QBD, COMMERCIAL COURT

Neutral Citation Number: [2012] EWHC 453 (Comm)

Case No: 2011 Folio 852

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 8 March 2012

Before :

STEPHEN MALES ESQ, QC

(sitting as a Deputy High Court Judge)

- -

Between :

Petrologic Capital SA	**Claimant**
- and -	
Banque Cantonale de Genève & another	**Defendant**

- -

- -

Charles Debattista and Sandra Healy

(instructed by Campbell Johnston Clark LLP) for the Claimant

John Lockey QC

(instructed by Watson, Farley & Williams LLP) for the First Defendant

Hearing dates: 28th February 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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STEPHEN MALES Esq, QC

Stephen Males Esq, QC:

Introduction

1. This is an application by the first defendant, Banque Cantonale de Genève ("the bank"), for an order declaring that the English court does not have jurisdiction to hear the claimant's claim against it. That claim is for an injunction to restrain the bank from paying out under a letter of credit which the bank issued at the request of the claimant, and for an order that the bank be required to pay to the claimant €2,385,506.33, that being the sum which the claimant describes (not altogether accurately) as currently held by the bank under the letter of credit.

2. Whether this court has jurisdiction depends upon whether there exists an agreement conferring jurisdiction on the English court pursuant to Article 23 of the Lugano II Convention. The claimant seeks to establish such an agreement, in writing or evidenced in writing, in three ways. First, it says that the instruction which it gave the bank to open the credit, which governed the relationship between the claimant as the applicant for the credit and the bank as the issuing bank, contained an agreement for exclusive English jurisdiction. Second, it says that the credit itself contained such an agreement, and that the jurisdiction clause in the credit should be taken to apply to the related contract between the applicant and the issuing bank. Third, it says that it is entitled to enforce the jurisdiction agreement in the credit pursuant to the Contracts (Rights of Third Parties) Act 1999 on the ground that the jurisdiction agreement purports to confer a benefit on the claimant.

3. The bank maintains that the parties have agreed that their relationship will be subject to Swiss law and jurisdiction, that there was no agreement between the parties for English jurisdiction, and that the claimant is not entitled to take the benefit of the jurisdiction clause in the letter of credit, which only governs the relationship between the bank and the beneficiary.

4. Since it is common ground on this application that I am concerned only with the question of jurisdiction, and not with the merits of the claimant's claim, the relevant facts can be stated shortly.

The facts

5. The claimant, Petrologic Capital SA, is a Swiss company with its registered office in Geneva, engaged in buying and selling petroleum products. On 3 March 2011 it opened an account with the bank and, for that purpose, signed the bank's "Basic contract". The "Basic contract" began by stating that:

"The present document constitutes the basis of all the business relations of the undersigned, hereafter the 'Client(s)', with Banque Cantonale de Genève, hereafter the 'Bank'."

6. It continued, after setting out details of the claimant and its business, by confirming that the claimant had received the bank's terms and conditions, and stating:

"[The Client] recognise(s) their provisions and their conditions as obligatory, without restriction, for all current, new and future business relations with the bank. Other subsequent written agreements are reserved".

7. Thus, although the "Basic contract" acknowledged the possibility that other subsequent agreements might be concluded, the indication was that (unless expressly agreed otherwise) the bank's general terms and conditions were intended to apply generally to all aspects of the relationship between the claimant and the bank, including any future business relations not specifically dealt with in the terms and conditions.

8. The bank's general conditions began with the statement that:

"These General Conditions govern the relationship between the Banque Cantonale de Genève, hereinafter called 'the Bank', and its clients".

9. They included Articles 20 and 22, which are particularly relevant. Article 20 provided as follows:

"**Special provisions**

In addition to the present General Conditions, some special conditions established by the Bank govern certain areas.

The Bank also observes banking and commercial practices; stock market trading is subject to the rules and practices of the relevant market; documentary credits are subject to the rules and practices of the International Chamber of Commerce.

The above is subject to any special agreement between the client and the Bank."

10. Article 22 was in the following terms:

"Applicable law and place of jurisdiction

All legal relations between the client and the Bank are subject to Swiss Law.

The place of performance of all obligations, the place of jurisdiction for clients domiciled abroad and the sole place of jurisdiction for any proceedings of any nature whatsoever is Geneva.

However, the Bank reserves the right to take legal action at the domicile of the client or before any other competent court."

11. Other bank documents signed by the claimant at the same time included a fiduciary deposit agreement, a set of terms and conditions applicable to derivative products, a general pledge agreement and a pledge of goods and assignment of claims. Each of these also contained a clause providing for Swiss law and jurisdiction in Geneva. The claimant also signed a discharge for instructions given to the bank by telex, cable, telephone, fax or e-mail, which referred to the bank's general conditions. Thus the combined effect of these documents was to underline that the entirety of the relationship between the parties was to be subject to Swiss law and jurisdiction.

12. The claimant also executed a power of attorney appointing Ramil Hakimov and Joseph Riedweg as its representatives for business relations with the bank, with authority to act on its behalf. The power of attorney stated that:

"All the contractual relations between the principal(s) or the company and the Bank are covered by the Bank's terms and conditions. ...

All legal relations between the principal(s) or the company and/or the authorised persons on the one hand and the Bank on the other shall be subject to Swiss law. The place of execution and the exclusive jurisdiction are Geneva."

13. These various agreements did not include an agreement providing specifically for the opening of letters of credit, but on 7 April 2011 the claimant executed two further

powers of attorney, each described as a "Specific Power of Attorney, Limited to Documentary Credits", which authorised two further individuals, Andre Maurer and Natalya Matyushenko, to act on behalf of the claimant in the handling and monitoring of letters of credit, although not to authorise the opening of such credits. These specific powers of attorney provided as follows:

"1. All contractual relationships between the Company and the Bank are governed by the General Conditions of the Bank. Furthermore, specific conditions of the Bank govern certain transactions, in particular the deposit of securities and other instruments, savings books and precious metal accounts. These contractual provisions are modified and/or completed by the present conditions and are also applicable to each of the Authorized Persons. ...

2. Any one of the Authorized Persons ... may exercise all rights pertaining to the Company in relation to documentary letters of credit, first demand guarantees or stand-by letters of credit (hereinafter referred to as 'Documentary Credits' or, individually, a 'Documentary Credit'), except the right to issue a Documentary Credit.

...

4. The instructions and actions authorized hereby include all acts which are customary in the handling and monitoring of Documentary Credits, including, in particular, but not limited to, the following acts:

● instructions to amend a Documentary Credit, issued on behalf of or in favour of the Company;

● acceptance of discrepancies in documents received in relation to a Documentary Credit, issued on behalf of all in favour of the Company;

● assignment in favour of the Bank or a third party of the proceeds or rights arising from a Documentary Credit; and

● disposal of documents in relation to a Documentary Credit, issued on behalf of or in favour of the Company.

11. The Company hereby confirms that it has taken due notice of, and accepted, the General Conditions of the Bank, in particular Articles 4, 6, 7 and 22.

...

15. All legal relationships between the Company and/or the Authorized Persons, on the one hand, and the Bank, on the other hand, are governed by Swiss law. The place of performance and the exclusive place of jurisdiction are in Geneva."

14. Thus the specific powers of attorney drew a distinction, in clauses 2 and 4, between the authority of the authorised persons to give instructions for the opening of a letter of credit (which was not authorised) and their authority to perform other acts which were customary in the handling and monitoring of letters of credit once opened. They made clear, pursuant to clauses 11 and 15, that the claimant accepted that the legal relationships between it and the bank were governed by Swiss law and subject to the exclusive jurisdiction of the Geneva courts.

15. In April 2011 the claimant concluded a contract with an Austrian company called MIC Petrochemische Vertriebs GmbH ("MIC") for the purchase of 3,000 mt (plus or minus 10%) of various oil products of Serbian origin, with payment by a standby letter of credit payable at sight, to be opened by a first class Swiss bank.

16. The claimant requested the bank to open a credit and on 21 April 2011 sent the purchase contract to the bank for this purpose. There followed various exchanges between the claimant and the bank clarifying points of detail as to the terms of the credit to be opened. In addition, because the claimant did not have sufficient funds in its account to enable the bank to proceed, the bank required it to transfer funds into its account, which the claimant duly did. The funds thus transferred became subject to the terms of the general pledge agreement dated 3 March 2011.

17. On 26 April 2011 Natalya Matyushenko sent to the bank a draft of the letter of credit which the claimant wished the bank to open, but the bank made clear that it required the application to be signed by Ramil Hakimov and Joseph Riedweg, the two individuals who were authorised to act for the claimant. Accordingly, the claimant sent a draft of the letter of credit, signed by these two individuals, to the bank. This draft, which the claimant describes as the bank's "mandate", identified the claimant as the applicant for the credit and MIC as the beneficiary. The credit was to be for €2,425,000 plus or minus 10%, and was to provide as follows:

"Validity:

May 30, 2011 at our counters in Geneva

Available with us by payment at sight, against presentation of the following documents

...

Special conditions:

...

3. The construction, performance and validity of this standby letter of credit shall be governed by and construed in accordance with English law, any claim or dispute arising out of or in connection with this standby letter of credit shall be subject to the exclusive jurisdiction of the English courts.

Except as otherwise herein stated this standby letter of credit is subject to the Uniform Customs and Practice for Documentary Credits UCP 600 of the International Chamber of Commerce, Paris, Rev 2007."

18. The bank duly issued the credit in this form, including the law and jurisdiction clause, in accordance with the claimant's instructions. Thus there is no doubt that the letter of credit itself is governed by English law and is subject to the exclusive jurisdiction of the English courts.

19. Subsequently, MIC requested the claimant, and the claimant requested the bank, to extend the validity of the credit to 26 June 2011, and this was duly done.

20. At some point -- the precise date does not appear and does not matter for present purposes -- the beneficiary presented documents to the bank and claimed payment of €2,385,506.3. However, the claimant contended that the goods had been disposed of to a third party and that it was the victim of a fraud perpetrated by, or with the participation of, its own signatory Andre Maurer. It applied to the Court of First Instance of Geneva on 16 June 2011 for an order to prohibit the bank from paying out under the letter of credit. It is common ground before me that this was an application for interim relief, with no substantive relief being claimed, so that no issue arises under Article 27 or 28 of the Lugano II Convention. The Geneva court made an *ex parte* order on 16 June 2011, but this was set aside on 29 August 2011 following a hearing between the parties. The claimant appealed unsuccessfully to the Geneva Court of Appeal, and has now appealed further, this time to the Swiss Federal Supreme Court. There are also criminal proceedings in Geneva, and an injunction has been issued in those criminal proceedings which currently prevents the bank from paying MIC, but the claimant is concerned that this injunction may be discharged at any time, possibly without warning.

21. Meanwhile this action was begun by claim form issued on 15 July 2011 against the bank and MIC. The relief sought is:

i) An injunction restraining [the bank] from paying to [MIC] or to any other entity on its behalf, all or part of the sum of €2,385,506.03 or any other amount in connection with the letter of credit opened on 26 April 2011 in favour of [MIC] bearing the reference no. DC112236/NFA ("the Letter of Credit").

ii) An injunction requiring [MIC] to withdraw and/or refrain from pursuing the call on the Letter of Credit.

iii) An order that [the bank] be required to pay the Claimant the sum of €2,385,506.03, this being the sum which is currently held by [the bank] under the Letter of Credit.

22. It is not quite accurate to describe the bank as holding funds under the letter of credit. In reality the bank has a liability under the credit (subject to the fraud exception, if it applies) to pay this sum to MIC if conforming documents have been presented, and it is holding the claimant's funds as counter security for that liability pursuant to the general pledge agreement.

23. This application is concerned only with the claimant's claims against the bank. I was told that the second defendant, MIC, has been served with the claim form, but that it has not acknowledged service. It has played no part in this application.

The Article 23 issues

24. The only basis on which the claimant seeks to found the jurisdiction of the English court against the bank, a Swiss company, is Article 23 of the Lugano II Convention, which is in the same terms as Article 23 of the Brussels Regulation. It provides:

"(1) If the parties, one or more of whom are domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

25. The test whether the requirements of Article 23 are satisfied is an independent test derived from European Union law. That test was not in dispute before me. In brief, and as explained further in cases such as *Bols Distilleries BV v. Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12 at [28] and *Deutsche Bank AG v. Asia Pacific Broadband Communications Inc* [2008] EWCA Civ 1091, [2008] 2 Lloyd's Rep 619 at [23] and [30], in order to satisfy Article 23 the claimant must demonstrate "clearly and precisely" that the clause which is relied on as conferring jurisdiction on the court was in fact the subject of consensus between the parties. At this interlocutory stage, applying the test of "good arguable case", the claimant must show on the material available that it has a much better argument than the defendant that the requirements of Article 23 are satisfied.

26. As already indicated, the claimant's primary case is that the document containing the terms of the letter of credit which it asked the bank to open, which it describes as the "mandate", contains a clause providing for English law and exclusive jurisdiction which was intended to govern the relationship between the claimant as the applicant for the credit and the bank as the issuing bank. The question, therefore, is what that clause in the draft credit was intended to be. Was it intended to be a law and jurisdiction clause which would form part of a contract between the claimant and the bank -- as the claimant put it, a term of the mandate between the parties? Or was it merely a law and jurisdiction clause which the claimant wished the bank to include in the letter of credit which would govern the relationship between the bank and the beneficiary when the credit was opened, but which was not intended to govern the relationship between the claimant and the bank? In order to establish jurisdiction on this basis, the claimant needs to show that it is much more likely to have been the former than the latter.

27. The second way in which the claimant puts its case is that the English law and jurisdiction clause in the letter of credit itself should be taken to apply to the relationship between the claimant and the bank. As Mr. Debattista confirmed on behalf of the claimant, this is in effect a submission that in the absence of any express choice of law

or jurisdiction to govern the relationship between the claimant and the bank, the parties must have intended the contract between them as applicant and issuing bank to be subject to the same law and jurisdiction clause as contained in the credit itself. Accordingly the question is whether the parties did so intend. Again, the claimant needs to show that it has much the better of this argument.

28. Thirdly, the claimant maintains that it can rely on the jurisdiction clause in the letter of credit pursuant to the Contracts (Rights of Third Parties) Act 1999. Here there is no doubt that the credit contained a clause providing for exclusive English jurisdiction. The question is whether the claimant has much the better of the argument as to whether it satisfies the requirements of the Act. If (but only if) it does, it is agreed that in accordance with the decision of the European Court of Justice in *Gerling Konzern Speziale Kreditversicherungs-AG v. Amministrazione del Tesoro dello Stato* [1983] ECR 2503, there is no reason in principle why Article 23 should not apply to enable the claimant as a third party to enforce the term in question.

The application of the bank's general conditions to letter of credit transactions

29. A critical question to each of the ways in which the claimant puts its case is whether the bank's general conditions, including the express agreement for Swiss law and jurisdiction, were intended to apply to letter of credit transactions in which the bank would open such credits at the request of the claimant. Mr. Lockey QC for the bank submitted that the bank's general conditions were all embracing, with no exclusion of letter of credit transactions from their application, and that this was fatal to the claimant's attempt to rely upon the English law and jurisdiction clause in the draft letter of credit. Mr. Debattista for the claimant, in contrast, submitted that the general conditions were not intended to apply to letter of credit transactions. He acknowledged, however, that if he was wrong about this, it would be necessary for the claimant to demonstrate that the agreement on Swiss law and jurisdiction was varied as a result of the terms in which the claimant requested the bank to open the letter of credit providing for English law and jurisdiction, and that (on this hypothesis) in the absence of a contractual variation, each of the ways in which the claimant puts its case must fail.

30. I begin, therefore, by considering the scope of the parties' initial agreement.

31. The bank's documents, signed by the claimant, made it very clear that the relationship between the claimant and the bank was to be governed by Swiss law and subject to the jurisdiction of the court in Geneva. The bank's “Basic contract” was

expressly stated to apply to all current, new and future business relations with the bank and included, in Article 22, a clear statement that all such relations were subject to Swiss law and that Geneva was the sole place of jurisdiction for any legal proceedings.

32. The claimant submits that this provision did not apply to letter of credit transactions. It says that this is the effect of Article 20 taken together with the fact that the general conditions contain no terms specifically applicable to letter of credit transactions. I do not agree. Article 20 contemplated expressly that documentary credits would, or at any rate might, form part of the future business relationship of the parties, and that these would be subject to the rules and practices of the International Chamber of Commerce -- for example, as set out in the UCP 600. If such future transactions were contemplated, as they clearly were, there was no reason to think that Article 22, providing for Swiss law and jurisdiction, was not intended to apply to such transactions. These were part of "the business relations" between the parties to which the general conditions including Article 22 were expressly subject.

33. Mr. Debattista referred to textbooks, including *Ellinger, The Law and Practice of Documentary Letters of Credit* (2010) at p.81 and *Jack, Documentary Credits* (4th ed, 2009) at [4.2], which describe an arrangement whereby the applicant and the issuing bank have a "master agreement that entitles the applicant to request the bank to open credits up to a certain amount subject to certain terms and conditions". He pointed out that the parties' "Basic contract" and the bank's general terms and conditions in this case contained no such terms and conditions and do not constitute such a master agreement. I accept that they do not. However, these textbook statements merely indicate one way in which parties may choose to structure their contractual relationship. They do not in any way detract from the fact that the "Basic contract" and the bank's general terms and conditions are of general application to the parties' relationship, are in sufficiently wide terms to include future letter of credit transactions, and specifically contemplate in Article 20 that such future letter of credit transactions will or may be entered into. There is nothing in these general contractual terms to commit the bank to open letters of credit at the claimant's request, but they make clear that if the future business relations between the parties do include the opening of such letters of credit, their relations in respect of such transactions will be subject to the general conditions including Swiss law and jurisdiction.

34. Further, to the extent that there is any room for doubt about the position concerning letters of credit, the "Specific Power(s) of Attorney, Limited to Documentary Credits",

also signed by the claimant, emphasised that Swiss law and jurisdiction were intended to apply in the letter of credit context also. I acknowledge that the specific power of attorney did not apply to the opening of letters of credit as distinct from the handling and monitoring of credits already opened, but the parties could not sensibly have intended that the Swiss law and jurisdiction clause should apply to some aspects of their relationship in relation to such letters of credit, while English law and jurisdiction applied to other such aspects. The specific power of attorney is therefore a powerful -- and to my mind conclusive -- indication that the parties' relationship, so far as letters of credit were concerned, was to be subject to Swiss law and jurisdiction.

35. Accordingly I reject the claimant's submission that the initial agreements between the parties made no provision at all for the regime which would apply in the event of future letter of credit transactions. This means that, since the parties' initial agreement was that their relationship, including the terms governing the opening of any letters of credit, should be subject to Swiss law and jurisdiction, the claimant needs to show that its request to open a letter of credit which was itself to be subject to English law and jurisdiction was intended to vary this aspect of the parties' relationship.

36. In the light of this conclusion, I turn to consider the various ways in which the claimant seeks to establish the existence of an agreement for English jurisdiction.

Was there an agreement for English jurisdiction in the "mandate"?

37. It is well established that the opening of a letter of credit involves a series of autonomous but nevertheless interconnected contracts. See for example Lord Diplock's well known analysis in *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] AC 168 at 182-3. The relevant contract in this case is the contract between the claimant as applicant and the bank as the issuing bank. There is no doubt that there was such a contract, constituted by the claimant's request to the bank to issue a letter of credit and the bank's agreement to do so. The question is whether the terms of that contract included an agreement for English jurisdiction which had the effect of varying the parties' existing agreement that any such contracts between them would be subject to Swiss law and jurisdiction.

38. The claimant contends that it did. Mr. Debattista cited various textbooks, including *Brindle & Cox, Law of Bank Payments* (4th ed, 2010), to the effect that the terms of the contract between the applicant and the issuing bank are usually contained in the mandate which the applicant gives to the bank, setting out the applicant's instructions in

relation to the credit. I would accept that this is usually so. However, it remains necessary to identify in any particular case the terms of the contract governing the relationship between the applicant and the issuing bank.

39. In the present case I have no doubt, on the evidence before me and viewing the matter objectively, that the English law and exclusive jurisdiction clause in the draft letter of credit was not intended to govern the relationship between the claimant and the bank. The parties' exchanges amount to no more than a statement of the terms in which the claimant wished the bank to open the credit. The English law and jurisdiction clause was no more than one of the terms which the claimant wished the bank to include in the letter of credit to be issued to the beneficiary. As already indicated, it was clear from the contractual documents signed by the claimant that as between the claimant and the bank any future letter of credit transactions were to be subject to Swiss law and jurisdiction. There is nothing in the particular circumstances surrounding the opening of the letter of credit in this case to suggest that the parties intended to vary their existing contractual arrangements in this respect.

40. In addition to the parties' exchanges leading up to the opening of credit, the claimant relies upon the fact that the draft letter of credit was signed by Messrs Hakimov and Riedweg. However, this takes matters no further. The bank needed their signature in order to open the credit since they were the only individuals with the necessary authority to give instructions on behalf of the claimant. There is no reason to conclude that these signatures were intended to do anything other than to authenticate the claimant's instruction for the opening of the credit in the terms of the draft.

41. There is no reason in principle why the parties should not agree that their own relationship should be subject to Swiss law and jurisdiction, while the credit which the bank was to open in favour of the beneficiary would be subject to English law and jurisdiction. In my judgment, that is what they did agree. Any other conclusion would mean, in effect, that although the parties contemplated, in the specific powers of attorney, that their relationship in respect of letter of credit transactions would be subject to Swiss law and jurisdiction, in practice that would only apply when the letter of credit itself was similarly subject to Swiss law and jurisdiction. This seems improbable.

42. Moreover, Mr. Debattista was constrained to accept that the effect of the specific powers of attorney was that at least some aspects of the relationship between the claimant and the bank would be governed by Swiss law and jurisdiction, albeit that he sought to limit the scope of the agreement on Swiss law and jurisdiction in the specific

powers of attorney to issues concerning the authority of the named individuals. I do not accept that the clause can sensibly be limited in this way. However, once it is acknowledged, as it must be, that at least some aspects of the parties' relationship were subject to Swiss law and jurisdiction, any further argument as to the uncommercial and implausible nature of such an arrangement falls away.

43. I conclude, therefore, that the parties' initial relationship provided that Swiss law and jurisdiction should apply to any future transaction for the opening of a letter of credit, and that this agreement was not varied by the circumstances in which the particular letter of credit in this case came to be opened. At all events, and sufficient for present purposes, the claimant has failed to demonstrate to the required standard any consensus between the parties that the English law and jurisdiction clause in the draft letter of credit should govern the relationship between the parties. The defendant has much the better of the argument.

44. I have reached this conclusion as a matter of the clear language of the parties' contracts. Mr. Lockey for the bank pointed out that this conclusion was also said by the bank's Swiss lawyer, M. Philippe Preti, to be the position as a matter of Swiss law, the applicable law, and that this evidence had not been contradicted by the claimant. However, M. Preti does not suggest that there are any special Swiss law principles applicable to the construction of the relevant contracts, and Mr. Lockey did not suggest that M. Preti's evidence amounted to a trump card overriding any other considerations. As it is, I agree with the conclusions which M. Preti states, for the reasons I have given.

45. Accordingly I reject the claimant's first way of putting its case.

Did the parties intend the jurisdiction clause in the credit to govern their relationship?

46. Mr. Debattista expressly accepted that if I concluded, as I have done, that the bank's general conditions including Article 22 apply to the letter of credit transaction in this case, his alternative arguments must fail. The first alternative argument, in short, was that on the assumption that the bank's general conditions did not apply, so that there was no other applicable law or jurisdiction clause, the English law and jurisdiction clause in the credit contract should be held to apply to the relationship between the claimant and the bank.

47. I can see that in principle, in the absence of any express choice of law to govern the relationship between an applicant and the issuing bank, it might well be right to conclude

that the parties intended their relationship to be governed at least by the same law as applied to the credit itself. Cases such as *Bastone & Firminger Ltd v. Nasima Enterprises (Nigeria) Ltd* [1996] CLC 1902 at 1910 give some support to this view. The contrary argument, advanced by Mr. Lockey in reliance upon the observation of Teare J in *Societe Generale SA v. Saad Trading* [2011] EWHC 2424 (Comm) at [33], is that because a letter of credit is the "immediate progeny" of a contract between the applicant and the issuing bank, and therefore is in a sense ancillary to that contract, it is unlikely that the latter contract should be construed by reference to the terms of the credit. However, if notwithstanding such objections the argument may be valid in relation to a choice of governing law, I can see too that in principle, a similar argument may apply to render an appropriately worded jurisdiction clause in the credit applicable to the contract between the applicant and the issuing bank, although that may give rise to questions whether in such circumstances the necessary consensus to satisfy Article 23 of the Lugano II Convention is established. If the argument is sound, it does not mean that the applicant would be taking the benefit of a clause in a contract, the credit, to which it is not a party. Rather, it would mean that, as a matter of construction of the contract between the applicant and the issuing bank, the court concluded that the parties intended their contract to be subject to the same jurisdiction as provided in the credit itself.

48. However, it was common ground that however these arguments might play out in another case, there is no room for any such construction of the contract between the applicant and the issuing bank in circumstances where there is already an express law and jurisdiction agreement which governs the relationship between them. That is the position here. The claimant and the bank agreed that their relationship, including the terms which would govern the opening of letters of credit, would be governed by Swiss law and subject to Swiss jurisdiction. My conclusion on the first way in which the claimant puts its case means that this alternative case cannot arise.

49. It is therefore unnecessary to explore further the claimant's submissions on this point.

Can the claimant enforce the jurisdiction clause in the credit under the 1999 Act?

50. Section 1 of the 1999 Act provides as follows:

"**Right of third party to enforce contractual term**

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if –

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third-party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

51. The claimant, which accepts that it is not a party to the letter of credit contract, contends that the requirements of this section are satisfied because:

i) the claimant is expressly identified in the letter of credit by name (ie as the applicant);

ii) the claimant was treated by MIC, the beneficiary, as a party to the credit when it requested the claimant to amend the maturity date;

iii) the jurisdiction agreement purports to confer a benefit on the claimant, in particular because:

a) the letter of credit was sent to the claimant in draft for countersignature;

b) its wide wording extends beyond the parties to the credit and includes any dispute which may arise out of or in connection with the credit;

c) a jurisdiction agreement in a letter of credit is unusual; and

d) it would be commercially absurd for the parties to have intended any jurisdiction other than the jurisdiction specified in the credit to govern the contract between the applicant and the issuing bank.

52. In my judgment the claimant's case under the 1999 Act must fail.

53. First, the effect of the 1999 Act is to enable a third party to enforce a term of a contract to which it is not a party. But that is not what the claimant is seeking to do in this case. The jurisdiction clause in the letter of credit applies to disputes between the parties to that contract, that is to say between the bank as issuing bank and MIC as beneficiary. Thus if the bank disputed its obligation to pay, the beneficiary would be under an obligation to sue in England and not elsewhere. If the beneficiary attempted to sue elsewhere, or if the bank attempted to obtain a declaration of non-liability from some other jurisdiction, the question of enforcing the jurisdiction clause could arise. But there is no dispute between the beneficiary and the bank. The bank's position is that the documents presented conformed with the requirements of the credit and it is willing to pay. The claimant is seeking to stop it from doing so. But it is not seeking to enforce the jurisdiction clause in the contract between the beneficiary and the bank in order to ensure that a dispute between those parties is litigated in the proper agreed forum. Rather, it is attempting to take the benefit of that clause for itself, in an action to prevent the bank from performing what the bank considers to be its obligation under the letter of credit. Moreover, the claimant is attempting to do so in order to avoid the terms of the Swiss law jurisdiction clause in its own contract with the bank.

54. Second, I do not accept that the letter of credit purports to confer the benefit of the jurisdiction clause on the claimant. As subsection (2) makes clear, this is a question of the proper construction of the contract, that is to say of the letter of credit. There is nothing in the letter of credit to suggest that the parties to that contract, that is to say the beneficiary and the bank, intended to confer on the claimant as the applicant the right to enforce the jurisdiction clause in the letter of credit. As to the matters relied on by the claimant and summarised above:

i) the fact that a draft of the credit was sent to the claimant for countersignature by the named authorised persons is of no contractual significance, but was merely a sensible precaution for the bank in order to avoid any argument about whether the opening of the letter of credit had been properly authorised;

ii) I do not accept that MIC treated the claimant as a party to the contract by requesting amendments; it was obvious that the claimant as the applicant would have to authorise any amendments because without such authorisation there was no possibility that the bank would agree to them; but, in any event, such amendments post dated the letter of credit contract and therefore cannot affect its true construction; even if they could, the amendments had no bearing on the enforcement of the jurisdiction clause in the credit;

iii) the width of the jurisdiction clause in the credit did not render it applicable to disputes between the claimant and the bank -- it applied to any dispute arising out of or in connection with the credit, and was therefore of wide scope, but it was still limited to disputes between the beneficiary and the bank as the parties to the letter of credit contract; and

iv) whether the inclusion of a jurisdiction clause in a letter of credit is unusual has no bearing on whether the credit purports to confer a benefit on the applicant.

55. I do not accept that it is commercially absurd for the parties to have agreed that the relationship between them would be subject to a different jurisdiction from the jurisdiction which would apply to govern disputes between the parties to the credit. In any event, for good or ill, this is clearly what the parties have chosen to do in this case. I do consider that it is highly unlikely that the parties would have intended to confer on a third party, and in particular on the applicant for the credit, any right to enforce the terms of the letter of credit contract. It would typically be the applicant who would have an interest in interfering with the performance of the credit, as shown by the many cases in which an applicant has attempted to obtain an injunction to restrain payment under a letter of credit when conforming documents are presented and the bank is willing to pay. Except in clear cases of fraud, the courts have firmly resisted such attempts.

56. To confer on an applicant a right to enforce terms of the letter of credit would detract from this clear rule and would risk undermining the autonomy of such credits, which is an essential feature of their commercial value. Article 4 of the UCP 600, which emphasises the autonomy of letters of credit, reinforces this conclusion. It provides not only that the bank's undertaking to honour a credit is not subject to claims or defences by the applicant resulting from its relationship with the issuing bank, but also that a beneficiary can in no case avail itself of the contractual relationship between the applicant and the issuing bank. If, as this article makes clear, a beneficiary cannot avail itself of the contract between the applicant and the issuing bank, it would be highly

unlikely for the parties to the credit to intend that the applicant should be entitled to avail itself of the terms of the credit.

Conclusion

57. Accordingly I reject all three ways in which the claimant seeks to establish jurisdiction under Article 23 of the Lugano II Convention. In each case the bank has (at least) much the better of the argument.

58. The English court therefore has no jurisdiction over the claimant's claims against the defendant bank.