

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH
PEOPLE

PARIS COURT OF APPEAL
International commercial chamber

DIVISION 5 - CHAMBER 16

DECISION DATED OCTOBER 19, 2021

(no. /2021, 9 pages)

Registration no. on the general roll: **RG no. 20/03074 – Portalis no. 35L7-V-B7E-CBPAO**

Decision deferred before the Court: Judgment of 17 October 2019 – Commercial Court of PARIS - RG no. 2018026734

APPELLANT

SAIB SOCIETE ARABE INTERNATIONALE DE BANQUE

Acting through all legal representatives, domiciled in this capacity at such registered office

56 Gameat El Dowal El Arabia Street, Mohandessin Giza
P054 EL MOHANDESSIN (EGYPT)

Represented by _____ of the _____

attorney at the PARIS Bar, court registration: _____

Assisted by Me _____ attorney at the PARIS Bar, court registration: _____, and
by Me _____ attorney at the Cairo Bar

RESPONDENT

**ABC INTERNATIONAL BANK PLC a company governed under English law,
acting for all legal purposes and represented by its legal representatives domiciled in
this capacity at such registered office**

1-5 Moorgate London - EC2R 6AB
EC2R LONDON - UNITED KINGDOM

Represented by Me _____, attorney at the PARIS Bar, court registration:

Assisted by Me _____ attorney at the PARIS Bar

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COMPOSITION OF THE COURT:

The case was heard on September 7, 2021, in a public hearing, before the Court composed of:

Mr. François ANCEL, President
Mrs. Fabienne SCHALLER, Judge
Mrs. Laure ALDEBERT, Judge

who have deliberated thereon

Court clerk, during the proceedings: Najma EL FARISSI

DECISION:

- IN ADVERSARIAL PROCEEDINGS
- Upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President, and Najma EL FARISSI, Court clerk, to whom the minute of the decision were issued by the signatory magistrate.



no. 00875

I- THE FACTS AND PROCEEDINGS

• Facts

- 1- ABC INTERNATIONAL BANK PLC (hereinafter ABC Bank) is a financial institution governed under English law specialising in the financing of activities related to international trade which has a branch in France.
- 2- Société Arabe Internationale de Banque (hereinafter "SAIB" bank) is an Egyptian bank.
- 3- In October 2014 SAIB Bank requested the French branch of the ABC Bank to issue a first-ranking guarantee to cover the possible default of its Egyptian Peugeot distributor client, Cairo for Development and Cars Manufacturing (hereinafter the "CDCM" company), in the performance of the distribution agreement entered into between the two companies.
- 4- Following this request, the SAIB bank proposed to issue a counter guarantee.
- 5- It is in this context that on October 13, 2014 Bank ABC issued a first demand guarantee (LGO 10944) in favour of Peugeot for an amount of USD 20,000,000, effective as of December 4, 2014.
- 6- In consideration of the issuance of this guarantee, on October 23, 2014, SAIB Bank issued a counter-guarantee to the ABC Bank referenced LG ARM 5900/14 for an amount of USD 20,000,000 under the same terms and conditions.
- 7- On February 20, 2018, Peugeot presented a claim for payment to ABC Bank represented by its branch in France in the amount of USD 17,139,461.36 in execution of its guarantee LG 010944 corresponding, according to its declaration, to the amount of Peugeot invoices unpaid on their due date by the company CDCM.
- 8- On February 26, 2018 ABC Bank demanded payment from SAIB Bank in execution of its counter-guarantee referenced LG ARM 5900/14.
- 9- On February 28, 2018, the SAIB bank contested that it had to do so on the grounds that, after checking its accounts, some invoices had already been paid.
- 10- On March 2, 2018, ABC made a payment of USD 17,139,461.36 to Peugeot.
- 11- The SAIB bank maintained its refusal to execute its guarantee for the requested amount acknowledging that it owed only the amount of USD 12,274,963.62 on the grounds that the balance (an amount of USD 4,864,497.74) had already been paid.

• Proceedings

- 12- It is in this context that by deed of May 11, 2018, ABC Bank summoned SAIB before the Paris Commercial Court in order to be ordered to pay the amount of USD 17,139,461.36 in addition to damages for late payment.
- 13- **By judgment of October 17, 2019, the Paris Commercial Court, with the benefit of provisional execution, proceeded as follows:**
 - held that the counter-guarantee L/G ARM 5900/14 issued by ARABE INTERNATIONALE DE BANQUE in favour of ABC INTERNATIONAL BANK PLC, a company incorporated under English law, is a first demand guarantee,
 - ordered ARABE INTERNATIONALE DE BANQUE to pay



ABC INTERNATIONAL BANK PLC the amount of USD 17,139,461.36 in addition to damages corresponding to interest at the rate of 2.49669% as from the due date of payment, i.e., February 26, 2018, with the interest being capitalised,

- ordered ARABE INTERNATIONALE DE BANQUE to pay ABC INTERNATIONAL BANK PLC the amount of €5,000 under Article 700 of the Code of Civil Procedure,
- dismissed ARABE INTERNATIONALE DE BANQUE's claims,
- ordered ARABE INTERNATIONALE DE BANQUE to pay the costs.

14- By declaration of February 10, 2020, SAIB Bank appealed against the judgment.

II / THE PARTIES' CLAIMS

15- In its latest submissions, communicated electronically on June 28, 2021, SAIB bank requested of the Court, in accordance with Article 1240 of the Civil Code, as follows:

- To declare its appeal admissible and well-founded,

Accordingly,

- Overturn the judgment of the Paris Commercial Court (3rd Chamber) rendered on October 17, 2019, insofar as it:

- held that the counter-guarantee L/G ARM 5900/14 issued by ARABE INTERNATIONALE DE BANQUE in favour of ABC INTERNATIONAL BANK PLC, a company incorporated under English law, is a first demand guarantee,
- ordered ARABE INTERNATIONALE DE BANQUE to pay ABC INTERNATIONAL BANK PLC the amount of USD 17,139,461.36 in addition to damages corresponding to interest at the rate of 2.49669% from the date on which payment was due, i.e., February 26, 2018, with the interest being capitalised
- ordered ARABE INTERNATIONALE DE BANQUE to pay ABC INTERNATIONAL BANK PLC the amount of €5,000 under Article 700 of the Code of Civil Procedure,
- Dismissed ARABE INTERNATIONALE DE BANQUE's claims,

And, ruling again:

- To limit the amount that Bank ABC is entitled to claim as counter-guarantee at the amount of USD 12,274,963.63, already paid by SAIB,

Accordingly:

- Dismiss ABC Bank's claim for payment of the amount of USD 4,864,497.74 unduly received, with interest paid by SAIB, and increased by legal interest until the date of payment.

Insofar as necessary:

- Order ABC Bank to reimburse the amount of USD 4,864,497.74 unduly received, with interest paid by SAIB, and received, together with the interest paid by SAIB, in addition to the legal interest until the date of payment,
- Order ABC Bank to pay the amount of 250,000 euros as damages to compensate for the damage caused by the abusive procedure and the harm to its reputation,
- Dismiss ABC Bank's claims and submissions,
- Order ABC Bank to pay Société Arabe Internationale de Banque the amount of 75,000 euros under Article 700 of the Code of Civil Procedure.
- Order ABC Bank to pay all the costs before the lower court and for the Appeal.

16- In its latest submissions communicated electronically on July 30, 2021, ABC Bank requested of the Court, in accordance with Articles 1231-6, 1343-3 and 2321 of the Civil Code and RUGD 758, as follows:



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As a principal claim,

- To rule that it is well-founded to request from Société Arabe Internationale de Banque the payment of 17,139,461.36 USD in execution of the counter-guarantee L/G ARM 5900/14;
- Dismiss any argument based on the base agreement entered into between Automobiles Peugeot and CDCM asserted by Société Arabe Internationale de Banque to oppose the payment;

Consequently,

- Confirm the judgment of October 17, 2019 in all its provisions;
- Confirm the order of Société Arabe Internationale de Banque to pay the amount of USD 17,139,461.36, in addition to damages corresponding to interest at the rate of 2.49669% from the due payment date, i.e., February 26, 2018, until payment is made, with the interest being capitalized, except for any adjustment thereof;

In the alternative,

- Order Société Arabe Internationale de Banque to pay ABC INTERNATIONALE BANK PLC the amount of USD 17,139,461.36, in addition to interest at the legal rate from the due date of payment i.e., February 26, 2018, until the date of full payment of the amounts due, with the interest being capitalised, except for any adjustment thereof;

In any event,

- Dismiss Société Arabe Internationale de Banque's claim, including the reimbursement of USD 4,864,497.74 and the payment of damages for the prejudice caused by abusive proceedings and harm to its reputation;
- Order Société Arabe Internationale de Banque to pay the amount of 85,000.00 euros under Article 700 of the Code of Civil Procedure and order it to pay all the costs;

17- The parties have accepted the protocol of procedure applicable to the International Commercial Chamber.

18- The close of the investigation procedure was pronounced on August 31, 2021.

III/ THE PARTIES' PLEAS

19- SAIB asserts in substance that, regardless of the name given to the guarantee, it issued a counter-guarantee which is a Stand By Letter of Credit (SLBC) and that it was necessary to present the corresponding invoices and bills of lading made out in the name of the issuing bank "marked to notify the importer" in order to implement the guarantee, which was not accomplished.

20- In support of its refusal to pay, it asserts firstly that it has the right to verify the documents produced in accordance with the provisions of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit endorsed by the ICC on June 21, 1999, in particular, the provisions of Articles 16 and 19, which relate to the examination of the claim and the exceptions to the payment obligation.

21- In this respect it maintains, without ignoring the fact that the guarantee is autonomous and independent of the base agreement:

- that it was necessary to present the invoices and the corresponding bills of lading (B/L), drawn up in the name of the issuing bank (SAIB), marked 'to be notified to the importer', and to prove the claim by means of compliant documents;

that the amendment of November 14, 2014 exempting Peugeot from having to produce copies of the invoices and bills of lading did not call into question the terms of the counter-guarantee, which obliged the parties to cite the documents for verification;

- that Peugeot's declaration included previously paid invoices in the amount of USD 4,864,497.74, which is evidenced from its own books and which it can rely on in accordance with Article 2 of the Uniform Guarantee Rules;

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- that some invoices had already been paid and in reality, the guarantee did not cover the CDCM debtor's default;
- that under the guise of allegedly compliant documents, ABC Bank intentionally paid on the basis of a false declaration by the beneficiary with a view to obtaining a second payment of certain invoices;
- that this conduct is of a fraudulent nature authorising it to refuse to execute its counter-guarantee, in accordance with what is agreed internationally and, in particular, Article 19-1 of the aforementioned United Nations Convention.

22- In this regard, it requests acknowledgment that the Beneficiary's fraud is evident and that ABC Bank, without listening to its precautions, has committed a fault, even complicity in fraud, by paying the Beneficiary against the terms agreed in the guarantee for which it must provide compensation and consequently reimburse the surplus.

23- Concerning the claim for damages for abusive procedure, SAIB bank asserts that the action taken by ABC Bank and the subsequent procedure is abusive insofar as SAIB bank had to appear before a court located on another continent; that ABC Bank seized its bank accounts, causing irreparable damage to its reputation in the international banking community.

24. In response, ABC Bank asserts that the counter-guarantee issued by SAIB is a first demand guarantee governed by the Uniform Rules for Demand Guarantees issued by the International Chamber of Commerce ("URDG 758") and French law; that no matter how the act is classified, it is in any case an autonomous guarantee in relation to the base agreement.

25- It asserts on the basis of the independence of the guarantee and counter-guarantee from the base agreement that:

- it was obliged to pay Peugeot on the basis of the presentation of the compliant documents without being able to discuss or delay the payment for any reason whatsoever and that in execution of the counter-guarantee, SAIB bank was obliged to pay the amounts paid by the latter to the beneficiary on first written demand
- it was not for SAIB Bank to verify whether the amounts were actually due according to the base agreement;
- the exceptions drawn from the base agreement should, if necessary, be the subject of an action by the principal, CDCM, against the beneficiary, in this case Peugeot, but cannot prevent payment.

26. It also contests the inaccuracy of the declaration of Peugeot's unpaid invoices and hence any fault or bad faith on its part, asserting that the amounts corresponding to the invoices for which payment was claimed under the guarantee by Peugeot take account of the partial payments, thus eliminating the alleged risk of paying twice.

27- Finally, it opposes the claim for damages for abusive procedure and requests, in principal, the confirmation of the decision which granted it interest at the Libor rate of 2.49669% to compensate for the delay in payment since its maturity date, i.e., February 26, 2018, alternatively that the amount to which the SAIB bank will be ordered to pay be accompanied by the legal interest rate by ordering the capitalisation of interest.

IV/ GROUND FOR THE DECISION

Concerning the applicable law

According to Article 3 of the EC Regulation no.593/2008 of June 17, 2008 on the law applicable to contractual obligations, called Rome I, "the agreement shall be governed by the law chosen by the parties".



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29- According to recital 13 of the Regulation, which "does not prohibit the parties from incorporating by reference in their agreement a non-State law or an international convention", the parties may refer by express stipulation to a non-State legal order such as private codifications.

30- However, this reference cannot be taken as a choice of law to govern the contractual relationship.

31- It is therefore necessary to firstly determine the applicable state law.

32- In this case, it is evident from the terms of the guarantee LG 0109944 issued by ABC Bank in favour of Automobiles Peugeot in Paris on October 24, 2014 and the counter-guarantee ARM -LG 5900/14 issued by SAIB Bank in favour of ABC Bank on October 23, 2014, respectively, that the parties have designated the applicable French law.

33-II is indeed expressly stipulated by each document:

- LG 0109944 "This guarantee is governed by French law; Place of Jurisdiction is Paris" i.e., "this guarantee is subject to French law- the courts of Paris have jurisdiction"
-ARM LG 5900/14 "This counter guarantee shall be governed by and construed under the applicable laws of France. Any dispute that may arise in connection therewith shall be submitted to the Paris Courts".

34- Accordingly, it is appropriate to apply French law to this dispute.

35- The fact that the undertaking is governed by French law does not prevent the application of the Uniform Rules for Demand Guarantees - publication 758 - RUGD - to which the parties have expressly referred in the deed, insofar as these rules are part of the agreement and can be enforceable against the parties, which is not contested by the latter.

36- On the other hand, as the parties do not refer to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit referred to by SAIE Bank, the application of which is subject to the parties' intent, these provisions will not be applied hereto.

Concerning the qualification of the counter-guarantee

37- If the parties disagree on the qualification of the commitment to be retained, first demand guarantee or stand-by letter of credit (SLBC), they acknowledge that their commitment is an autonomous guarantee independent of the base agreement or the underlying contract.

38- The definition of an autonomous guarantee in French law is provided by Article 2321 of the Civil Code which stipulates as follows:

"An autonomous guarantee is an undertaking by which the guarantor undertakes, in consideration of an obligation undertaken by a third party, to pay an amount either on first demand or according to agreed terms. The guarantor is not bound in the event of manifest abuse or fraud by the beneficiary or collusion by the latter with the principal. The guarantor may not raise any exception relating to the obligation guaranteed. Unless otherwise agreed, this security shall not follow this guaranteed obligation".

39- This definition does not differ from that provided by Article 5 of the Uniform Rules on the Independence of Guarantees and Counter-Guarantees 758, according to which:
"A guarantee is per se independent of the underlying relationship and claims and the guarantor is by no means affected or committed by these relationships; (...)



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"A counter-guarantee is per se independent of the guarantee, the underlying relationship, the claim of any other counter-guarantee to which it refers and the counter-guarantor is by no means affected or bound by that relationship. Any reference in the counter-guarantee to the underlying relationship for the purpose of identification thereto does not affect the independence of the counter-guarantee. The counter-guarantor liable to pay under the counter-guarantee cannot raise exception pleas arising from any relationship other than a relationship between the counter-guarantor and the guarantor or other counter-guarantor in whose benefit the counter-guarantee is issued."

39- It is not disputed that the stand-by letter of credit is an Anglo-Saxon variant of the autonomous guarantee in that it is independent of the main transaction and the beneficiary is not required to establish non-performance.

40- It is not subject to any particular legislation and follows the regime of the general laws applicable to letters of credit when such legislation exists.

41- It is necessary to determine the nature of the commitment.

42- In this case, it is not disputed that it was at the request of SAIB bank that ABC bank issued a guarantee (LGO 10944) in favour of Peugeot (beneficiary) in the context of an agreement entered into between Automobiles Peugeot and CDCM (importer in Egypt and principal) for the supply of vehicles and spare parts and services for an amount of 20,000,000 USD.

43- This guarantee became effective on December 4, 2014, after the termination of a guarantee previously issued by Al-Ahli United Bank.

44- According to the terms of the Guarantee issued (LGO 10944) by ABC Bank, the free translation of which is not disputed, the bank undertook in the following terms for the benefit of Automobiles Peugeot:

- *"the bank guarantee is provided as security for payments due for the supply of vehicles, spare parts and services (all transport documents must be issued to the order of the company SAIE marked notify the importer)"*

- *"upon CDCM's order, we irrevocably and unconditionally undertake to pay to Automobiles Peugeot on first demand, irrespective of the validity and effects of the agreement entered into between Automobiles Peugeot and CDCM Egypt and waiving all rights of discussion and defence in relation thereto, all amounts within the threshold of USD 20,000,000."*

- upon presentation by Peugeot of a signed request for payment, indicating that:

1 - *"(A) the goods have been delivered in accordance with the agreement*

(B) payment has not been received when due for the amount claimed under the guarantee

The declaration of invoices due indicating the amount and date of the invoices as well as the dates and numbers of the corresponding bills of lading".

2- *a copy of the B/Ls issued to the order of SAIB with the indication notified to the importer with the related invoices."*

45- In consideration of the issuance of guarantee in favour of Automobiles Peugeot, SAIB bank has by message entitled "counter guarantee SAIB L/G ARM 5900/14" indicated on October 13, 2014 that it was committed in favour of ABC Bank in these terms: *"in consideration of your issuance of the aforementioned counter-guarantee, we hereby irrevocably and unconditionally undertake to pay on first written demand by swift message any amount within the threshold of USD 20,000,000 (twenty million USD) in addition to the commissions, interest, taxes and expenses which you have been requested to pay to the beneficiary Automobiles Peugeot, under the terms of your own counter-guarantee."*



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46- Accordingly, it results from the foregoing that SAIB bank, irrevocably and unconditionally committing itself under the same conditions and terms of the guarantee of ABC Bank and by waiving the assertion of any argument in relation to the underlying agreement entered into between Peugeot and GDCM has assented to a first-demand guarantee within the meaning of the provisions of Article 2321 of the Civil Code.

47- No element contrary to this designation, which appears in the deed, evidences that it is, in reality, a standby letter of credit. It is also observed that whether the deed is qualified as a first demand guarantee or a standby letter of credit, the commitment remains subject to French law in reference to the Uniform Guarantee Rules -758- for which the major characteristic is the unenforceability of exceptions.

48- It is therefore appropriate to examine the counter-guarantor's refusal to perform in the light of French law and the codification of the Uniform Guarantee Rules No 758.

Concerning the refusal by SAIB bank to execute the payment

Concerning the compliance of the call for guarantee:

49- SAIB bank, without questioning the independent nature of the guarantee in relation to the base agreement, i.e., the supply agreement between Peugeot and CDCM, contests that the call for guarantee met the conditions set by the parties.

50- It is not contested that, by virtue of the principle of freedom of contract, the conditions are set by the parties.

51- Therefore, it is necessary to examine whether the guarantee was duly called in accordance with the terms and conditions set by the parties.

52- In this case, it is not disputed that, according to the provisions of the deed, the first-ranking guarantee issued by ABC Bank was subject only to the presentation of the documents mentioned in the undertaking, namely a declaration by Peugeot including the required information, it being acknowledged that the parties had waived the right to produce the bills of lading and the invoices.

53- Indeed, although the terms of the Guarantee initially provided that Peugeot Automobiles had to submit a copy of the bills of lading and invoices, they were amended on November 14, 2014 at the request of SAIB Bank (which was also in possession of the bills of lading), to require only a declaration mentioning the invoices due, with an indication of the amount and date of the invoices, as well as the dates and numbers of the bills of lading, which was provided.

54- However, Peugeot regularly produced in support of its claim for payment the declaration that the invoices for the goods delivered in accordance with the contract, in the amount of USD 17,139,461.36, were unpaid on their due date according to the list of invoices due with an indication of the amount and date of the invoices, as well as the dates and numbers of the bills of lading in accordance with what the parties had agreed.

55- Contrary to the appellant's assertions, the verification of the document attempting to call into question the amount claimed on the grounds that certain invoices had been paid previously cannot defeat the claim for payment, since it requires discussing the debtor's payments and to reinstating the enforceability of exceptions into the



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discussions, under the guise of document compliance, which cannot affect the guarantee, regardless of its qualification.

56- It must therefore be held that the implementation of the first-ranking guarantee and then of the counter-guarantee in the light of the elements produced evidently complied with the conditions set by the parties in their undertaking and that the ground based on the inaccuracy of the amount owed by CDCM, verified by the appellant, could not defeat the claim for payment.

Concerning the exception of fraud

58- Pursuant to paragraph 2 of Article 2321 of the Civil Code, the guarantor may not be held liable in the event of manifest abuse or fraud by the beneficiary or collusion by the beneficiary with the principal.

59- Where the issue is not the calling of the first-ranking guarantor, but the latter's calling of the counter-guarantor, the abuse, fraud or collusion of the final beneficiary can only be taken into account by the court if it is established that the guarantor was aware thereof.

60- Yet, in this case, even if the fraudulent or abusive nature of the call for guarantee were to be established, which is seriously contested by the respondent, who maintains that the invoices in support of the call for guarantee took account of the partial payments that had been made, there is nothing to evidence that the guarantor, at the time of the call for guarantee, was aware of any abuse, fraud or collusion with the beneficiary.

61- This acknowledgment is not established by the sole letter by SAIB bank informing ABC Bank in response to the call for guarantee on February 28, 2018 "*to have identified a difference between the outstanding balance and the amount of the claim*" which is not *per se* evidence of fraudulent or abusive conduct. This alleged revelation, as mentioned above, was moreover an unenforceable exception to the implementation of the undertaking which could not be taken into account by the first-ranking bank.

62- The result of these statements and findings is that by executing the payment in view of the required elements, ABC Bank did not act fraudulently nor did it commit any fault, as a result of which SAIB Bank, bound by the same terms and conditions, could not refuse to execute its counter-guarantee on such grounds.

63- Therefore, the judgment should be approved insofar as it ordered SAIB Bank to pay the amount requested, in addition to interest for late payment which is not contested and dismissed its claim for abusive procedure and all its other provisions.

64- SAIB bank should be ordered to pay the costs of the proceedings and to pay ABC bank, which had to incur unrecoverable costs to assert its rights, an indemnity under Article 700 of the Code of Civil Procedure, equitably set at the amount of 10,000 euros.

V/ OPERATIVE PROVISIONS

The Court, **on these grounds**,

- 1- Approves the judgment rendered by the Commercial Court on October 17, 2019 in all its provisions;
- 2- Orders Arabe Internationale de Banque (SAIB) to pay ABC International Bank the amount of 10,000 euros under Article 700 of the Code of Civil Procedure;
- 3- Orders it to pay the costs.

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The Court Clerk

the President

Najma EL FARISSI

François ANCEL



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Traduis

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