash Kulkarni KC (instructed by **Penningtons Manches Cooper LLP**) for **the Defendant/Applicant**
Sean O'Sullivan KC and **Thomas Steward** (instructed by **Holman Fenwick & Willan LLP**) for **the Claimant/Respondent**

Hearing dates: 23 January 2024
Draft Judgment Circulated: 24 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Honourable Mr Justice Foxton:

1. This is the Defendant's (**"BCV's"**) application challenging the jurisdiction of the court in respect of proceedings commenced by the Claimant (**"MBL"**) asking the court to make declarations as to MBL's entitlement to enforce two Standby Letters of Credit (**"the SBLCs"**) issued by BCV.

2. The English proceedings were commenced on 1 August 2022, in circumstances in which MBL had previously commenced proceedings against BCV in Switzerland for the same relief on 24 November 2020 (**"the Swiss Civil Proceedings"**). The Swiss Civil Proceedings were stayed on BCV's application on 3 September 2021 pending an ongoing criminal investigation in Switzerland relating to the transaction, and they remain stayed.

3. By the time of this hearing, the only live issue between the parties was whether MBL could satisfy the court that England and Wales is clearly the most appropriate forum for the determination of the dispute. I informed the parties at the end of the argument that I was so satisfied and dismissed BCV's jurisdiction challenge. This judgment sets out my reasons for doing so.

The background

4. MBL is an international bank, incorporated and existing under the laws of Australia.

5. BCV is a bank, incorporated and existing under the laws of Switzerland, with its registered office in Switzerland.

6. By an "Advance Payment and Supply Agreement" dated 22 November 2019 (with reference number MP19-25-500-IDME-018) **("the November Agreement"**), MBL agreed to purchase, and a UAE company called Phoenix Global DMCC **("Phoenix"**) agreed to sell, 75,000mt (+/-10%) of coal.

7. By clause 2 of the November Agreement, MBL was obliged to make payment in advance, in the amount of US$4,537,500. That payment was made to Phoenix on 22 November 2019 (**"the November Payment"**), to be secured by an SBLC.

8. MBL entered into two further "Advance Payment and Supply Agreements" with Phoenix (again, as supplier), dated 15 January 2020 and 28 January 2020 (together **"the 2020 Agreements"**), in relation to the purchase by MBL of 70,000mt (+/-10%) of coal **("the Cargo"**). The 2020 Agreements also provided for payment to be made by MBL in advance, to be secured by SBLCs.

9. BCV issued two SBLCs on 9 and 23 January 2020:

    i) SBLC No. IX01117010308925 dated 15 January 2020 in the amount of US$4,340,000.

    ii) SBLC No. IX01117010309522 dated 28 January 2020 in the amount of US$4,410,000.

10. The SBLCs were stated to be subject to the "VERSION OF THE ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS IN EFFECT ON THE DATE OF ISSUE …" (which was UCP 600). The SBLCs were "SUBJECT TO … THE LAWS OF ENGLAND".

11. MBL contends that Phoenix failed to deliver the Cargo and was therefore in default under the November Agreement, and that this constituted an event of default of "any other agreement between the Parties" within the meaning of Clause 1.1 of the 2020 Agreements. On 17 March 2020, MBL issued default notices to Phoenix and called for repayment of the Advance Payments in full within 5 business days. No payments were made, and Phoenix has since gone into liquidation.

12. On 26 March 2020, MBL demanded payment under the SBLCs in the amounts of US$4,340,000 and US$4,410,000. Under Article 14(b) of UCP 600, BCV was entitled to 5 business days to consider whether, on their face, the payment requests constituted compliant presentations, and under Article 16(d) of UCP 600, if rejecting the requests, BCV was required to give notice to MBL no later than the fifth banking day following the day of presentation.

13. BCV sent two SWIFT messages, dated 2 and 3 April 2020, requesting additional information relating to the shipment of goods under the underlying sale contract between MBL and Phoenix which MBL provided by SWIFT message of 8 April 2020. BCV did not identify any discrepancies in the payment requests, whether within 5 business days or at all, nor did BCV give notice that it was refusing to honour the SBLCs.

14. On 23 April 2020, MBL started the process for its claim for relief in the Swiss Civil Proceedings. On 24 November 2020, after obtaining authorisation to proceed, MBL formally filed a claim against BCV in the Chambre Patrimoniale Cantonale, in Lausanne, Switzerland (**"the CPC"**).

15. On 11 December 2020, BCV filed a criminal complaint with the Ministère Public Central (the Central Public Prosecutor's Office) in the Canton of Vaud against "an unknown person" for fraud and forgery, alleging that Phoenix presented documents to obtain the SBLCs which suggested that Phoenix was buying the Cargo from MBL, rather than the other way around. BCV alleges that these contracts were fictitious / falsified and that, if Phoenix had made it clear that it was actually selling the Cargo to MBL, BCV would not have provided the SBLCs in the form which was used. I shall refer to the resultant criminal investigation as the Swiss Criminal Proceedings.

16. MBL denies any involvement in any dishonest actions, and BCV currently advances no allegation that MBL was involved. Nor has MBL been named in any criminal proceedings.

17. On 12 March 2021, BCV sought a stay of the Swiss Civil Proceedings, pending the outcome of the Swiss Criminal Proceedings. On 3 September 2021, the CPC granted BCV's application for a stay. MBL appealed against the stay to the Chambre des Recours Civile du Tribunal Cantonal Vaudois **("the Vaud Court of Appeal"**), requesting that the stay be lifted.

18. On 9 December 2021, the Vaud Court of Appeal declined to lift the stay, which was to remain in place "until the criminal proceedings PE20.022757FDA currently pending before the Central Public Prosecutor's Office of the Canton of Vaud are remitted or abandoned".

19. On 11 February 2022, C appealed to the Tribunal Fédéral **("the Swiss Supreme Court").** On 25 March 2022, the Swiss Supreme Court dismissed MBL's appeal.

20. While expert evidence from Sir William Blair as to the applicable principles of English law relating to payment under letters of credit was placed before the Swiss Courts, it does not feature in the explanations given for the decisions reached by the Swiss Courts, which are reasoned exclusively by reference to Swiss law.

21. By letter of 9 May 2023, the CPC requested that the parties provide an update as to the Swiss Criminal Proceedings. On 25 May 2023, Mr Fabien Hohenauer of HDC law, on behalf of MBL wrote to M Guex, on behalf of BCV, inviting BCV to participate in a joint request to the CPC to lift the stay of proceedings.

22. On 30 May 2023, Mr Guex wrote separately to the CPC making clear that BCV would oppose any request to lift the stay of the Swiss Civil Proceedings. By letter of the same date, Mr Guex separately responded to Mr Hohenauer referring to his letter to the CPC and refusing the latter's request jointly to request the lifting of the stay.

23. On 6 June 2023, Mr Hohenauer wrote to the CPC unilaterally requesting the lifting of the stay. The CPC responded by letter dated 7 June 2023 refusing that request.

24. Two letters rogatory have been sent as part of the criminal proceedings for the purpose of securing evidence (one to the prosecutor in Australia on 22 April 2022, and one to the United Arab Emirates on 27 May 2022). On the evidence before the Court, no responses have yet been received. The time estimate originally put forward by M Guex for a likely response to those requests has, on any view, been exceeded, and any estimate as to when a response will come is necessarily highly speculative.

25. These proceedings were issued on 11 August 2022, and MBL was given permission to serve BCV out of the jurisdiction on 18 August 2022.

26. The parities placed Swiss law evidence before the court as to how long the stay of the Swiss Civil and Criminal Proceedings could reasonably be expected to continue. The experts agree that the stay of the Swiss Civil Proceedings that has been granted is of "indeterminate duration" which would fall to be lifted once a decision has been made by the Public Prosecutor that the Swiss Criminal Proceedings have been "remitted or abandoned". BCV's expert, M Guex, suggests that the CPC might resume the Swiss Civil Proceedings after the requests for international assistance have been answered, or if there is no response. MBL's expert, M Michod, disagrees and points out that the Vaud Court of Appeal has held that the stay will be lifted only on a decision to refer or close the Swiss Criminal Proceedings. The experts agree that it is "currently difficult to estimate the length of the criminal proceeding, and therefore the length of the civil proceeding between MBL and BCV". Even if and when answers to these requests are obtained, the progress of the Swiss Criminal Proceedings remains unclear. As M Michod points out, if the Public

Prosecutor proceeded with an indictment or classification against persons other than MBL, without reaching any decision about MBL, the stay of the Swiss Civil Proceedings would continue. M Michod anticipates that the resolution of the Swiss Civil Proceedings could take several years.

27. On the evidence before me, I am satisfied that there is a very real risk of the Swiss Civil Proceedings remaining stymied for a period of several years, although I accept more favourable outcomes (measured in many months) are also possible.

The consequences of the parties' choice of English law as the governing law of the SBLCs

28. The legal effects of a letter of credit governed by English law are clear. As noted in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1979] QB 159, 169:

> "It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. That was clearly stated in *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127, Jenkins L.J. giving the judgment of this court, said, at p. 129:
> '… it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with the established practice.'
>
> To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank."

29. Even where the courts of the bank's domicile have granted an injunction seeking to prevent a bank from paying out under a letter of credit, that will not provide it with a basis for refusing to do so. As Lord Denning MR noted in *Power Curber International Ltd v National Bank of Kuwait Sak* [1981] 1 WLR 1233, 1241-42:

> "If the court of any of the countries should interfere with the obligations of one of its banks (by ordering it not to pay under a letter of credit) it would strike at the very heart of that country's international trade. No foreign seller would supply goods to that country on letters of credit — because he could no longer be confident of being paid. No trader would accept a letter of credit issued by a bank of that country if it might be ordered by its courts not to pay. So it is part of the law of international trade that letters of credit should be honoured — and not nullified by an attachment order at the suit of the buyer.
>
> Added to this, it seems to me that the buyer himself by his conduct has precluded himself from asking for an attachment order. By opening the letter of credit in favour of the seller, he has implicitly agreed that he will not raise any set off or counterclaim — such as to delay or resist payment. He has contracted under the

> terms of the Uniform Customs and Practice by which he promises that the bank will pay without regard to any set off or counterclaim: and implicitly that he will not seek an attachment order …"

30. The substantive characteristics of a letter of credit have important procedural implications, which are intended to prevent the payee's substantive rights being circumvented by procedural means.

31. First, when a party seeks to prevent the bank paying on grounds of fraud of the beneficiary, or the bank itself seeks to resist payment on that basis, a heightened evidential requirement applies: the fraud must be "established or obvious fraud" (*Edwards Owen*, 169) or fraud that was "very clearly established" (ibid,173) (see also *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31, [59]). This enhanced merits test gives effect to the legal nature of a letter of credit as a matter of English law and can therefore properly be regarded as an aspect of substantive English law, rather than a purely procedural rule. As I noted in, *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm), [41], "the enhanced merits requirement is a concomitant of the decision to treat irrevocable credits and similar instruments as equivalent to cash,"

32. Second, it is well-established that the Court will not stay the enforcement of a judgment under a letter of credit pursuant to its procedural stay jurisdiction: *Continental Illinois v National Bank Trust Company of Chicago* [1986] 2 Lloyd's Rep 441, 445:

> "We can see no relevant distinction between the guarantee in that case and the guarantees presently under consideration. The purpose of both was to ensure immediate payment if the principal debtor did not pay. Indeed the present cases make it the more necessary that the court should not interfere, for here the parties have specifically provided both in the loan agreement and the guarantees that payment should be made free of any set off or counterclaim. It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated. We do not doubt that the court has a discretion to grant a stay but it should in our view be "rarely if ever" exercised, as Lord Dilhorne said in relation to claims on bills of exchange. Guarantees such as this are the equivalent of letters of credit and only in exceptional circumstances should the court exercise its power to stay execution."

See also *National Infrastructure Development Co Ltd v Banco Santander SA* [2017] EWCA Civ 27, [45].

33. Pausing there, it will be immediately apparent that the course and state of the Swiss Civil Proceedings has failed to give effect to the substantive characteristics of the SBLCs under their applicable law:

    i) First, BCV has been able to prevent MBL enforcing the SBLCs while third party investigations into a potential fraud taking place, when BCV is not even in a position to present an arguable case of fraud against MBL, still less present "clear evidence" of MBL's knowledge of the fraud.

ii) Second, BCV has been able to use Swiss procedural law as a basis for not performing its substantive obligations under the SBLCs.

34. Mr Kulkarni KC accepted that BCV had been able to obtain relief from the Swiss Court which it could not have obtained from the English court. That relief could not be obtained from this court not because of differences in the procedural regimes of the two jurisdictions, but because it would be inimical to the substantive law governing the SBLCs.

The forum conveniens analysis

35. The test is set out in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 at 478, 482 and relevant factors are summarised at *White Book*, [6.37.16] and in Adrian Briggs KC, *Civil Jurisdiction and Judgments* (7th), [22.12]-22.17]:

i) The "fundamental principle" is that the court "has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice".

ii) In a "service out" case, the burden is on the claimant not merely to persuade the court that England is the appropriate forum, but "to show that this is clearly so".

iii) Factors which have been held to be important, depending on the nature of the case, include governing law, the factual focus, and the location and language of witnesses and documents.

iv) Delay can be relevant but is likely to be a sufficient factor on its own only in extreme cases.

36. In this case, the current course of the Swiss Civil Proceedings, their likely future course over many months, and, quite possibly longer, will prevent attempts to enforce the SBLCs while investigations are undertaken which might, or might not, provide a defence, which all conflict with MBL's substantive rights under the SBLCs as a matter of their (English) governing law. This provides a strong basis for concluding that England and Wales (where the court's procedure will be applied in a manner compatible with those substantive rights) is the forum in which the case can most suitably be tried for the interests of all the parties and for the ends of justice. This is not a "pure" delay case, nor a comparative assessment of the pluses and minuses of purely procedural regimes.

37. By contrast, if BCV has a defence to the claim to enforce the SBLCs as a matter of English law (and none has been suggested so far), then the English court will give effect to that defence. However, if there is no such defence, the English proceedings will proceed in a manner consistent with the substantive characteristics of the SBLCs under English law as instruments "akin to cash", with judgment in a matter of months.

38. By way of a development of that point, I also accept Mr O'Sullivan KC's submission that the English court is best placed to give effect to the applicable law of the SBLCs, with its procedural consequences. While there will be many cases in which the applicable law will be of only limited weight in determining the most appropriate forum, the law

applicable to letters of credit and equivalent financial instruments has a number of important and technical consequences. The extent to which English law gives effect to the autonomous nature of a documentary credit, and the status of such instruments as "akin to cash", is one of the principal reasons why it is often chosen as the governing law of such instruments. The history of the Swiss Civil Proceedings, and their anticipated future course, strongly suggest that the continuation of proceedings in that jurisdiction will not give effect to the parties' choice of English law in the respects I have described.

39. Those matters far outweigh the links with Switzerland which Mr Kulkarni KC pointed to – BCV's domicile, and the (related) fact that Switzerland was identified in the SBLCs as the place of expiry, payment and where presentation would take place.

40. There are four further matters raised by Mr Kulkarni KC which are said to point to the contrary conclusion to the one I have reached, and with which I should deal.

41. First, he points to the fact that MBL itself commenced the Swiss Civil Proceedings. However, at the time it did so, the Lugano Convention 2007 was in force, and it could not have brought proceedings against BCV elsewhere. I accept that by the time the Swiss Civil Proceedings were formally commenced, it would have been open to MBL to wait for 5 weeks before being able to bring proceedings here. However, the steps which had to be taken so that MBL could commence the Swiss Civil Proceedings occurred some seven months earlier, including a formal mediation which had to be completed before the CPC would give MBL permission to commence proceedings. The parties were "well-entrenched" in the Swiss legal context before the commencement of proceedings in England and Wales became possible.

42. Second, he suggests that allowing these proceedings to continue would cut across considerations of comity so far as the Swiss Courts are concerned, particularly when MBL did not commence the proceedings immediately after the CPC imposed a stay and/or after the Swiss Supreme Court rejected the final appeal. However:

    i) It was MBL which commenced the Swiss Civil Proceedings and MBL which wishes to end them at an early stage in their life. I am unable to see how an order which permits MBL to pursue proceedings in another jurisdiction rather than the one in which it initially chose to pursue its claim involves any form of interference with the process of or an affront to the Swiss Courts.

    ii) There has been no substantive progress in the Swiss Civil Proceedings, the claim having been put on hold. This is not a case, therefore, in which a party has permitted the foreign proceedings to advance to any considerable extent before seeking to bring them to an end.

43. Third, he points to the inherently vexatious nature of a party bringing two sets of proceedings in two different jurisdictions at the same time and for the same claim (*Denby Pottery Co Ltd v David Shaw Silverware North America Ltd* [2013] EWHC 4458 (QB), [40]) and the risk of irreconcilable judgments this involves (*Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65). However, if BCV's jurisdiction challenge is dismissed, MBL is willing to undertake to use its best endeavours to discontinue the Swiss Proceedings.

44. Finally, Mr Kulkarni KC suggested that it was somehow relevant that (contrary to what Mr Kulkarni KC accepted was the correct position under the relevant statutes and statutory instruments) a guidance note issued by the Ministry of Justice and a statement by the Swiss Federal Office of Justice manifested a common expectation that the Lugano Convention 2007 would continue to apply. I am unable to see how any misunderstanding as to the continuing application of the Lugano Convention 2007 under the law of England Wales could have the effect that England and Wales was not the most appropriate forum, when determining whether it was appropriate to exercise a jurisdiction which the court undoubtedly has. In any event I accept Mr O'Sullivan KC's submission that the materials relied upon do not suggest that the *lis alibi pendens* regime in the Lugano Convention 2007 would continue to apply in a case such as the present (whatever they might say about the heads of jurisdiction and the enforcement of judgments).