EUROBANK ERGASIAS SA V BOMBARDIER INC: THE FRAUD EXCEPTION EXTENDS TO THE FRAUD OF A THIRD-PARTY OF WHICH THE BENEFICARY IS NOT INNOCENT

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The recent decision of the Supreme Court of Canada in Eurobank Ergasias SA v Bombardier Inc usefully complements the letter of credit law principles laid down in its seminal decision almost forty years ago in Bank of Nova Scotia v Angelica-Whitewear Ltd.

The decision brings clarity to the notion of "fraud" in letter of credit law. A demand made in breach of an undertaking not to demand payment and a provisional arbitral order not to demand payment, one week before the release of an arbitral award dispositive of the existence of an underlying debt, sufficed to establish the fraud exception to the principle of autonomy and stop the payment of a documentary credit.

The decision also extends the fraud exception to the fraud of parties other than the beneficiary, where the beneficiary has knowledge of the fraud and participates in it. Thus, the issuer of a guarantee supported by a counter-guarantee must be prevented from obtaining payment under the counter-guarantee where it knew that the beneficiary's draw under the guarantee was fraudulent and nevertheless paid such draw.

The judgments of the Supreme Court of Canada and Quebec courts reached conclusions opposite to those reached by Greek courts in related legal proceedings regarding fraud. The Supreme Court of Canada stressed the importance of judicial comity generally in letter of credit law and explained the reasons why comity could not play a role in the case at hand.

La récente décision de la Cour suprême du Canada dans l'affaire Eurobank Ergasias SA c Bombardier Inc. complète utilement les principes du droit des lettres de crédit énoncés dans sa décision historique rendue il y a près de quarante ans dans l'affaire Banque de Nouvelle-Écosse c Angelica-Whitewear Ltd.

Cette décision clarifie la notion de « fraude » dans le droit des lettres de crédit. Une demande faite en violation d'un engagement de ne pas

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demander le paiement et d'une ordonnance arbitrale provisoire de ne pas demander le paiement, une semaine avant la publication d'une sentence arbitrale tranchant sur l'existence de la dette sous-jacente, a suffi pour établir l'exception de fraude au principe d'autonomie et suspendre le paiement d'un crédit documentaire.

La décision étend également l'exception de fraude à la fraude commise par des parties autres que le bénéficiaire, lorsque celui-ci a connaissance de la fraude et y participe. Ainsi, l'émetteur d'une garantie soutenue par une contre-garantie doit être empêché d'obtenir le paiement au titre de la contre-garantie lorsqu'il savait que le tirage du bénéficiaire au titre de la garantie était frauduleux et qu'il a néanmoins effectué ce paiement.

Les jugements de la Cour suprême du Canada et des tribunaux québécois ont abouti à des conclusions opposées à celles des tribunaux grecs dans des procédures judiciaires connexes concernant la fraude. La Cour suprême du Canada a souligné l'importance du principe de courtoisie dans le droit des lettres de crédit et a expliqué les raisons pour lesquelles la courtoisie ne pouvait jouer un rôle dans l'affaire en question.

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Introduction

In the recent case of *Eurobank Ergasias SA v Bombardier Inc* ("*Eurobank Ergasias*"), the Supreme Court of Canada confirmed an injunction that permanently prohibits the payment of a counter-guarantee (the "Counter-guarantee") issued by a Canadian bank (National Bank of Canada or "NBC") in favour of a Greek bank (Eurobank Ergasias SA or "Eurobank").[2]

The Counter-guarantee supported a letter of guarantee (the "Guarantee") issued by Eurobank in favour of the Hellenic Ministry of National Defense ("HMOD"), to whom a Canadian airplane manufacturer (Bombardier Inc or "Bombardier") had sold firefighting airplanes.[3] The Counter-guarantee and Guarantee were issued at the request of Bombardier to secure its obligations pursuant to a related offsets contract entered into between Bombardier and HMOD, which required Bombardier to purchase goods and services from Greek suppliers ("Offsets Contract").[4]

In the circumstances set out in part 1 of this comment, a dispute arose under the Offsets Contract. HMOD demanded payment under the Guarantee. Eurobank honoured the demand and claimed under the Counter-guarantee. Bombardier filed applications to enjoin NBC from paying Eurobank's claim, which were allowed by the Superior Court of Quebec and confirmed by the Court of Appeal of Quebec. The Supreme Court of Canada granted leave and added its own confirmation.

The principles of documentary credit law that applied were laid out in 1987 by the Supreme Court of Canada in the case of *Bank of Nova Scotia v Angelica-Whitewear Ltd* ("*Angelica-Whitewear*").[5] The fundamental question in *Eurobank Ergasias* was whether or not the circumstances of the case triggered the application of the fraud exception and supported orders to stop NBC from paying a complying demand under the Counter-

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2 2024 SCC 11 [*Eurobank Ergasias*].

3 The guarantee was initially issued by ANZ Grindlays Bank Limited, replaced by New TT Hellenic Postbank SA, replaced by Eurobank Ergasias SA (see the judgment of the Court of Appeal of Quebec in *Eurobank Ergasias SA v Bombardier Inc*, 2022 QCCA 802 at para 78, n 50 [*Eurobank Ergasias QCCA*]). For the sake of simplicity, the term "Eurobank" shall designate all three banks that successively issued the Guarantee.

4 *Eurobank Ergasias*, *supra* note 2 at para 20.

5 [1987] 1 SCR 59, 1987 CanLII 78 (SCC) [*Angelica-Whitewear*]. For a recent and illuminating perspective on these principles, see M Deschamps, "Letter of credit: The autonomy principle and the fraud exception" (2022) 38 BFLR 245.

guarantee.[6] The Superior Court of Quebec's decision found that they did[7] and the appellate courts saw no palpable and overriding error.[8]

Part 2 highlights the importance attached by the court to judicial comity in letter of credit law, in a case where harmony between the laws of Greece and Canada with respect to the fraud exception could not be achieved.

Part 3 discusses the conclusions of the Supreme Court of Canada regarding the fraudulent character of the draws under each of the Guarantee and the Counter-guarantee. The fact that HMOD's demand violated its own undertaking not to draw during the course of arbitral proceedings and an order by the arbitral tribunal preventing it from drawing during such period were particularly problematic, given the importance of arbitration in Canadian law.

The comment ends in part 4 with a discussion of the wording and structuring of cross-border standby credit transactions that parties can use to manage risks such as the ones that materialized in *Eurobank Ergasias*.

1. Background and judicial history

a) Background

A commercial dispute arose in 2008 regarding the performance of Bombardier's obligations under the Offsets Contract.[9] HMOD argued that the contractual targets of goods and services to be procured in Greece were not met. Bombardier initially replied that it was not able to find qualified local suppliers. As provided under the Offsets Contract, the parties referred the dispute to arbitration.[10]

In 2012, HMOD formally undertook not to draw under the guarantee pending the arbitration proceedings (the "Undertaking"). Subsequent to the Undertaking, Bombardier challenged the validity of the Offsets Contract altogether, on the basis that it breached the principles of free movement of goods under European laws.

In August 2013, HMOD unexpectedly breached the Undertaking and demanded payment under the Guarantee. On Bombardier's application,

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6 *Eurobank Ergasias*, *supra* note 2 at para 4.
7 *Ibid* at paras 46, 52.
8 *Ibid* at paras 51, 91, 117.
9 *Eurobank Ergasias QCCA*, *supra* note 3 at para 15.
10 *Eurobank Ergasias*, *supra* note 2 at para 24.

the arbitral tribunal issued a procedural order preventing HMOD from demanding payment under the guarantee (the "Procedural Order"). Provisional injunctions were also issued by the Superior Court of Quebec against HMOD, Eurobank and NBC (the "Provisional Injunctions"), enjoining Eurobank not to pay HMOD's draw under the Guarantee, and not to demand payment under the Counter-guarantee, as well as enjoining NBC from paying any amount under the Counter-guarantee to Eurobank. The first Provisional Injunction was issued in August 2013 and expired without being renewed in September 2013.[11] The second Provisional Injunction was subsequently issued on December 20, 2013 for a period of ten days.[12]

In Greece, in the Fall of 2013, Eurobank petitioned the Athens One-Member First-Instance Court for an order preventing HMOD from demanding payment under the Guarantee pending the arbitral proceedings. The order was granted on a provisional basis but was subsequently denied on the merits on December 16, 2013.[13] Contrary to the Superior Court of Quebec in the first Provisional Injunction, the Athens One-Member First-Instance Court failed to conclude that HMOD's actions disentitled it from demanding payment under the Guarantee.

On December 23, 2013, HMOD made another formal demand for payment under the Guarantee, in breach of its Undertaking, the Procedural Order and the second Provisional Injunction (which was then in force). This occurred one week before the previously announced date of release of the award on the merits by the arbitral tribunal (being December 31, 2013). Eurobank asked HMOD if it would waive its demand until the end of the arbitral proceedings, given the circumstances. HMOD replied with the notice of a legal proceeding known as an extrajudicial invitation protest, which required immediate payment under pain of severe civil and penal consequences.

The day following the notice of extrajudicial invitation protest, Eurobank paid HMOD's draw and, on December 27, 2013, demanded payment under the Counter-guarantee.

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[11] *Bombardier Inc c General Directorate for Defense Armaments and Investments of the Hellenic Ministry of National Defense*, 2013 QCCS 6892 [*Provisional Injunction I*].

[12] *Bombardier Inc c General Directorate for Defense Armaments and Investments of Hellenic Ministry of National Defense*, 2013 QCCS 6896 [*Provisional Injunction II*].

[13] *Eurobank Ergasias*, *supra* note 2 at para 30.

b) The Provisional Injunctions

There was no reference to any allegation or evidence of fraud in the reasons for the first Provisional Injunction. The application for the injunction was argued on the basis of the court's power to protect and enforce the choice made by the parties to submit their dispute to arbitration:

> Mais ici, ce que recherche Bombardier, c'est précisément le respect du processus d'arbitrage choisi par les parties dans leur contrat. Elle requiert de cette Cour des ordonnances forçant le Ministère grec à respecter ses engagements à l'égard d'un arbitrage qui est en cours depuis quatre ans.[14]

The Superior Court of Quebec applied the general principles for the granting of provisional injunctions: urgency; appearance of right; serious or irreparable harm; and the balance of convenience.[15]

In the second Provisional Injunction, the Superior Court of Quebec noted that the situation was essentially the same as the situation that existed at the time of the first Provisional Injunction and the result was the same.[16]

The reasons of the Provisional Injunctions made no reference to *Angelica-Whitewear,* nor to the requirement of fraud set out therein:

> An exception to the general rule that an issuing bank is obliged to honour a draft under a documentary credit when the tendered documents appear on their face to be regular and in conformity with the terms and conditions of the credit has been recognized for the case 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.[17]

The requirement of fraud achieves the appropriate balance between two competing 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.[18]

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14 *Provisional Injunction I*, *supra* note 11 at para 11.
15 *Ibid* at paras 18–28.
16 *Provisional Injunction II*, *supra* note 12 at paras 20, 37.
17 *Angelica-Whitewear*, *supra* note 5 at 71.
18 *Ibid* at 72.

Although *Angelica-Whitewear* does not foreclose the possibility of new exceptions to the autonomy principle, Canadian courts have not yet granted an injunction on any basis other than fraud.[19] The Supreme Court of Canada agreed in *Eurobank Ergasias* that the fraud exception defined in *Angelica-Whitewear* is the only recognized exception to the autonomy principle in Canadian law.[20]

It is not clear how the reasoning in the Provisional Injunctions satisfies the requirement that fraud be demonstrated to the court.

This concern is without consequence in *Eurobank Ergasias*, however, as the Supreme Court of Canada was careful not to include the breach of the second Provisional Injunction in the list of elements which it agreed triggered the fraud exception:

> It is sufficient to observe, as did the trial judge and the majority of the Court of Appeal, that HMOD's demands for payment in contravention of Procedural Order No. 11 and its own undertaking, including a demand immediately before the final arbitral award was released, can support a finding that it engaged in fraud. For this reason, it is unnecessary to decide whether other aspects of HMOD's conduct that the trial judge identified amount to fraud.[21]

Had the second Provisional Injunction been a material circumstance, the Supreme Court of Canada would have had an opportunity to remind first level courts that the "strong *prima facie* case of fraud" criterion, first enunciated in *Angelica-Whitewear*, "in the highly specialized field of documentary credit, subsumes all three normal criteria for the issuance of an interlocutory injunction."[22]

c) The Safeguard Order

On December 31, 2013, the arbitration tribunal released its award, which not only dismissed HMOD's claim against Bombardier, but declared the Offsets Contract null and void.[23] Shortly thereafter, Bombardier applied for and obtained a safeguard order from the Superior Court of Quebec preventing the payment of the Counter-guarantee pending a hearing on

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19 *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Limited Partnership*, 2023 ABKB 736 at paras 41–42.

20 *Eurobank Ergasias*, *supra* note 2 at para 67.

21 *Ibid* at para 120.

22 *SNC-Lavalin Polska SP ZOO v BNP Paris Canada*, 2017 QCCS 3694 at para 24 [*SNC-Lavalin Polska*].

23 *Eurobank Ergasias*, *supra* note 2 at para 36.

the merits of its application for a permanent injunction (the "Safeguard Order").[24]

The Superior Court of Quebec relied in part on the arbitral award to support its finding that HMOD's draw under the Guarantee was fraudulent:

> [42] Here, the underlying contract has been declared null by the competent arbitration tribunal. So, to conclude that the letter of guarantee is null, is elementary. A demand under a null contract appears to satisfy the undersigned's notion of fraud.
>
> [43] However, it is worse. The conduct of the Greek Government in attempting to and finally succeeding in obtaining payment was clearly abusive and fraudulent. The facts speak for themselves. The legal opinion of Professor Calavros states that under Greek law, the behaviour was abusive.[25]

There is no doubt that the arbitral award severely damaged the merit and credibility of HMOD's assertion that it was entitled to the proceeds of the Guarantee. HMOD appealed the award to the Cour d'appel de Paris, but this appeal was ultimately dismissed (in April 2015) and the award became unimpeachable.[26]

However, at the time when Eurobank considered and paid HMOD's draw, and when it made a demand under the Counter-guarantee, the dispute between Bombardier and HMOD remained unresolved in the sense that the arbitral tribunal had not yet released its award.[27] It is not easy to see how the subsequent evidence of the arbitral award may have been admissible to trigger the application of the fraud exception, because what ultimately mattered was whether Eurobank had knowledge of HMOD's fraud when it paid its demand under the Guarantee.[28]

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24 *Bombardier Inc c General Directorate for Defense Armaments and Investments of the Hellenic Ministry of National Defense*, 2014 QCCS 181.

25 *Ibid* at paras 42–43.

26 *Ibid* at para 36.

27 As already noted in the text, the second Provisional Injunction was issued on December 20, 2013 for a period of ten days, HMOD demanded payment under the Guarantee on December 23, Eurobank paid on December 24 and the arbitral award was released as previously announced on December 31 of the same year.

28 *Eurobank Ergasias*, *supra* note 2 at para 129. This is discussed more fully in part 3 of this comment.

d) The trial decision and subsequent appeals

Years after the Safeguard Order, at the conclusion of a trial, the Superior Court of Quebec found that the circumstances triggered the fraud exception and enjoined NBC from paying the Counter-guarantee to Eurobank.[29]

The court found that HMOD should be prevented from demanding payment under the Guarantee because it undertook not to do so in no uncertain terms as per the Undertaking; the Procedural Order and the second Provisional Injunction prohibited it from doing so; and the timing of the demand, just a few days before the release of the arbitration tribunal's award, suggested an intention to keep the proceeds regardless of the outcome of the arbitration process.[30] These circumstances collectively demonstrated, to the satisfaction of the Superior Court of Quebec, the requisite measure of impropriety, dishonesty and deceit that is characteristic of fraud.[31]

The court also concluded on the basis of the evidence that Eurobank knowingly and voluntarily participated in the fraud by making the proceeds available to HMOD instead of declining to do so.[32] Eurobank's draw under the Counter-guarantee itself breached the second Provisional Injunction, and this added weight to the court's finding that in choosing to submit to HMOD's extrajudicial invitation to protest, Eurobank "knowingly enabled fraud to produce its fruits."[33]

As already noted, in a majority decision, the Court of Appeal of Quebec dismissed Eurobank's appeal.

In *Eurobank Ergasias*, a majority in the Supreme Court of Canada agreed with the courts below and dismissed Eurobank's appeal, ending the Canadian side of a fifteen-year-old legal battle over the liability of Bombardier under the Offsets Contract and the proceeds of the related security in the form of the Guarantee and Counter-guarantee.[34]

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

30 The Supreme Court of Canada observed that HMOD had not returned the funds received from Eurobank. It also noted that, during the hearing, HMOD expressed the position that it is not required to do so. This, the court wrote, "on its own, supports a finding that HMOD engaged in fraud" (see *Eurobank Ergasias*, *supra* note 2 at para 119).

31 *Ibid* at para 175.

32 *Ibid* at paras 187, 196.

33 *Ibid* at para 205.

34 *Ibid* at paras 91, 117, 123–24, 137–38.

2. The role of judicial comity in letter of credit law

The certainty with which the Canadian courts characterized HMOD's demand for payment as fraudulent contrasts with the decisions of the Greek courts in the cases litigated in that country.

After the judgments of Quebec courts finding HMOD's conduct to have been fraudulent, Eurobank initiated legal proceedings to seek restitution by HMOD of the sums paid to it under the Guarantee. While a first level court agreed with Eurobank, the Athens Court of Appeal and the Hellenic Supreme Court ultimately dismissed its claim.[35] The process took several years, and the decision of the Hellenic Supreme Court only became available at the time of the appeal before the Supreme Court of Canada.

It is fair to say, in light of these judicial decisions, and the earlier decision of the Athens One-Member First-Instance Court, that, under Greek law, HMOD was not bound by its own Undertaking, the arbitration proceedings, the Procedural Order, the second Provisional Injunction or the award of the arbitration tribunal. Also, it was not fraudulent for HMOD to receive the proceeds of the Guarantee and hold on to them.[36]

The Supreme Court of Canada held that the Greek decisions had no "decisive relevance" in the case.[37] The question was whether the impugned conduct of HMOD and Eurobank could be characterized as fraudulent under Quebec law. The courts of Quebec and the Supreme Court of Canada could, as they did, give no weight whatsoever to the evidence of the decisions of the Greek courts.[38]

In *Angelica-Whitewear*, the Supreme Court of Canada drew persuasive authority from American cases[39] and the Uniform Commercial Code,[40] English cases[41] and French doctrine,[42] in laying out the foundational letter of credit law principles in Canada. Clearly, it was desirable for the court to take international comity into account in designing a Canadian exception of fraud that would be harmonious with the laws in other countries, to the extent possible. The court added that there was no reason why the

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35 *Ibid* at paras 42–43.

36 *Ibid* at paras 7, 30, 98.

37 *Ibid* at para 99.

38 *Ibid* at paras 106–08. Likewise, the Greek courts gave no weight to the findings of fraud by the Quebec courts (see *Eurobank Ergasias QCCA*, *supra* note 3 at para 68).

39 *Angelica-Whitewear*, *supra* note 5 at 73–74.

40 *Ibid* at 74–78.

41 *Ibid* at 78–80.

42 *Ibid* at 82.

fraud exception should not be applied in Quebec on the same basis as it had been in common law jurisdictions. It used its influence and authority to ensure domestic comity across the common law and civil law systems:

> Thus, while there is a suggestion in the reasons of Monet J.A. in the Court of Appeal in the present case that the decisions on the fraud exception in common law jurisdictions may be of interest but not of relevance in Quebec, I can, with respect, see no reason of principle why they should not be applied in determining the scope and availability of the fraud exception to the autonomy of documentary credits under Quebec law. *This is particularly so because of the desirability of as much uniformity as possible in the law with respect to these vital instruments of international commerce* [Emphasis added].[43]

In *Eurobank Ergasias*, the court observed that the fraud exception has been applied uniformly across Canada because it rests on a "shared idea" by the civil and common law systems.[44] In addition, the Supreme Court of Canada noted with well-deserved pride that "common law courts outside of Canada have turned to *Angelica-Whitewear* as a helpful resource[.]"[45]

Given this attachment to uniform principles in letter of credit law, the Supreme Court of Canada took a moment in *Eurobank Ergasias* to explain why it was not possible for the Canadian courts to give any relevance to the Greek judgments:

> In this case, a decisive factor was the conclusion of the foreign courts that a party can disregard an order of an arbitral tribunal to which it has agreed to be subject (see Sup. Ct. reasons, at para. 176; C.A. reasons, at para. 69).[46]

To give the decisions of the Greek courts any weight would raise a "public order concern" in Canada, because they are inconsistent with the value of arbitration in Canadian law.[47] The Supreme Court of Canada hints that this concern may very well explain why Eurobank never sought to enforce the Greek judgments in Canada.[48]

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43 *Ibid* at 82–83.

44 *Eurobank Ergasias*, *supra* note 2 at para 84.

45 *Ibid*.

46 *Ibid* at para 107. The reasons of the Hellenic Supreme Court are to the same effect: "'[a]s far as the issuing of interim orders by the International Court of Arbitration and the Superior Court of Quebec respectively are concerned, which prohibited payment of the guarantee letters on an interim basis, it should be noted that as interim decisions of the International Court of Arbitration and the foreign court they were not binding on the Greek State'" (*ibid* at para 108).

47 *Ibid* at para 109.

48 *Ibid* at para 102.

Thus, it can be seen that the position taken in *Eurobank Ergasias* to give no weight whatsoever to the Greek decisions does not invalidate the desirability of "as much harmony as possible" in cross-border letter of credit law matters.[49] The case of *Eurobank Ergasias* is an unfortunate but simple reminder that such harmony is not always possible when the solution provided by foreign law is incompatible with an important element of the local legal system.

3. The conclusions of the Supreme Court of Canada regarding fraud

Eurobank Ergasias raised the question whether Eurobank's draw under the Counter-Guarantee was fraudulent.[50] The answer was that HMOD's draw under the Guarantee was fraudulent and that by honouring HMOD's draw notwithstanding its knowledge of the fraud Eurobank actively participated in it and made HMOD's fraud its own.[51]

a) The fraudulent nature of HMOD's draw under the Guarantee

Even if we assume that Bombardier failed to fulfill its obligations under the Offsets Contract, on December 23, 2013, at the time of its demand for payment under the Guarantee, HMOD had agreed not to exercise its right to demand payment pending the arbitral proceedings, pursuant to the terms of the Undertaking. It was also enjoined from making any such demand by the Procedural Order and the second Provisional Injunction.

The Supreme Court of Canada confirmed that fraud may occur in the context of a letter of guarantee where the beneficiary makes a demand when it knows that it has no right to do so.[52] However, the court noted that "a breach of contract, without more, is not fraud."[53] The Supreme Court of Canada adopted the often quoted words of the former Ontario Court (General Division) in *Cineplex Odeon Corp v 100 Bloor West General Partner Inc*, that only where the conduct imports some aspect of impropriety, dishonesty or deceit can it be said to be fraudulent.[54]

The late timing of the demand in *Eurobank Ergasias* suggested an improper, dishonest or deceitful intention to keep the proceeds of

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49 *Angelica-Whitewear*, *supra* note 5 at 82–83.

50 *Eurobank Ergasias*, *supra* note 2 at para 62.

51 *Ibid* at para 66.

52 *Ibid* at paras 114, 116.

53 *Ibid* at para 125.

54 1993 CarswellOnt 2358 at para 31, [1993] OJ No 112, quoted with approval by the Supreme Court of Canada (*Eurobank Ergasias*, *supra* note 2 at para 115).

the Guarantee in the event that the award would be unfavourable. The violation by HMOD of the Undertaking and the Procedural Order would not by themselves have amounted to fraud. They were breaches of contract, without more. But in the eyes of the Supreme Court of Canada they did constitute fraud when completed by the element of timing:

> It is sufficient to observe, as did the trial judge and the majority of the Court of Appeal, that HMOD's demands for payment in contravention of Procedural Order No. 11 and its own undertaking, including a demand immediately before the final arbitral award was released, can support a finding that it engaged in fraud.[55]

It is noteworthy that the Supreme Court of Canada did not include the breach of the Provisional Injunctions in the list of the circumstances that supported a finding of fraud.[56] As noted, the second Provisional Injunction prevented not only demands for payment by HMOD under the Guarantee but as well demands by Eurobank under the Counter-guarantee.[57] It was in force when Eurobank claimed under the Counter-guarantee.[58]

b) The fraudulent nature of Eurobank's draw under the Counter-guarantee

In *Angelica-Whitewear*, the Supreme Court of Canada wrote that the fraud exception was "confined to fraud by the beneficiary of a credit and should not extend to fraud by a third party of which the beneficiary is innocent."[59] This remark was made in passing, as the circumstances in *Angelica-Whitewear* involved the fraud of the beneficiary.[60] Nearly forty years later, *Eurobank Ergasias* provided the Court with an opportunity to revisit the issue in a more concrete context. It was the fraud of a third party, HMOD, of which Eurobank was argued not to be innocent as beneficiary under the Counter-guarantee, because of the knowledge it had of the fraud at the time it honoured HMOD's draw under the Guarantee.[61]

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55 *Eurobank Ergasias*, *supra* note 2 at para 120.

56 *Ibid* at para 120.

57 See the actual orders of *Provisional Injunction I*, *supra* note 11 and *Provisional Injunction II*, *supra* note 12.

58 The Court of Appeal of Quebec and the Superior Court of Quebec both noted the breach of the second Provisional Injunction as one element of the evidence of fraud (see *Eurobank Ergasias*, *supra* note 3 at para 68 and *HMOD 2018*, *supra* note 29 at paras 180–81).

59 *Angelica-Whitewear*, *supra* note 5 at 84.

60 *Ibid* at 83.

61 *Eurobank Ergasias*, *supra* note 2 at para 111.

The Supreme Court of Canada agreed with the courts below that "a beneficiary ceases to be 'innocent' when they have knowledge of the fraud of the third party and participate in that fraud."[62] Testimonial evidence by Eurobank's representatives confirmed that Eurobank "knew of the conduct by HMOD that, by Canadian standards, amounts to fraud."[63] However, in the words of the court, "simply knowing about the fraud of a third party is not sufficient. A beneficiary does not engage in the third party's fraud unless they participate in it."[64] The payment of the Guarantee and the making of a demand or payment under the Counter-Guarantee constituted the requisite element of participation.[65]

4. Wording and structuring of guarantees

Eurobank Ergasias was not the first time the fraud exception was argued by a Canadian account party in an application for an injunction against a Canadian bank to enjoin payment under a counter-guarantee supporting a foreign guarantee.

In *Locomotives Kadco Inc c Syrian Railways*, the application was dismissed because of insufficient evidence regarding the application of the fraud exception.[66] Note the reasons of the Superior Court of Quebec regarding the alleged knowledge by the Canadian bank of the beneficiary's fraudulent demand under the foreign guarantee, which foreshadows the conclusions of *Eurobank Ergasias*:

> *CONSIDÉRANT que les allégations de la requête* font état d'un litige commercial entre Kadco et Syrian Railways mais *sont clairement insuffisantes pour permettre au tribunal de conclure* que Syrian Railways aurait commis une fraude à l'égard de Kadco, ou encore *que la Banque de Syrie aurait eu connaissance d'une fraude de la part de Syrian Railways à l'endroit de Kadco mais aurait néanmoins demandé paiement de la garantie émise à son bénéfice par RBC* [Emphasis added][.][67]

In *SNC-Lavalin Constructeurs International Inc v Shariket Kashraba Skikda.spa* ("*SNC-Lavalin*"), the application was dismissed because the counter-guarantee provided that disputes thereunder would be submitted to the laws and courts of the foreign jurisdiction in which the guarantee was established in favour of the beneficiary.[68]

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62 *Ibid* at para 129.
63 *Ibid* at para 135.
64 *Ibid* at para 131.
65 *Ibid* at paras 133–34.
66 2010 QCCS 4742 at para 7.
67 *Ibid* at para 12.
68 2010 QCCA 1589, refusing to grant leave to appeal from 2010 QCCS 3236.

In *Groupe SM (International) Construction Inc c Banque Nationale du Canada* ("*Groupe SM (International)*"), the application was dismissed for the same reason.[69] In addition, the indemnification agreement between the bank that issued the counter-guarantee and the account party provided that the account party waived its rights to apply to Quebec courts if the credit document provides that disputes thereunder are determined by foreign courts.[70]

In *SNC-Lavalin Polska SP.ZOO v BNP Paris Canada*, the application was dismissed in the absence of any proof of fraud.[71]

Banks that engage in international trade finance are aware of the risk that the law and judicial decisions in one country may lead to results that contradict or conflict with the laws and judicial decisions in another country. In *Eurobank Ergasias*, the application of the fraud exception was denied in Greece[72] but granted in Canada.[73]

What are some structuring and drafting strategies that parties can use or attempt to use to manage such a risk?

As noted by the Supreme Court of Canada, Bombardier acknowledged that it devised the guarantee package involving the Counter-guarantee by a Canadian bank subject to the jurisdiction of local courts, precisely because it was familiar with the way in which Canadian courts apply the fraud exception and wanted to protect itself against a fraudulent collection by HMOD.[74] This is one strategy account parties may wish to consider when asked to provide standby documentary credit in favour of a foreign beneficiary.

Another strategy is to consider how the wording of the documentary credit may reduce the risk of fraud. For example, it would have been in Bombardier's interests to try to incorporate in the language of the Guarantee a condition that ties the amount claimed under the Guarantee to the amount ordered to be paid by an arbitral award. After all, if the parties agreed to arbitrate disputes under the Offsets Contract, and the Guarantee was intended to serve as security, then perhaps all could have become comfortable with payment under the Guarantee to be made once an arbitral award confirmed the amount owed by Bombardier by reason

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69 2013 QCCA 1118 [*Groupe SM 1118*]; 2013 QCCS 2775 [*Groupe SM 2775*].

70 *Groupe SM 1118*, *supra* note 69 at para 6.

71 *SNC-Lavalin Polska*, *supra* note 22.

72 *Eurobank Ergasias*, *supra* note 2 at paras 30, 42–43.

73 *Ibid* at paras 98–102, 104, 106.

74 *Ibid* at para 140.

of any performance defaults on its part. This appears to be the result which the Undertaking sought to achieve.

With the agreement of the parties, special provisions can cause all disputes, whether under the underlying commercial contract, the guarantee in one country, and the counter-guarantee in another, to be governed by the laws and be submitted to the courts of a single country, whether the beneficiary's country or any other country. Such provisions are enforced by courts, as illustrated by *SNC-Lavalin* and *Groupe SM (International)*.[75] If a single legal system is used to resolve all disputes, the risk of conflicting decisions in the countries involved by the transaction is greatly diminished, if not outright eliminated.

It is often helpful to consider the incorporation of governing laws and jurisdiction clauses in the documentary credits, when they are not stipulated by default in the uniform customs and practice which the documentary credits adopt in their terms, to avoid conflicting decisions of courts in different countries.[76]

Conclusion

There was a hint of its future reasoning in *Eurobank Ergasias* in the Supreme Court of Canada's earlier decision in *Angelica-Whitewear*.

As already noted, the earlier obiter statement that the fraud exception was "confined to fraud by the beneficiary of a credit and should not extend to fraud by a third party of which the beneficiary is innocent" opened the door to an extension of the fraud exception cases of third-party frauds of which the beneficiary is not innocent.[77]

There may have been another foreshadowing of its subsequent decision in *Eurobank Ergasias*, at the end of the reasons in *Angelica-Whitewear*. In an obiter statement, the Supreme Court of Canada expressed a reluctance to enforce an exculpatory provision that would shift to the applicant customer the liability for a fraudulent collection notwithstanding sufficient knowledge by the issuing bank:

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75 *SNC-Lavalin Polska*, *supra* note 22; *Groupe SM 1118*, *supra* note 69; *Groupe SM 2775*, *supra* note 69.

76 English courts dismissed the claim that a draw was fraudulent and ordered the issuing bank to honour a draw under a documentary credit, even though the Brazilian courts had granted an injunction forbidding payment (see *National Infrastructure Development Co Ltd v Banco Santander SA*, [2017] EWCA Civ 27).

77 *Angelica-Whitewear*, *supra* note 5 at 83–84.

> Before concluding something should perhaps be said about an exemption clause or exclusion of liability in the agreement between the Bank and Whitewear respecting the letter of credit on which the Bank relied to some extent, although I did not understand it to be strongly urged in this Court. It is *clause 13 of the agreement*, which is quoted in full in the judgment of Monet J.A. in the Court of Appeal, [1985] C.A. 718 at pp. 72324, and the pertinent parts of which read as follows: "All users of the Credit shall be deemed to be agents of the Undersigned and *neither the Bank nor its agents or correspondents shall be responsible for the negligence or fraudulence of any user of the Credit*... and the obligations hereunder of the Undersigned to the Bank shall not be in any way lessened or affected if any bill or document accepted, paid or acted upon by the Bank or its agents or correspondents is in any or all respects invalid, insufficient, fraudulent or forged or if any bill or document does not bear a reference or sufficient reference to the Credit or if no note thereof is made on the Credit." *Monet J.A. held that clause 13 would not relieve the Bank of liability for payment of the draft if it had knowledge of fraud by the beneficiary of the credit. I agree, although it was not necessary to reach that point in view of my conclusion that the fraud exception was not applicable in this case* [Emphasis added].[78]

A parallel might be drawn between, on the one hand, the issuing bank that pays a fraudulent draw and attempts to enforce the applicant's indemnity, and, on the other, the issuer of a guarantee that pays a fraudulent draw and attempts to enforce the counter-guarantee supporting it. As hypothesized in *Angelica-Whitewear* in the passage above, knowledge of the fraud would prevent enforcement of the indemnity by the issuing bank, for reasons similar to those that prevented Eurobank form enforcing the Counter-guarantee in *Eurobank Ergasias*.

Eurobank Ergasias is a carefully drafted decision in a difficult and complicated case. The Supreme Court of Canada's reasons cover or raise a variety of interesting questions for documentary credit industry participants and legal specialists. Looking ahead, the foundational principles set out in *Angelica-Whitewear* continue to apply, with the new principle that the account party may allege the fraud of a third party to prevent the beneficiary from touching the proceeds of a documentary credit, if the beneficiary is aware of, and participates in, such fraud.

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78 *Ibid* at 108–09.