



SUPREME COURT OF CANADA

CITATION: Eurobank Ergasias
S.A. v. Bombardier inc., 2024
SCC 11

APPEAL HEARD: November 14,
2023

JUDGMENT RENDERED: April 5,
2024

DOCKET: 40350

BETWEEN:

**Eurobank Ergasias S.A. and General Directorate for Defense Armaments and
Investments of the Hellenic Ministry of National Defense**
Appellants

and

Bombardier inc. and National Bank of Canada
Respondents

- and -

Canadian Bankers' Association
Intervener

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 151)

Kasirer J. (Wagner C.J. and Rowe, Martin, Jamal,
O'Bonsawin and Moreau JJ. concurring)

DISSENTING Côté J. (Karakatsanis J. concurring)

REASONS:

(paras. 152 to 299)

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**Eurobank Ergasias S.A. and
General Directorate for Defense Armaments and Investments
of the Hellenic Ministry of National Defense**

Appellants

v.

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2024 SCC 11

File No.: 40350.

2023: November 14; 2024: April 5.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Financial institutions — Banks — Letters of credit — Bank's obligation to

pay on demand — Fraud exception — Scope and availability of exception when fraud of third party to letter of credit is alleged — Whether fraudulent conduct of stranger to letter of credit can be attributable to letter's beneficiary as beneficiary's own fraud, thereby requiring issuing bank to refuse demand for payment under fraud exception.

In 1998, the Hellenic Ministry of National Defense (“HMOD”) entered into a procurement contract with a Canadian company for the purchase of firefighting amphibious aircraft. At the same time, the parties concluded an offsets contract pursuant to which the Canadian company would subcontract some of the work associated with the aircraft procurement to Greek companies. The offsets contract provided that the Canadian company would owe HMOD liquidated damages if it did not fulfil its subcontracting obligations. Payment of these liquidated damages was secured by a letter of credit issued by a Greek bank in favour of HMOD (“Greek Letter of Guarantee”). A second letter of credit was issued by a Canadian bank in favour of the Greek bank to secure payment of the amounts that the latter would be required to pay HMOD under the Greek Letter of Guarantee should HMOD state that the Canadian company failed to perform its obligations under the offsets contract (“Canadian Letter of Counter-Guarantee”). Disputes under the offsets contract were to be resolved by an arbitral tribunal under the rules of the International Chamber of Commerce (“ICC”).

When the Canadian company determined that it would be unable to meet its subcontracting obligations under the offsets contract, an ICC Arbitral Tribunal was constituted and arbitration hearings took place. HMOD formally undertook not to

demand payment under the Greek Letter of Guarantee for as long as the arbitration procedure was ongoing. However, while the issuance of the final award was still pending, HMOD repeatedly demanded payment from the Greek bank. The Canadian company sought and obtained an order from the ICC Arbitral Tribunal preventing HMOD from demanding payment under the Greek Letter of Guarantee until issuance of the final award. It also sought and obtained provisional injunctions from the Superior Court of Quebec to prevent payment under the Greek Letter of Guarantee and the Canadian Letter of Counter-Guarantee. Despite this, HMOD made a final demand for payment, seven days before the final award was set to be released, and said that the Greek bank would be subject to civil and criminal legal measures if it refused to pay. The Greek bank paid HMOD under the Greek Letter of Guarantee, and the Greek bank then demanded payment from the Canadian bank under the Canadian Letter of Counter-Guarantee.

The ICC Arbitral Tribunal's final award decided that the offsets contract violated European Union law such that it was null and void *ab initio* and that no liquidated damages were due by the Canadian company to HMOD. In response to the final award, the Greek bank commenced proceedings before Greek courts, where it unsuccessfully sought to recover the money that it had paid to HMOD. The Greek courts decided that the conduct of HMOD under the Greek Letter of Guarantee was not fraudulent under Greek law. In parallel proceedings before Quebec courts, the Canadian company sought a permanent injunction enjoining the Canadian bank from paying the Greek bank under the Canadian Letter of Counter-Guarantee. It argued that

the fraud exception to an issuing bank's near absolute duty to honour a demand for payment under a letter of credit applied to the Greek bank as beneficiary under the Canadian Letter of Counter-Guarantee. Given that HMOD's conduct was fraudulent, the Greek bank's demand for payment under the Canadian Letter of Counter-Guarantee was, by extension, also fraudulent. The trial judge held that the manner in which HMOD obtained payment under the Greek Letter of Guarantee was fraudulent, and that the Greek bank's own conduct was fraudulent because its payment to HMOD was a result of fraud of which it was aware. He thus enjoined the Canadian bank from paying any amount to the Greek bank under the Canadian Letter of Counter-Guarantee. The Greek bank appealed. The Court of Appeal dismissed its appeal, holding that it was open to the trial judge to conclude that the Canadian bank was not bound to pay the Greek bank as beneficiary under the Canadian Letter of Counter-Guarantee, since the Greek bank had sufficient knowledge of the fraud prior to paying under the Greek Letter of Guarantee.

Held (Karakatsanis and Côté JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Rowe, Martin, **Kasirer**, Jamal, O'Bonsawin and Moreau JJ.: The fraud exception applies with respect to the Greek bank's demand for payment under the Canadian Letter of Counter-Guarantee. Given that the Greek bank, as the beneficiary of the Canadian Letter of Counter-Guarantee, knew of and participated in fraud by HMOD, that fraud can be attributed to the Greek bank as its

own. The requirement that there be fraud by the beneficiary is therefore met. Moreover, there is no question that the Greek bank's fraud was brought to the attention of the Canadian bank as issuer of the Canadian Letter of Counter-Guarantee. On that basis, the Canadian bank was rightly enjoined by the trial judge from paying out any amount under the Canadian Letter of Counter-Guarantee to the Greek bank and the majority of the Court of Appeal made no error in confirming that conclusion.

A letter of credit is an instrument understood to be autonomous from the underlying contract to which it speaks that is issued by a financial institution at the behest of its customer. It entitles the beneficiary of the letter to payment on demand from the issuing bank, so long as that demand conforms to the requirements set out in the letter of credit. Commonly relied upon in domestic and international commercial transactions, letters of credit are widely used as a means of managing risk. They are issued in order to ensure that the beneficiary will be paid what they believe they are owed under an underlying contract. A demand for payment will typically arise when there is an allegation of failure of the customer or account party to perform some duty as agreed. The premise is pay now, and argue later if necessary. It is the issuing financial institution who takes on the risk of not being paid by their client.

There are two fundamental principles to the law governing letters of credit: autonomy and strict compliance. Autonomy means that a letter of credit is an independent obligation of the issuing or confirming bank. The obligation of the issuing bank to honour a valid demand for payment is independent of the performance of the

underlying contract for which the credit was issued. The bank undertakes to pay the beneficiary provided that specified conditions are met. The bank's customer may ultimately have a claim against the beneficiary, but that is typically not the financial institution's concern, since the letter of credit ensures that the beneficiary is paid in the meantime. Strict compliance means that the obligation of the issuing bank must be determined based only on the strict conformity of the presentation (including conformity of the documents presented) with the terms of the letter of credit. It requires not only that the tendered documents conform to the terms and conditions of the letter of credit but that they appear on their face, upon reasonably careful examination, to be consistent with one another. The test does not require perfection. It is possible, in clearly appropriate cases, to overlook immaterial discrepancies.

Fraud is the only exception recognized in Canadian law to the issuing bank's obligation to pay the beneficiary on demand. When there is fraud by the beneficiary of the credit which has been sufficiently brought to the knowledge of the bank before payment or demonstrated to a court called on by the customer of the bank to issue an interlocutory injunction, the issuing bank need not honour the draft. The potential scope of the fraud exception must be properly circumscribed. It should be sufficiently inclusive to capture most conduct that should not be facilitated through letters of credit, yet at the same time, if it is too inclusive, letters of credit could become much less reliable. To achieve a balance, the standard set for fraud is high. "Fraud" in this context must import some aspect of impropriety, dishonesty or deceit. A key feature of civil or commercial fraud is its effect on the demand for payment by the

beneficiary. If a beneficiary demands payment while knowing that they have no right to be paid under the underlying contract, that conduct may amount to fraud. Whether it does is an issue of mixed fact and law for which deference is owed on appeal.

The fraud exception is no less applicable when a second letter of credit is issued by a financial institution that requires it to pay when presented with an attestation that a first letter of credit has been called upon. Indeed, the conduct of a beneficiary under a counter-guarantee may serve to make the fraud of a third party its own. In such a case, the fraud exception applies directly to the demand of the beneficiary. However, the fraud of a third party to a letter of credit does not engage the fraud exception where the beneficiary to the letter is innocent of that fraud. To accept otherwise would unduly expand the fraud exception at the expense of the reliability of letters of credit.

A beneficiary ceases to be innocent when they have knowledge of the fraud of a third party and participate in that fraud. When there is both knowledge and participation, the third party's fraud can fairly be attributed to the beneficiary as the beneficiary's own. This is not indirect or vicarious liability but is merely an application of the fraud exception to the beneficiary of the relevant letter of credit.

In the instant case, the trial judge's finding that HMOD engaged in fraud is entitled to deference. His determination that HMOD engaged in some measure of impropriety that could amount to fraud is amply supported by the evidence. The evidence supports a finding that HMOD engaged in a fraudulent attempt to circumvent the ICC Arbitral Tribunal's interim order and final award by repeating its demand for

payment around one week before the final award was released and, after the final award was issued and it became clear that HMOD had no right under the offsets contract to the money that it received, by not returning the money. In addition, there is no basis to interfere with the trial judge's conclusion that the Greek bank had clear knowledge of HMOD's fraud and that it actively participated in HMOD's fraud by paying HMOD in improper circumstances. The Greek bank's employees who made the decision to pay HMOD knew that HMOD was enjoined from demanding payment under the Greek Letter of Guarantee and that the issuance of the final arbitral award was imminent. The Greek bank was not merely suspicious that HMOD demanded payment contrary to the interim order; it clearly knew that this was happening. At the very least, this suggests that the Greek bank knew that the demand for payment was made in contravention of at least one order, which, in the circumstances, amounts to clear knowledge of the fraudulent conduct of HMOD. Because it knew of and participated in HMOD's fraud, the Greek bank became the co-author of that fraud and must, for the purposes of the fraud exception, bear responsibility for it. As the beneficiary of the Canadian Letter of Counter-Guarantee, it is the Greek bank's fraud that is actionable before Quebec courts.

As for the judgments of the Greek courts, they have no decisive relevance in measuring the conduct of HMOD and the Greek bank. Absent a successful application for recognition and enforcement, foreign judgments are merely evidence and the weight given to them is an issue of fact to which deference is owed on appeal. A decision to place little or no weight on an unenforceable foreign judgment can be justified if that decision does not give proper consideration to relevant Canadian

judgments or raises other public order concerns. Here, the foreign courts concluded that a party can disregard an order of an arbitral tribunal to which it had agreed to be subject. In the circumstances, both the trial judge and the Court of Appeal expressly opted to give no weight to the decisions of the Greek courts. No reviewable error has been shown.

Per Karakatsanis and Côté JJ. (dissenting): The appeal should be allowed and the action instituted by the Canadian company against the Greek and Canadian banks should be dismissed. To conclude otherwise would dismiss as irrelevant the decisions of the Greek courts, which cannot be ignored. International comity is an essential guiding principle when considering or enforcing foreign judgments. In the instant case, there is no public policy rationale for not giving weight to the judgments of the Greek courts. Taking them into account, HMOD's demand for payment under the Greek Letter of Guarantee was neither fraudulent nor tantamount to fraud; and, even if it were, the Greek bank would be innocent of that fraud. There is an inherent contradiction in the requirement that a reviewing court place itself in the position of the issuing bank at the time of payment to assess whether it had sufficient knowledge of any fraud, but at the exact same time discard the decisions of the courts of competent jurisdiction that were binding on that bank. Thus, the trial judge's conclusion that the fraud exception applies cannot stand.

The Greek Letter of Guarantee and the Canadian Letter of Counter-Guarantee in this case are best referred to as demand guarantees. Demand

guarantees, like letters of credit, are contracts established at the request of a principal whereby the guarantor, usually a bank, irrevocably promises to pay the beneficiary on demand, irrespective of any ongoing dispute between the principal and the beneficiary. While the terms and conditions for payment of a demand guarantee reflect the underlying contract, the guarantor undertakes to pay regardless of external facts or events. In this sense, the demand guarantee is independent from the underlying contract; it is autonomous in nature. When parties to a commercial transaction agree to use demand guarantees to secure the performance of their obligations, they express their intention to be bound by a “pay now, argue later” structure. The guarantor’s obligation to pay is triggered solely on the terms and conditions specified by the principal. Once the terms and conditions are set, the only control that the bank may exercise is over the regularity of the documents tendered by the beneficiary. The fundamental rule is that the documents must appear on their face, upon reasonably careful examination, to be in accordance with the terms and conditions of the letter of credit. The bank’s role as a guarantor is thus simple. It must pay when presented with a compliant demand, and cannot investigate the circumstances of the underlying contract to determine whether the obligation secured by the demand guarantee was performed. The bank does not have the specialized skill and experience to be a referee on matters that divide the parties to the secured contract, and it should not and is not expected to enter into controversies between the parties to the underlying contract.

The guarantor’s obligation to pay when presented with a compliant demand is subject to one exception — fraud. The principal has two options to prevent

payment under a demand guarantee: it can seek an interlocutory injunction from a court of competent jurisdiction to restrain the bank from honouring the demand by establishing a strong *prima facie* case of fraud, or it can present sufficient evidence of fraud to the guarantor before payment is made. Payment should be refused only in the rare cases where the guarantor has clear or obvious knowledge of the fraud. “Clear or obvious knowledge” is a high standard in that the fraud must be blatantly apparent. What is “clear or obvious” fraud in a legal sense is not necessarily “clear or obvious” in a commercial sense. That is why, when a court is asked to review the legality of a bank’s decision to honour its obligation to pay pursuant to a demand guarantee, it must place itself in the exact same situation that the bank was in at that time, without resorting to *ex post facto* reasoning. The exception must be kept narrow: the potential scope of the fraud exception must not be a means of creating serious uncertainty and a lack of confidence in the operation of demand guarantees; at the same time the application of the principle of autonomy must not serve to encourage or facilitate fraud in such transactions.

Courts can look to either the tendered documents or the underlying contract to detect fraud. However, an allegation of fraud is not an invitation for courts to allow sophisticated commercial parties to refashion their agreement to an “argue now, pay later” structure when the bar is not met. Fraud is a high bar, and the exception will not apply where the principal can only prove conduct amounting to something less than fraud. Fraud in this context involves some aspect of public order — bad faith alone is not enough — and it has to be tailored to the specific context of demand guarantees.

The case must be one where the demand on the guarantee is utterly without justification or where it is apparent there is no right to payment.

Fraud committed by a third party should not prevent an innocent beneficiary from demanding payment on a demand guarantee. In the context of a letter of guarantee backed by a counter-guarantee, fraud committed by the beneficiary of the guarantee will always be third-party fraud for the purposes of the counter-guarantee. Where the guarantor has clear or obvious knowledge of the beneficiary's fraud under the letter of guarantee but decides to pay nonetheless, that fraud can be attributed to the guarantor. What triggers the demand for payment under a counter-guarantee is payment under the guarantee. To determine whether a beneficiary's demand for payment under a counter-guarantee was fraudulent, a court must look past the clear line of separation between the guarantee and the counter-guarantee. This inquiry must not be transformed, however, into a dispute over the underlying contract.

In the instant case, the trial judge and the majority of the Court of Appeal erred by not giving any weight to the judgments of the Greek courts. Had these judgments been considered as facts informing the conduct of HMOD and of the Greek bank for the purposes of assessing whether the fraud exception applies to the Canadian Letter of Counter-Guarantee, the only possible conclusion would have been that HMOD's demand under the Greek Letter of Guarantee and the Greek bank's decision to pay were valid. It is irrelevant that the Greek judgments were not formally recognized and therefore not enforceable in Quebec, since the Greek Letter of

Guarantee was governed by Greek law and the parties to this letter were not domiciled in Quebec. There would have been no reason to seek the recognition and enforcement of the Greek judgments because there was simply nothing in these decisions to be enforced in Quebec.

Furthermore, while the Greek judgments are not binding on the Quebec courts, the principle of comity must guide any determination regarding the weight to be given to them. When foreign judgments are received in evidence without being formally recognized in Quebec, they are still *prima facie* proof of the reported facts, of the proper application of the foreign law and of the foreign court's jurisdiction over the matter, under art. 2822 *C.C.Q.* They cannot simply be ignored by Quebec courts, who must recognize the factual effect of those decisions. A foreign decision introduced as evidence is a factual constraint on the Quebec courts and should be treated as such. Although a trial judge is free to determine the appropriate weight to be given to a foreign decision in light of all the evidence, they cannot second-guess the reported facts or the proper application of the foreign law by the foreign court. This is precisely what the trial judge failed to do. Further, the public order exception in arts. 3081 and 3155(5) *C.C.Q.* cannot serve as a basis for disregarding the factual effect of the Greek judgments. Giving a factual effect to a foreign decision is very different from a Quebec court applying foreign law, recognizing that decision, or incorporating its solution into Quebec's legal order.

In light of all of the evidence, which includes the Greek judgments, the trial judge's ultimate conclusion that the requirements for the fraud exception were met cannot stand. The trial judge failed to interpret as a whole HMOD's undertaking not to demand payment under the Greek Letter of Guarantee as long as the arbitration procedure was ongoing and until the final award was rendered. HMOD could validly withdraw its undertaking, and it was no longer in effect when HMOD demanded payment. Drawing on the Greek Letter of Guarantee in this context thus cannot be a basis for a finding of fraud. It was also an error for the trial judge to conclude that HMOD's conduct was fraudulent on the basis of either the ICC Arbitral Tribunal's interim order or one of the Superior Court's provisional injunctions, which were not enforceable in Greece. As to the timing of HMOD's demand for payment, although it may be tempting to look at HMOD's conduct after the fact, doing so would constitute impermissible reasoning. On the face of the Greek Letter of Guarantee, HMOD could validly demand payment when it did.

Finally, even if HMOD's conduct was fraudulent or tantamount to fraud for the purposes of the Canadian Letter of Counter-Guarantee, in light of all the evidence, the Greek bank (the beneficiary) must be considered innocent of HMOD's (the third party) alleged fraud for the purposes of that letter. In assessing whether the Greek bank had clear or obvious knowledge of the alleged fraud, the Court must place itself in the exact same situation that the Greek bank was in by standing in its shoes, and therefore confine itself to the facts as the Greek bank knew them on the date when payment to HMOD was made. The Greek bank was faced with a judgment from a court

of competent jurisdiction — the only court of competent jurisdiction for the purposes of the Greek Letter of Guarantee — which found that HMOD could validly draw on the Greek Letter of Guarantee. This decision, as a factual constraint, is a determinative element in the analysis of the Greek bank’s clear or obvious knowledge. In reality, only one decision was enforceable against the Greek bank at the time, and this decision did not enjoin it from paying HMOD. Given the autonomous nature of the guarantee and lack of an operative injunction, the Greek bank had no choice but to pay. The conduct of the Greek bank was that of an innocent beneficiary under the Canadian Letter of Counter-Guarantee. It did not participate in any fraud, nor did it have clear or obvious knowledge of alleged fraud at the time of payment. The requirements for the fraud exception were not met, and in consequence, the autonomy of the Canadian Letter of Counter-Guarantee had to prevail.

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By Côté J. (dissenting)

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APPEAL from a judgment of the Quebec Court of Appeal (Mainville, Hamilton and Baudouin JJ.A.), 2022 QCCA 802, [2022] AZ-51858542, [2022] Q.J. No. 5189 (Lexis), 2022 CarswellQue 8102 (WL), setting aside in part a decision of Wery J., 2018 QCCS 2127, [2018] AZ-51505317, [2018] Q.J. No. 5489 (Lexis), 2018 CarswellQue 5279 (WL). Appeal dismissed, Karakatsanis and Côté JJ. dissenting.

Karim Renno, Michael Vathilakis, Geneviève Dickey and Justine Covey,
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Basile Angelopoulos and Ovidiu Rosu, for the appellant the General
Directorate for Defense Armaments and Investments of the Hellenic Ministry of
National Defense.

*Sophie Melchers, Michel G. Sylvestre, Jérémy Boulanger-Bonnely and
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Eric Bédard, Marie-Hélène Beaudoin and Arielle Reeves-Breton, for the
respondent the National Bank of Canada.

Mathieu Lévesque, for the intervener.

The judgment of Wagner C.J. and Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ. was delivered by

KASIRER J. —

I. Overview

[1] This appeal invites the Court to determine when, by reason of the fraud
exception recognized in Canadian law, an issuing bank must refuse to honour a demand

for payment under a letter of credit. The debate in this case has fixed on allegations of fraud brought against a third party to the disputed letter of credit. When will the fraudulent conduct of a stranger to a letter of credit be attributable to that letter's beneficiary, as the beneficiary's own fraud, thereby requiring the issuing bank to refuse a demand for payment under the fraud exception?

[2] At the heart of this dispute is a Letter of Counter-Guarantee governed by Quebec law. This letter of credit was issued by the National Bank of Canada at the behest of its customer, Bombardier inc., in favour of a Greek bank, Eurobank Ergasias S.A. By arranging the issuance of this letter of credit, Bombardier sought to facilitate a complex transaction for the supply of aircraft to the Hellenic Ministry of Defense, or "HMOD". Eurobank issued a distinct Letter of Guarantee in favour of HMOD, again at Bombardier's request, that is subject to Greek law. The plan for the interlocking letters of credit was straightforward: should HMOD call on Eurobank to honour the Greek Letter of Guarantee, Eurobank would be entitled to call on the National Bank to reimburse it under the Quebec Letter of Counter-Guarantee.

[3] When HMOD demanded payment under the Greek letter of credit, Bombardier sought an injunction before the Quebec Superior Court to stop the National Bank from honouring a subsequent demand for payment by Eurobank as beneficiary under the Quebec Letter of Counter-Guarantee. Bombardier has alleged that HMOD — a third party to the Quebec letter — committed fraud under that instrument and that, by reason of Eurobank's knowledge and participation in that fraud, the National Bank

should be prevented from honouring Eurobank's demand for payment based on the fraud exception. If the credit is honoured by the National Bank, Bombardier would of course be liable to its bank for that amount. That is unfair, says Bombardier, because an arbitration tribunal to which the parties had submitted their differences decided that Bombardier did not owe the relevant funds to HMOD.

[4] The narrow question on appeal to this Court is whether fraud committed by HMOD under the Greek letter of credit can be attributed to Eurobank as its own as beneficiary of the Quebec letter of credit. In that event, says Bombardier, the fraud exception to the autonomous character of letters of credit should apply to Eurobank. This would mean that the National Bank must refuse the beneficiary's demand for payment under the Quebec letter as fraudulent. In an alternative argument, Bombardier takes the view that because the underlying contract is null, so too are the letters of credit connected to it, notwithstanding the principle of autonomy that governs such letters.

[5] In *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59, the Court recognized the fraud exception to an issuing bank's near absolute duty to honour a demand for payment under a letter of credit. Writing for the Court, Le Dain J. carefully sought to balance two competing policy objectives that he described as being in "tension" in the law: the importance to international commerce that banks respect the autonomous character of letters of credit and the importance of suppressing fraud in transactions (p. 72). On the one hand, widening the fraud exception might undermine the reliability of letters of credit; on the other hand, turning a blind eye to fraud might

encourage misconduct in letter transactions. Le Dain J. concluded that the fraud exception should be confined to cases of obvious fraud of the beneficiary that is so egregious that the legitimacy of the supporting letter of credit can no longer be assumed. The bar for the fraud exception was set high. In keeping with this careful balance and high bar, he wrote, the exception should not extend to the fraud of a third party of which the beneficiary is “innocent” (p. 84).

[6] We are now asked to consider if the fraud exception can extend to fraud by a third party and in what circumstances the beneficiary’s conduct — in this case Eurobank’s — will not be viewed as “innocent”. Specifically, the Court must decide whether, by reason of its connection to the third party HMOD’s misdeeds, Eurobank must answer for that fraud as its own.

[7] The factual and legal setting is made complex by these interlocking letters of credit that are governed by different laws. It is made more complicated still in that Greek courts have decided that HMOD’s conduct under the Letter of Guarantee was not fraudulent under Greek law.

[8] That said, in the proceedings relevant to this appeal, Bombardier sought an injunction in the Quebec Superior Court. Those proceedings fix our attention only on Quebec law and only on the Letter of Counter-Guarantee. And while judgments of the Greek courts have spoken to HMOD’s responsibility under the Greek Letter of Guarantee, no one has petitioned the Quebec courts for their recognition and enforcement under the relevant provisions of the *Civil Code of Québec* (“C.C.Q.”).

[9] To answer whether the National Bank must refuse payment to Eurobank under the fraud exception, we need not opine on the validity of the Letter of Guarantee under Greek law nor measure HMOD's conduct under Greek law. These questions are the proper province of the Greek courts and cannot decide the matter before this Court that turns on whether the fraud exception applies to the Letter of Counter-Guarantee, governed as it is by Quebec law.

[10] Eurobank has urged the Court in written and oral argument — mistakenly in my respectful view — to undertake an analysis of the fraud exception in the context of the Letter of Guarantee. Eurobank does so, no doubt, thinking that we will be convinced by judgments of the Greek courts concluding that there was no fraud by HMOD under the Greek letter of credit. But that is not the question on appeal before this Court, and since recognition and enforcement of these foreign decisions has not been obtained before the Quebec courts, those judgments cannot decide the matter. Instead, we must first ask whether HMOD's conduct amounted to fraud by a third party under the Letter of Counter-Guarantee as governed by Quebec law. If so, we must then decide whether the fraud exception applies to Eurobank as beneficiary under the Quebec letter, on the basis of its own conduct, according to the Canadian standard set forth in *Angelica-Whitewear*.

[11] To my mind, where fraud by a third party is established on the facts and a beneficiary under a letter of credit governed by Quebec law knows of that fraud and

participates in it, the fraud becomes the beneficiary's own. The fraud exception then applies, and the issuer must be stopped from paying the beneficiary.

[12] Here, the trial judge decided, as a matter of fact, that HMOD acted fraudulently. He found too that Eurobank knew of HMOD's fraud and nevertheless demanded payment under the Quebec Letter of Counter-Guarantee. In a word, Eurobank was not "innocent" because it was aware of the third-party fraud and participated in it. Like the majority judges in the Court of Appeal, I see no reviewable errors in these findings nor in the trial judge's ultimate conclusion: HMOD's fraud is attributable to Eurobank as its own and Eurobank cannot, as beneficiary under the Quebec letter, demand payment.

[13] On this basis, I would dismiss the appeal and confirm the conclusion that the National Bank should be enjoined from honouring Eurobank's demand for payment under the fraud exception recognized in *Angelica-Whitewear*. In the circumstances, I find it unnecessary to decide whether the letters of credit are null.

II. Background

[14] Understanding this appeal requires a brief description of the four principal actors, the two underlying contracts and the two interlocking letters of credit.

A. *The Relevant Actors*

[15] Bombardier inc., a respondent in this appeal and plaintiff in the originating proceedings, is a Canadian aviation company. Its head office is in Montreal, Quebec.

[16] Eurobank Ergasias S.A. (together with its predecessors, “Eurobank”), the appellant and a defendant before the Superior Court, is a Greek bank. One of its predecessors was the issuer of the Letter of Guarantee. Eurobank is the beneficiary of the Letter of Counter-Guarantee.

[17] The General Directorate for Defense Armaments and Investments of the Hellenic Ministry of National Defense is designated as an appellant in this appeal and a defendant in first instance. It is responsible for military procurement for the Hellenic Republic. As it notes in its written argument, HMOD did not file appeals from the trial judgment or the judgment of the Court of Appeal because it does not recognize the jurisdiction of Quebec courts over it, but stated it was “duty-bound” to address before our Court points it raised in the courts below (A.F., HMOD, at para. 96).

[18] The National Bank of Canada, the second respondent in this appeal, is a Canadian bank. Its head office is in Montreal. The National Bank is the issuer of the Letter of Counter-Guarantee. It was named as a defendant in the originating proceedings by Bombardier, its customer, who sought to stop the bank from making payment which would ultimately be to Bombardier’s detriment. The National Bank takes positions that are consonant with Bombardier’s views of an issuing bank’s responsibility under a letter of credit. In particular, the National Bank joins Bombardier

in asking that Eurobank not be paid under the Quebec letter and that the present appeal be dismissed.

B. The Underlying Contracts

[19] In 1998, HMOD entered into a procurement contract with Bombardier for the purchase of 10 firefighting amphibious aircraft for US\$252,151,899. The contract is governed by Greek law.

[20] At the same time, Bombardier and HMOD concluded an “Offsets Contract”, pursuant to which Bombardier agreed to subcontract some of the work associated with the aircraft procurement to Greek companies. Also governed by Greek law, the Offsets Contract provides that Bombardier would owe HMOD liquidated damages at the end of a 10-year term if it did not fulfil its subcontracting obligations. It was agreed that payment of these liquidated damages would be secured by a letter of credit issued by a Greek bank in favour of HMOD. The Offsets Contract also directs that disputes will be resolved by an arbitration tribunal, to be seated in Paris, under the rules of the International Chamber of Commerce (“ICC”).

C. The Letters of Credit

[21] One of Eurobank’s predecessors, ANZ Grindlays Bank Limited, also a Greek bank, issued the Letter of Guarantee in favour of HMOD on February 5, 1999, in the amount of US\$27,736,709 to secure payment of the liquidated damages

Bombardier would owe pursuant to the Offsets Contract. The Letter of Guarantee is governed by Greek law. Under the Offsets Contract, HMOD was responsible for reducing the amount of the Letter of Guarantee as Bombardier fulfilled its subcontracting obligations. In June 2010, the Letter of Guarantee was reduced to US\$13,868,354.60.

[22] The National Bank issued the Letter of Counter-Guarantee in favour of Eurobank on January 29, 1999, to secure payment of the amounts that Eurobank would be required to pay HMOD under the Letter of Guarantee should HMOD state that Bombardier failed to perform its obligations under the Offsets Contract. HMOD is not a party to the Letter of Counter-Guarantee, which is governed by Quebec law. The Letter of Counter-Guarantee provides that the “National Bank of Canada hereby irrevocably undertake[s] to reimburse [Eurobank] all amount(s) claimed by the beneficiary of [its Letter of] Guarantee” (A.R., vol. IV, at p. 118). It states further that payment would be made under the Letter of Counter-Guarantee by the issuing National Bank “after receipt of [Eurobank’s] tested telex/authenticated SWIFT indicating that [it] ha[s] received from the beneficiary of [its] guarantee [(i.e. the beneficiary of the Letter of Guarantee, HMOD)] a demand for payment in conformity with the terms and conditions of [its] guarantee [(i.e. the Letter of Guarantee)]” (p. 118).

[23] While the two letters of credit are distinct — and governed by different laws — they are connected. The opening paragraphs of the Letter of Counter-

Guarantee, which reproduce word for word the entirety of the Letter of Guarantee, make that plain.

D. *The Initial Dispute*

[24] Eventually, Bombardier determined that it would be unable to meet its subcontracting obligations under the Offsets Contract given what it viewed as an insufficient number of available and qualified Greek companies. Bombardier claimed that it should not be required to pay liquidated damages. HMOD disagreed. To resolve the matter, an ICC Arbitral Tribunal was constituted as provided for in the Offsets Contract. Arbitration proceedings took place over several years, with hearings in 2012 and 2013. In 2012, Bombardier obtained permission to add a second issue to its claim, arguing that the Offsets Contract was null because it violated European Union law relating to the free movement of goods.

[25] In April 2012, HMOD formally undertook to Bombardier and the ICC Arbitral Tribunal not to demand payment under the Letter of Guarantee “for as long as the [arbitration] procedure is ongoing” (A.R., vol. IV, at p. 199).

[26] In July 2013, Bombardier and HMOD were advised that the ICC Arbitral Tribunal would issue its final award by December 31, 2013.

[27] On August 5, 2013, notwithstanding its previous undertaking, HMOD demanded payment from Eurobank under the Letter of Guarantee in the amount of

US\$13,868,354.60 while the issuance of the final award was still pending. This was followed by other demands for payment, leading up to a final demand on December 23, 2013.

E. *Applications for Interim Relief*

[28] On learning that HMOD had demanded payment under the Letter of Guarantee, Bombardier filed an urgent application for interim relief with the ICC Arbitral Tribunal. Bombardier sought an order declaring that HMOD's demand for payment was invalid and requiring HMOD to comply with its undertaking. On August 13, 2013, the ICC Arbitral Tribunal issued Procedural Order No. 11, which "order[ed] that [HMOD] shall 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" (A.R., vol. V, at p. 39). Bombardier asked for assurances that HMOD would comply with this order, but such assurances were not given.

[29] Unsure as to whether HMOD would comply with Procedural Order No. 11, Bombardier filed a motion for provisional, interlocutory and permanent injunction and safeguard order in the Superior Court of Quebec. Bombardier sought orders to prevent payment under the Letter of Guarantee and the Letter of Counter-Guarantee. In August 2013, Prévost J. issued a provisional injunction, to last 10 days, that enjoined Eurobank and the National Bank from honouring the letters of credit. Later, Davis J. issued a new provisional injunction, to last 10 days, that also prevented payment.

[30] In August 2013, Eurobank brought parallel proceedings in Greece, seeking an order to prevent payment under the Letter of Guarantee until the conclusion of the arbitral proceedings. Judge Chrysoula Pana of the Athens One-Member First Instance Court issued a provisional injunction that authorized Eurobank to not pay under the Letter of Guarantee. On December 16, 2013, Judge Panayiotis Kostis of that court dismissed Eurobank's application for injunctive relief on its merits.

F. *HMOD's Final Demand for Payment*

[31] On December 5, 2013, the ICC Arbitral Tribunal informed the parties that its final award had been submitted to the ICC Court for approval, which was confirmed by the ICC Court on December 19, 2013. On December 23, 2013, the ICC Arbitral Tribunal informed the parties that the final award would be released on December 31, 2013.

[32] On December 23, 2013, HMOD served Eurobank with an "Extrajudicial Invitation-Protest" demanding that Eurobank, as the issuer of the Letter of Guarantee, pay HMOD as beneficiary of that letter of credit. The Extrajudicial Invitation-Protest stated that Eurobank had an obligation to pay HMOD in accordance with its demand, notwithstanding the orders of Quebec courts. No reference was made to the imminent issuance of the final arbitral award or HMOD's undertaking not to demand payment under Procedural Order No. 11. The Extrajudicial Invitation-Protest further stated that "[i]n 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 [Eurobank] for the fraudulent misappropriation of the amount embodied in the letter of guarantee and for any other offense” (A.R., vol. VI, at p. 151 (emphasis deleted)).

[33] Drawing on expert evidence, the trial judge described the measures alluded to in the Extrajudicial Invitation-Protest in detail. He found that Eurobank believed that if it did not comply with the Extrajudicial Invitation-Protest, it would expose itself to the freezing of a portion of its assets and assets of its employees, as well as criminal sanctions, including imprisonment, for the bank’s representatives.

[34] The day after the Extrajudicial Invitation-Protest was served, Eurobank paid HMOD under the Greek Letter of Guarantee.

[35] On December 27, 2013, following up on earlier communications, Eurobank demanded payment from the National Bank under the Quebec Letter of Counter-Guarantee. The notice to the National Bank recorded that HMOD had demanded payment of US\$13,868,354.40 pursuant to the Letter of Guarantee and, “[t]herefore, [the National Bank is] in default on [its] obligations, including under the terms of the above referenced counter-guarantee” for the same amount, plus expenses and interest (A.R., vol. VI, at p. 148).

G. *The Final ICC Arbitral Award and Subsequent Proceedings*

[36] In its final award, the ICC Arbitral Tribunal decided that the Offsets Contract violated European Union law. It was thus null and void *ab initio*, and thus no liquidated damages were due. That award was upheld by the Court of Appeal of Paris.

[37] In the weeks following, Schragger J., as he then was, issued a safeguard order upon petition by Bombardier. Schragger J. decided that HMOD's conduct was "clearly abusive and fraudulent" and that Eurobank's predecessor had acted with "full knowledge of the facts" (2014 QCCS 181, at paras. 43 and 46 (CanLII)). This was "a fraud or at least participation . . . in a fraud", on the part of the Greek bank, that "sufficiently polluted" demands for payment under the Quebec letter (paras. 46-47). Relying on *Angelica-Whitewear*, Schragger J. enjoined the National Bank from paying Eurobank under the Letter of Counter-Guarantee. The safeguard order was later extended until the issuance of the judgment on the merits.

[38] Bombardier's action on the merits for an injunction relating to Eurobank's demand for payment under the Letter of Counter-Guarantee advanced to trial in the Superior Court. These proceedings are at the origin of the present appeal.

[39] As amended, Bombardier's originating motion sought homologation of the award of the ICC Arbitral Tribunal and a permanent injunction enjoining the National Bank from paying Eurobank under the Letter of Counter-Guarantee. Bombardier rested its arguments on two grounds, both of which remain in dispute before this Court.

[40] First, Eurobank's connection to HMOD's fraudulent conduct as beneficiary under the Letter of Counter-Guarantee makes the fraud its own, such that the National Bank should not honour Eurobank's demand for payment. Bombardier argues that the fraud exception applied to Eurobank as beneficiary under the Quebec letter. Given that HMOD's conduct was fraudulent, pleaded Bombardier, Eurobank's demand for payment under the Letter of Counter-Guarantee is, by extension, also fraudulent. More specifically, Eurobank knew of HMOD's fraud under the Letter of Guarantee and nevertheless demanded payment under the Letter of Counter-Guarantee. For Bombardier — joined in this argument by the National Bank — this means that the fraud should be by extension attributed to Eurobank such that it cannot call on the National Bank to honour its undertaking to pay under the Letter of Counter-Guarantee.

[41] Second, and in the alternative, Bombardier argues that the letters of credit are null. Given that the Offsets Contract is null because it violates European Union law, so too are the letters of credit associated with it, including the Letter of Counter-Guarantee.

[42] In proceedings before Greek courts that were parallel to the proceedings before Quebec courts, Eurobank sought to recover the money that it had paid to HMOD. On November 29, 2019, the Greek court of first instance ordered HMOD to reimburse Eurobank the amount it had paid under the Letter of Guarantee, plus interest. The Court of Appeal of Athens allowed an appeal of that order after the trial judgment of the Quebec Superior Court was rendered. Eurobank moved to admit the judgment of

the Court of Appeal of Athens as new evidence before the Court of Appeal of Quebec. That motion was granted. At the time of the hearing in our Court, a further appeal before the Hellenic Supreme Court was pending.

[43] Following the hearing, the Hellenic Supreme Court rendered judgment, confirming in substance the decision of the Court of Appeal of Athens. While the present appeal was on reserve, Eurobank successfully moved to adduce the judgment of the Hellenic Supreme Court as new evidence for the purposes of this appeal. Bombardier and the National Bank contested the motion, arguing in particular that the judgment of the Hellenic Supreme Court has only “tenuous relevance” to the questions on appeal and that, as a result, the test for adducing additional evidence on appeal was not made out. I disagree. It is sufficient that the proposed additional evidence bear on a “potentially” decisive issue — here the character of the conduct of HMOD — to meet the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 (see also *Barendregt v. Grebliunas*, 2022 SCC 22, at para. 29). The motion having been granted, I propose to consider the probative value of this fresh evidence on appeal.

III. Judicial History

A. *Quebec Superior Court, 2018 QCCS 2127 (Wery J.)*

[44] The trial judge held that Quebec courts had jurisdiction over the proceedings relating to the Letter of Counter-Guarantee as well as jurisdiction to

homologate the arbitral award as a matter incidental to that letter. He homologated the award and ordered HMOD to comply with it.

[45] Turning to whether the National Bank, as the issuer of the Letter of Counter-Guarantee, should be enjoined from paying Eurobank, he addressed Bombardier's argument that the fraud exception applied. To answer that question, the trial judge considered whether the payment by Eurobank, as issuing bank under the Letter of Guarantee, was made to HMOD as a result of the latter's fraud.

[46] The trial judge held that the manner in which HMOD obtained payment under the Letter of Guarantee was fraudulent. He rejected Eurobank's argument that it had been forced to make the payment by HMOD's threats. Eurobank's own conduct was fraudulent because its payment to HMOD was a result of fraud of which it was aware. Ultimately, he wrote, "Eurobank may not have conceived the fraudulent plot, it may not have supplied the weapons, but it surely participated in pulling the trigger" (para. 205 (CanLII)). The trial judge characterized Eurobank's conduct as "tantamount to 'fraud'", noting that "[o]nce contaminated by HMOD's fraud, Eurobank cannot cleanse itself and may not demand payment from [the National Bank]. *Fraus Omnia Corruptit*" (para. 214).

[47] Finally, the trial judge held that "[i]t is difficult to accept in law that the invalidity, *ab initio*, of the Offsets Contract . . . does not cause the invalidity of the instruments that were issued to guarantee the obligations flowing from said contract" (para. 237). Given that the Letter of Guarantee was declared null by the ICC Arbitral

Tribunal, the Counter-Guarantee “must follow suit”, and the National Bank “should be ordered not to pay Eurobank” (para. 240).

[48] At the end of the day, the trial judge declared the Letter of Counter-Guarantee null and enjoined the National Bank from paying any amount to the beneficiary under the Counter-Guarantee. He homologated the final award of the ICC Arbitral Tribunal and declared that the payment made to HMOD under the Letter of Guarantee was not due and could not be the basis for payment under the Counter-Guarantee or produce legal consequences against Bombardier. Finally, he ordered that HMOD comply with the final arbitral award.

B. *Quebec Court of Appeal, 2022 QCCA 802 (Mainville, Hamilton and Baudouin J.J.A.)*

(1) Mainville J.A., Baudouin J.A. Concurring

[49] By a majority judgment, the Court of Appeal allowed the appeal for the sole purpose of striking the Superior Court’s order that HMOD comply with the ICC Tribunal’s final award. Writing for the majority, Mainville J.A. confirmed the trial judgment in all other respects. In particular, the court enjoined the National Bank from paying Eurobank under the Letter of Counter-Guarantee and declared that letter of credit null.

[50] First, the majority agreed with the trial judge that Quebec courts have jurisdiction over the Letter of Counter-Guarantee. However, the trial judge should not have ordered HMOD to comply with the final arbitral award as it is not domiciled in Quebec. Quebec courts can homologate the award so that it is legally binding in Quebec, but cannot order that it be binding extraterritorially in Greece.

[51] Second, the majority saw no basis to interfere with the trial judge's conclusion that the National Bank be enjoined from paying Eurobank as beneficiary under the Letter of Counter-Guarantee.

[52] Eurobank did not directly challenge the finding of fraud on the part of HMOD before the Court of Appeal. That challenge came from HMOD itself. However, since HMOD did not recognize the jurisdiction of Quebec courts, it had not filed an appeal of the trial judgment. Its contestation of this finding was therefore not properly before the Court of Appeal and was dismissed on that basis alone. In any event, no reviewable error was shown in the trial judge's conclusion that HMOD had engaged in "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" (para. 60 (CanLII)).

[53] Moreover, the finding of a Greek court that HMOD acted consistently with Greek law does not undermine the trial judge's conclusion that HMOD acted fraudulently. The foreign judgments were not formally recognized and, as such, are not "binding on Quebec courts" (para. 64). Mainville J.A. accepted that the judgment of the Court of Appeal of Athens could "form part of the record in this case" (para. 62).

However, citing the principle in art. 3155(5) *C.C.Q.*, he noted that Quebec courts could disregard a foreign judgment when the outcome of the judgment is manifestly inconsistent with public order in international relations. The outcome of the judgment of the Court of Appeal of Athens was, in his view, manifestly inconsistent with public order. “It would be curious indeed”, wrote Mainville J.A., “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” (para. 68). Further, the judgment of the Court of Appeal of 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” (para. 69).

[54] After reviewing evidence given by Eurobank’s representatives at trial, Mainville J.A. held that it was open to the trial judge to conclude that the National Bank was not bound to pay Eurobank, as beneficiary under the Letter of Counter-Guarantee. “It is clear in this case”, he wrote, “that Eurobank had sufficient knowledge of the fraud prior to paying” (para. 71). Although Eurobank paid HMOD as a result of threats made against it, the trial judge had rightly concluded that this did not absolve it of responsibility. Eurobank’s decision to pay was contrary to orders of Quebec courts and the ICC Arbitral Tribunal. These orders must be upheld as a matter of judicial and public policy. Ordering the National Bank to pay under the Letter of Counter-Guarantee would “condone the evasion of a binding arbitration process by means of fraud and threats” and render meaningless the interim order and final awards of the ICC tribunal (para. 76).

(2) Hamilton J.A., Dissenting

[55] The dissenting judge would have allowed the appeal, set aside the trial judgment in part, and dismissed the action.

[56] Hamilton J.A. rejected Eurobank's arguments based on the lack of jurisdiction of the Quebec courts over the Letter of Counter-Guarantee and chose not to comment on the authority of Quebec courts to order HMOD to comply with the ICC Arbitral Tribunal's order.

[57] Turning to a consideration of HMOD's demand for payment under the Letter of Guarantee, he wrote that the conduct was, "in a word, deplorable" (para. 164).

[58] The dissenting judge proceeded to review each of the six bases the trial judge identified in finding that HMOD's conduct amounted to fraud. He found the trial judge had made errors in every conclusion but one. In particular, he decided that HMOD was entitled to withdraw its undertaking not to demand payment under the Letter of Guarantee because the undertaking did not have a "specific duration" (para. 177). He held that the provisional orders of the arbitral tribunal, including Procedural Order No. 11, were not binding on HMOD because no court had declared the orders to be enforceable. The orders were contractually binding on HMOD, but "[t]he breach of the order by HMOD is . . . a contractual breach, . . . not a legal one" (para. 184). As for the characterization of HMOD's "legal bullying" against Eurobank,

the dissenting judge wrote that there is “nothing fraudulent” in threatening to apply sanctions available under Greek law for the failure to pay (para. 192).

[59] For the dissenting judge, it was, however, “indicative of fraud” that once HMOD received the final arbitration award, it continued to refuse repayment of the amount it had received under the Letter of Guarantee (para. 200). He continued: “. . . 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” (para. 201).

[60] He nevertheless chose not to hold Eurobank responsible for the fraud. While Eurobank knew that HMOD’s demand was made right before the final arbitral award was issued, it did not know that HMOD expected to lose or intended to keep the funds even if it lost. Although Eurobank may have suspected fraud, “these suspicions . . . should not be assimilated to knowledge of fraud” (para. 218).

[61] Ultimately, it was not “clear and obvious” to Eurobank that HMOD’s demand for payment was fraudulent based on suspicions alone (para. 223). Eurobank did not pay with knowledge of the fraud, therefore it is entitled to payment from the National Bank under the Letter of Counter-Guarantee.

IV. Issues and Grounds of Appeal

[62] The issue before this Court is whether the National Bank is required to refuse Eurobank's demand for payment under the Quebec Letter of Counter-Guarantee. The Court must determine whether the courts below erred in deciding that the fraud exception applies to Eurobank, in light of HMOD's misconduct, so that the National Bank must be enjoined from honouring the demand for payment. A second issue is raised in the alternative: Did the courts below err in deciding that payment is not due because the Letter of Counter-Guarantee is null given that the underlying Offsets Contract was declared null by the ICC Arbitral Tribunal?

[63] Before this Court, Eurobank submits that HMOD's conduct does not amount to fraud because the Greek courts confirmed its right to demand payment under the Letter of Guarantee. Notwithstanding the orders of the ICC Arbitral Tribunal, HMOD's demand for payment was not indicative of fraud because provisional orders cannot be homologated. HMOD's conduct was perhaps a breach of contract, but not an illegal act (A.F., at paras. 74-75).

[64] Even if HMOD engaged in fraud, Eurobank says that it could not have known about it since "the Court of competent jurisdiction — the Greek Court — confirmed otherwise" (A.F., at para. 88). Finally, its decision to honour HMOD's demands was made under threat and, consequently, cannot be considered fraudulent.

[65] Based on the parties' arguments, it would seem that they have, at times, lost sight of the issues that are properly before this Court. Much of the debate in this case was framed around the question whether HMOD's conduct in respect of the Letter

of Guarantee amount to fraud under Quebec law. But the Letter of Guarantee is not subject to Quebec law. And while the two letters are interlocking, HMOD is technically a stranger — a third party — to the Letter of Counter-Guarantee, which is the letter of credit that is at issue before this Court.

[66] The real issue is whether, under Quebec law, HMOD's conduct amounts to what Le Dain J. in *Angelica-Whitewear* called “fraud by a third party” in respect of the Quebec Letter of Counter-Guarantee. If so, then the subsequent issue becomes whether that third party's fraud can be attributed to Eurobank, as party to and beneficiary under that letter of credit, such that the fraud exception applies. In that case, payment by the issuer, the National Bank, should be prohibited.

V. Analysis

A. *The Law Relating to Letters of Credit in Canada*

[67] A letter of credit is an instrument, understood to be autonomous from the underlying contract to which it speaks, that is issued by a financial institution at the behest of its customer. It entitles the beneficiary of the letter to payment on demand from the issuing bank, so long as that demand conforms to the requirements set out in the letter of credit. Typically, the customer contracts with the financial institution to issue the letter of credit as a means of providing comfort to the beneficiary that an underlying agreement will be performed as promised. The financial institution has a nearly absolute obligation to pay when presented with a valid demand. There is only

one recognized exception in Canadian law: when there is fraud by the beneficiary that is brought to the financial institution's attention prior to payment, as explained in *Angelica-Whitewear*.

[68] Some letters of credit are used to facilitate payment in a transaction “as a means of moving money from one jurisdiction to another” (K. McGuinness, *The Law of Guarantee* (3rd ed. 2013), at §16.20; see also *Crawford and Falconbridge, Banking and Bills of Exchange* (8th ed. 1986), by B. Crawford, at p. 838; N. L’Heureux and M. Lacoursière, *Droit bancaire* (5th ed. 2017), at pp. 399-400). These letters of credit, called often “documentary letters of credit”, are typically the primary method of payment in the transaction. However, it is increasingly common for a different sort of letter of credit that “began [to evolve] only a few decades ago”, called a “standby letter of credit” to be used as a “performance ensuring mechanism” rather than the primary method of payment (McGuinness, at §16.43). L’Heureux and Lacoursière explain that [TRANSLATION] “[a] standby letter of credit is a letter of credit whose usual function is to serve as a guarantee. Its purpose is therefore different from that of the traditional documentary letter of credit that constitutes a payment instrument” (p. 434).

[69] I note that the parties and the courts below have primarily referred to the Letter of Guarantee and the Letter of Counter-Guarantee simply as “letters of credit”, although they have occasionally used other terms, such as “guarantee” and “counter-standby” (see, e.g., A.R., vol. VI, at p. 83). When a letter of credit is used as a means to secure performance of a contractual obligation, it may be called a “standby letter of

credit” (see G. B. Graham and B. Geva, “Standby Credits in Canada” (1984), 9 *Can. Bus. L.J.* 180, at p. 183). The term “demand guarantee” is used for similar purposes, especially outside of North America (see McGuinness, at §§3.87-3.88 and 16.51-16.52; see also R. Goode, “Abstract Payment Undertakings in International Transactions” (1996), 22 *Brook. J. Int’l L.* 1, at p. 15). The difference between demand guarantees and standby letters of credit has been said to be “largely illusory or, perhaps, of a semantic nature” (E. P. Ellinger, “Standby Letters of Credit” (1978), 6 *I.B.L.* 604, at p. 622). As Professor Roy Goode observed, “from a legal viewpoint demand guarantees and standby credits are indistinguishable, and the latter clearly falls within the definition of a demand guarantee in article 2 [of the *Uniform Rules for Demand Guarantees*]” (p. 16). With that in mind, it is not unusual for standby letters of credit to be subject to the *Uniform Rules for Demand Guarantees*, as is the case here (A.R., vol. IV, at p. 118). Whether the Letter of Guarantee and the Letter of Counter-Guarantee are best described as “demand guarantees”, “letters of credit” or “standby letters of credit” is of no consequence to the outcome of this appeal.

[70] Commonly relied upon in domestic and international commercial transactions, letters of credit are widely used as a means of managing risk. In particular, standby letters of credit are issued in order to ensure that the beneficiary will be paid what they believe they are owed under an underlying contract. The letter of credit does not replace the customer’s obligation to pay the beneficiary under the underlying contract. Instead, the letter of credit is superimposed on the transaction (L’Heureux and Lacoursière, at pp. 399-400). A demand for payment will typically arise when there is

an allegation of “failure of the customer or account party to perform some duty as agreed” (*Crawford and Falconbridge*, at p. 838). The premise is “pay now, and argue later if necessary” (McGuinness, at §16.47).

[71] The beneficiary can take comfort in knowing that they will be paid, unless they engage in fraud, and that any disputes relating to the underlying contract will be resolved only after they have been paid. The risk of non-payment by their co-contracting party is allocated away from them. Instead, the issuing financial institution takes on the risk of not being paid by their client. Should the beneficiary make a valid demand for payment because the issuer’s client is in default under the underlying contract, the client is no less responsible for its breach of contract and must reimburse the issuer.

[72] While letters of credit “are only as good as the issuer who stands behind them” (McGuinness, at §16.53), the business community has come to regard autonomous letters of credit issued by reputable banks as a reliable means of ensuring payment for the beneficiary. For this reason, courts are “slow to interfere” with letters of credit, “because interventions by the courts that are too ready or too frequent might seriously impair the reliance which international business places on [them]” (I. F. G. Baxter, *The Law of Banking* (4th ed. 1992), at p. 172).

(1) Autonomy and Strict Compliance

[73] There are two fundamental principles to the law governing letters of credit: autonomy and strict compliance (L’Heureux and Lacoursière, at p. 403; see also M. Deschamps, “Letters of Credit: The Autonomy Principle and the Fraud Exception” (2022), 38 *B.F.L.R.* 245, at p. 249).

(a) *Autonomy of the Letter of Credit*

[74] Autonomy means that “a letter of credit is an independent obligation of the issuing or confirming bank” (*Crawford and Falconbridge*, at p. 853; see also *Angelica-Whitewear*, at p. 70; L’Heureux and Lacoursière, at p. 403; Deschamps, at p. 248). As the Quebec Court of Appeal has noted, [TRANSLATION] “[i]t is well established that a letter of credit is an autonomous contract between the issuing bank and the beneficiary and is defined by its own terms and conditions, independently of the contract between the originator and the issuing bank or between the beneficiary and the originator” (*Groupe SM (International) Construction inc. v. Banque Nationale du Canada*, 2013 QCCA 1118, at para. 8 (CanLII)). The obligation of the issuing bank to honour a valid demand for payment is “independent of the performance of the underlying contract for which the credit was issued” (*Angelica-Whitewear*, at p. 70).

[75] In an opinion that refers to *Angelica-Whitewear*, the United States Court of Appeals for the Second Circuit observed that, due to the autonomy principle, “[t]he letter of credit takes on a life of its own” which “infuses the credit transaction with the simplicity and certainty that are its hallmarks” (*Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813 (1992), at p. 815). The autonomy principle gives letters of

credit their reliable character; a dispute about performance of the underlying contract generally does not justify a bank's refusal to honour the credit. A leading American case that was cited by Le Dain J. in *Angelica-Whitewear* was careful to recall that the autonomy principle should not be lightly set aside: "It would be a most unfortunate interference with business transactions if a bank before honoring drafts drawn upon it was obliged or even allowed to go behind the documents . . . and enter into controversies between the buyer and the seller . . ." (*Sztejn v. J. Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631 (Sup. Ct. 1941), at p. 633).

[76] It follows that "the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met" (*Bolivinter Oil S.A. v. Chase Manhattan Bank*, [1984] 1 Lloyd's Rep. 251 (Eng. C.A.), at p. 257). Of course, the bank's customer may ultimately have a claim against the beneficiary, but that is typically none of the financial institution's concern since the letter of credit ensures that the beneficiary is paid in the meantime. The financial institution [TRANSLATION] "is not . . . required to inquire into the performance of the underlying contract" since its obligation is simply to pay the beneficiary when presented with a valid demand (L'Heureux and Lacoursière, at p. 403).

(b) *Strict Compliance*

[77] Strict compliance means that “the obligation of the issuing bank must be determined based only on the strict conformity of the presentation (including conformity of the documents presented) with the terms of the letter of credit” (Deschamps, at p. 248). Therefore, the financial institution must ensure that the beneficiary, when it demands payment, presents documents that correspond to the requirements stated in the letter of credit. A letter of credit “is drafted to define the scope and terms of the issuer’s undertaking so that the issuer need only examine the terms of the letter of credit and the documents presented by the beneficiary” (*OMERS Realty Corp. v. 7636156 Canada Inc. (Trustee in Bankruptcy of)*, 2020 ONCA 681, 153 O.R. (3d) 271, at para. 42). As Le Dain J. explained, strict compliance “requires not only that the tendered documents conform to the terms and conditions of the letter of credit but that they appear on their face to be consistent with one another” (*Angelica-Whitewear*, at p. 98).

[78] “Substantial compliance” is not the test. Only documents that strictly conform to the terms in the letter of credit will trigger an obligation to pay (*Crawford and Falconbridge*, at p. 856; see also *Angelica-Whitewear*, at p. 96). That said, there is room for a limited qualification to this rule that makes it possible, in clearly appropriate cases, to overlook immaterial discrepancies (*Angelica-Whitewear*, at pp. 97-98; see also *Universal Stainless Steel & Alloys Inc. v. JP Morgan Chase Bank*, 2009 ONCA 801, 256 O.A.C. 109).

[79] Le Dain J. wrote that “[t]he fundamental rule is that the documents must *appear* on their face, upon reasonably careful examination, to be in accordance with the terms and conditions of the letter of credit” (*Angelica-Whitewear*, at p. 94 (emphasis in original)). A “reasonably careful examination” does not require perfection. The Singapore Court of Appeal, speaking to the same idea, observed that this works “to protect the bank and to ensure the smooth flow of international trade and the avoidance of delay” (*Beam Technology (Mfg) Pte Ltd v. Standard Chartered Bank*, [2002] SGCA 53, [2003] 1 S.L.R. 597, at para. 32). That said, if the financial institution pays the beneficiary without evaluating the documents presented to ensure that they strictly conform to the requirements set out in the letter of credit, they run the risk of not being reimbursed by their client (*L’Heureux and Lacoursière*, at p. 404).

(2) The Fraud Exception to the Autonomy of Letters of Credit

[80] As noted, the issuing financial institution’s obligation to pay the beneficiary on demand is nearly absolute. There is only one recognized exception: when there is “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” (*Angelica-Whitewear*, at p. 71).

[81] Le Dain J. took care to note that “[t]he 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” (p. 72). To achieve this balance, the standard set in *Angelica-Whitewear* for fraud is high in order to attain, as the intervener helpfully stated, a “proper apportionment of risk between [the] issuers of letters of guarantee . . . and the participating business parties to the underlying transaction” (I.F., at para. 31).

[82] The fraud exception is no less applicable when a second letter of credit is issued by a financial institution that requires it to pay when presented with an attestation that the first letter of credit has been called upon. As Professors L’Heureux and Lacoursière observe, the bank issuing the counter-guarantee must make the payment to the beneficiary when it attests that it has received a demand for payment under the first letter of credit. They explain that the obligation of the issuer of a counter-guarantee should however be subject to the exception of fraud by the beneficiary: [TRANSLATION] “Only obvious fraud or clear abuse constitutes an obstacle to payment of the guarantee by the bank that must make the decision to pay or not to pay” (p. 433).

[83] The intervener says that in instances of a counter-guarantee, a third party will sometimes engage in fraudulent conduct. The fraud by a third party in a counter-guarantee does not preclude the application of the fraud exception to the counter-guarantee itself “where the beneficiary of a letter of counter-guarantee would be a perpetrator of a clear and obvious fraud” (I.F., at para. 26, fn. 32). I agree that the conduct of a beneficiary under a counter-guarantee may serve to make the fraud of a

third party its own. In such a case, the fraud exception applies directly to the demand of the beneficiary.

[84] While *Angelica-Whitewear* spoke first to Quebec law, Le Dain J. emphasized that the fraud exception to the autonomy of letters of credit is identical in both the Canadian common and civil law systems. It rests on a shared idea that is “expressed in the civil law by the maxim *fraus omnia corrumpit* and in the common law by the maxim *ex turpi causa non oritur actio*” (p. 82). Le Dain J. observed that this shared foundation for the fraud exception underscores “the desirability of as much uniformity as possible in the law with respect to these vital instruments of international commerce” (p. 83). Indeed, courts across Canada have applied the test developed in *Angelica-Whitewear* (Deschamps, at p. 256; see also *OMERS Realty*, at para. 43), and common law courts outside of Canada have turned to *Angelica-Whitewear* as a helpful resource (see, e.g., *Alaska Textile* (United States); *Xing Fa (Hong Kong) Imp. & Exp. Ltd. v. Sungsan International Co.*, [2018] HKCFI 2743 (Hong Kong); *Westpac New Zealand Ltd. v. MAP and Associates Ltd.*, [2011] NZSC 89, [2011] 3 N.Z.L.R. 751 (New Zealand)).

[85] I share Le Dain J.’s sense of the importance of a right balance between the need to protect the autonomy of letters of credit with the need to discourage fraud. The exception should be sufficiently inclusive to capture most fraudulent conduct that should not be facilitated through letters of credit. At the same time, if the fraud exception is too inclusive, letters of credit could become much less reliable. Balancing

these two concerns requires this Court to set a high bar for fraud, which should be obvious before an issuing bank refuses to honour payment under a letter of credit.

[86] Le Dain J. was right to say that, generally speaking, the fraud of a third party to a letter of credit does not engage the fraud exception where the beneficiary of the letter is innocent of that fraud. To accept that the fraud of a third party requires the issuer to refuse to honour a demand for payment in all circumstances would expand the fraud exception at the expense of the reliability of letters of credit. But Le Dain J. was equally careful to leave open the possibility that the beneficiary might not be “innocent” of the third party’s misconduct. At a minimum, the beneficiary will likely be innocent of the third party’s fraud if it demands payment in circumstances in which it is unaware of the fraud (see L. Sarna, *Letters of Credit: The Law and Current Practice* (3rd ed. (loose-leaf)), at pp. 5-56 and 5-57). But where the beneficiary has knowledge of fraud and proceeds to call for payment when it knows that the conditions of payment are not met, the beneficiary has, in a manner of speaking, made the fraud their own. This can occur in situations, like the present appeal, where the third party is itself a party to a letter of guarantee which interlocks with a letter of counter-guarantee. As the intervener wrote, “in cases where it is established to the knowledge of the issuer of the letter of counter-guarantee that its beneficiary had clear and obvious knowledge of the fraud (perpetrated by the beneficiary of the primary letter of guarantee), that said issuer could refuse payment thereunder” (I.F., at para. 26).

[87] For the trial judge, this latter scenario is what happened here. He found that HMOD, a third party to the Letter of Counter-Guarantee, perpetrated a fraud as beneficiary under the primary Letter of Guarantee. Eurobank, the beneficiary of the Letter of Counter-Guarantee, had clear and obvious knowledge of that fraud and called for payment anyway. Eurobank is therefore not innocent of the fraud perpetrated by HMOD. The National Bank, as issuer of the counter-guarantee, knew of this state of affairs before it paid and thus should not honour the demand for payment under the Letter of Counter-Guarantee. I turn now to Eurobank's contestation of the scenario described by the trial judge and confirmed on appeal.

B. *Application*

[88] Before this Court, Eurobank argues that the trial judge, as well as the majority in the Court of Appeal, erred in applying the fraud exception.

[89] First, Eurobank says that the Greek courts, who were competent to decide the matter under the Letter of Guarantee, found that HMOD did not act fraudulently in demanding payment under that letter of credit. Moreover, HMOD's conduct, while "unsavoury", is not fraudulent because there was nothing "illegal" or "deceitful" in its demand for payment (A.F., Eurobank, at paras. 64, 67 and 79). HMOD supports this position, arguing that Greek courts found its conduct to be neither abusive nor fraudulent under the Letter of Guarantee and that the judgments of the Greek courts were "misread, improperly criticized and completely disregarded" by the courts below (A.F., HMOD, at para. 5).

[90] Second, Eurobank says that even if one were to conclude that HMOD acted fraudulently, that conduct has no bearing on its right, as beneficiary under the Letter of Counter-Guarantee, to demand payment (A.F., at para. 109). The trial judge erred in finding that Eurobank knew that HMOD's conduct constituted fraud because there was not one "iota" of proof before him (para. 111). In addition, the principle of autonomy means that the Letter of Counter-Guarantee is "distinct", and the fraud exception must be applied in that light (para. 115).

[91] For the reasons that follow, I disagree with Eurobank and HMOD. It is important to emphasize that Eurobank must identify a legal error or a palpable and overriding error of fact or of mixed fact and law in order to justify appellate intervention. Appellate courts must remember in particular that "there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 25) and that issues of mixed fact and law, absent an extricable legal error, are owed the same degree of deference. As I will explain, I am of the view that Eurobank has failed to identify a reviewable error.

[92] It is true that the Letter of Guarantee is governed by Greek law and that Greek courts have jurisdiction to determine whether Eurobank was required to comply with HMOD's demand for payment. But the Greek judgments have not been formally recognized by Quebec courts under the rules for recognition and enforcement of foreign decisions found in Title Four of Book Ten on Private International Law in the *Civil*

Code of Québec; they are thus unenforceable in the province. Under the Letter of Counter-Guarantee which is governed by Quebec law, HMOD's demand for payment under the Greek letter of credit is relevant to determining whether Eurobank's own conduct, as beneficiary under the Letter of Counter-Guarantee, engages the fraud exception. The trial judge concluded that HMOD demanded payment to which it had no right. In my view, that amounts to fraud of a third party that is relevant to the Letter of Counter-Guarantee. Moreover, the trial judge's conclusions that Eurobank was aware of and participated in HMOD's fraud are entitled to deference. I conclude, as the majority of the Court of Appeal did, that the trial judge's decision that the fraud exception applies with respect to the Letter of Counter-Guarantee should not be interfered with.

[93] Eurobank is the beneficiary of the Letter of Counter-Guarantee. An analysis of whether the fraud exception can apply must focus on whether Eurobank, as beneficiary, engaged in fraud that was brought to the attention of the National Bank.

[94] Although a letter of credit is autonomous from other contracts involved in a transaction, *Angelica-Whitewear* makes it plain that the fraud exception can apply if there is fraud in the transaction, even if the fraud affects the letter of credit only indirectly (pp. 72 and 84). This can include fraud by a third party. A third party may, for example, be a person other than the issuer or the beneficiary who forged documents that were given to the beneficiary (see generally *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] 1 A.C. 168 (H.L.)).

[95] In this case, the scope of the transaction is clear. While the Letter of Counter-Guarantee is an autonomous letter of credit and is as such separate from other contracts, the very text of the Letter of Counter-Guarantee indicates that it is part of a broader transaction. The Letter of Counter-Guarantee and the Letter of Guarantee are, on the very face of the letter in dispute here, interlocking. Indeed, the first four paragraphs of the Letter of Counter-Guarantee reproduce word for word the text of the Letter of Guarantee (A.R., vol. IV, at pp. 114-15). In so doing, it recalls to the parties that its operation is dependent on the triggering of the Letter of Guarantee by a demand for payment by HMOD. While HMOD is technically a third party to the Letter of Counter-Guarantee — in that it is neither issuer nor beneficiary — its conduct is a fact upon which the triggering of a demand for payment by Eurobank can be made. Indeed, as the text of the Letter of Counter-Guarantee makes plain, when HMOD calls for payment under the Greek letter, Eurobank has a corresponding right to demand payment under the interlocking Letter of Counter-Guarantee.

[96] That disputed letter makes the link between the two letters explicit:

IN CONSIDERATION OF YOU [i.e. Eurobank] ISSUING AT OUR REQUEST THE ABOVEMENTIONED GUARANTEE, WE, NATIONAL BANK OF CANADA HEREBY IRREVOCABLY UNDERTAKE TO REIMBURSE YOU [i.e. Eurobank] ALL AMOUNT(S) CLAIMED BY THE BENEFICIARY OF YOUR GUARANTEE [i.e. HMOD] UP TO BUT NOT EXCEEDING USD 27,736,709.00 (TWENTY-SEVEN MILLION SEVEN HUNDRED THIRTY-SIX THOUSAND SEVEN HUNDRED NINE...00/100 UNITED STATES DOLLARS) PLUS COSTS, STAMP DUTIES AND VALUE ADDED TAX AS APPROPRIATE, WITH SAME VALUE RATE AS OF THE DATE OF YOUR PAYMENT, AFTER RECEIPT OF YOUR [i.e. Eurobank] TESTED TELEX/AUTHENTICATED SWIFT

INDICATING THAT YOU [i.e. Eurobank] HAVE RECEIVED FROM THE BENEFICIARY OF YOUR GUARANTEE A DEMAND FOR PAYMENT IN CONFORMITY WITH THE TERMS AND CONDITIONS OF YOUR GUARANTEE. [Emphasis added.]

(A.R., vol. IV, at p. 118)

[97] Overall, the text of the Letter of Counter-Guarantee makes it plain that the conduct of HMOD under the Letter of Guarantee falls within the scope of the transaction even though HMOD is a third party to the Letter of Counter-Guarantee. In fact, the Letter of Guarantee is the underlying contract for the Letter of Counter-Guarantee, which means that fraud with respect to the Letter of Guarantee is directly relevant to the Letter of Counter-Guarantee. If that fraud was perpetrated by the beneficiary of the Letter of Guarantee — who is a third party to the Letter of Counter-Guarantee — the fraud exception could apply to the Letter of Counter-Guarantee if that letter’s beneficiary is not “innocent” of the fraudulent conduct (*Angelica-Whitewear*, at p. 84). Demanding payment under the Letter of Counter-Guarantee in reaction to a demand for payment under the Letter of Guarantee that is known to be fraudulent would therefore amount to fraud that is relevant to the Letter of Counter-Guarantee.

[98] Before this Court, Eurobank insists that, because Greek courts held that HMOD did not engage in fraud, it is not open to Quebec courts to say otherwise. The Court of Appeal of Athens and the Hellenic Supreme Court decided that HMOD was not bound by its commitment to refrain from demanding payment under the Letter of Guarantee or by Procedural Order No. 11. Counsel for Eurobank went so far as to insist that “the debate [in this appeal] was rendered moot by the decision by the Athens Court

of Appeal” (transcript, at p. 2). While Eurobank initially conceded before the Quebec Court of Appeal that HMOD engaged in fraud, it now says that it is justified in walking back from that concession because that position is inconsistent with judgments of Greek courts.

[99] With respect, Eurobank is wrong to say that the judgments of Greek courts have any decisive relevance in this case.

[100] While “foreign judgments are not enforceable in and of themselves” (*Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, at para. 20), they may be recognized and declared enforceable under arts. 3155 et seq. *C.C.Q.* When a foreign judgment has not been recognized and enforced, it may nevertheless be received in Quebec as evidence. In such a case, and as Mainville J.A. correctly observed in the impugned judgment, the foreign judgment provides *prima facie* proof of its reported facts and of the good application of foreign law, but it is not binding on Quebec courts (see generally C. Piché, *La preuve civile* (6th ed. 2020), at p. 259; G. Goldstein and E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), at No. 155).

[101] When a party applies for recognition and enforcement of a foreign judgment pursuant to arts. 3155 et seq. *C.C.Q.*, the burden falls on the opposing party to show that an exception to the general rule that foreign judgments ought to be recognized and enforced in Quebec applies (*Barer v. Knight Brothers LLC*, 2019 SCC 13, [2019] 1 S.C.R. 573, at para. 24).

[102] In this case, no party has sought the recognition and enforcement of the Greek judgments in Quebec. This may have been a deliberate choice on Eurobank's part given the difficulty it might have faced in light of the public order exception in art. 3155(5) *C.C.Q.* and the likelihood that this exception would have been raised by opposing parties. The public order exception applies when "the solution provided by the foreign judgment" cannot "be harmoniously incorporated into the legal order of the Quebec forum" (*R.S. v. P.R.*, 2019 SCC 49, [2019] 3 S.C.R. 643, at para. 52). As the majority judges in the Quebec Court of Appeal observed in this case, the Greek judgments, particularly those of Judge Kostis of the Athens One-Member First Instance Court and of the Court of Appeal of Athens, might have raised public order concerns because of their inconsistency with the relevant orders of the ICC Arbitral Tribunal. Mainville J.A. wrote that the decision of the Court of Appeal of 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 identified this as a public order concern (para. 69).

[103] Mainville J.A. explained, relying on arts. 3155(5) and 3081 *C.C.Q.*, that Quebec courts are not bound to enforce or recognize foreign judgments when the result of doing so is manifestly inconsistent with public order as understood in international relations. I take due note of Mainville J.A.'s analysis of this point, which is amply supported by this Court's jurisprudence and relevant scholarship (*R.S.*, at paras. 52-53; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at paras. 71-72; Goldstein and

Groffier, at No. 166; S. Guillemard and V. A. Ly, *Éléments de droit international privé québécois* (2019), at pp. 64-66). Mindful that the public order exception is understood to be more limited under art. 3155 *C.C.Q.*, I take care to recall that this matter need not be decided here because no application for recognition and enforcement was made.

[104] Absent a successful application for recognition and enforcement, the Greek judgments are merely evidence that do not bind Quebec courts, and the weight given to them is an issue of fact to which deference is owed on appeal. While none of the parties expressly argued this point, pursuant to art. 2822 *C.C.Q.*, in the law of evidence, a foreign judgment may be treated as a semi-authentic act that is presumptively proof of its contents that may be produced as evidence in Quebec (see Piché, at Nos. 341 and 345; Goldstein and Groffier, at No. 155). As Mainville J.A. correctly noted, “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 application of the foreign law and of the foreign court’s jurisdiction on the matter” (para. 64).

[105] In *Canadian Forest Navigation Co. v. R.*, 2017 FCA 39, [2017] 4 C.T.C. 63, a case that Mainville J.A. relied upon, Boivin J.A. explained that “factual findings contained within [foreign] judgments are facts that cannot be disregarded by a Court” but rejected the idea that “pursuant to article 2822 *C.C.Q.* these foreign orders are dispositive” (paras. 15 and 19). The weight given to “foreign orders as facts”, as Boivin J.A. recalled, is a matter for the trier of fact to decide, “with a full evidentiary record at

his or her disposal” (para. 20; see also *Digiulian v. Succession de Digiulian*, 2022 QCCA 531).

[106] The trial judge and the majority judges at the Court of Appeal plainly saw this and concluded that Bombardier had met its burden. Both the trial judge and the Court of Appeal expressly considered the weight to be given to the decision of Judge Kostis as a matter of fact. Mainville J.A. considered the significance of the decision of the Court of Appeal of Athens, which had been rendered after the trial judgment of Wery J. The trial judge expressly considered how much weight to give the decision of Judge Kostis and opted to give it none. Expressly referring to Judge Kostis’s decision, Mainville J.A. confirmed that finding and, likewise, decided to give “no weight” to the decision of the Court of Appeal of Athens (para. 65). I emphasize that “it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence” absent a palpable and overriding error (*Housen*, at para. 23). Eurobank has failed to show any basis to interfere with the decisions by the courts below to give no weight, as evidence, to the Greek judgments.

[107] Moreover, as Mainville J.A. observed, a decision to place little or no weight on an unenforceable foreign judgment can be justified if that decision does not give proper consideration to relevant Canadian judgments or if it raises other public order concerns (see paras. 65 and 67-69; see also *Beals*, at para. 29). While comity is “a useful guiding principle” (*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 17), it is important to recall that it is also

“a balancing exercise” (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 27). 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). In the circumstances, it was open to the courts below to give the Greek decisions no weight, as mere facts rather than as executory judgments, in measuring the conduct of HMOD and Eurobank for the purposes of the Letter of Counter-Guarantee.

[108] For the same reasons as the trial judge and the majority of the Quebec Court of Appeal in respect of the foreign decisions they considered, I would give no evidentiary weight to the judgment of the Hellenic Supreme Court that has been adduced by Eurobank as additional evidence before this Court. I recall that Mainville J.A. properly observed that the decision of the Court of Appeal of 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” (para. 69). The Hellenic Supreme Court ostensibly confirmed that same conclusion. In the certified English translation, quoting from the judgment of the Court of Appeal of Athens with approval, it wrote that “[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” (Motion to adduce fresh evidence, at p. 67).

[109] The judgment of the Hellenic Supreme Court thus raises exactly the same public order concern as the judgment of the Court of Appeal of Athens which led to the findings, made respectively by the Quebec Superior Court and Court of Appeal, to give no weight to the decisions of the Greek courts. Even taking account of the new evidence, Eurobank has failed to show any error in the courts below warranting interference on appeal. Moreover, the judgment of the Hellenic Supreme Court, which speaks to the conduct of HMOD under Greek law with respect to the Letter of Guarantee, sheds no light on whether HMOD's conduct, as a third party to the Letter of Counter-Guarantee, was fraud by a third party by Canadian standards pursuant to *Angelica-Whitewear*. Nor does that judgment speak usefully to whether Eurobank knew of or participated in that fraud in a manner that is relevant to its demand for payment under the Letter of Counter-Guarantee. The judgment of the Hellenic Supreme Court adduced in evidence, like the prior Greek decisions weighed by the courts below, has no probative value in respect to the issues now before this Court.

[110] Although these judgments might be enforceable in Greece, as I have emphasized, HMOD's conduct under Greek law is not at issue. Instead, it is HMOD's conduct under Quebec law with respect to the Letter of Counter-Guarantee that is engaged directly by Bombardier's petition for an injunction against the National Bank making payment in the Superior Court. Absent an enforceable foreign judgment on the matter, Quebec courts were required to draw their own conclusions, in applying Quebec law, regarding whether HMOD engaged in fraud in the transaction as a third party to the Letter of Counter-Guarantee.

[111] For the reasons that follow, I am of the view that no reviewable error has been shown in the trial judge's overall conclusion that HMOD engaged in fraud, as a third party to the Letter of Counter-Guarantee. The appellant has also failed to show a basis for interfering with the trial judge's view that HMOD's fraud can be attributed to Eurobank as beneficiary. Eurobank knew of and acted upon HMOD's fraud and thus is not innocent of that fraud. The fraud exception applies to the Letter of Counter-Guarantee.

(1) HMOD Engaged in Fraud as a Third Party to the Letter of Counter-Guarantee

[112] In this case, HMOD is alleged to have engaged in fraud in the transaction rather than fraud in the tendered documents. Le Dain J. emphasized that "fraud in the underlying transaction of such a character as to make the demand for payment under the credit a fraudulent one" may include "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" (*Angelica-Whitewear*, at p. 83; see also L'Heureux and Lacoursière, at pp. 409-10; M. Lemieux, "Les décisions *Bombardier Inc. c. Hermes Aero LLC* et l'autonomie des crédits standby" (2003), 63 *R. du B.* 427, at p. 428).

[113] In the years since *Angelica-Whitewear*, Canadian courts have emphasized that, in the context of letters of credit, "[f]raud is not simply a legitimate dispute or disagreement over the interpretation of a contract, however one-sided that dispute may appear" (*Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc.*, [1993] O.J.

No. 112 (Lexis), 1993 CarswellOnt 2358 (WL) (C.J. (Gen. Div.)), at para. 31 (WL); see also *Fiberex Technologies Inc. v. Bank of Montreal*, 2015 ABQB 496, [2016] 4 W.W.R. 547, at para. 23; *Standard Trust Co. (Liquidation) v. Bank of Nova Scotia*, 2001 NFCA 27, 201 Nfld. & P.E.I.R. 8, at para. 59). As a Hong Kong court similarly noted, it is well established that “[d]ue to autonomy of the credit, operation of the fraud exception is strictly policed so [that] it . . . is not extended to disputes on the underlying contract” (*DBS Bank (Hong Kong) Ltd. v. New Harvest International Development Ltd.*, [2017] HKCFI 30, at para. 62 (HKLII)). Quebec courts have also recognized that a dispute concerning the underlying contract is not necessarily indicative of fraud (*SNC-Lavalin Polska SP. ZOO v. BNP Paris Canada*, 2017 QCCS 3694, at para. 40 (CanLII); *Bombardier Inc. v. Hermes Aero*, 2004 CanLII 7014 (Sup. Ct.), at para. 35; *SNC-Lavalin Constructeurs international inc. v. Shariket Kahraba Skikda.spa*, 2010 QCCS 3236, at para. 27 (CanLII); *Banque Nationale du Canada v. CGU Cie d’assurance du Canada*, 2004 CanLII 49434 (Sup. Ct.), at para. 49).

[114] “Fraud” in this context does not refer to fraud in the criminal sense and carries with it a different connotation. Generally, civil or commercial fraud is broader than its criminal counterpart (McGuinness, at §17.342). A key feature of fraud in this context is its effect on the demand for payment by the beneficiary. As authors L’Heureux and Lacoursière observed, [TRANSLATION] “the subject matter of the fraud may be either the documents or the underlying transactions (that is, the commercial contract) of such a character as to make the demand for payment under the letter of credit a fraudulent one” (p. 410). If a beneficiary demands payment while knowing that

they have no right to be paid under the underlying contract, that conduct may amount to fraud (McGuinness, at §17.338). Whether it does is an issue of mixed fact and law for which deference is owed on appeal. In this case, the essence of HMOD's fraudulent conduct is that it demanded payment under the Letter of Guarantee when it knew it had no right to do so.

[115] The bar is nevertheless high. As author Marc Lemieux has explained, the fraud exception is limited to cases of obvious fraud [TRANSLATION] “to avoid unduly interfering with the commercial utility and efficacy of letters of credit” (p. 433; see also L’Heureux and Lacoursière, at pp. 409-10). A mere absence of good faith may not be sufficient, even if that might lead to civil liability in other contexts. In this context, fraud goes further: it must “import some aspect of impropriety, dishonesty or deceit” (*Cineplex*, at para. 31, cited with approval by several courts in Quebec and the common law provinces, including in *Royal Bank v. Gentra Canada Investments Inc.* (2001), 15 B.L.R. (3d) 25 (Ont. C.A.), at para. 8; *OMERS Realty*, at para. 45; *SNC-Lavalin Polska*, at para. 40; *Alessandra Yarns, l.l.c. v. Tongxiang Baoding Textile Co.*, 2015 QCCS 346, at para. 34 (CanLII)). As an Ontario court observed, “a demand for payment is only fraudulent if the claim to the funds is not even colourable as being valid or has absolutely no basis in fact” (*Royal Bank v. Gentra Canada Investments Inc.* (2000), 1 B.L.R. (3d) 170 (S.C.J.), at para. 56, aff’d (2001), 15 B.L.R. (3d) 25).

[116] I am mindful that it is a serious matter to describe the conduct of an arm of a foreign state — and one that is a member of the European Union and a significant

actor in international commerce — as “fraudulent”. It is important to take care, when characterizing the conduct of a foreign state, not to impugn the integrity of a respected player in the international business community. But I insist that the term is used here in the specific context of letters of credit where, under *Angelica-Whitewear*, fraud includes a demand for payment by a beneficiary when it knew it did so without a right to payment. No further inference should be drawn from the use of the term here and, with due respect for the trial judge, I would not have used epithets such as “legal bullying” or “legal blackmail” here (paras. 175 and 182). For reasons of comity, Canadian courts should be cautious about criticizing the laws of a foreign state even though, as it is best to acknowledge, Canadian and international law sometimes requires them to do so (see generally *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, [2020] 1 S.C.R. 166, at para. 50).

[117] That said, I am of the view that the trial judge’s finding that HMOD engaged in fraud, which is one of mixed fact and law, is entitled to deference. Eurobank has failed to show that the judge’s overall conclusion on this point is the product of palpable and overriding errors. His determination that HMOD engaged in “some measure of impropriety” that could amount to fraud — which was acknowledged even by the dissenting judge at the Court of Appeal — is amply supported by the evidence (see paras. 175-76). That said, I do not find it necessary to endorse all of his findings on this point.

[118] As Mainville J.A. noted, the trial judge took account of evidence of HMOD's conduct, including evidence that might militate against a finding of fraud. I agree with Mainville J.A. that the trial judge did not make a reviewable error, in particular, on the specific point of the timing of the demand for payment in light of the order of the ICC Arbitral Tribunal that enjoined HMOD from demanding payment. The evidence supports a finding that HMOD engaged in a "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" (C.A. reasons, at para. 60).

[119] Specifically, the evidence indicates that HMOD, a party to the arbitral proceedings, violated Procedural Order No. 11 of the ICC Arbitral Tribunal, which enjoined it from demanding payment under the Letter of Guarantee. In violation of that order and its own undertaking, around one week before the final arbitral award was released, HMOD repeated its demand for payment. After the final award was issued and confirmed by the Court of Appeal of Paris, it became clear that HMOD had no right under the Offsets Contract to the money that it received. Still, HMOD has not returned the money it received from Eurobank under the Letter of Guarantee. In fact, HMOD has taken the position before this Court that it is not required to return the money because Bombardier has not sought repayment directly from it (A.F., at para. 94). This, on its own, supports a finding that HMOD engaged in fraud.

[120] 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.

[121] I will not comment on the manner in which HMOD demanded payment through the Extrajudicial Invitation-Protest. Although there is some expert evidence on Greek law in the record, this Court should not make original findings with respect to whether HMOD's Extrajudicial Invitation-Protest was permitted or required under Greek law. Mindful that HMOD is a foreign actor, what it can be fairly criticized for, by Quebec courts in respect of a Quebec letter of credit, is demanding payment in a related letter of credit in contravention of an order of an arbitral tribunal and its own undertaking on the eve of the release of an arbitral award that would pronounce on its right to payment.

[122] I add that the dissenting judge at the Court of Appeal agreed that HMOD engaged in fraud, specifically based on the fact that HMOD never had the intention to repay the funds the arbitral court determined that it owed (C.A. reasons, at para. 200). He went so far as to assert that “[t]he conduct of HMOD in this matter was, in a word, deplorable” (para. 164). That said, he would not have found that HMOD's violation of Procedural Order No. 11 amounts to fraud because that order was not capable of being homologated, which means that HMOD's violation of that order is “a contractual breach, but not a legal one” (para. 184). For two reasons, I disagree.

[123] First, it is inappropriate to interfere with the trial judge's finding of mixed fact and law that HMOD engaged in fraud absent a palpable and overriding error. It is trite law that appellate courts must take special care not to make original findings of fact or mixed fact and law unless they can point, with the requisite precision, to an obvious error that impacts the result (see generally *Housen*).

[124] The trial judge had the advantage of hearing the evidence first-hand, including the explanations of some of the key actors. The majority judges in the Court of Appeal were rightly careful not to impose their own interpretation of the evidence. Said respectfully, I am of the view that the dissenting judge did not follow that rule. In order to set aside the trial judgment, palpable and overriding errors would have to be shown in respect of each of the judge's findings as to the sources of HMOD's fraud. While I fix on the finding in respect of Procedural Order No. 11 as sufficient for dismissing the appeal, other examples present serious challenges to the appellant Eurobank. For example, Eurobank has not succeeded, in my eyes, in showing a reviewable error in the trial judge's conclusion that HMOD's withdrawal of its undertaking not to demand payment was fraudulent conduct. Again with the utmost respect, I am unconvinced by the explanation of the dissenting judge for interfering with the trial judge's conclusion on this point. The characterization that "[t]he undertaking did not have a specific duration" (para. 177) strikes me as an inaccurate interpretation of the promise made by HMOD. In point of fact, HMOD undertook not to demand payment "for as long as the [arbitration] procedure is ongoing" (A.R., vol. IV, at p. 199). The undertaking did have a specific duration — until the moment

the award was issued — even if that date was not certain. Be that as it may, the finding of fraud in respect of Procedural Order No. 11 suffices here.

[125] Second, while it is true that a provisional order of an arbitral tribunal is not susceptible of being homologated, it does not follow that HMOD could not have engaged in fraud by violating Procedural Order No. 11. I agree that a breach of contract, without more, is not fraud. However, a breach of contract, like any other behaviour in a transaction that “import[s] some aspect of impropriety, dishonesty or deceit” (*Cineplex*, at para. 31), can amount to fraud. Whether a breach of contract amounts to fraud is a matter of mixed fact and law to which deference is owed on appeal. I add that we are concerned with whether HMOD’s conduct amounts to fraud by a third party under the Letter of Counter-Guarantee, not with whether a provisional order of an arbitral tribunal can be enforced by a court. I agree with the majority judges on appeal that HMOD’s conduct was, as found by the trial judge, an instance of fraud upon which he could rely (C.A. reasons, at paras. 58-60).

[126] Overall, there is no basis to interfere with the trial judge’s conclusion that HMOD engaged in misconduct that is sufficient to trigger, as the fraud of a third party, the fraud exception in Canadian law. However, I emphasize again that I make no comment as to whether HMOD might have engaged in fraud under Greek law or whether its conduct could bring about any consequences with respect to the Letter of Guarantee before the Greek courts, and I recall that the relevant judgments of those courts have not been recognized as enforceable under Quebec law. For the purposes of

the Letter of Counter-Guarantee, given its very terms, it is sufficient to conclude that HMOD's conduct amounts to fraud of a third party. The remaining issue to be decided is whether Eurobank, as beneficiary, is "innocent" of that fraud.

(2) HMOD's Fraud Became Eurobank's Own

[127] As Le Dain J. wrote, the fraud exception is "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" (*Angelica-Whitewear*, at p. 84). An Ontario court correctly observed that "[i]t is implicit in the foregoing comment that the fraud exception in letter of credit cases might extend to fraud by a third party of which the beneficiary of the letter of credit cannot be said to be innocent" (*Royal Bank v. Darlington*, 1995 CarswellOnt 2661 (WL), [1995] O.J. No. 1044 (Lexis) (C.J. (Gen. Div.)), at para. 231; see also *Global Steel Ltd. v. Bank of Montreal*, 1999 ABCA 311, 244 A.R. 341, at para. 21).

[128] The sense given to conduct of a beneficiary that is not "innocent" needs to be circumscribed so as not to upset the autonomous character of letters of credit, even where they are interlocking as is the case here. I am mindful that, while an innocent beneficiary is entitled to expect that the fraud of a third party will not be attributed to them because they are not asked to police the underlying transaction, the issuer and their client are equally entitled to expect that the fraud exception may apply if the beneficiary bears responsibility for that fraud as its own. Therefore, the issue is whether the fraud of the third party can fairly be considered as that of the beneficiary.

[129] A beneficiary ceases to be “innocent” when they have knowledge of the fraud of the third party and participate in that fraud. When there is both knowledge and participation, the third party’s fraud — in this case HMOD — can fairly be attributed to the beneficiary — here, Eurobank, under the Letter of Counter-Guarantee. To be clear, when the fraud of a third party is attributed to the beneficiary, that fraud becomes the beneficiary’s own; this is not indirect or vicarious liability. Attributing the fraud of a third party to the beneficiary is merely an application of the fraud exception to the beneficiary of the relevant letter of credit.

[130] As is always the case, clear knowledge of an obvious fraud prior to payment by the financial institution is required (see L’Heureux and Lacoursière, at p. 411; B. Crawford et al., *The Law of Banking and Payment in Canada* (loose-leaf), at § 13:171). A beneficiary cannot be responsible, in the commercial or civil sense, for fraud of which it had no knowledge (Sarna, at pp. 5-56 and 5-57; see also R. P. Buckley, “The 1993 Revision of the Uniform Customs and Practice for Documentary Credits” (1995), 28 *Geo. Wash. J. Int’l L. & Econ.* 265, at p. 308; E. A. Caprioli, *Le crédit documentaire: évolution et perspectives* (1992), at No. 373). This makes good sense because, unfortunately, parties will at times participate in commercial fraud unwittingly. Author Lazar Sarna gives the example of a “hidden fraudulent act” such as “the falsification of the true boarding date by a carrier without the knowledge of the beneficiary” (pp. 5-56 and 5-57).

[131] However, simply knowing about the fraud of a third party is not sufficient. A beneficiary does not engage in fraud unless they participate in it. As L'Heureux and Lacoursière note, [TRANSLATION] “[i]t is . . . clear in Canadian and Quebec law that only fraud committed by the beneficiary is recognized, including that of a third party when the beneficiary participated in it” (p. 411; see also Crawford et al., at § 13:171; *Crédit Lyonnais Canada v. First Mercantile Investment Corp.*, 1996 CarswellOnt 4711 (WL), [1996] O.J. No. 4309 (Lexis) (C.J. (Gen. Div.)), at para. 44). Participation can, as in this case, take the form of honouring a demand for payment in improper circumstances. It can also take the form of knowingly presenting fraudulent documents to the issuer. All that is required is some action by the beneficiary that involves them in the fraud of the third party. Where, for example, a beneficiary demands payment, for its own advantage, knowing of the third party's fraud, that is fraud on an independent measure of which the beneficiary is not innocent.

[132] Since both knowledge and participation are required, the scope of the fraud exception will be kept appropriately narrow. Beneficiaries can take comfort in knowing that the fraud of a third party will not be attributed to them unless they have actively taken on responsibility for that fraud. A well-intentioned beneficiary that unwittingly facilitates the fraud of a third party or chooses to not participate in the fraud of a third party need not worry that fraud will be attributed to them. Equally, a beneficiary who demands payment where it did not know of the fraud of the third party will remain innocent. Limiting the scope of the fraud exception in this way will protect the reliability of Canadian letters of credit. However, a beneficiary becomes a co-author of

the fraud of a third party by knowingly participating in the misconduct and, as a result, will have that fraud attributed to them; in such a circumstance, the fraud exception may rightly apply so that the letter of credit cannot be used to facilitate a clear case of fraud.

[133] The trial judge held that Eurobank knew “that HMOD’s conduct constituted clear fraud” (para. 196) because HMOD’s demand was made in contravention of orders of the ICC Arbitral Tribunal and of the Superior Court (para. 197). Mainville J.A. agreed that Eurobank “clearly did” know of HMOD’s fraud (at para. 72), and pointing to the evidence relating to Procedural Order No. 11, he observed that “[i]t is clear in this case that Eurobank had sufficient knowledge of the fraud prior to paying” (para. 71). Hamilton J.A. acknowledged that Eurobank had “notice” of Procedural Order No. 11 (para. 212). Notwithstanding that knowledge, he concluded that “it was not clear and obvious that [HMOD’s] request was fraudulent” (para. 223).

[134] With respect, the dissenting judge failed to identify a palpable and overriding error in the trial judge’s conclusion of mixed fact and law that Eurobank knew of and participated in HMOD’s fraud. The trial judge found that Eurobank “did indeed voluntarily make the payment knowing that HMOD’s conduct constituted clear fraud” (para. 196 (emphasis deleted)). He wrote that Eurobank paid HMOD “in contravention of not one but two orders. One from the ICC Arbitral Tribunal and another from Justice Davis of the Quebec Superior Court” (para. 197), which lends support to his conclusion that Eurobank knew of HMOD’s fraud. More significantly,

there is evidence, including testimony from Eurobank's employees that made the decision to pay HMOD, to support a finding that Eurobank knew that HMOD demanded payment under the Letter of Guarantee in contravention of Procedural Order No. 11 of the ICC Arbitral Tribunal.

[135] At trial, Dimitri Konstantopoulos, General Director of Corporate Banking at Eurobank, agreed with a proposition put to him that Eurobank was “aware that there [was] an ICC ruling against the Ministry of Defense saying ‘do not request payment under the letter of guarantee’” (A.R., vol. VIII, at p. 50). Athanasios Danis, Director of the Legal Department of Eurobank at the time that payment was made to HMOD, testified that he was aware that Bombardier sought and obtained interim relief from the ICC Arbitral Tribunal that enjoined HMOD from demanding payment under the Letter of Guarantee. He also testified that he had concerns “about the good faith of HMOD” (p. 64). While a simple absence of good faith is not sufficient to trigger the fraud exception, the testimony from Mr. Konstantopoulos and Mr. Danis indicates that Eurobank knew of the conduct by HMOD that, by Canadian standards, amounts to fraud. In that light, it was open to the trial judge to conclude that Eurobank knew of HMOD's fraud.

[136] The dissenting judge agreed that “Eurobank obviously knew that the demand [for payment under the Letter of Guarantee] was being made on the eve of the final arbitration award” (C.A. reasons, at para. 217). However, he concluded that Eurobank “did not know that HMOD expected to lose or intended to keep the funds

regardless of the outcome” (para. 217). At that point, “Eurobank only had suspicions” (para. 217). While I agree that mere suspicions “should not be assimilated to knowledge of fraud” (para. 218), I respectfully do not share the view that Eurobank’s knowledge of HMOD’s fraud was a mere suspicion. Eurobank’s employees who made the decision to pay HMOD testified at trial that they knew that HMOD was enjoined from demanding payment under the Letter of Guarantee and that the issuance of the final arbitral award was imminent. Eurobank was not merely suspicious that HMOD demanded payment contrary to Procedural Order No. 11; it clearly knew that this was happening. At the very least, this suggests that Eurobank knew that the demand for payment was made in contravention of at least one order, which, in the circumstances, amounts to clear knowledge of the fraudulent conduct of HMOD.

[137] Therefore, I see no basis to interfere with the trial judge’s conclusion that Eurobank had clear knowledge of HMOD’s fraud.

[138] Moreover, I have been shown no palpable and overriding error in the trial judge’s conclusion that “Eurobank may not have conceived the fraudulent plot, it may not have supplied the weapons, but it surely participated in pulling the trigger” and that Eurobank “knowingly enabled fraud to produce its fruits” (para. 205). Eurobank actively participated in HMOD’s fraud by paying HMOD in improper circumstances.

[139] In sum, because Eurobank knew of and participated in HMOD’s fraud, it became the co-author of that fraud and must, for the purposes of the fraud exception, bear responsibility for it. HMOD’s fraud became Eurobank’s own. As the beneficiary

of the Letter of Counter-Guarantee, it is Eurobank's fraud that is actionable before Quebec courts.

[140] I add that, while the Letter of Counter-Guarantee was issued to ensure that Eurobank would be paid if it had to pay HMOD under the Letter of Guarantee, all Canadian letters of credit are issued subject to the fraud exception. Much like how Eurobank was entitled to rely on the near certainty of being paid in normal circumstances, Bombardier, as the client of the issuing bank, was entitled to rely on the availability of the fraud exception should it apply. Indeed, there is evidence to suggest that the decision to have a letter of credit subject to Quebec law was designed to ensure that the fraud exception be made available for Bombardier's protection. The structure involving two letters of credit was devised, as François Ouellette, Vice-President of Legal Services and Contracts for the Business Aviation Division of Bombardier, explained at trial, to [TRANSLATION] "avoid a risk of fraud" (A.R., vol. IX, at p. 9). He testified that, as part of the transaction that involved an international dimension and foreign law which brought uncertainties, Bombardier sought comfort in dealing with a Canadian bank and in knowing that the fraud exception in Canadian law could apply. Eurobank, as a party to the Letter of Counter-Guarantee, took whatever risks this entailed for it as beneficiary of that letter. At trial, Mr. Ouellette said:

[TRANSLATION] . . . we at Bombardier . . . we know the law that governs the issuance of and collection on letters of credit under Quebec law, which explains the requirement that a letter of credit issued by a foreign bank be subject to a counter-guarantee by a local bank.

. . . [T]he reason behind our requirement that there be a letter of counter-guarantee was precisely to avoid having to go and fight before the Greek courts. . . . [T]he letter of counter-guarantee also meant that we weren't subject to a fraudulent collection because under Canadian rules . . . , the exception to collection on a letter of credit is fraud, so the letter of counter-guarantee from the National Bank protected us against any fraud attempt by the Greek government.

(A.R., vol. IX, at pp. 66 and 99-100)

[141] Against this backdrop, the fraud exception applies to ensure that Bombardier and the National Bank will not have to assume the losses associated with fraud attributed to Eurobank as its own.

[142] Finally, Eurobank's alternative argument that it acted under duress is without foundation. No basis has been shown to interfere with the trial judge's conclusion that Eurobank's conduct as beneficiary was voluntary. Eurobank knew of HMOD's fraud and demanded payment from the National Bank, fully aware of the circumstances. I accept that Eurobank was clearly in a difficult position: it no doubt felt pressure from HMOD, and it no doubt saw the possible risk that, in Canada, it might lose its case on the Letter of Counter-Guarantee. But as the trial judge found, Eurobank did not resist pressure from HMOD "after considering the risks that resistance would have entailed" (para. 203). Between two options, Eurobank made a choice to demand payment from the National Bank rather than face the consequences of denying payment to HMOD. It did not act involuntarily in so doing. It chose to knowingly participate in fraud under competing pressures. On one hand, it could have refused to participate in HMOD's fraud which would have prevented it from becoming

a co-author of that fraud under Canadian law. On the other hand, it could have exposed itself to well-founded allegations of fraud under Canadian law in order to avoid what seemed to be more serious liability under Greek law. It chose the latter course of conduct. Eurobank, as a Greek bank, might well have made a reasonable business decision in these challenging circumstances, but for our purposes one only needs to observe is that its decision was voluntary and not imposed. Given that Eurobank acted voluntarily, it is not necessary to decide whether duress provides an excuse to the fraud exception more generally. I would note, however, that when pressed at the hearing, Eurobank was unable to point to any authority to support its claim that there is a duress exception to the fraud exception (transcript, at p. 21).

(3) Conclusion on the Fraud Exception

[143] I conclude that the fraud exception applies with respect to Eurobank's demand for payment under the Letter of Counter-Guarantee. Given that Eurobank, as the beneficiary of the Letter of Counter-Guarantee, knew of and participated in fraud by HMOD, that fraud can be attributed to it as though it was its own. The requirement that there be fraud by the beneficiary is therefore met. Moreover, there is no question that Eurobank's fraud was brought to the attention of the National Bank, the issuer of the Letter of Counter-Guarantee. On that basis, the National Bank was rightly enjoined by the trial judge from paying out any amount under the Letter of Counter-Guarantee to Eurobank and the majority of the Court of Appeal made no mistake in confirming that conclusion.

VI. Impact of the Nullity of the Offsets Contract on the Letter of Counter-Guarantee

[144] Although most of the trial judge's analysis focused on the fraud exception, he wrote that "[i]t is difficult to accept in law that the invalidity, *ab initio*, of the Offsets Contract . . . does not cause the invalidity of the instruments that were issued to guarantee the obligations flowing from said contract" (para. 237). He added that "[i]t is obvious that the Letter of Guarantee that was declared null and void *ab initio* by the ICC Arbitral Tribunal Final Award which has been homologated by this Court, the Counter-Guarantee must follow suit and that [the National Bank] should be ordered not to pay Eurobank" (para. 240). On that basis, he held that the Letter of Counter-Guarantee is null. A majority of the Court of Appeal upheld this conclusion.

[145] Respectfully, I would note that the trial judge was mistaken to say that the ICC Arbitral Tribunal declared the Letter of Guarantee to be null because the Offsets Contract is null. In its final award, the ICC Arbitral Tribunal concluded that "[t]he Offsets Contract is declared null and void *ab initio*, together with its Articles 20 related to Liquidated Damages and 21 related to the Letter of Guarantee" (A.R., vol. VI, at p. 143).

[146] Eurobank appealed the trial judge's conclusion that the Letter of Counter-Guarantee is null to the Court of Appeal. The majority upheld this conclusion. Hamilton J.A. would have allowed the appeal because he found that the fraud exception did not apply. In proposing to dismiss the action instituted by Bombardier against Eurobank,

he did not include a plain direction as to whether or on what basis he would find the Letter of Counter-Guarantee valid.

[147] Before this Court, Bombardier argues that the Letter of Counter-Guarantee is null because the Offsets Contract is null. Given the manner in which issues were joined at trial and on appeal, and the fact that this argument was presented as an alternative basis to deciding whether the National Bank should be enjoined from paying Eurobank under the Letter of Counter-Guarantee, I will refrain from deciding the matter. That said, Bombardier's argument touches on an unsettled point of law that is, in my view, worthy of three comments.

[148] First, if a beneficiary demands payment under a letter of credit when they know that the underlying contract is null, such conduct might trigger the fraud exception (see *Angelica-Whitewear*, at p. 83; *McGuinness*, at §17.338; *OMERS Realty*, at para. 45). This should not be confused with a dispute regarding the underlying contract (*Angelica-Whitewear*, at p. 70). Demanding payment pursuant to a contested right is not fraud. By contrast, demanding payment knowing that one has no right to be paid under the underlying contract may well be fraudulent, depending on the circumstances.

[149] Second, in Quebec law, there is a "requirement, spoken to in art. 1371 *C.C.Q.*, to the effect that it is of the essence of an obligation arising out of a juridical act that there be a cause which justifies its existence" (*6362222 Canada inc. v. Prelco inc.*, 2021 SCC 39, at para. 72). It may well be argued that the objective cause of the

obligation to make payment by the issuing bank in a letter of credit may be detached from, and not inherently dependent on, the underlying contract.

[150] Third, there may be room to argue that, if an underlying contract is contrary to public order, so are the letters of credit arising from it (see A. Peters, “Standby Letters of Credit in Financing Transactions” (1994), 13 *Nat. B.L. Rev.* 40, at p. 53). But Crawford et al. note the paucity of judicial consideration of the question of whether manifest illegality of the underlying transaction would justify an issuer in refusing to pay on an otherwise conforming demand under a letter of credit (§ 13:176). This suggests to me that the matter need not be decided here, and that it probably should not. Since this appeal can be disposed of by addressing an issue that was fully developed and argued — the fraud exception — I would leave these questions for another day.

VII. Disposition

[151] On the basis that the fraud exception applies to the Letter of Counter-Guarantee to preclude the National Bank from paying Eurobank under that letter, I would dismiss the appeal with costs payable by the appellant Eurobank.

The reasons of Karakatsanis and Côté JJ. were delivered by

CÔTÉ J. —

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I. Overview

[152] This appeal requires our Court to consider the proper limits of the fraud exception to the autonomy of demand guarantees in complex international commercial transactions. This case is of great importance for the banking industry since clarity and predictability are required for the efficient operation of these financial instruments.

[153] The appellant Eurobank Ergasias S.A. is a Greek bank whose predecessor issued a demand guarantee, governed by Greek law (“Letter of Guarantee”), in favour of the appellant Hellenic Ministry of National Defense (“HMOD”). The Letter of Guarantee was secured by a counter-guarantee, governed by Quebec law (“Letter of Counter-Guarantee”), issued by the respondent National Bank of Canada (“National Bank”) at the request of the respondent Bombardier inc.

[154] It is alleged that HMOD acted fraudulently by demanding payment under the Letter of Guarantee, to Eurobank’s knowledge, such that Eurobank’s decision to pay was fraudulent for the purposes of the Letter of Counter-Guarantee. Invoking the fraud exception, Bombardier petitioned the Quebec courts to, among other things, enjoin National Bank from reimbursing Eurobank under the Letter of Counter-Guarantee. An injunction was granted on a provisional basis. Bombardier

sought a permanent injunction to the same effect, which was granted by the Quebec Superior Court and upheld, in a divided decision, by the Quebec Court of Appeal.

[155] I am of the view, like Hamilton J.A. of the Quebec Court of Appeal, that the action instituted by Bombardier against Eurobank and National Bank should be dismissed. To conclude otherwise in the present case requires dismissing as irrelevant the decisions of the Greek courts, which, in my view, cannot be ignored for the determination of this case. International comity is an essential guiding principle when giving a factual effect to or enforcing a foreign decision, and in this case, there is no public policy rationale for not giving weight to the judgments of the Greek courts.

[156] Taking the judgments of the Greek courts into account, I am of the opinion that the conclusion to be reached is that HMOD's demand for payment under the Letter of Guarantee was neither fraudulent nor tantamount to fraud. Even had I accepted that HMOD's conduct was fraudulent or tantamount to fraud, Eurobank would, in my view, be innocent of that fraud. There is an inherent contradiction in the requirement that a reviewing court place itself in the position of the issuing bank at the time of payment to assess whether it had sufficient knowledge of any fraud, but at the exact same time discard the decisions of the courts of competent jurisdiction that were binding on that bank and informing this knowledge. The trial judge's conclusion that the fraud exception applies as per the requirements established in *Bank of Nova Scotia v. Angelica-Whitewear Ltd.*, [1987] 1 S.C.R. 59, cannot stand. Unlike the majority in the

Court of Appeal, I see reviewable errors in the trial judge's findings and in his ultimate conclusion.

[157] For the reasons that follow, I would allow the appeal.

II. Factual and Legal Context

A. *The Relevant Contractual Arrangements*

[158] On November 20, 1998, Bombardier and HMOD entered into a procurement contract ("Procurement Contract") for the manufacturing of 10 CL-415 firefighting amphibious aircraft in addition to other services and equipment, for a total value of US\$252,151,899. As a condition of the Procurement Contract, Bombardier was to enter into a second contract with HMOD ("Offsets Contract"). Pursuant to the Offsets Contract, Bombardier agreed to subcontract part of the manufacturing of the aircraft to Greek suppliers.

[159] In entering into the Offsets Contract, Bombardier agreed to a liquidated damages clause, the amount of which was to be secured by a demand guarantee to be issued by a Greek bank (arts. 20 and 21, reproduced in A.R., vol. IV, at p. 95). The parties agreed that all disputes relating to the Offsets Contract would be submitted to an arbitral tribunal, seated in Paris, under the rules of the International Chamber of Commerce ("ICC Arbitral Tribunal") (art. 25). Like the Procurement Contract, the Offsets Contract was governed by Greek law (art. 28).

[160] On February 5, 1999, the Letter of Guarantee was issued by Eurobank's predecessor, ANZ Grindlays Bank Limited, in favour of HMOD to secure the payment of any potential liquidated damages.¹ The Letter of Guarantee was backed by the Letter of Counter-Guarantee previously issued by National Bank on January 29, 1999, at Bombardier's request. It is noteworthy that the Letter of Guarantee is governed by Greek law, while the Letter of Counter-Guarantee is governed by Quebec law.

B. *Chronology of Events*

[161] On December 30, 2008, Bombardier filed a request for arbitration before the ICC Arbitral Tribunal, claiming that it was impossible to fulfill some of its obligations under the Offsets Contract. HMOD contested the claim. Neither Eurobank nor National Bank was a party to these proceedings.

[162] On June 17, 2010, HMOD agreed to reduce the amount of the Letter of Guarantee by half given Bombardier's partial performance of the Offsets Contract (art. 21.3). The amount currently in issue is US\$13,868,354.60.

¹ ANZ Grindlays Bank Limited 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, but that of its predecessor. Eurobank was not involved when the payment to HMOD under the Letter of Guarantee was made in December 2013.

[163] On April 2, 2012, HMOD wrote to Bombardier advising it that since it had not satisfied its full obligations under the Offsets Contract, HMOD would be calling for payment on the Letter of Guarantee.

[164] On April 10, 2012, Bombardier informed HMOD and the ICC Arbitral Tribunal that it would seek interim injunctive relief to prevent HMOD from calling on the Letter of Guarantee until the arbitral award was released.

[165] On April 20, 2012, HMOD wrote to Bombardier and the ICC Arbitral Tribunal, expressly undertaking not to demand payment under the Letter of Guarantee “for as long as the [arbitration] procedure is ongoing” and until the final award was rendered (“Written Undertaking”) (A.R., vol. IV, at p. 199). HMOD provided this Written Undertaking on the assumption that the proceedings would end shortly.

[166] On August 15, 2012, Bombardier sought permission to amend its arbitration claim to raise an additional issue — whether the Offsets Contract was null and void for violating European Union competition law. Permission to amend was granted and Bombardier filed a supplemental brief on December 3, 2012. As a result of that amendment, a second hearing had to be scheduled. This caused significant delay in the arbitration proceedings.

[167] On July 17, 2013, more than 15 months after the Written Undertaking had been provided, HMOD issued a formal decision approving the call on the Letter of

Guarantee. It did so in accordance with its sovereign rights, following the applicable administrative procedures.

[168] On July 29, 2013, Bombardier and HMOD were informed that the ICC Arbitral Tribunal's award would be rendered by December 31, 2013.

[169] On July 31, 2013, HMOD sent a letter to Bombardier informing it that it was in default of its obligations under the Offsets Contract and had to pay the penalty (US\$13,868,354.60).

[170] On August 5, 2013, HMOD made a first demand to Eurobank for the immediate payment of the outstanding amount under the Letter of Guarantee.

[171] On August 13, 2013, at Bombardier's request, the ICC Arbitral Tribunal issued an interim order enjoining HMOD from demanding any payment under the Letter of Guarantee until its final award was issued ("Interim Order"). Again, neither Eurobank nor National Bank was a party to the proceedings in which the Interim Order was sought.

[172] The same day, National Bank received an affidavit from Eurobank indicating that although it had received no new demand for payment from HMOD, it expected to receive one. Bombardier then wrote to HMOD seeking assurances that it would comply with the Interim Order.

[173] On August 14, 2013, HMOD's counsel replied that they were not in a position to provide a written undertaking that HMOD would comply with the Interim Order. Given this unwillingness to provide such an assurance, Bombardier proceeded with an application for an injunction before Prévost J. of the Quebec Superior Court.

[174] During the injunction hearing, Bombardier learned that on August 12, 2013, Eurobank had received a second demand for payment under the Letter of Guarantee from HMOD. The demand complied with the terms of the Letter of Guarantee.

[175] On August 16, 2013, Eurobank made a request to National Bank for payment under the Letter of Counter-Guarantee. It made clear that HMOD was insisting that Eurobank pay under the Letter of Guarantee.

[176] The same day, Prévost J. of the Quebec Superior Court granted Bombardier's motion for a provisional injunction, which was to remain in force until August 26, 2013, and ordered HMOD to withdraw its demand for payment. Prévost J. also ordered Eurobank to refrain from paying any amount under the Letter of Guarantee and National Bank to refrain from paying any amount under the Letter of Counter-Guarantee (2013 QCCS 6892 ("Prévost Injunction")). This injunction was issued on the basis of art. 3138 of the *Civil Code of Québec* ("C.C.Q.") and art. 940.4 of the former *Code of Civil Procedure*, CQLR, c. C-25 ("C.C.P.") (essentially equivalent to art. 623 of the *Code of Civil Procedure*, CQLR, c. C-25.01). The latter provision allows Quebec courts to "grant provisional measures before or during

arbitration proceedings”. To reiterate, only Bombardier and HMOD were parties to the arbitration proceedings.

[177] On August 20, 2013, Eurobank applied to the Athens One-Member First Instance Court for an injunction compelling HMOD to withdraw its request for payment under the Letter of Guarantee and enjoining HMOD from making any new requests until the ICC Arbitral Tribunal’s final award was issued.

[178] On August 22, 2013, Judge Pana of the Athens One-Member First Instance Court allowed “the claimant (temporarily) not to liquidate the Guarantee letter without suffering any legal consequences/penalties until the hearing of the petition for the interim measures on the hearing date set out below” (“Pana Injunction”; A.R., vol. VI, at p. 29).

[179] The Prévost Injunction, which was to remain in force for only 10 days, expired on August 26, 2013. Bombardier did not seek its renewal until four months later.

[180] On November 22, 2013, Eurobank’s petition for an injunction was heard on the merits by Judge Kostis of the Athens One-Member First Instance Court. The Pana Injunction was extended until Judge Kostis’s final decision was rendered.

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

[182] On December 16, 2013, Judge Kostis rendered his decision and dismissed Eurobank's petition for an injunction ("Kostis Decision"). There was no appeal possible from the Kostis Decision.

[183] On December 18, 2013, acting on the basis of the Kostis Decision, HMOD presented Eurobank with its third and final demand for payment under the Letter of Guarantee.

[184] On December 19, 2013, Eurobank informed National Bank that its application for injunctive relief had been dismissed by Judge Kostis. It further explained that the Pana Injunction was therefore no longer in effect and that, given that there was no operative injunction, it had to issue payment to HMOD. Consequently, Eurobank demanded payment under the Letter of Counter-Guarantee.

[185] The same day, Bombardier filed an application for provisional, interlocutory and permanent injunctions.

[186] On December 20, 2013, Davis J. renewed the Prévost Injunction for a period of 10 days ("Davis Injunction"). The Davis Injunction was also issued on the basis of art. 3138 *C.C.Q.* and art. 940.4 of the former *C.C.P.*

[187] On December 23, 2013, the ICC Arbitral Tribunal informed the parties that its final award had been approved and that it would be communicated to the parties on December 31, 2013.

[188] The same day, Eurobank contacted HMOD and asked it to reconsider its demand for payment in light of the Davis Injunction. In response, HMOD served Eurobank with a demand letter ordering it to pay in accordance with the Letter of Guarantee without any further delay, failing which HMOD would “take not only civil but also criminal legal measures” against Eurobank (“Extrajudicial Invitation-Protest”) (A.R., vol. VI, at p. 151 (emphasis deleted)).

[189] **On December 24, 2013, Eurobank paid HMOD US\$13,868,354.60 pursuant to the Letter of Guarantee.**

[190] **On December 27, 2013, Eurobank reiterated its demand for payment under the Letter of Counter-Guarantee.**

[191] On December 31, 2013, the ICC Arbitral Tribunal’s final award was released (“Arbitral Award”). It ruled that the “Offsets Contract is declared null and void *ab initio*, together with its Articles 20 related to Liquidated Damages and 21 related to the Letter of Guarantee” (A.R., vol. VI, at p. 143).

[192] On January 8, 2014, Schrager J. (as he then was) issued a safeguard order which enjoined National Bank from paying under the Letter of Counter-Guarantee until the matter was finally determined by a Quebec court.

[193] On April 14, 2015, the Arbitral Award was affirmed in all respects by the Paris Court of Appeal.

[194] On December 24, 2018, Eurobank instituted proceedings before the Athens One-Member First Instance Court against HMOD for unjust enrichment to recover the amount it paid under the Letter of Guarantee.

[195] On November 29, 2019, the Athens One-Member First Instance Court rendered its decision, finding in favour of Eurobank and ordering HMOD to reimburse the funds.

[196] On December 8, 2020, that decision was overturned by the Athens Court of Appeal. It found that HMOD was not bound by (1) the Written Undertaking or (2) the Interim Order. Eurobank further appealed that decision to the Hellenic Supreme Court.

[197] On January 9, 2024, the Hellenic Supreme Court released its decision, confirming the conclusions of the Athens Court of Appeal in full. The decision of the Hellenic Supreme Court was released after the hearing before this Court, while the appeal was under reserve. It is final and cannot be appealed. Eurobank successfully filed a motion for leave to adduce that decision as further evidence before this Court. Given that the decision bears on a “decisive or potentially decisive” issue, the motion was rightfully granted (*Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775).

III. Procedural History

A. *Quebec Superior Court, 2018 QCCS 2127 (Wery J.)*

[198] Bombardier sought an injunction before the Quebec Superior Court to enjoin National Bank from paying any amount under the Letter of Counter-Guarantee; it also sought the homologation of the Arbitral Award.

[199] With respect to Bombardier's request for an injunction, Wery J. recognized the important principle of autonomy of letters of credit and that it is subject to the fraud exception. He held that HMOD's conduct amounted to fraud for the following reasons: HMOD had threatened Eurobank with severe consequences if it failed to comply with its demand for payment, the timing of the demand was only days before the Arbitral Award was released, and the demand was made in defiance of both the Interim Order and the Davis Injunction.

[200] Eurobank argued that, notwithstanding HMOD's misconduct, it did not act fraudulently because it did everything it could to avoid HMOD's demand and paid only when HMOD threatened it with severe legal repercussions. In rejecting this argument, Wery J. acknowledged that Eurobank had a difficult choice to make, but, in his view, Eurobank's decision to pay was wrongful given HMOD's fraud. Therefore, National Bank was enjoined from paying any amount under the Letter of Counter-Guarantee.

[201] Wery J. homologated the Arbitral Award and ordered HMOD to comply with it. Given that the ICC Arbitral Tribunal had found that the Offsets Contract was null and void *ab initio*, it followed, according to Wery J., that the instruments issued to guarantee its performance were also null and void.

B. *Quebec Court of Appeal, 2022 QCCA 802*

(1) Mainville J.A., Baudouin J.A. Concurring

[202] Writing for the majority, Mainville J.A. allowed the appeal only in part so as to strike from Wery J.'s decision the order compelling HMOD to comply with the Arbitral Award. He held that the Quebec Superior Court had no jurisdiction to order HMOD to comply with the Arbitral Award, as it is neither domiciled nor resident in Quebec. He concluded that otherwise Wery J. made no reviewable errors, including with respect to his finding that the Letter of Counter-Guarantee was not enforceable in the circumstances of the case.

[203] Mainville J.A. held that HMOD's conduct amounted to fraud. He rejected HMOD's submission that it could not have acted fraudulently given that it complied with the judgments of the Greek courts and with Greek law. He found that public policy considerations compelled him to disregard the Kostis Decision and the judgment of the Athens Court of Appeal. Thus, Wery J. was correct in giving no weight to the Kostis Decision. As a result, Mainville J.A. determined that Eurobank had sufficient knowledge of HMOD's fraud prior to paying.

(2) Hamilton J.A., Dissenting

[204] Hamilton J.A. dissented. He would have allowed the appeal and set aside in part Wery J.'s judgment. He would have dismissed the action instituted by Bombardier against Eurobank and National Bank.

[205] Hamilton J.A. determined that Wery J. put too heavy a burden on Eurobank. While the record hinted at the possibility of HMOD's conduct being fraudulent, it did not necessarily follow that Eurobank knew of or participated in that fraud such that it could be attributed as its own.

[206] The language of the Letter of Guarantee clearly established that (1) HMOD was not required to obtain a judgment confirming that it was owed money before it could call the Letter of Guarantee, and (2) Eurobank could not refuse to pay even if Bombardier had taken any legal action before any court of law in any country.

[207] While an injunction could be sought to prevent a demand under the Letter of Guarantee, *it had to be issued by the right court and for the right reasons*. Bombardier did not attempt to obtain an injunction from the Greek courts, which were the courts of competent jurisdiction. The fact was that Judge Kostis refused to issue the injunction sought by Eurobank. No appeal of this decision was possible. In these circumstances, Hamilton J.A. concluded that it was difficult to criticize Eurobank for not having complied with the Interim Order and the Davis Injunction.

[208] Eurobank knew that HMOD's fraudulent demand was being made on the eve of the final arbitral award, but it did not know that HMOD expected to lose and

that it intended to keep the funds regardless of the outcome. At that stage, Eurobank only had suspicions; Eurobank was diligent, took steps to investigate, and sought an injunction, which was refused. It was not *clear or obvious*, at that moment, that there was fraud.

[209] Hamilton J.A. noted that the transaction was supposed to be risk-free for Eurobank and that it should not bear the risk of HMOD's fraudulent conduct. 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 that it hoped to gain under the Procurement Contract.

IV. Issues

[210] Eurobank raises the following three issues in its factum:

- (1) What are the proper limits to the fraud exception to the autonomous nature of demand guarantees?
- (2) Could the Quebec courts rule that Eurobank's conduct amounted to bad faith when it abided by the judgments rendered by the Greek courts?
- (3) How is risk to be apportioned between the parties to a complex commercial transaction scheme utilizing demand guarantees?

V. Analysis

[211] At the outset of my analysis, I believe that a clarification is in order. Although the parties and the courts below refer to the instruments in dispute as letters of credit, they are best referred to as demand guarantees.

[212] Letters of credit and demand guarantees are widely used in international commercial transactions. These financial instruments are issued by banks to secure the parties' performance of their contractual obligations. While letters of credit and demand guarantees are similar in nature and are governed by many of the same principles, they each have a distinct purpose. Letters of credit are designed to secure the fulfillment of the transaction; parties are expected to draw on them as the primary method of payment. Demand guarantees, like standby letters of credit, are contingent in nature. They will be called on only when a contractual obligation is not performed or is partly performed (R. Goode, "Abstract Payment Undertakings in International Transactions" (1996), 22 *Brook. J. Int'l L.* 1, at pp. 3-4).

[213] The Letter of Guarantee and the Letter of Counter-Guarantee are best referred to as demand guarantees in the circumstances. This is so for two reasons. First, the purpose of these instruments is to secure payment under the Offsets Contract's liquidated damages clause, so they are contingent in nature. They would be called upon only if Bombardier failed to fulfill its offsets obligations. Second, the Letter of Guarantee and the Letter of Counter-Guarantee are expressly stated to be subject to the *Uniform Rules for Demand Guarantees* (1992): "OUR COUNTER-GUARANTEE . . .

IS SUBJECT TO THE UNIFORM RULES FOR DEMAND GUARANTEES (ICC PUBLICATION 458)” (A.R., vol. IV, at p. 118).

A. *Demand Guarantees Are Autonomous*

[214] Demand guarantees are contracts established at the request of a principal whereby the guarantor, usually a bank, irrevocably promises to pay the beneficiary on demand, irrespective of any ongoing dispute between the principal and the beneficiary. Like letters of credit, demand guarantees are autonomous. In *Angelica-Whitewear*, the leading case in Canada on letters of credit, Le Dain J. summarized the rationale behind the principle of autonomy as follows:

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. [Emphasis added; p. 70.]

[215] This rationale is equally applicable to demand guarantees. Le Dain J. noted in *Angelica-Whitewear* that the principle of autonomy is reflected in the general provision of the *Uniform Customs and Practice for Documentary Credits* (1962). It is also reflected in the international rules that govern demand guarantees, that is, the *Uniform Rules for Demand Guarantees* (1992), as well as their 2011 revision.

Articles 2b) and 2c) of the 1992 uniform rules expressly enshrine the principle of autonomy:

b) Guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they may be based, and Guarantors are in no way concerned with or bound by such contract(s), or tender conditions, despite the inclusion of a reference to them in the Guarantee. The duty of a Guarantor under a Guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the terms of the Guarantee.

c) . . . Counter-Guarantees are by their nature separate transactions from the Guarantees to which they relate and from any underlying contract(s) or tender conditions, and Instructing Parties are in no way concerned with or bound by such Guarantees, contract(s) or tender conditions, despite the inclusion of a reference to them in the Counter-Guarantee.

[216] While the terms and conditions for payment of a demand guarantee reflect the underlying contract, the guarantor undertakes to pay *regardless of external facts or events*. In this sense, the demand guarantee is independent from the underlying contract (N. L'Heureux and M. Lacoursière, *Droit bancaire* (5th ed. 2017), at pp. 428-29). Indeed, when parties to a commercial transaction agree to use demand guarantees to secure the performance of their obligations, they express their intention to be bound by a “pay now, argue later” structure (J. F. Dolan, “Tethering the Fraud Inquiry in Letter of Credit Law” (2006), 21 *B.F.L.R.* 479, at p. 480 (emphasis added)).

[217] The guarantor’s obligation to pay is triggered solely on the terms and conditions specified by the principal. These requirements may also be supplemented by the *Uniform Rules for Demand Guarantees* if they are expressly incorporated. Once

the terms and conditions are set, [TRANSLATION] “the only control that [the bank, and not the principal,] may exercise is over the regularity of the documents tendered by the beneficiary” (C. Gilbert, “Similarités et distinctions entre la fraude du bénéficiaire d’un crédit documentaire et celle du bénéficiaire d’une garantie de bonne exécution” (1987), 17 *R.D.U.S.* 585, at p. 590). The guarantor’s role in ensuring, with “reasonable care” (*Uniform Rules for Demand Guarantees* (1992), art. 9), that the tendered documents strictly comply with the terms and conditions of the demand guarantee is [TRANSLATION] “strictly financial” (Gilbert, at p. 590). In this regard, Le Dain J. wrote that “[t]he fundamental rule is that the documents must *appear* on their face, upon reasonably careful examination, to be in accordance with the terms and conditions of the letter of credit” (*Angelica-Whitewear*, at p. 94 (emphasis in original)).

[218] The bank’s role as a guarantor is thus simple. The bank must pay when presented with a compliant demand. It cannot investigate the circumstances of the underlying contract to determine whether the obligation secured by the demand guarantee was performed. The bank does not have the specialized skill and experience to be a “referee on matters that divide the parties to the secured contract” (R. F. Bertrams, *Bank Guarantees in International Trade* (4th ed. rev. 2013), at p. 82). The bank should not and is not expected to “enter into controversies” between the parties to the underlying contract (*Sztejn v. J. Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631 (Sup. Ct. 1941), at p. 633).

B. *The Fraud Exception to the Principle of Autonomy*

[219] The guarantor's obligation to pay when presented with a compliant demand is subject to one exception — fraud. Pursuant to *Angelica-Whitewear*, the principal has two options to prevent payment under a demand guarantee. First, it can seek an interlocutory injunction from a court of competent jurisdiction to restrain the bank from honouring the demand by establishing a strong *prima facie* case of fraud. Otherwise, the principal must present sufficient evidence of fraud to the guarantor before payment is made. The guarantor should refuse payment only in the rare cases where *it has clear or obvious* knowledge of the fraud (*Angelica-Whitewear*, at p. 84).

[220] The two rationales behind the fraud exception are to ensure that courts do not endorse fraud and to maintain the commercial utility and efficacy of demand guarantees (R. P. Buckley and X. Gao, "The Development of the Fraud Rule in Letter of Credit Law: The Journey So Far and the Road Ahead" (2002), 23 *U. Pa. J. Int'l. Econ. L.* 663, at pp. 664-67). The exception must be kept narrow. As Le Dain J. stressed in the context of letters of credit, "[t]he 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" (*Angelica-Whitewear*, at p. 72). The same can be said for demand guarantees. Parties should not resort to the courts to enjoin banks from paying under a demand guarantee where no strong *prima facie* case of fraud exists or where clear or obvious evidence of fraud cannot be established.

(1) Fraud Is a High Bar

[221] Courts can look to either the tendered documents or the underlying contract to detect fraud (*Angelica-Whitewear*, at p. 83). However, an allegation of fraud is not an invitation for courts to allow sophisticated commercial parties to refashion their agreement to an “argue now, pay later” structure when the bar is not met (Dolan, at p. 480 (emphasis added)). Fraud is a high bar, and the exception will not apply where the principal can only prove conduct amounting to “something less than fraud” (*Standard Trust Co. (Liquidation) v. Bank of Nova Scotia*, 2001 NFCA 27, 201 Nfld. & P.E.I.R. 8, at paras. 70-72; see also *Northern American Trust Co. v. Hospitality Equity Corp.*, [1995] A.J. No. 1306 (Lexis), 1995 CarswellAlta 1171 (WL) (Q.B.), at para. 31; *Johannesen (Re)*, 2002 ABQB 756, 218 D.L.R. (4th) 148, at para. 47).

[222] Fraud in this context lacks a precise definition, and Le Dain J. did not provide one in *Angelica-Whitewear*. On a general level, fraud involves some aspect of [TRANSLATION] “public order” (J. Stoufflet, “Fraud in Documentary Credit, Letter of Credit and Demand Guaranty” (2001), 106 *Dick. L. Rev.* 21, at p. 23). I agree with the intervener, the Canadian Bankers’ Association, that bad faith alone is not enough to establish fraud (I.F., at para. 22). It has to be something more, and it has to be tailored to the specific context of demand guarantees (Bertrams, at p. 373). Cases in which the fraud exception is applied often rely on the definition set out by Blair J. (as he then was) in *Cineplex Odeon Corp. v. 100 Bloor West General Partner Inc.*, [1993] O.J.

No. 112 (Lexis), 1993 CarswellOnt 2358 (WL) (C.J. (Gen. Div.)), at paras. 31-32 (WL):

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; *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.* [, [1978] 1 Q.B. 159 (C.A.)], at p. 169. [Underlining added.]

As Blair J. noted, there needs to be some aspect of impropriety, dishonesty or deceit; the case must be one where the demand on the guarantee can be said to be “clearly untrue or false” or “utterly without justification” or where “it is apparent there is ‘no right to payment’”.

[223] In this regard, I agree that “[i]f a beneficiary demands payment while knowing that they have no right to be paid under the underlying contract, that conduct

may amount to fraud” (Justice Kasirer’s reasons, at para. 114, citing K. McGuinness, *The Law of Guarantee* (3rd ed. 2013), at §17.338). However, an understanding of the factual context is essential. What may at one time constitute a valid demand may at a later time be deemed invalid. This does not mean that the beneficiary had no right to make its demand for payment at the time of making it. Again, a demand guarantee by its very nature is independent from any underlying dispute. A demand for payment will be fraudulent only if it is apparent to the beneficiary that there was no right to payment when it was presented, for instance because the underlying contract had already been found to be void (see, e.g., *OMERS Realty Corp. v. 7636156 Canada Inc. (Trustee in Bankruptcy of)*, 2020 ONCA 681, 153 O.R. (3d) 271, at para. 45). In the absence of such knowledge, a simple demand for payment under the demand guarantee is neither fraudulent nor tantamount to fraud.

(2) Clear or Obvious Knowledge of Fraud

[224] A guarantor is bound to pay under a demand guarantee unless it is specifically enjoined from doing so by a court of competent jurisdiction or unless clear or obvious evidence of the beneficiary’s fraud has been brought to its attention (*Angelica-Whitewear*, at pp. 84-85). To define “clear or obvious knowledge”, it is not useful to compare it with the absence of knowledge. It goes without saying that no knowledge is not “clear or obvious knowledge”. Some knowledge may exist without amounting to “clear or obvious knowledge”. For example, suspicious circumstances are of no legal consequence. The bank must pay when the requirements for payment

are otherwise met, regardless of any suspicion (*Banco Nacional de Cuba v. Bank of Nova Scotia* (1988), 4 O.R. (3d) 100 (H.C.J.), at pp. 119-20).

[225] “Clear or obvious knowledge” is also a high standard. The test is not “whether a court will or may eventually determine that there was fraud, but rather when the [guarantor] looked at the situation, was it clear and obvious to [the guarantor] acting reasonably that there had been a fraud” (*Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. C.J. (Gen. Div.)), at p. 716 (emphasis added), aff’d on appeal (1997), 151 D.L.R. (4th) 574 (Ont. C.A.)). What is “clear or obvious” fraud in a legal sense is not necessarily “clear or obvious” in a commercial sense (M. S. Kurkela, *Letters of Credit and Bank Guarantees Under International Trade Law* (2nd ed. 2008), at p. 179). That is why, when a court is asked to review the legality of a bank’s decision to honour its obligation to pay pursuant to a demand guarantee, it must place itself in the exact same situation that the bank was in at that time, without resorting to *ex post facto* reasoning (*Angelica-Whitewear*, at pp. 100-102).

[226] The standard must be high for three reasons. First, as the Alberta Court of Appeal recently stated in *Pacific Atlantic Pipeline Construction Ltd v. Coastal Gaslink Pipeline Ltd*, 2024 ABCA 74, at para. 7 (CanLII):

The stricter standard ensures courts do not too readily interfere with the operation of letters of credit and undermine their utility and efficacy. The characteristic that gives letters of credit international commercial utility and efficacy is that they operate independently of disputes about performance of the underlying contract. They are intended to provide beneficiaries a “ready means of obtaining prompt payment”. Where a beneficiary presents an issuing bank a draft accompanied by documents

that appear on their face to be in accordance with the terms and conditions of the letter of credit, the bank is generally obliged to honour the draft: *Angelica-Whitewear* at 70-73. This autonomy permits “both assurance and immediacy of payment”: Lazar Sarna, *Letters of Credit: The Law and Current Practice*, 3rd ed (Toronto: Thomson Reuters, Release 2024-1) at 5:1 (WL Can).

[227] Second, the standard must be high to ensure that the parties to the underlying transaction, who had the opportunity to assess the risks of the transaction and to negotiate the law applicable to it, do not transfer those risks to the institution securing the transaction. By agreeing to provide a demand guarantee, the principal (here Bombardier) agrees to assume the risk of payment “being made notwithstanding that [it] can subsequently establish in litigation or arbitration that the dispute is to be resolved in [its] favour” (*Veolia Water Technologies, Inc. v. K+S Potash Canada General Partnership*, 2019 SKCA 25, 440 D.L.R. (4th) 129, at para. 43, citing *Ouais Group Engineering & Contracting Ltd. v. Saipem SPA*, [2013] EWHC 990 (Q.B.), at para. 45). Transferring the risk to the issuing bank would upset its role in this type of transaction. A bank’s only obligation is, and should remain, to strictly abide by the instructions incorporated in the demand guarantee. After all, banks stand to earn only marginal remuneration as guarantors. Their “relatively modest remuneration is based on the assumption that the bank’s task is confined to duties which can be performed quickly, easily and almost mechanically” (Bertrams, at p. 82).

[228] Third, the standard must be high because when fraud is alleged regarding a demand for payment under a demand guarantee, banks are faced with a dilemma. Making a wrong assessment on whether to honour the demand for payment exposes

the bank to a lawsuit by the beneficiary. However, by paying out, the bank risks failing to obtain reimbursement from the principal (P. Ellinger and D. Neo, *The Law and Practice of Documentary Letters of Credit* (2010), at p. 149). That is why the fraud contemplated by the clear or obvious standard is one [TRANSLATION] “that is blatantly apparent” (J.-P. Mattout, *Droit bancaire international* (4th ed. 2009, at p. 258). Any doubt must benefit the beneficiary: [TRANSLATION] “Fraud must not be open to interpretation; otherwise doubt will necessarily favour the beneficiary” (*ibid.*, at p. 259). As Waller J. observed in *Turkiye Is Bankasi AS v. Bank of China*, [1996] 2 Lloyd’s Rep. 611 (Q.B.D.), at p. 617:

It is simply not for a bank to make enquiries about the allegations that are being made one side against the other. If one side wishes to establish that a demand is fraudulent it must put the irrefutable evidence in front of the bank. It must not simply make allegations and expect the bank to check whether those allegations are founded or not. [Emphasis added.]

[229] It goes without saying that where allegations and counter-allegations are made regarding fraud, it is not for the bank to make a determination or take sides; otherwise it would find itself “entangled in an insoluble conflict of interests” (Bertrams, at p. 81). This task is best reserved for the courts of competent jurisdiction.

(3) Third-Party Fraud in the Context of Counter-Guarantees

[230] In *Angelica-Whitewear*, Le Dain J. wrote that fraud committed by a third party should not prevent an innocent beneficiary from demanding payment on a letter of credit (at p. 84). This statement must be adapted to the present context, which

involves a letter of guarantee backed by a counter-guarantee. Indeed, fraud committed by the beneficiary of a letter of guarantee is always third-party fraud for the purposes of the counter-guarantee. I agree that where the guarantor has clear or obvious knowledge of the beneficiary's fraud under the letter of guarantee but decides to pay nonetheless, that fraud can be attributed to the guarantor.

[231] What triggers the demand for payment under a counter-guarantee is payment under the guarantee. To determine whether a beneficiary's demand for payment under a counter-guarantee was fraudulent, a court must look past the clear line of separation between the guarantee and the counter-guarantee. This inquiry must not be transformed, however, into a dispute over the underlying contract (*Bombardier Inc. v. Hermes Aero*, 2004 CanLII 7014 (Que. Sup. Ct.), at paras. 35 and 40; *Banque Nationale du Canada v. CGU Cie d'assurance du Canada*, 2004 CanLII 49434 (Que. Sup. Ct.), at para. 49; *SNC-Lavalin Constructeurs international inc. v. Shariket Kahraba Skikda.spa*, 2010 QCCS 3236, at para. 27 (CanLII); *SNC-Lavalin Polska SP. ZOO v. BNP Paris Canada*, 2017 QCCS 3694, at paras. 40-46 (CanLII)).

VI. Application

[232] The issues in the present case can be summarized as follows: Does Eurobank's conduct prevent it from asking for payment under the Letter of Counter-Guarantee? My analysis first focuses on Eurobank's main argument, which is that in order to answer this question, the Court has to determine, for the purposes of the Letter of Counter-Guarantee, whether Eurobank should have made payment under the

Letter of Guarantee. Second, I discuss Eurobank's alternative argument, which is that this Court should consider only whether the demand for payment complies with the relevant terms of the Letter of Counter-Guarantee.

A. *The Impact of the Judgments of the Greek Courts for the Purposes of the Letter of Counter-Guarantee*

[233] Before reviewing the circumstances of HMOD's demand for payment and Eurobank's decision to honour it, I must mark an important departure from the reasoning of the courts below. In my view, and I say this with respect, the trial judge and the majority of the Court of Appeal erred by not giving any — not even a little — weight to the judgments of the Greek courts. They simply ignored them.

[234] At the outset, I acknowledge that the Greek judgments were not formally recognized under art. 3155 *C.C.Q.* and are therefore not enforceable in Quebec. However, this is irrelevant since the Letter of Guarantee was governed by Greek law and the parties to the Letter of Guarantee were not domiciled in Quebec. There would have been no reason to seek the recognition and enforcement of the Greek judgments because there was simply nothing in these decisions to be enforced in Quebec. Quebec courts have no *prima facie* jurisdiction over the merits of any dispute arising from the Letter of Guarantee.

[235] While the Greek judgments are not binding on Quebec courts, in this context, the principle of comity must guide any determination regarding the weight to

be given to them (*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205, at para. 17). It is important to bear in mind that when foreign judgments are received in evidence without being formally recognized in Quebec, they still make *prima facie* proof of the reported facts, of the proper application of the foreign law and of the foreign court's jurisdiction over the matter under art. 2822 C.C.Q. Foreign decisions cannot simply be ignored by Quebec courts (*Canadian Forest Navigation Co. v. R.*, 2017 FCA 39, [2017] 4 C.T.C. 63, at para. 16, quoting H. Kélada, *Reconnaissance et exécution des jugements étrangers* (2013), at p. 37). In the absence of any dispute as to the authenticity of a foreign decision or as to the foreign court's jurisdiction to render it, Quebec courts *must* recognize the [TRANSLATION] "factual effect" of that decision (G. Goldstein and E. Groffier, *Droit international privé*, t. I, *Théorie générale* (1998), at p. 372; C. Emanuelli, *Droit international privé québécois* (3rd ed. 2001), at No. 327; G. Goldstein and J. A. Talpis, *L'effet au Québec des jugements étrangers en matière de droits patrimoniaux* (1991), at pp. 14-16 and 53-57; J.-G. Castel, "*Kuwait Airways Corp. c. Irak*, 2010 CSC 40" (2011), 56 *McGill L.J.* 751, at p. 758). A foreign decision introduced as evidence is a factual constraint on the Quebec courts and should be treated as such; [TRANSLATION] "[i]t is not about extending the effects that the foreign decision has in a foreign country to Quebec, but about taking the foreign decision into consideration as a fact" (Goldstein and Groffier, at p. 372). It is of fundamental importance to give effect to foreign decisions introduced as evidence because they constitute [TRANSLATION] "a certain and precise basis of expectations" for the parties upon which they are binding (P. Mayer, V. Heuzé and B. Remy, *Droit international privé* (12th ed. 2019), at No. 372).

[236] Of course, a trial judge is free to determine the appropriate weight to be given to a foreign decision in light of all of the evidence (see, e.g., *Digiulian v. Succession de Digiulian*, 2022 QCCA 531). However, a trial judge cannot second-guess the reported facts or the proper application of the foreign law by the foreign court (Kélada, at pp. 37-38, quoting B. Audit and L. D’Avout, *Droit international privé* (6th ed. 2010), at No. 459; see also Emanuelli, at No. 326; Goldstein and Groffier, at pp. 373-74, quoting *Bauron v. Davis* (1897), 6 B.R. 547, at p. 553). Yet in dismissing the Kostis Decision, the trial judge wrote:

It is puzzling that Justice Kostis had come to the conclusion that “*it [could] not be speculated that third Respondent [Eurobank] made a commitment for the non-forfeiture of the Letter of Guarantee, while being duly represented with respect to such commitment*”. As we have seen, the proof of HMOD’s commitment not to draw on the Letter of Guarantee was out there in writing.

It’s even more confusing that Justice Kostis could have come to that conclusion in his six-page ruling, when one considers that his colleague Justice Pana had arrived at a completely different conclusion in [her] detailed and well-crafted 30-page ruling as regards HMOD’s conduct

The merits did not bring any new light that would bring this Court to another conclusion. HMOD’s conduct did constitute fraud under the exception rule to the autonomy of letters of credit.

. . .

That ruling, which was essentially of a procedural nature had decided that the conditions of an interlocutory injunctive order had not been met in this case, because the claimant would not suffer irreparable harm that could not be repaired by damages from a solvent party like the Hellenic Ministry of Defence (HMOD).

Consequently, HMOD’s Extrajudicial Invitation Protest ordered Eurobank to “*comply with the judgment*” that had ordered nothing to Eurobank.

Eurobank did nothing before this Court nor the Greek courts after it received HMOD's Extrajudicial Invitation Protest. It is also difficult to accept that Eurobank could not have gone back before the Greek courts as soon as the ICC Arbitral Tribunal Final Award was handed down or that it could not have been able to take action to recuperate the money it had paid to HMOD, even if the task might have been long and difficult. The judgment of Justice Kostis was based on the very premise that HMOD was a solvent defendant, as a member of the European Union and that it would be in a position to reimburse Eurobank if damages were granted by the Greek courts. Once the ICC Arbitral Tribunal Final Award had declared the Offsets Contract null and void, it makes little doubt that the Greek courts would have had no choice but to draw the inescapable consequence thereof and to refuse to order payment to HMOD or ultimately condemn the latter to reimburse Eurobank [Emphasis in original; paras. 189-202 (CanLII).]

[237] There was no dispute as to the authenticity of the Kostis Decision. It is also undisputed that the Greek courts had jurisdiction over the Letter of Guarantee given that the parties were domiciled in Greece and given that it was governed by Greek law (Offsets Contract, art. 28; Procurement Contract, art. 35.5, reproduced in A.R., vol. IV, at p. 65). While it was open to the trial judge to determine the weight to be given to the Kostis Decision as a fact informing whether HMOD's conduct was fraudulent, the trial judge could not consider the "merits" of the decision in doing so. However, that is precisely what he did: "The merits did not bring any new light that would bring this Court to another conclusion" (para. 191). In disregarding the Kostis Decision on the basis of its merits, the trial judge went against the rule codified in art. 2822 *C.C.Q.*, which provides that a decision "purporting to be issued by a competent foreign public officer makes proof of its content against all persons". Contrary to the position of my colleague on this point, this, in my view, amounts to an error of law. In these circumstances, the trial judge had to give the Kostis Decision a "factual effect", and he committed an error of law in giving it none.

[238] I am also of the view, contrary to my colleague's position, that the trial judge made reviewable errors, i.e., palpable and overriding errors, in disregarding the Kostis Decision.

[239] First, the trial judge misread the Pana Injunction and, as a result, unduly criticized the Kostis Decision that dismissed Eurobank's application for an interlocutory injunction. The trial judge found that it was "puzzling" and "even more confusing that Justice Kostis could have come to [the] conclusion [to dismiss Eurobank's application for injunctive relief] in his six-page ruling, when one considers that his colleague Justice Pana had arrived at a completely different conclusion in [her] detailed and well-crafted 30-page ruling as regards HMOD's conduct" (paras. 189-90). With respect, that finding by the trial judge was patently wrong. As HMOD explains, Judge Pana's ruling was confined to four lines on the last page of the document (A.F., at paras. 64-66). The remaining 28 pages reproduced Eurobank's application in its entirety. Judge Pana did not make any finding or ruling regarding HMOD's conduct in those four lines:

The court accepts the request for preliminary injunction.

The court allows [Eurobank] (temporarily) not to liquidate the Guarantee letter without suffering any legal consequences/penalties until the hearing of the petition for the interim measures on the hearing date set out below.

(A.R., vol. VI, at p. 29)

This error was overriding. It led the trial judge to dismiss as irrelevant the Kostis Decision when considering whether HMOD's third and final demand for payment was

fraudulent and whether Eurobank's decision to pay amounted to participation in that fraud.

[240] Second, it was simply wrong for the trial judge to determine that Eurobank could not rely on the Kostis Decision to justify its decision to pay under the Letter of Guarantee on the basis that Judge Kostis "had not ordered Eurobank to pay" (para. 198). The fundamental nature of demand guarantees must be kept in mind, namely their autonomy from the underlying contract. Under a demand guarantee, a bank has a near absolute obligation to pay the agreed sum on presentation of a compliant written demand. The Letter of Guarantee is an irrevocable and definite undertaking to pay. In light of the objective and spirit of such a letter, Eurobank had no choice but to pay unless it was specifically enjoined from doing so — and as per the Kostis Decision, it was not.

[241] Third, the trial judge clearly erred when he held that, in light of the Arbitral Award, "Greek courts would have had no choice but to draw the inescapable consequence thereof and to refuse to order payment to HMOD or ultimately condemn the latter to reimburse Eurobank" (para. 202). Irrespective of the fact that this assertion inappropriately questions the merits of the Kostis Decision and shows *ex post facto* reasoning, it was simply wrong to determine that the Arbitral Award resulted in this "inescapable consequence". Eurobank's claim against HMOD in Greece was dismissed by both the Athens Court of Appeal and the Hellenic Supreme Court in decisions which confirmed, albeit indirectly, the Kostis Decision. The Athens Court of Appeal

concluded that HMOD could call on the letter when it did. HMOD was no longer bound by the Written Undertaking at the time, it could not be bound by the Interim Order, and its demand was validly presented before any judgment of the ICC Arbitral Tribunal had been released (A.R., vol. III, at p. 104). The Athens Court of Appeal suggested that even though Eurobank was not entitled to repayment, Bombardier could seek recourse for unjust enrichment against HMOD once the Letter of Counter-Guarantee was paid out (pp. 103-5). The Hellenic Supreme Court confirmed the Athens Court of Appeal's conclusions in full and dismissed Eurobank's claim (Hellenic Supreme Court decision, reproduced in motion to adduce fresh evidence, at pp. 51-81).

[242] One ground of appeal raised by Eurobank before the Quebec Court of Appeal related to the trial judge's treatment of the Kostis Decision. In support of its position, Eurobank filed the Athens Court of Appeal's decision as new evidence. Mainville J.A. reviewed this decision but ultimately refused to give it any weight, confirming the trial judge's treatment of the Kostis Decision. In doing so, Mainville J.A. repeated the trial judge's error of law under art. 2822 *C.C.Q.* and the three palpable and overriding errors that I have identified (para. 65 (CanLII), citing *Sup. Ct. reasons*, at paras. 189-91). He also stated that "public policy considerations may compel a Quebec court to disregard a foreign law or a foreign judgment" (para. 67). In his view, the outcome reached by the Athens Court of Appeal was inconsistent with public order as understood in international relations, and the Greek judgments were rendered in contravention of the principles of reciprocity, order, and

fairness. He concluded that the public order exception in arts. 3081 and 3155(5) *C.C.Q.* prevented the Kostis Decision from being recognized and enforced in Quebec.

[243] Respectfully, Mainville J.A. erred in doing so. Articles 3081 and 3155(5) *C.C.Q.* cannot serve as a basis for disregarding the “factual effect” of the Greek judgments. Nor can the “balancing exercise” governing the recognition and enforcement of foreign decisions at common law, because that exercise is already codified in art. 3155(5) *C.C.Q.* (*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at paras. 27 and 30). Eurobank did not ask for Greek law to apply, but for the Greek judgments to be given a “factual effect”. Article 3081 *C.C.Q.*, which codifies the public order exception to the choice of law rules established in Book Ten of the *C.C.Q.*, is of no relevance (Goldstein and Groffier, at p. 267; Emanuelli, at No. 464). Further, no party sought the recognition or enforcement of the Greek judgments in Quebec under art. 3155 *C.C.Q.* The “factual effect” of a judgment is [TRANSLATION] “independent” from its recognition or enforcement in Quebec (J.-G. Castel, *Droit international privé québécois* (1980), at p. 846; Goldstein and Talpis, at p. 57; Goldstein and Groffier, at p. 372). The exception in art. 3155(5) *C.C.Q.* does not apply.

[244] Importing the public order exception or other similar considerations into the assessment of the weight to be given to a foreign decision as a factual constraint is unsupported by any authority and is contrary to the text and purpose of art. 2822 *C.C.Q.* In conducting such an assessment, Quebec courts cannot question whether the foreign

decision should be a fact on the basis of public policy considerations. It is either a fact or not. If it is a fact, it is an important one, especially when it binds the parties and informs their behaviour. Giving a “factual effect” to a foreign decision is very different from applying foreign law, recognizing that decision, or incorporating its solution into Quebec’s legal order.

[245] Even if I were to accept that public policy considerations can inform the weight to be given to the Greek judgments as evidence, I would be of the view that none apply. The Kostis Decision was absolutely central to understanding HMOD’s and Eurobank’s conduct at the time of payment. Yet Mainville J.A. did not mention any public policy considerations for disregarding it. When considering the weight to be given to the decision of the Athens Court of Appeal, he wrote that it should be disregarded because it “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” (para. 69).

[246] With respect, I disagree with that approach. At this juncture, it is important to note that the Arbitral Award was not relevant to Eurobank’s claim for unjust enrichment — which turns on whether HMOD had a right to call on the Letter of Guarantee at the time of payment — and, as a result, was properly not considered by the Athens Court of Appeal. Moreover, it would be inappropriate to attribute fraud to Eurobank for HMOD’s alleged breach of the Interim Order given that Eurobank was

not a party to the arbitration proceedings. This rationale, if applicable, should not be used to determine the evidentiary weight to be given to the Greek judgments, especially the Kostis Decision, in assessing Eurobank's conduct.

[247] It is also important to keep in mind that public order as understood in international relations is of “narrow application” and is “more limited” than its domestic counterpart (*Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 75; *R.S. v. P.R.*, 2019 SCC 49, [2019] 3 S.C.R. 643, at para. 53; see also S. Guillemard and V. A. Ly, *Éléments de droit international privé québécois* (2019), at p. 62; Emanuelli, at No. 298). Consideration of public order is not an invitation for Quebec courts to “consider the merits of the decision or of the foreign law” (*R.S.*, at para. 52; see also *Barer v. Knight Brothers LLC*, 2019 SCC 13, [2019] 1 S.C.R. 573, at para. 26). Foreign decisions can be disregarded only if the consequences of attributing evidentiary weight to them “would be so inconsistent with certain of the underlying values of the Quebec legal system as to be incapable of being incorporated into it” (*R.S.*, at para. 52). As I explain below, any breach of the Interim Order or of the Arbitral Award is merely contractual. Contrary to my colleague, I am of the view that an alleged contractual breach, which alone does not amount to fraud, does not create “clear conflicts” with, is not “manifestly inconsistent” with and does not constitute a “serious” divergence from Quebec public order as understood in international relations (*R.S.*, at paras. 53-54; see also Justice Kasirer's reasons, at para. 108). The consequences of attributing evidentiary weight to the decisions of the Athens Court of Appeal and of the Hellenic Supreme Court are not [TRANSLATION] “shocking” (Guillemard and Ly, at

p. 61), nor do they “offend our sense of morality” (*Beals*, at para. 75). Again, giving a “factual effect” to a foreign decision is different from incorporating the solution it provides into Quebec’s legal order. Public order as understood in international relations cannot justify disregarding the decisions of the Athens Court of Appeal and of the Hellenic Supreme Court.

[248] Mainville J.A. criticized the Greek courts for failing to give weight to the Quebec orders. With respect, he erred in doing so for the following reasons. First, the Quebec orders sought to govern the conduct of Greek parties under the Letter of Guarantee, which is expressly stated to be subject to Greek law (not Quebec law). Any dispute arising from the Letter of Guarantee was squarely within the jurisdiction of the Greek courts. In accordance with the principle of comity, it was for the Quebec courts to show deference to and respect for the jurisdiction of the Greek courts over the Letter of Guarantee (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1095). Second, one of the parties was not the usual litigant but a branch of the Greek government with sovereign rights, which it had decided to exercise. Third, it is doubtful that the Greek courts actually failed to give the appropriate weight to the Quebec orders. At the time the Kostis Decision was rendered, the only relevant Quebec order was the Prévost Injunction, which had already lapsed. Further, Judge Kostis had already ruled on the dispute by the time that the Davis Injunction was rendered. The Athens Court of Appeal and the Hellenic Supreme Court gave the appropriate weight to the Davis Injunction. They took it into account as a factual constraint on HMOD and Eurobank, while recognizing that it was not enforceable or binding in Greece, and rightly so.

[249] Furthermore, I agree with Hamilton J.A. that the decision to grant the Quebec orders in the first place was questionable (paras. 184-85). Any injunction granted under art. 940.4 *C.C.P.* must be grounded in one of the jurisdiction-conferring provisions of Book Ten of the *C.C.Q.* (F. Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international* (2005), at No. 397). The Quebec orders were issued on the basis of art. 3138 *C.C.Q.*, which provides that Quebec courts may order provisional or conservatory measures even if they have no jurisdiction over the merits of the dispute. Under that provision, courts should rarely, if ever, issue extraterritorial injunctions: [TRANSLATION] “[w]here there is an *absence of jurisdiction over the merits*, . . . the possible extraterritorial effect of the enforcement of [provisional or conservatory] measures will *directly* come into play in the decision to order them or not” (G. Goldstein, *Droit international privé*, vol. 2, *Compétence internationale des autorités québécoises et effets des décisions étrangères (Art. 3134 à 3168 C.c.Q.)* (2012), at p. 101 (emphasis in original); see also J. A. Talpis, with the collaboration of S. L. Kath, “*If I am from Grand-Mère, Why Am I Being Sued in Texas?*” *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at p. 18; Bachand, at n° 397). In this case, the Quebec courts could validly enjoin National Bank from paying under the Letter of Counter-Guarantee, assuming that there was a strong *prima facie* case of fraud. However, they could not validly enjoin HMOD or Eurobank from acting under the Letter of Guarantee. Interestingly, the majority of the Court of Appeal set aside the trial judge’s conclusion ordering HMOD to comply with the Arbitral Award because the trial judge had no jurisdiction in this regard (C.A. reasons, at para. 46). The same

reasoning should have applied to the provisional measures sought by Bombardier. In circumstances like in the instant case, it is not open to the Quebec courts to order the Greek state to act in a particular way, especially where sovereign rights are concerned.

[250] No public policy consideration can justify disregarding the Greek judgments. I agree with Eurobank that, “[a]s a bank domiciled in Greece, judgments rendered in Greece regarding [its] operations in Greece are obviously binding upon it, no matter where else those judgments might (or might not) be recognized and enforced” (A.F., at para. 178 (emphasis omitted)). However, the Quebec orders and the Interim Order were not enforceable in Greece. Any concerns about order and fairness arise from the Quebec courts’ unwillingness to give weight, as factual constraints, to the Greek judgments by which the parties are and were bound. As the late J.-G. Castel wisely pointed out, “[p]rotecting the justified expectations of the parties is an objective that is particularly important in private international law cases involving international business transactions, as ‘it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state’” (“The Uncertainty Factor in Canadian Private International Law” (2007), 52 *McGill L.J.* 555, at pp. 558-59, quoting American Law Institute, *Restatement of the Law, Second: Conflict of Laws 2d* (1971) at §6.g). This is especially true with respect to the Kostis Decision, which was contemporaneous with the facts of the present case.

[251] In my view, the courts below could not ignore the Kostis Decision in light of both art. 2822 *C.C.Q.* and the circumstances of this case. Nor could the decisions of the Athens Court of Appeal and of the Hellenic Supreme Court be disregarded insofar as they confirm the Kostis Decision. Had these judgments been duly considered as facts informing HMOD's and Eurobank's conduct for the purposes of assessing whether the fraud exception applies to the Letter of Counter-Guarantee, the only possible conclusion in the present case would have been that HMOD's demand under the Letter of Guarantee and Eurobank's decision to pay were valid.

B. *HMOD's Demand for Payment Was Neither Fraudulent Nor Tantamount to Fraud*

[252] I will now address the trial judge's conclusion that the requirements for the fraud exception, established in *Angelica-Whitewear*, were met. In light of all of the evidence, which I emphasize includes the Greek judgments, I am of the view that his conclusion cannot stand. The standard for fraud is a high one.

(1) HMOD's Written Undertaking

[253] In considering whether HMOD's conduct was fraudulent, the trial judge emphasized that HMOD went "against its word" when it demanded payment under the Letter of Guarantee (paras. 171-77). This was an error because he ignored the words of the Written Undertaking, the context in which it was provided, and the fact that it had

been validly withdrawn at the time of HMOD's demand. In other words, he failed to interpret the Written Undertaking as a whole.

[254] The Written Undertaking has eight paragraphs, which shed light on its context. The trial judge's conclusion ignores the first seven, which clearly state that HMOD retained all of its legal rights, including its sovereign rights under Greek public law, to draw on the Letter of Guarantee. The relevant paragraphs of the Written Undertaking read as follows:

2. The right of [HMOD] to unilaterally impose penalties to the supplier, when the latter refuses to or does not perform appropriately his contractual obligations, is clearly provided and described both in the presidential decree governing the said contract (p.d. 284/1989), and the contractual clauses themselves.

3. Such right of [HMOD] is inextricably connected with the exercise of public power; the penalties that are unilaterally imposed by the administration, in execution of contractual clauses, have the character of personal administration acts that can be challenged only before the Greek administrative courts.

4. [Bombardier] may neither forbid [HMOD] to, nor prevent it in any way from exercising its said sovereign right, namely to calculate and impose penalties, when the conditions set by law and contract concur.

7. . . . we reiterate that [HMOD] has not contemplated, on the contrary it has denied and is denying any and all claims raised by Bombardier Inc, which you represent. We also remind that we have expressly reserved all our legal rights, and we advise you once more that, always within the context of the arbitration procedure, we do not waive our sovereign rights.

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.]

(A.R., vol. IV, at pp. 197-99)

[255] These paragraphs all serve to preserve HMOD's "legal rights", including its sovereign rights, to demand payment under the Letter of Guarantee, and the trial judge erred in casting them aside as meaningless. By failing to interpret the Written Undertaking as a whole, the trial judge went against the clear rule of art. 1427 *C.C.Q.* that "[e]ach clause of a contract [must be] interpreted in light of the others so that each is given the meaning derived from the contract as a whole."

[256] On this point, I reach the same conclusions as Hamilton J.A. I also note that Judge Kostis, the Athens Court of Appeal, and the Hellenic Supreme Court interpreted the Written Undertaking in the same way. Judge Kostis expressly considered the Written Undertaking; he concluded that it could not "be speculated that [HMOD] made a commitment for the non-forfeiture of the letter of guarantee" (A.R., vol. VI, at p. 76). The Athens Court of Appeal similarly concluded that HMOD's Written Undertaking did not create "any false expectations on the part of [Bombardier]", given what HMOD explained in these paragraphs (A.R., vol. III, at p. 102). The Hellenic Supreme Court confirmed this conclusion (p. 66).

[257] The trial judge also ignored the important conditions set out in paras. 4, 7 and 8 of the Written Undertaking.

[258] The first sentence of para. 8 is of great importance. It confirms that the Written Undertaking was provided on the assumption that the arbitration hearing would proceed in June 2012 and would conclude shortly thereafter. The Written Undertaking was provided on April 20, 2012, before Bombardier raised its new issue regarding the validity of the Offsets Contract under art. 34 of the *Treaty on the Functioning of the European Union*, [2012] O.J. C. 326/47. As a result of this new issue, the arbitration proceedings were delayed for another year. The circumstances in which the Written Undertaking was provided had changed significantly: the hearing was extended well beyond June 2012, and termination was no longer “anticipated” in the same way. Clearly, the condition under which HMOD promised not to draw on the Letter of Guarantee no longer applied.

[259] I agree with Hamilton J.A. that HMOD could validly withdraw its undertaking. As he noted, HMOD did so by putting Bombardier in default on July 31, 2013. This means that when HMOD demanded payment on December 18, 2013, the Written Undertaking was no longer in effect. Drawing on the Letter of Guarantee in this context cannot be a basis for a finding of fraud.

[260] The Athens Court of Appeal reached the same conclusion, holding that “there exists no doubt regarding [HMOD’s] intentions not to [draw on the Letter of Guarantee] in the context of the hearing already started before the [ICC]” (A.R., vol. III, at p. 104). Once a new argument was made, there was no longer any obligation for HMOD to refrain from exercising its sovereign rights. The Athens Court of Appeal

concluded: “In view of said facts, it was not proved whatsoever by any evidence that the behaviour of [HMOD] during forfeiture and payment to [HMOD] of the [Letter of Guarantee] was evidently abusive” (p. 105).

[261] The Hellenic Supreme Court was of the same view. It acknowledged that HMOD “voluntarily and in good faith agreed” not to call the Letter of Guarantee while the arbitration proceedings were ongoing (p. 73). However, the Written Undertaking was provided on the assumption that “a decision on that matter was expected to be issued by the end of 2012” (*ibid.*). When Bombardier raised its new argument about the validity of the Offsets contract, it “changed the scope of the proceedings” (*ibid.*). The context in which the Written Undertaking was provided changed. The Hellenic Supreme Court recognized that. As a result, it concluded that “in the case at hand there was no abusive or fraudulent exercise of [HMOD]’s right to request seizure of the guarantee letter payable on first demand for reasons relating to the underlying relationship between it and the debtor, a Canadian company, nor its obligation to compensate [Eurobank] on that ground” (*ibid.*, at p. 70). Indeed, paras. 4, 7 and 8 of the Written Undertaking are clear that HMOD reserved its rights and that the Written Undertaking itself was not absolute.

(2) HMOD’s Breach of the Provisional Orders

[262] The trial judge held that HMOD’s demand for payment was made in contravention of the Interim Order and of the Davis Injunction.

[263] The context of each order is important. Both the Interim Order and the Davis Injunction were granted on the basis of the Written Undertaking, which I, like Hamilton J.A., have concluded was validly withdrawn. To obtain an injunction enjoining a beneficiary from calling for payment on a letter of guarantee, the applicant must establish “a strong *prima facie* case” that the beneficiary is “expressly disentitled” from demanding payment (*Veolia Water Technologies*, at para. 43; see also *Pacific Atlantic Pipeline Construction Ltd v. Coastal Gaslink Pipeline Ltd*, 2023 ABKB 736, at para. 46 (CanLII), *aff’d* 2024 ABCA 74, at paras. 6-7 and 9-10 (CanLII); *Sirius International Insurance Co. (Publ.) v. FAI General Insurance Ltd.*, [2003] EWCA Civ 470, [2003] 1 W.L.R. 2214, *rev’d* on other grounds [2004] UKHL 54, [2004] 1 W.L.R. 3251; *Simic v. New South Wales Land and Housing Corporation*, [2016] HCA 47, 260 C.L.R. 85).

[264] In *Pacific Atlantic Pipeline*, the principal applied for an injunction to enjoin the beneficiary from drawing on a standby letter of credit. The chambers judge considered a “verbal forbearance agreement” pursuant to which the beneficiary had agreed not to draw on the letter of credit pending arbitration. The chambers judge acknowledged that the beneficiary had made representations that it would not draw on the instrument, but concluded that these representations did not rise to the level of certainty that a strong *prima facie* case requires (para. 59). While each case is factually distinct, what is common to all of them is the high bar to establish that there is legal certainty that the beneficiary intended not to draw on the instrument and that this undertaking applied at all relevant times.

[265] In my view, the high bar that a strong *prima facie* case requires was not met for the Interim Order or for the Davis Injunction. This is because the Written Undertaking was validly withdrawn at the time. In fact, five days before HMOD called for payment under the Letter of Guarantee, HMOD notified Bombardier by letter that it intended to do so. HMOD attached the formal ministerial decision to that letter. Furthermore, the Written Undertaking expressly reserved HMOD's rights, including its sovereign rights, and it was provided in the context that the arbitration was expected to end in June 2012. But these circumstances changed when Bombardier raised a new argument in August 2012.

[266] Regardless of whether the Interim Order should have been issued, it is essential to characterize the nature of the breach of that order in determining the legal consequences that should flow from it. The Interim Order was issued by the ICC Arbitral Tribunal at Bombardier's request on August 13, 2013. The Tribunal found that Bombardier had a *prima facie* (I note, not a strong prima facie) case for interim measures in light of the Written Undertaking given by HMOD. All parties acknowledge that the Interim Order was not and could not be enforced by the Greek courts — or by the Quebec courts (2013 QCCS 6892, at para. 5 (CanLII)). Such a breach is not equivalent to a breach of a court order. That being said, it is true that HMOD and Bombardier had agreed that the ICC Arbitral Tribunal would have jurisdiction over any dispute that might arise between them. They were contractually bound to comply with any conservatory and interim measures ordered by the Tribunal. Therefore, HMOD's

breach of the Interim Order was a contractual breach. This alone does not amount to fraud.

[267] As for the Quebec orders, HMOD presented its third and final demand for payment on December 18, 2013, i.e., at a time when there was no injunction enjoining it from doing so. Indeed, the Prévost Injunction had expired on August 26, 2013, and the Davis Injunction was not issued until December 20, 2013, after the demand for payment had been presented by HMOD. That demand for payment was a logical continuation of the demand of August 12, 2013, that had been suspended by the Pana Injunction. Therefore, it was an error to conclude that HMOD's demand on December 18, 2013, was in contravention of a Quebec injunction. The Davis Injunction only ordered HMOD to withdraw its demand for payment after the fact. Again, the Davis Injunction was not enforceable in Greece, and it is doubtful that it should have been issued in the first place.

[268] Consequently, it was an error to conclude that HMOD's conduct was fraudulent or tantamount to fraud on the basis of either the Interim Order or the Davis Injunction. Neither an alleged breach of contract nor an alleged failure to comply with non-binding injunctions can ground a finding of fraud in the circumstances of this case. This was also the view of the Athens Court of Appeal, which was further confirmed by the Hellenic Supreme Court (A.R., vol. III, p. 104; Hellenic Supreme Court decision, at pp. 67 and 69).

(3) The Timing of HMOD's Demand for Payment

[269] Another point of concern for the trial judge was the timing of HMOD's demand (paras. 182-84). It may be tempting to look at HMOD's conduct after the fact and determine that it engaged in some kind of fraud. Its failure to repay the money that it obtained under the Letter of Guarantee, even after the Offsets Contract was found to be null and void, is certainly questionable. I must not, however, engage in impermissible reasoning by looking at HMOD's conduct today and inferring fraud from it. Rather, I must limit myself to what occurred before the payment under the Letter of Guarantee, without the benefit of hindsight. As long as the underlying contract is valid, a beneficiary is entitled to demand payment under a demand guarantee. Indeed, the consequences of a call on a demand guarantee "can be harsh, draconian and abrupt" without amounting to fraud (*Royal Bank of Canada v. Darlington*, [1995] O.J. No. 1044 (Lexis), 1995 CarswellOnt 2661 (WL) (C.J. (Gen. Div.)), at para. 181).

[270] It is essential to keep in mind that the formal ministerial decision to call the Letter of Guarantee was made on July 17, 2013. The first demand for payment was presented on August 5, 2013, after a demand letter had been sent to Bombardier on July 31, 2013. Eurobank refused to honour the demand because it did not comply with the terms and conditions of the Letter of Guarantee. The second demand for payment was made on August 12, 2013, but the Pana Injunction, which was issued after that demand was made, prevented Eurobank from paying. No new demand was presented while the Pana Injunction was in force. With respect, and as I explained above, the trial judge erred in not giving weight to the Greek judgments. The Kostis Decision, which set aside the temporary Pana Injunction, was central to HMOD's decision to reiterate

its demand for payment under the Letter of Guarantee. HMOD reiterated its demand for payment only once the Kostis Decision was rendered in its favour and the Pana Injunction was no longer in effect.

[271] That third and final demand for payment was presented on December 18, 2013, only two days after the Kostis Decision, which triggered the presentation of that demand, was rendered. The demand for payment as well as the Extrajudicial Invitation-Protest clearly stated that HMOD was drawing on the Letter of Guarantee pursuant to Judge Kostis's conclusions regarding the allegations of fraud (A.R., vol. VI, at pp. 79 and 149-50). It was totally unjustified — to say the least — for the trial judge to write that, in exercising its rights under Greek law and the Letter of Guarantee, “HMOD utilized what appears to be nothing short than legal blackmail and extortion in order to force Eurobank to pay” (para. 182 (emphasis added)).

[272] On the face of the Letter of Guarantee, it is clear that HMOD could validly demand payment under it despite any objection by Bombardier or any legal action before any court of law:

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. [Emphasis added.]

(A.R., vol. IV, at p. 112)

[273] Since Judge Kostis dismissed Eurobank's application for an injunction, the conclusion, from HMOD's perspective, was that it had a valid contractual right to draw on the Letter of Guarantee.

[274] When placed in its context, as is required by both the law and the facts of this case, HMOD's decision to draw on the Letter of Guarantee does not meet the high threshold for fraud. Though HMOD acted against the Interim Order by presenting a demand and against the Davis Injunction by not withdrawing that demand, neither the Interim Order nor the Davis Injunction was enforceable in Greece. HMOD clearly acted pursuant to the Kostis Decision when it demanded payment under the Letter of Guarantee. On the basis of the Kostis Decision, it cannot be said that HMOD's demand was "clearly untrue or false" or "utterly without justification" or that it was "apparent there was no right to payment".

[275] I agree with Hamilton J.A. that the trial judge erred in finding fraud on the basis of HMOD's conduct, that is, its alleged breach of the Written Undertaking, the Interim Order, and the Davis Injunction, as well as the timing of its demand. However, with respect, I do not agree with Hamilton J.A. that fraud can be inferred from

HMOD's decision not to repay Eurobank after losing before the ICC Arbitral Tribunal (paras. 200-201). Any finding regarding HMOD's intention to repay or not is speculative and is insufficient to ground a finding of fraud. Rather, its decision not to repay should be considered in light of the fact that the Arbitral Award had not yet been homologated in Greece. It could not be taken for granted that the Arbitral Award would be homologated in Greece and that HMOD would not comply with it if homologated. In this regard, I agree with Mainville J.A. that the trial judge had no jurisdiction to order HMOD to comply with the Arbitral Award (para. 46). At the time of the hearing before our Court, Bombardier had not yet sought the homologation of the Arbitral Award in Greece.

C. *Even if HMOD's Conduct Was Fraudulent or Tantamount to Fraud, Eurobank Was Innocent of That Fraud*

[276] I now turn to the question of whether, if I were to accept that HMOD's conduct was fraudulent or tantamount to fraud for the purposes of the Letter of Counter-Guarantee, the fraud exception would apply in the circumstances. I am of the view that, in light of all of the evidence, Eurobank (the beneficiary) has to be considered innocent of HMOD's (the third party) alleged fraud for the purposes of the Letter of Counter-Guarantee. Again, the Kostis Decision was central to Eurobank's decision to honour HMOD's demand for payment. When the Kostis Decision is taken into account, the only conclusion that can be drawn is that Eurobank did not have clear or obvious knowledge of fraud and did not participate in it. There is an inherent contradiction in the requirement that a reviewing court, in assessing whether a bank had sufficient

knowledge of any fraud, place itself in the position of the issuing bank at the time of payment, but at the same time discard the decisions of courts of competent jurisdiction that were binding on that bank at the time.

(1) Eurobank's Knowledge

[277] When a beneficiary of a demand guarantee has committed fraud, that fraud will not be attributed to the guarantor unless it is established that the guarantor had clear or obvious knowledge of that fraud. "Clear" in this context has been described as "unambiguous, easily understood, manifest, not confused and not doubtful", while "obvious" means "easily seen or recognised or understood, palpable, indubitable" (*Royal Bank of Canada*, at para. 209). Put simply, the fraud must be [TRANSLATION] "blatantly apparent" (Mattout, at p. 258).

[278] In assessing whether Eurobank had clear or obvious knowledge of the alleged fraud, our Court must place itself in the exact same situation that Eurobank was in by "standing in [its] shoes" (Kurkela, at pp. 179-80; *Unicredito Italiano S.P.A., Hong Kong Branch v. Alan Chung Wah Tang*, [2002] HKCFI 339, at para. 32 (HKLII)). Thus, I must confine myself to the facts as Eurobank knew them on December 24, 2013, the date when payment was made. Relying on information that Eurobank did not have at the time would be an error. For example, Eurobank did not know whether HMOD would be successful in the arbitration proceedings or what HMOD would do if it were to lose.

[279] The trial judge determined that Eurobank paid under the Letter of Guarantee “in full knowledge” of HMOD’s fraud (para. 210). He relied on the fact that Eurobank knew of the Written Undertaking as well as HMOD’s decision to draw on the Letter of Guarantee in contravention of the Interim Order and of the Davis Injunction. It is undisputed that Eurobank had knowledge of these facts; however, they cannot ground the conclusion that Eurobank had *clear or obvious knowledge of fraud*. Let me explain.

[280] After HMOD demanded payment under the Letter of Guarantee on August 5, 2013, Eurobank instituted its own proceedings for injunctive relief before the Athens First Instance Court. That application was ultimately dismissed on its merits by Judge Kostis on December 16, 2013. Eurobank, HMOD, Bombardier, and National Bank were all represented in these proceedings and presented their evidence as to the alleged fraud. Through this process, Judge Kostis was made aware of the arbitration proceedings, the Interim Order, the Prévost Injunction, and the Written Undertaking. Despite all of this, Judge Kostis determined that there were no grounds for granting the injunction: “. . . this does not render the behavior of [HMOD], who defends its rights, abusive; nor can such a behavior be speculated to be abusive . . .” (A.R., vol. VI, at p. 75). He refused to enjoin Eurobank from paying under the Letter of Guarantee.

[281] Eurobank was then faced with a judgment from a court of competent jurisdiction (I stress, the only court of competent jurisdiction for the purposes of the

Letter of Guarantee), which found that HMOD could validly draw on the Letter of Guarantee. The Kostis Decision, as a factual constraint, is a determinative element in the analysis of Eurobank's "clear or obvious knowledge". Eurobank had knowledge of HMOD's alleged fraudulent conduct; Eurobank and the other parties presented the Greek court with evidence as it existed at the time. However, Judge Kostis still held that HMOD could validly call on the letter because there was no reason to conclude that any fraudulent act had been committed. I fail to understand how it can be concluded that Eurobank had knowledge of fraud, let alone clear or obvious knowledge.

[282] After the Kostis Decision was rendered, HMOD reiterated its demand for payment on December 18, 2013. Eurobank subsequently contacted National Bank, informing it that it had no choice but to pay. It is clear from these exchanges that Eurobank was under the — in my view, correct — impression that HMOD was making its demand pursuant to the Kostis Decision. Indeed, Eurobank explained to National Bank that its application for injunctive relief had been dismissed by Judge Kostis. It further explained that the Pana Injunction was therefore no longer in effect. Given that there was no binding injunction, it had to issue payment to HMOD: "UNDER THE TERMS OF [THE LETTER OF GUARANTEE] AND APPLICABLE GREEK LAW WE HAVE THE OBLIGATION TO PAY THE BENEFICIARY THE AMOUNT OF US\$13,868,354.40 WITHIN THREE WORKING DAYS . . ." (A.R., vol. VI, at p. 84).

[283] After the Davis Injunction was granted on December 20, 2013, Eurobank even contacted HMOD, asking it to reconsider its demand for payment in light of that injunction (A.R., vol. VI, at pp. 173-76). This was on December 23, 2013. In response, HMOD served Eurobank with the Extrajudicial Invitation-Protest, ordering it, under penalty of both civil and criminal sanctions, to make payment under the Letter of Guarantee. “These were serious sanctions and Eurobank, as a Greek bank, was exposed to them” (C.A. reasons, at para. 215). In the Extrajudicial Invitation-Protest, HMOD wrote that the Davis Injunction could not be enforced in Greece given the opposite judgment rendered by Judge Kostis. Moreover, HMOD stressed that “the Greek courts would lack the jurisdiction to make a judgment upon a case of interim measures and provisional injunction order for non-payment of a letter of guarantee payable on demand, with the Canadian State as defendant party and beneficiary of the letter of guarantee and a Canadian Bank as debtor” (A.R., vol. VI, at p. 150).

[284] It was in this context that Eurobank had to make its decision. From Eurobank’s reasonable perspective (*Mitchell*, at p. 716), the Kostis Decision and the Extrajudicial Invitation-Protest would have dissipated any knowledge of fraud that it may have had. Indeed, Eurobank had specifically pleaded before the Greek courts in the summer of 2013 that HMOD’s “exercise of its right for the payment of the Letter of Guarantee [was] and continue[s] to be obviously abusive, in bad faith” (A.R., vol. VI, at p. 19). But Eurobank lost on this. So any remaining suspicions that Eurobank may have had became of no moment. This is certainly not “clear or obvious knowledge” where fraud “is blatantly apparent”. I agree with Hamilton J.A. that such

suspicious do not rise to the level of clear or obvious knowledge (paras. 217-18; *Banco Nacional*, at pp. 119-20).

(2) Eurobank's Alleged Participation

[285] The trial judge determined that Eurobank participated in HMOD's fraud by choosing to pay in "contravention of not one but two orders", i.e., the Interim Order and the Davis Injunction (para. 197). Although Eurobank "did not collude in any way" in HMOD's alleged fraud, the trial judge nevertheless determined that it "knowingly enabled fraud to produce its fruits" (paras. 196 and 205). He found that Eurobank had the choice of either complying with these two orders or complying with HMOD's Extrajudicial Invitation-Protest. From Eurobank's decision to comply with the latter, the trial judge inferred fraudulent participation.

[286] It is true that Eurobank's decision to pay was "voluntary" (Sup. Ct. reasons, at para. 196). However, the voluntariness of the payment is not the appropriate inquiry. When a bank pays under a demand guarantee, it always does so voluntarily. What matters is whether Eurobank was enjoined from paying by a court of competent jurisdiction on a *prima facie* case of fraud or whether it was presented with clear or obvious evidence of fraud and chose to pay nonetheless, neither of which, as I have concluded, was the case. What amounts to mere suspicions of "improper circumstances" does not meet this threshold. The difficulty in this case is that there were conflicting orders from different courts and from an arbitral tribunal. The reality

is that the only order that was enforceable against Eurobank, i.e., the Kostis Decision, did not enjoin it from paying. There was no “choice” to be made.

[287] While the trial judge determined that the Kostis Decision, in refusing injunctive relief, had not expressly ordered Eurobank to pay, the fundamental nature of demand guarantees must be kept in mind. As I have explained, under a demand guarantee, a bank is obliged to pay on presentation of a written demand for payment that complies with the terms and conditions of the guarantee. It is an irrevocable and definite undertaking to pay. The terms of the Letter of Guarantee itself reflect this principle:

... 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. [Emphasis added.]

(A.R., vol. IV, at p. 112)

[288] This language makes clear that Eurobank could not refuse payment without improperly exceeding its role as a guarantor and entering into the parties’ arena. It could be prevented from paying under the Letter of Guarantee only if an injunction on a strong *prima facie* case of fraud was issued by a court of competent jurisdiction. Eurobank sought that injunction, temporarily succeeded, then permanently failed. Bombardier — not National Bank — took action, but it instituted proceedings before a court that had no jurisdiction to enjoin Eurobank, or HMOD for that matter, regarding the Letter of Guarantee.

[289] The trial judge held that Eurobank should have chosen to comply with the Davis Injunction and the Interim Order instead of the Kostis Decision and the Extrajudicial Invitation-Protest. In my view, it is simply not reasonable to have expected Eurobank, when faced with this so-called “choice”, to comply with orders that were not enforceable against it. The Davis Injunction was not enforceable in Greece, and it is doubtful that it, like the Prévost Injunction, should have been issued in the first place. As for the Interim Order, Eurobank was not part of the arbitration proceedings and could not be bound by it (*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 62). It is noteworthy that the Athens Court of Appeal and Hellenic Supreme Court concluded that Eurobank had no choice but to pay. Payment had to be made under the Letter of Guarantee given its autonomous nature and the fact that there was no operative injunction. The Kostis Decision had dismissed Eurobank’s application for injunctive relief, and the Davis Injunction and the Interim Order were not binding in Greece (Hellenic Supreme Court decision, at p. 67, citing with approval the Athens Court of Appeal decision, reproduced in A.R., vol. III, at pp. 100-102). I could not say it better than Hamilton J.A. did: “. . . it is important that the injunction be sought from the right court and for the right reason” (para. 210).

[290] In my view, Eurobank’s conduct was that of an innocent beneficiary under the Letter of Counter-Guarantee. Eurobank played the role that it undertook to play pursuant to the Letter of Guarantee. It did not participate in any fraud, nor did it have clear or obvious knowledge of HMOD’s alleged fraud at the time of payment. Given

that the requirements for the fraud exception were not met, the autonomy of demand guarantees — their governing principle and *raison d'être* — had to prevail.

(3) The Apportionment of Risk Between the Parties

[291] I cannot accept Bombardier's argument that it was for Eurobank to bear the risks of payment in this context. It is clear from the text of the Letter of Counter-Guarantee that Eurobank did not assume any risk by undertaking to pay under the Letter of Guarantee, except in very narrow circumstances. It is also clear that Eurobank complied with the strict conditions stated in the Letter of Counter-Guarantee:

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 NINE. .00/100 UNITED STATES DOLLARS) PLUS COSTS, STAMP DUTIES AND VALUE ADDED TAX AS APPROPRIATE, WITH SAME VALUE RATE 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. [Emphasis added.]

(A.R., vol. IV, at p. 118)

[292] Once Eurobank complied with HMOD's demand and paid under the Letter of Guarantee, National Bank was obliged to honour Eurobank's demand for payment

under the Letter of Counter-Guarantee. The parties agreed to this causal chain of demands and payments, which was predicated on a “pay now, argue later” structure.

[293] Eurobank was not a party to the Offsets Contract. It is not rational from a commercial perspective that Eurobank, as the institution simply securing the transaction, would be the one stuck with the risk arising from that transaction. As I have explained, this conclusion would upset the role of banks in this type of transaction. While Bombardier suggests before this Court that the decision to have a counter-guarantee subject to Quebec law was designed to ensure that the fraud exception would be available, there is evidence to suggest that the Letter of Counter-Guarantee was instead required by Eurobank to mitigate any risk on its part. In addition, it is standard commercial practice for local banks securing transactions between local and foreign actors to seek security from a foreign bank instead of dealing directly with the foreign party (*L’Heureux and Lacoursière*, at pp. 430-31; *Mattout*, at pp. 241-44; *Kurkela*, at p. 14; *Bertrams*, at pp. 118-19; *Ellinger and Neo*, at p. 335; *Droit bancaire: Institutions, comptes, opérations, services* (8th ed. 2010), by J. Stoufflet, at No. 880). By ensuring that the Letter of Counter-Guarantee was secured by a bank that was local for Bombardier, Eurobank expected to be paid. It made sure that it would not have to deal with onerous proceedings in Quebec should any dispute regarding payment arise.

[294] Since the requirements for the fraud exception are not met, this leaves only the Letter of Counter-Guarantee. As Eurobank argues, it complied with the only

obligation that it had under the Letter of Counter-Guarantee — it indicated to National Bank that it had received a compliant demand for payment from HMOD. The conditions and formalities of the letter were respected; nothing in this context can prevent National Bank from honouring this demand. Respecting the autonomy of the Letter of Counter-Guarantee and considering it independently from the underlying dispute leads to the conclusion that National Bank is obligated to honour the demand for payment presented by Eurobank.

D. *Impact of the Declaration of Nullity of the Offsets Contract on the Letters of Guarantee and Counter-Guarantee*

[295] As an alternative argument in support of its application, Bombardier asks this Court to enjoin National Bank from paying under the Letter of Counter-Guarantee because the Offsets Contract was “declared null and void *ab initio*” by the ICC Arbitral Tribunal (A.R., vol. VI, at p. 143). This position is premised on two arguments.

[296] First, Bombardier argues that Eurobank cannot be paid under the Letter of Counter-Guarantee because it must be deemed to have never existed under art. 1422 C.C.Q. (R.F., at paras. 121 and 128). The trial judge upheld this argument at first instance as follows: “It is obvious that the Letter of Guarantee that was declared null and void *ab initio* by the ICC Arbitral Tribunal Final Award which has been homologated by this Court, the Counter-Guarantee must follow suit and that [National Bank] should be ordered not to pay Eurobank” (para. 240). With respect, he erred in stating this. The ICC Arbitral Tribunal declared only the relevant clauses of the Offsets

Contract void *ab initio*, not the Letter of Guarantee. Moreover, such a statement by the trial judge runs contrary to the well-established principle of autonomy. Where the contract underlying a demand guarantee is found to be null, the guarantee is not as a result invalid for being contrary to public order under art. 1411 *C.C.Q.* Under a demand guarantee, the bank agrees to pay on simple request, regardless of any underlying dispute. That obligation is “separate and distinct” from the underlying contract (G. B. Graham and B. Geva, “Standby Credits in Canada” (1984) 9 *Can. Bus. L.J.* 180, at p. 189; L’Heureux and Lacoursière, at pp. 428-29). The nullity of the Offsets Contract does not make the cause of National Bank’s obligation to pay disappear under art. 1371 *C.C.Q.* The Letter of Counter-Guarantee therefore remains valid.

[297] Second, Bombardier argues that the Letter of Counter-Guarantee should not be enforceable because the Offsets Contract was illegal (R.F., at paras. 126-27). In the present case, it is not necessary to discuss this argument at length since at the time Eurobank paid under the Letter of Guarantee and presented its demand under the Letter of Counter-Guarantee, the Arbitral Award had not been rendered. Furthermore, Eurobank was not a party to the arbitration proceedings and was not able to assess whether HMOD would win or lose. Imposing an unprecedented illegality exception would be to treat Eurobank “unfairly” after it “performed [its] part of the bargain” (L. Sarna, *Letters of Credit: The Law and Current Practice* (3rd ed. (loose-leaf)), at p. 5-16.1). Eurobank should not be on the hook for the nullity of the Offsets Contract. Securing the transaction was supposed to be risk-free for Eurobank. Its aversion to risk

was the very reason for the issuance of the Letter of Counter-Guarantee. Ultimately, “[t]he risk was Bombardier’s and it must assume it” (C.A. reasons, at para. 230).

[298] In any event, the enforceability of the Arbitral Award against HMOD remains unsettled. Indeed, the Arbitral Award has not yet been homologated in Greece, so one cannot speculate as to the final result.

VII. Conclusion

[299] I would allow the appeal, set aside the judgments rendered on appeal and in first instance, and dismiss the action instituted by Bombardier against Eurobank and National Bank, the whole with costs to Eurobank throughout.

Appeal dismissed with costs, KARAKATSANIS and CÔTÉ JJ. dissenting.

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