Neutral Citation Number: [2025] EWHC 312 (Comm)

Case No: LM-2024-000172

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/02/2025

Before :

Louise Hutton KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

Litasco S.A.	**Claimant**
- and -	
Banque El Amana S.A.	**Defendant**

- -
- -

William Day and Emmanuel Michelakakis-Howe (instructed by **Floyd Zadkovich LLP**) for the **Claimant**
Richard Power (instructed by **Payne Hicks Beach LLP**) for the **Defendant**

Hearing dates: 06 November 2024
Draft judgment circulated to parties: 06 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 14 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LOUISE HUTTON KC

Louise Hutton KC:

1. The Claimant ("Litasco") applies for summary judgment. The Defendant ("BEA" or "the Bank") applies to amend its Defence and to stay these proceedings pending the resolution of Court proceedings in Mauritania.

2. Litasco is a petroleum marketing and trading company headquartered in Switzerland. It operates petroleum refineries and a retail network in a number of jurisdictions worldwide.

3. Litasco claims against BEA under a standby letter of credit ("the SBLC"). BEA issued the SBLC on or around 28 March 2019 in the amount of USD 1,800,000 as security for the third of a series of loan agreements entered into between Litasco (as lender) and Société Kerkoub pour l'Investissement SA ("SKI") ("the Third Loan Agreement"). SKI primarily operates in the hydrocarbon sector in Mauritania and elsewhere in West Africa and Litasco advanced the loans to SKI to fund the construction and development of an LPG distribution network in Guinea.

4. Litasco says that following various amendments of the Third Loan Agreement, payment was due on or around 31 December 2021 and that no payment was made. On 13 January 2022, via Banque Cantonale de Geneve ("BCGE"), Litasco made a compliant presentation under the SBLC, requiring payment from BEA two New York working days later, on 17 January 2022. Payment has not been made.

5. Although BEA does not formally admit that a compliant presentation was made, it does not deny it and Litasco points to the fact that, by Article 16(f) of the UCP600 (to which the SBLC is subject), "*If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation*", and that no notice as required by Article 16 was given by BEA within the 5 banking day period provided by that Article. In opposing the application for summary judgment, BEA has not contended that the presentation was not compliant.

6. BEA instead relies on orders made by the Mauritanian courts as providing a defence to Litasco's claim, originally pursuant to the rule in *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (CA) and also pursuant to Article 9(3) of the Rome I Regulation[1] but in the skeleton for this hearing, Mr Power (counsel for BEA) indicated that BEA was content to proceed on the basis that Article 9(3) adds nothing to the *Ralli Bros* principle (which he noted was the view taken by Cockerill J in *Banco San Juan Internacional Inc v Petroleos de Venezuela SA* [2021] 2 All ER (Comm) 590 at [118]). At the hearing, BEA also argued that a defence was available to it as a matter of the recognition which it said should be given by this court to the orders of the Mauritanian courts.

7. BEA filed evidence of Mauritanian law from Mr Mohamed Lemine Abdel Hamid, a barrister in Mauritania. No evidence of foreign law has been filed by Litasco.

8. There are two sets of proceedings in Mauritania. The first is a civil claim brought by SKI. Mr Hamid says that in those proceedings:

    i) By an application dated 11 January 2024, SKI sought an order from the Nouakchott Commercial Court in Mauritania suspending the performance of the SBLC.

    ii) By an order dated 20 February 2024, the Nouakchott Commercial Court dismissed SKI's application.

    iii) SKI appealed and that appeal was rejected by the Nouakchott Commercial Court of Appeal on 7 March 2024.

[1] Regulation 593/2008/EC, retained in English law by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019.

iv) SKI appealed to the Supreme Court and sought a stay of execution of the Court of Appeal's decision and, pending the ruling of the Supreme Court, a suspension of performance of the SBLC.

v) By an order dated 15 March 2024, the President of the Commercial Division of the Supreme Court ordered the suspension of the performance of the Court of Appeal's order pending a ruling on the application for a stay of execution.

vi) On 30 April 2024, the Commercial Division of the Supreme Court ruled on the application for a stay of execution and ordered a stay of execution of the Court of Appeal's order dated 7 March 2024 pending a ruling on the appeal to the Supreme Court of that order ("the 30 April 2024 Stay Order").

9. There is also a criminal claim against Mr Fabien Roy, who at the relevant times acted for Litasco:

i) That criminal claim for breach of trust (under Article 376 of the Mauritanian Criminal Code) was filed by the Public Prosecutor in the Nouakchott Regional Court. (After this judgment was circulated in draft, the court was informed that the criminal claim against Mr Roy was discontinued by the Public Prosecutor after the date of the hearing of these applications.)

ii) SKI joined that criminal claim as a plaintiff and sought the seizure of the SBLC by the investigating magistrate.

iii) By order dated 30 May 2024 ("the Attachment Order"), the investigating magistrate ordered the seizure of the SBLC. BEA was notified of the seizure by letter dated 31 May 2024 (14 days after it served its Defence in these proceedings). BEA seeks permission to amend to rely on the Attachment Order (as well as the 30 April 2024 Stay Order) as a defence to the claim.

10. Mr Hamid's evidence is that each of the 30 April 2024 Stay Order and the Attachment Order prohibit BEA under Mauritanian law from paying the sum due under the SBLC. He says:

i) That it follows from the 30 April 2024 Stay Order that "*BEA can no longer pay the SBLC amount. It will be subject to civil and criminal penalties if it does not comply with the content of order no. 10/2024*" (i.e. the 30 April 2024 Stay Order).

ii) That the Attachment Order "*constitutes a court decision with the effect of ordering BEA to refrain from paying the SBLC amount to the beneficiary, Litasco. According to Mauritanian law, this order suspends the enforceability of the SBLC and obliges the bank to keep the SBLC amount until it receives a new order which terminates the effect of the seizure order*" and that if BEA pays in accordance with the SBLC while the Attachment Order is in force, it may be subject to criminal prosecution which can result in a prison sentence and a fine.

11. On the face of it, that is not entirely obvious from the terms of the orders themselves, but Mr Hamid's evidence is not challenged for the purpose of these applications.

The Governing Law of the SBLC

12. The first issue which arises on Litasco's summary judgment application is the governing law of the SBLC. It is common ground on the pleadings that, as originally issued, English law was not the applicable law of the SBLC. On 29 July 2019, BEA sent a SWIFT message to BCGE as follows:

(20) Transaction Reference Number	*002/SBLC/2019*
(21) Related Reference	*DC221542/OP1*
(79) Narrative	*In ref to our MT 760 001 / SBLC / 2019 for USD 1.800.000 please bring the following amendement [sic] : Field 77C : Special Consitions [sic]* *+ read this stand-by LC shall be governed by and construed in accordance with English law and be subject to UCP 600. Any dispute or claim arising from or in connection with this stand-by LC shall be subject to the exclusive jurisdiction of the courts of England.*

13. There is an error in this message in that Field (20) and Field (79) cannot both be right. Field (20) refers to "002/SBLC/2019" which is the reference number for the SBLC, while Field (79) refers to "001/SBLC/2019" which is the reference number for the earlier standby letter of credit issued in respect of the Second Loan Agreement (the "Earlier SBLC").

14. Litasco says that the effect of this SWIFT message was to change the applicable law for the SBLC pursuant to Article 3(2) of the Rome I Regulation, which permits the parties to "agree to subject the contract to a law other than that which previously governed it".

15. Mr Power (counsel for BEA) helpfully expressly agreed with Litasco's submission that the better view was that whether the SWIFT message was effective to make that change should be resolved as a matter of English law (whether as the putative applicable law, by reference to Article 10 of Rome I, or as the lex fori, which it said was supported by the Supreme Court's analysis in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117 at [33]).

16. Litasco says Field (79) is the error in the SWIFT message. It says that the Court can and should proceed on the basis that it is an obvious typographical error and that the SWIFT message should simply be read as referring to the SBLC in issue in this case (not the Earlier SBLC).

17. BEA does not deny that the message would be effective to change the applicable law for the SBLC to English law but for the error in the message. It says that the fact there is an error means that it is not clear whether the intention was to amend the SBLC at issue in this case or the Earlier SBLC, and that the issue cannot be resolved as a matter of construction but would require the SWIFT message to be rectified, which would in turn require evidence as to the understanding of the relevant parties.

18. Mr Day (who appeared with Mr Michelakakis-Howe for Litasco) submitted that it is clear that the reference to the Earlier SBLC in Field (79) is the error and that the reference to the SBLC in Field (20) is correct because:

    i) Fields (20) and (21) are consistent with each other: the reference "DC221542/OP1" in Field (21) is BCGE's reference for the SBLC.

    ii) The SWIFT message was sent to BCGE which makes sense for the SBLC but not for the Earlier SBLC, because BEA's counterparty bank by SWIFT for the Earlier SBLC was UBAF, not BCGE.

    iii) The value of USD 1.8m identified in Field (79) is consistent with the SBLC but not the Earlier SBLC (which was for USD 4m).

    iv) BEA sent a separate SWIFT message to UBAF in connection with the Earlier SBLC the same day (also varying the governing law to English law).

19. Mr Day also submitted that it made sense for the parties to vary the SBLC's terms to make English law the governing law because of its connection with the Third Loan Agreement, which also chose English law as the governing law.

20. In submitting that the intended effect of the amendment sent by the SWIFT message was unclear, Mr Power emphasised that Field (79) is the only field which purports to deal with governing law and is the field which in terms provides that the Earlier SBLC (i.e. the letter of credit with reference MT760 001/SBLC/2019), not the SBLC itself, shall be governed by English law.

21. The evidence filed by BEA stated that this was an issue "*best left for trial*" but, as Mr Day pointed out, there was no suggestion that BEA would have any relevant witness evidence to give on this issue.

22. I accept Mr Day's submissions on this point. For the reasons he gives (set out above), I consider that Field (79) contains an obvious typographical error and that the only sensible construction of the SWIFT message was that it was amending the SBLC (not the Earlier SBLC). I do not consider there is any real prospect of BEA persuading the Court otherwise at trial.

Recognition: the Mauritanian civil proceedings

23. The starting point for the arguments on recognition is therefore not only that the English court has jurisdiction to determine BEA's liability to Litasco under the SBLC (BEA having decided not to pursue the jurisdiction challenge it initially indicated in its Acknowledgment of Service but to participate in these proceedings), but also that the SBLC is governed by English law.

24. One of the bases on which BEA opposes the grant of summary judgment is a claim that the 30 April 2024 Stay Order (made in the civil proceedings in Mauritania) is entitled to recognition. Its pleaded case is that Litasco:

> "has submitted to the jurisdiction of the Mauritanian Courts over the SBLC (by participating in the substantive proceedings <u>and contending therein that the SBLC should be paid</u>) and is therefore bound by the decision of the Commercial Chamber of the Supreme Court of the Islamic Republic of Mauritania [the 30 April 2024 Stay Order]. In the premises, the Claimant is precluded by the doctrine of *res judicata* or cause of action or issue estoppel, or abuse of process, from asserting that the SBLC is currently payable and/or bringing this claim" (underlining for the words BEA seeks to add by amendment).

25. In submissions, the point put was different. It was said that BEA "*has a real prospect of showing that the English Court should recognise the orders of the Mauritanian courts and, on that basis, decline to enter judgment against BEA pending the resolution of the Mauritanian proceedings.*" While Mr Power recognised that the Mauritanian orders were not yet final and conclusive orders, he submitted that they might become so by the time of trial and that, accordingly, it would be inappropriate to conclude that BEA has no real prospect of persuading the English Court to recognise the orders on this ground alone.

26. However, BEA's own expert agrees with Litasco that Litasco has not submitted to the jurisdiction of the Mauritanian Courts, because it has in each document submitted to the Mauritanian Court disputed the jurisdiction of the Mauritanian Courts (although Mr Hamid's opinion is that Litasco is nonetheless bound by the decisions and orders of the Mauritanian Court which he considers in his report). Litasco submits that that is the end of the question, given that English law will not usually regard as submission a step which the relevant foreign court does not regard as a submission: see *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 97. Litasco further relies on s.33 of the Civil Jurisdiction and Judgments Act 1982 which provides that a party shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that it appeared in those proceedings to contest the jurisdiction of the court or to ask the court to dismiss or stay the proceedings on the basis they should be submitted to arbitration or to the determination of the courts of another country.

27. BEA did not identify any particular step taken or argument advanced by Litasco in the Mauritanian civil proceedings which it said should be regarded as a submission as a matter of English law (Mr Hamid having given his opinion that there was no step amounting to a submission to the jurisdiction as a matter of Mauritanian law).

28. In those circumstances, I do not consider the argument that the 30 April 2024 Order should be recognised and treated by this court as binding on Litasco for the purpose of these proceedings has any real prospect of success. Nor is any basis advanced as to why this position would change before trial in these proceedings: there is no evidence to suggest (and it was not argued) that Litasco is likely to change its position in the Mauritanian civil proceedings and submit to the Mauritanian Court's jurisdiction. I therefore find there is no real prospect of BEA succeeding at trial on this basis.

<u>Recognition: the Mauritanian criminal proceedings</u>

29. So far as concerns the Mauritanian criminal proceedings and the Attachment Order made in those proceedings, it was accepted by Litasco that for the purpose of the summary judgment application, the Court should have regard to the draft Amended Defence advanced by BEA which pleads the Attachment Order.

30. Mr Power advanced in submissions an argument that the Attachment Order should be recognised and given effect to by the English Court and that this provides a defence (irrespective of the *Ralli Bros* or Article 9(3) points addressed below).

31. I accept Mr Day's submission that the Amended Defence does not clearly plead a recognition defence in respect of the Attachment Order, pleading that only in respect of the orders in the civil proceedings. Nonetheless, it seems to me appropriate to consider the argument based on recognition of the Attachment Order. That is because (i) the draft Amended Defence pleads the Attachment Order and avers that the Attachment Order prevents BEA from paying and denies that BEA is liable to pay under the SBLC, (ii) Mr Power sought permission to amend if necessary and (iii) permission would be given at this stage if the amended case had sufficient merit (a merits hurdle which would be met if the amended case had a real prospect of success).

32. Mr Power relies on the fact that the lex situs[2] of the alleged debt (i.e. the debt owed by BEA to Litasco under the SBLC) is Mauritania (this is alleged in BEA's Defence and expressly admitted in Litasco's Reply, albeit that Litasco's Reply goes on expressly to deny that the lex situs is the applicable law: it avers that the SBLC is expressed to be governed by English law, which is therefore the applicable law). For this reason, Mr Power says that the Attachment Order preventing BEA from paying under the SBLC provides an arguable defence.

33. He relies on *Power Curber International Ltd v National Bank of Kuwait Sak* [1981] 1 WLR 1233 (CA). In *Power Curber*, the Kuwait courts made a provisional attachment order of the sums due to the plaintiffs payable by the defendant bank under a letter of credit governed by the law of North Carolina. In proceedings brought in London, Parker J gave summary judgment in favour of the plaintiffs but imposed a stay of execution pending further order in light of the provisional attachment order. Both parties appealed. The Court of Appeal dismissed the cross-appeal and upheld the judgment in favour of the plaintiff, and allowed the plaintiffs' appeal against the stay of execution.

34. Denning LJ recorded in his judgment that the provisional attachment prevented the defendant bank from making any further payment under the letter of credit in Kuwait or outside Kuwait, and made the bank accountable to the Kuwait court for the amount involved.

35. Two arguments were advanced by the bank as giving rise to an arguable defence:

    i) First, that the proper law of the contract was Kuwaiti law and that, by that law, the payment of the sums was unlawful. The Court of Appeal rejected this argument, holding that the proper law of the contract was the law of North Carolina, where payment was to be made.

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[2] *Dicey, Morris and Collins on The Conflict of Laws*, 16th edition ("*Dicey*") defines "*lex situs*" at paragraph 1-028 as the "*law of the country where a thing is situated*".

ii) Second, the bank argued that the lex situs of the debt was Kuwait, and it was Kuwaiti law which governed the effect of the attachment. It was said that if the attachment was lawful by Kuwaiti law, all other countries should give effect to it. The Court of Appeal rejected this argument also, holding (by a majority, Denning and Griffiths LJJ) that the lex situs of the debt was North Carolina and not Kuwait. Waterhouse J agreed that the argument based on the lex situs did not give rise to a real prospect of success, but for different reasons. At 1244 D-F he said:

> "In the absence of any previous binding authority, I have not been persuaded that this debt due under an unconfirmed letter of credit can be regarded as situate in North Carolina merely because there was provision for payment at a branch of a bank used by the sellers in Charlotte …
>
> "Nevertheless, Parker J was right, in my judgment, to refuse the bank leave to defend because the Kuwaiti provisional order of attachment did not affect the existence of the debt. Counsel for the bank has submitted that the effect of that order was to alter the debt from one due to the sellers to a debt due to the court or held to the order of the court awaiting a decision as to whom it should be paid. I agree with Parker J that his submission is based upon a single sentence in an affidavit and that it does not bear that weight. There is no acceptable evidence that, according to the law of Kuwait, the debt has ceased to be due to the sellers. There is no ground, therefore, for granting leave to defend and counsel for the bank has not sought to argue that a stay of proceedings is justified if leave to defend was properly refused."

36. In *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2018] AC 690, the Supreme Court held that the analysis of the lex situs by the majority in *Power Curber* was wrong, and that a debt under a letter of credit is situated where the issuing bank (as debtor) resides and not where the debt has to be paid.

37. Mr Power submitted that had the Court of Appeal held that the lex situs of the debt was Kuwait, and that as a matter of Kuwait law the debt had ceased to be due, the bank would have had an arguable defence. He therefore relied on *Power Curber* as giving rise to a defence to at least the standard of a good arguable case, that where the lex situs of the debt is Mauritania, the English court will have regard to the Attachment Order because the expert evidence filed by BEA is that the Attachment Order "*deprives Litasco of the SBLC amount*". In other words, Mr Power's submission was that the analysis of Waterhouse J was correct in that case, but the outcome in this case is different because whereas in *Power Curber* Waterhouse J found that there was "*no acceptable evidence that, according to the law of Kuwait, the debt has ceased to be due to the sellers*", here there was such evidence. As I understood it, the argument was that the Attachment Order made in Mauritania was effective to discharge the debt or otherwise to have such proprietary or in rem effect over the debt that it would be recognised because the lex situs of the debt is agreed to be Mauritanian law, despite the fact that the applicable law of the SBLC is English law.

38. As set out above, it is common ground on the pleadings that the lex situs of the debt is Mauritania. (I note that, as also set out above, this argument on recognition of the Attachment Order was not pleaded originally or in the draft Amended Defence and was

advanced only in submissions for this hearing. Litasco's pleading admitted that the lex situs of the debt was Mauritania but expressly averred, in making that admission, that the lex situs was irrelevant.)

39. That leaves the question whether the Attachment Order as a matter of Mauritanian law has the effect that the debt under the SBLC has been discharged or has other proprietary or in rem effect.

40. As to that, while it is correct that Mr Hamid (BEA's expert) states that the Attachment Order "*deprives Litasco of the SBLC amount*", he explains in the second part of that sentence that that is because "*it prohibits BEA from making the payment*". This does not provide a sufficient basis for BEA to show it has a defence with a real prospect of success based on an argument that the debt has been discharged or has ceased to be due or any alleged proprietary effect of the Attachment Order as a matter of Mauritanian law. On the face of it, the evidence is that the attachment order simply prohibits BEA from making payment while the order remains in effect. I am therefore not persuaded that the expert evidence on which Mr Power relies provides a sufficient basis for such an argument. Mr Hamid's evidence seems clear that the effect of the order is simply to prohibit payment by BEA.

41. There is no evidence as to the effect of any final attachment or seizure order which might be made in the criminal proceedings, and thus no evidence that any such final order would have different effect to the current provisional order. BEA's argument was based on the effect of the Attachment Order (the order currently in place).

42. I therefore find that the *Power Curber* argument does not give BEA a defence with a real prospect of success.

The *Ralli Bros* point

43. BEA's primary basis for opposing the summary judgment application was that it says it has a real prospect of successfully defending the claim by relying on the *Ralli Bros* principle.

44. In his skeleton, Mr Power cites the following passage from the judgment given by Falk LJ (Snowden and Males LJJ agreeing) in *Celestial Aviation Services Limited v Unicredit Bank GmbH, London Branch* [2024] EWCA Civ 628, [105-106] (Mr Power's emphasis):

> "105. The *Ralli Bros* principle is well-established. It is a limited exception to the general principle that the enforceability of a contract governed by English law is determined without reference to illegality under any other law. **The exception applies where contractual performance necessarily requires an act to be done in a place where it would be unlawful to carry it out:** see for example *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm), [2017] 2 CLC 735 at [79] per Leggatt J and *Banco San Juan Internacional Inc v Petróleos De Venezuela S.A.* [2020] EWHC 2937 (Comm), [2021] 2 All ER (Comm) 590 ("*Banco San Juan*") at [62], [77] and [79] per Cockerill J.
>
> "106. A distinction has been drawn in the case law between situations where performance is illegal in the jurisdiction where performance must take place,

> where the principle applies, and cases where the illegality relates to a preparatory step to performance, or "equipping to perform": *Banco San Juan* at [80]-[83], where the illegality does not excuse non-performance …".

45. Mr Power submits that this passage makes clear that the principle in *Ralli Bros* is not limited to circumstances where performance is unlawful by reason of legislation but that the principle is a general one, excusing performance where that performance would necessarily require an act to be done in a place where it would be unlawful to carry it out.

46. He further relies on the *Celestial Aviation* passage above and at [117] (set out below) to submit that the principle is not only applicable where it would be unlawful to make payment **in the place of the account to which payment is to be made**. In *Celestial Aviation* the bank accounts to which payment was to be made were in London and Dublin. At [117] Falk LJ said (Mr Power's emphasis):

> "117. If it is correct that settlement otherwise than by a US dollar transfer to the specified account is precluded, then the Ralli Bros principle could be engaged **if the act of performance, in this case effecting payment in US dollars to the specified account**, would have required the involvement of a correspondent bank in the United States, as UniCredit contend, in what is more than a preparatory step. As to that (and leaving to one side the fact that the demands for payment in Dublin expressly refer to a correspondent bank), we do not have any findings of fact by the judge."

47. Mr Power says this shows the investigation is a broader one, namely whether performance of the contract will necessarily require an unlawful act. Mr Power also relies on *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 as showing that it is not the case that the only question is whether performance is illegal at the place of the account to which the payment is to be made, because in that case the Court did not simply look to where payment was to be made (in that case, in London), but it also investigated whether performance (the payment process) necessarily involved action which was unlawful in New York.

48. In this case, it is BEA's evidence that performance of its obligation under the SBLC (i.e. to pay) necessarily involves it doing acts in Mauritania where they will be unlawful because contrary to orders made by the Mauritanian courts.

49. The evidence filed by BEA is that:

    i) It has no branches or registered offices outside Mauritania.

    ii) It can only make a payment to an overseas recipient such as Litasco in US Dollars through SWIFT.

    iii) The relevant SWIFT instruction would need to be sent from Mauritania to one of BEA's correspondent banks overseas. Ms Zahra (BEA's Director of Resources and Operations) states that such a SWIFT payment order could only be made by the back office international payments team of BEA in Nouakchott in Mauritania with the approval of either Ms Zahra herself or of Mr Mohamed (BEA's Chief Executive Officer).

50. In reliance on the expert evidence of Mr Hamid, BEA says it would be unlawful for it to make payment in this way in Mauritania, and as there is no other way in which it can make payment, the *Ralli Bros* principle applies.

51. For Litasco, Mr Day says that the principle in *Ralli Bros* does not apply to provide BEA with a defence in this case, for a number of reasons.

Performance unlawful in the sense that it would be contrary to a court order

52. First, Litasco says that the *Ralli Bros* principle does not apply to acts of performance in a foreign jurisdiction which are unlawful in the sense of being a breach of a foreign court order rather than contrary to the legislation or regulation of that foreign jurisdiction.

53. Many of the relevant cases simply refer to an act of performance being unlawful, and do not address the question whether the unlawfulness is by reason of legislation or regulation, or by reason that the relevant act would be contrary to a court order. Mr Day submitted, however, that none of the cases in the *Ralli Bros* line of authority involved unlawfulness by reason of court order rather than the legislative authority of a foreign state and Mr Power was not able to point to any authority to disprove that assertion.

54. Mr Day also submitted that, so far as the issue is addressed in the authorities and textbooks, the formulation of the *Ralli Bros* principle is consistent with the principle applying only to legislation and regulation and inconsistent with it applying to court orders. In particular:

    i) In *Kleinwort, Sons & Co v Ungarische Baumwolle Industrie AG* [1939] 2 KB 678 (CA), in discussing the *Ralli Bros* principle, Branson J (at first instance) referred at 687 to a contract being rendered unenforceable "*by supervenient foreign legislation*" and at 699, du Parcq LJ referred to a foreign sovereign state "*legislating*".

    ii) *Dicey*, introducing the principle at [32-255], states (emphasis added), "W*hen the illegality arises under foreign law, the principal concern is comity, that is to say deference to* ***the legislative authority*** *of the foreign State to treat as lawful or unlawful conduct taking place in its own territory, and judicial restraint as regards assisting or sanctioning the breach of the laws of a friendly foreign country.*"

55. Mr Day further submitted that if the *Ralli Bros* principle were to extend to cases where a foreign court had made an (unrecognised) order which rendered performance unlawful, not by the lex loci solutionis[3] but by the law of the relevant foreign state, that would be entirely inconsistent with the rules governing the recognition of foreign judgments and orders.

56. I accept that to extend the *Ralli Bros* principle to acts of performance in a foreign jurisdiction unlawful in the sense of being in breach of an order made by a court in that jurisdiction, as opposed to acts unlawful by reason of legislation or regulation in force in that foreign jurisdiction, would be not only an extension of the principle but inconsistent with the formulation of the principle in *Kleinwort, Sons & Co*, which has repeatedly been

[3] *Dicey* defines "*lex loci solutionis*" at paragraph 1-028 as the "*law of the country where a contract is to be performed or where a debt is to be paid*".

treated as a leading case (cited, for example, in *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm) at [46] per Leggatt J, as he then was), and with the explanation of the principle in *Dicey*.

57. I also accept that such an extension would be inconsistent with the well-established rules on the recognition of foreign court decisions. I accept that the *Ralli Bros* principle is part of the rules concerning governing law, and not the rules concerning the recognition of foreign court orders – hence the frequent reference in the textbooks and authorities discussing the *Ralli Bros* authorities to the *lex loci solutionis*: see, for example, *Dicey* at para.32-258; *Kleinwort, Sons & Co* at 694 and 700; *Banco San Juan* at [62].

58. For those reasons, I consider that a defence based on the *Ralli Bros* principle relying on the orders of the Mauritanian court has no real prospect of success.

59. If this were the only basis advanced by Litasco for rejecting the *Ralli Bros* defence to the summary judgment application, I would reject it on this basis alone, which is sufficient to show that BEA has no real prospect of success on its *Ralli Bros* defence. There are, however, other reasons why I consider BEA's *Ralli Bros* defence has, in any event, no real prospect of success.

The Ralli Bros defence cannot be relied on where the defendant is at fault in some way

60. On the facts of this case, I consider that BEA has no real prospect of successfully relying on the *Ralli Bros* principle because payment on the SBLC has been due since 17 January 2022 (two New York working days after the compliant presentation on 13 January 2022) and the first order relied on as making payment unlawful was made on 30 April 2024 (and the underlying proceedings were not started until 11 January 2024).

61. There was therefore, even on BEA's case, no reason why it could not make payment on the SBLC when payment fell due or at any time after that until 30 April 2024.

62. In *Banco San Juan*, Cockerill J said (at [84]) that the *Ralli Bros* line of authority "*makes clear that the party relying on the doctrine will in general not be excused if he could have done something to bring about valid performance and failed to do so*". In that case, lawful performance was possible if a licence was obtained from OFAC. Cockerill J held (at [104]) that even if the sanctions prima facie rendered the performance of PDVSA's payment obligations necessarily illegal at the place of performance, PDVSA could not rely on the Ralli Bros defence because it had "*failed to show that had it discharged its obligation to apply for a licence, that application would have failed*".

63. In *Celestial Aviation*, it was not disputed that "*a principle exists to the effect that a party seeking to rely on the Ralli Bros doctrine may be precluded from doing so if they could have done something to avoid illegality in the place of performance*" (per Falk LJ at [120]). The Court of Appeal went on to hold (at [130]) that the application that was made by UniCredit for a licence from OFAC did not amount to reasonable efforts to obtain a licence to pay the amounts due under the letters of credit in that case, and that US sanctions did not therefore assist UniCredit.

64. Mr Power submitted that *Banco San Juan* and *Celestial Aviation* were concerned with a specific issue about obtaining a licence and whether the defendant in each case could obtain a licence to perform the obligation notwithstanding the controls or sanctions then

in place. He submitted they did not assist Litasco here where there is no suggestion that BEA could obtain permission from the Mauritanian court to circumvent its orders, and that neither case was support for the proposition that, if a party was in breach before the acts rendering it unlawful to perform the contract, it must still perform the contract notwithstanding that performance would necessarily involve an unlawful act. The whole premise of the licence point, it was submitted, was that because the defendant could go away and obtain a licence, it had not established that payment was unlawful.

65. I do not agree that that is the basis on which the licence point meant that the *Ralli Bros* defence, if otherwise available in the *Banco San Juan* and *Celestial Aviation* cases, would nevertheless not have been open to the defendant in each case. The reason the *Ralli Bros* defence was in any event unavailable was because each defendant "*could have done something to bring about valid performance and failed to do so*" (*Banco San Juan* at [84] per Cockerill J) or "*could have done something to avoid illegality in the place of performance*" (*Celestial Aviation* at [120] per Falk LJ). In *Celestial Aviation*, Falk LJ accepted (at [125-130]) the submission that the defendant "*did not make reasonable efforts to obtain an OFAC licence*" because of the way it chose to frame its application.

66. I accept Mr Day's submission that the position is a fortiori in this case, where the steps BEA failed to take were the required timely performance of the payment obligation itself, there being no doubt that the payment could lawfully have been made at any time until 30 April 2024.

67. BEA was in breach of its contractual obligations in failing to make payment during that time in accordance with the terms of the SBLC and is therefore unable to rely on the *Ralli Bros* principle as a defence to this claim.

The place of performance is the place of receipt

68. This was Mr Day's primary point. He submitted that because as a matter of English law (which governs this transaction) "*the place of performance*" for the purpose of a cross-border payment obligation is the place of receipt, the only relevant "*unlawfulness*" for the purpose of the *Ralli Bros* principle would be unlawfulness under Swiss law (the relevant receiving bank account being, it was agreed, an account held with BCGE in Switzerland). The fact that (at least for the purpose of this part of the argument) it is unlawful under Mauritanian law for BEA to make the payment is, he submitted, simply irrelevant.

69. Mr Day submitted that the place of performance for a cross-border payment obligation is the place where the performance is contractually due (here, Switzerland). He relied on the statement in *Mann and Proctor on The Law of Money* at paragraph 7.117 that, "*So far as English private international law is concerned, the 'place of payment' is the place in which the debtor is obliged to tender payment; this must, of course, correspond to the place in which the creditor is contractually entitled to receive the payment.*" That sentence has a footnote on which Mr Day also relied which states, "*Thus, if payment is to be made by means of an international credit transfer, the place of payment is the place in which the bank branch holding the creditor's account is situate. The debtor may have to take preparatory steps to organize the payment from the country in which his own bank is situate, but that country does not thereby become the place of payment: Libyan Arab Foreign Bank v Bankers Trust Co [1989] QB 728.*"

70. Mr Day also relied on the discussion of the *Ralli Bros* principle in *Dicey* at paragraph 32-359 which is as follows:

> "For the principle in *Ralli Bros*, as so understood, to be applicable it is necessary that 'performance includes the doing in a foreign country of something which the laws of that country make it illegal to do'. It is not enough that performance is excluded, or that the contract is rendered a nullity or unenforceable, or that the act is unlawful by the law of the country in which it happens to be done, or that the contract is contrary to public policy according to the law of the place of performance. It must be 'unlawful by the law of the country in which the act has to be done', i.e. by the law of the country in which, according to its express or implied terms, the contract must be performed. It would not matter whether the person liable to perform would, by doing so, infringe the laws of the foreign country in which that person is resident or carries on business, or of which he or she is a national or in the case of a company is incorporated, if the law of that country is neither the governing law of the contract nor the (sole) lex loci solutionis."

71. Mr Day submitted that there were different ways of describing the distinction identified by Mann and by Dicey. Mann (at paragraph 7.44) describes it as a distinction between the mode of performance and the performance itself. The more recent cases distinguish between preparatory steps which have to be taken by one contracting party to equip itself for performance and the performance itself at the place of performance. In *Banco San Juan* at [79-83] (in a passage cited by Falk LJ in *Celestial Aviation* at [106]), Cockerill J said as follows:

> "79. The doctrine therefore offers a narrow gateway: the performance of the contract must necessarily involve the performance of an act illegal at the place of performance. Subject to the *Foster v Driscoll* principle, it is no use if the contract could be performed some other way which is legal; and it is no use if the illegal act has to be performed somewhere else.
>
> "80. This distinction forms the basis for a line of authority, derived from the judgment of Atkin J in *Kleinwort Sons & Co. v Ungarische Baumolle Industrie Aktiengesellschaft* [1939] 2 KB 678 and relied on by BSJI, which establishes that "it is immaterial whether one party has to equip himself for performance by an illegal act in another country" (Staughton J in *Libyan Arab Bank*).
>
> "81. This was developed by Teare J in *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm) at [104]-[110] thus:
>
> "the English law of conflicts excuses performance of an obligation where performance would be illegal by the law of the country where the obligation is to be performed but does not excuse performance where, although performance of the obligation is not illegal in the country where performance is to take place, steps necessary to enable a party to perform its obligation would be illegal in the country where such steps would be taken."
>
> "82. BSJI also drew attention to the decision of the Court of Appeal in *Toprak v Finagrain* [1979] 2 Lloyd's Rep 98 . In Toprak , a Turkish state

organisation agreed under the terms of an English law contract to purchase wheat by opening a letter of credit " with and confirmed by a first class US or West European bank ". The buyers failed to open the letter of credit, and in response to a claim by the sellers, asserted that, under Turkish law, it would have been illegal for them to open a letter of credit without exchange control permission from the Turkish Ministry of Finance, which they had been unable to obtain, and their breach was therefore excused by reason of the rule in Ralli Bros . The Court of Appeal held that "[i]llegality by the law of Turkey [was] no answer whatever to [the] claim ": at 114 per Denning LJ.

"83. This decision was explained by Staughton J in the *Libyan Bank* case thus (at 265f-g):

"The Turkish buyers might have had money anywhere in the world which they could use to open a letter of credit with a United States or West European bank. In fact it would seem that they only had money in Turkey, or at any rate needed to comply with Turkish exchange control regulations if they were to use any money they may have had outside Turkey. But that was no defence, as money or a permit was only needed to equip themselves for performance, and not for performance itself.""

72. Mr Power, for his part, expressly acknowledged that if Litasco's position on place of receipt is correct (i.e. that for the purpose of applying the *Ralli Bros* principle in this case, one looked only at the lawfulness of performance according to the law of Switzerland, not the law of Mauritania), then the *Ralli Bros* principle would not apply here. But he submitted that two authorities, namely *Libyan Arab Bank*, and the Court of Appeal's recent decision in *Celestial Aviation*, made clear that that was wrong. He said that the question which decides whether the *Ralli Bros* principle applies is whether the contractual performance would necessarily require an act to be done in a place where it would be unlawful to carry out that act.

73. In that respect, he referred to the passage at [117] of *Celestial Aviation* (set out above) where Falk LJ stated that "*the Ralli Bros principle could be engaged* ***if the act of performance, in this case effecting payment in US dollars to the specified account****, would have involved the involvement of a correspondent bank in the United States, as Unicredit contend, in what is more than a preparatory step*" (Mr Power's emphasis).

74. As recorded in Falk LJ's judgment at [33] in the *Celestial Aviation* case, demands were made in the terms required by the letters of credit. Each demand specified a US dollar account. Four of the accounts were in London and eight were in Dublin. The demands which specified a Dublin account also identified a correspondent account in the US through which payment was to be made.

75. The decision on other issues in the case meant that the impact of the *Ralli Bros* principle was limited, and (as set out above) the Court of Appeal decided that, even if the *Ralli Bros* principle was engaged, Unicredit could not rely on US sanctions as excusing payment because it did not make reasonable efforts to obtain a licence form the US authorities (as Falk LJ explained at [103]). It followed that it was not necessary for the Court of Appeal to deal with the other *Ralli Bros* issues that had been raised but Falk LJ explained that she wanted to do so because of the conclusion of the judge at first instance

that payment could have been made in cash and the arguments that it could have been tendered in sterling or euros.

76. I have set out above Falk LJ's summary of the principle at [105-106] of her judgment. She continued at [108] to say that she "*would not wish to endorse either the judge's decision that cash could be paid, or the alternative argument that payment could be made in a different currency. Quite apart from the fact that no demand for payment in cash or in a different currency was actually made, neither proposition appears to engage with the terms of the contracts.*" She emphasised that while the demand in *Libyan Bank* requested a banker's draft, it expressly stated that payment in cash would be accepted in the alternative.

77. I accept Mr Day's submission that *Celestial Aviation* was a case where the contract specified the method of contractual performance (involving a correspondent bank account in the US) and that, for that reason, the question of whether any part of that (contractually mandated method of) performance is unlawful somewhere other than the place of receipt of the payment is relevant to whether the *Ralli Bros* principle applies. I accept that *Celestial Aviation* therefore does not demonstrate that the court will in general ask whether contractual performance necessarily requires an act to be done in any place where it would be an illegal act, rather than asking whether performance necessarily involves an performance of an act illegal at the place of performance of the contract.

78. *Libyan Arab Foreign Bank v Bankers Trust Co* was a case in which Libyan Arab Foreign Bank had an account with Bankers Trust in London. The US imposed sanctions which as a matter of New York law prohibited payment being made by Bankers Trust to Libyan Arab Bank. Libyan Arab Bank demanded payment by a banker's draft or cash in US dollars in London. Ultimately, Libyan Arab Bank succeeded at trial on the basis that there was no argument that payment in cash in London would involve any illegal action in New York.

79. Mr Power's submission was that Staughton J's detailed analysis of the various payment mechanisms that might have been used in that case and whether they involved acts unlawful in New York demonstrated that the question is not whether performance necessarily involves performance of an act illegal **at the place of performance of the contract**. In that case payment was to be made in London, so (he submitted) if Mr Day's formulation of the principle is correct, there would have been no need for any of that analysis, because the only question would have been whether there was any act which was illegal in London (that being the place where payment was to be made). Mr Power relied on various statements made in the judgment as being similarly inconsistent with Litasco's case. For example, at 763A-B, Staughton J said, "*That makes it unnecessary to answer the question, which I regard as particularly difficult, whether the issue of a banker's draft or banker's payment by Bankers Trust to the Libyan Bank would necessarily involve illegal action in New York*". And in expressing his conclusion, Staughton J said at 764F, "*Demand was in fact made for cash in this case, and it was not complied with. It has not been argued that the delivery of such a sum in cash in London would involve any illegal action in New York. Accordingly I would hold Bankers Trust liable on that ground.*"

80. I do not accept that the *Libyan Arab Bank v Bankers Trust* judgment demonstrates that the question formulated by Mr Day is wrong. Staughton J recorded as common ground that the principle was that "*Performance of a contract is excused if (i) it has become*

illegal by the proper law of the contract, or (ii) it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done" (at 743F). He went on at 743H to say that "*There may, however, be a difficulty in ascertaining when performance of the contract 'necessarily involves' doing an illegal act in another country*" and he referred to the *Toprak* case (mentioned in the *Banco San Juan* passage I have set out above) as relevant to that question. He concluded from *Toprak* (at 744H to 745A) that "*it is immaterial whether one party has to equip himself for performance by an illegal act in another country. What matters is whether performance itself necessarily involves such an act. The Turkish buyers might have had money anywhere in the world which they could use to open a letter of credit with a United States or Western European bank. In fact it would seem that they only had money in Turkey, or at any rate needed to comply with Turkish exchange control regulations if they were to use any money they may have had outside Turkey. But that was no defence, as money or a permit was only needed to equip themselves for performance, and not for performance itself.*" He went on to state that "*Some difficulty may still be encountered in the application of that principle*" (at 745G) and that he would have to "*return to this problem later*" (at 746A). It was after this introduction to the *Ralli Bros* issues in the case that he went on later in the judgment to analyse the various different payment methods on which he had heard evidence and argument to determine whether they involved any act illegal in New York.

81. There seems, therefore, to have been no argument advanced before him on the particular point raised by this application (i.e. whether to invoke the principle, the relevant act has to be done at the place of performance of the contract so that it is unlawful by the law of the place of performance of the contract, rather than an act done elsewhere so that it is unlawful by the law of that other jurisdiction). Further, Staughton J's judgment followed a lengthy trial (20 days) at which the parties had adduced evidence on the issues which Staughton J considered in his judgment. In the event, his decision on the *Ralli Bros* point was a relatively short one (that Bankers Trust could not resist payment because the demand made was a demand for cash and there was no suggestion that payment in cash in London would involve any illegal act in New York). Even leaving aside the agreed formulation of the *Ralli Bros* principle recorded at 743F of the judgment, it is not surprising, given the sums at stake and the length of the trial, that Staughton J made findings on the various issues which had been the subject of evidence and argument before him as to the various potential methods of payment, even if they were in the event not necessary for his decision. I therefore do not accept the submission that the fact the judgment contains that analysis of various potential payment methods shows that the question formulated by Mr Day is the wrong question. Again, even leaving aside the formulation of the *Ralli Bros* principle apparently agreed in that case, it was in the event ultimately unnecessary for Staughton J to consider the precise scope of the *Ralli Bros* principle because there was no argument that payment in cash involved any act illegal in New York. The judgment therefore simply does not address the particular question raised by this application.

82. It seems to me that the better analysis of *Toprak* (apparently not argued in the *Libyan Arab Bank* case) is that identified in the *Banco San Juan* judgment at [79] set out above ("*it is no use if the illegal act has to be performed somewhere else*", i.e. somewhere other than the contractual place of performance) and set out in *Dicey*: rather than the only relevant distinction being between an act of performance and an act equipping the relevant party to perform, there is also a relevant distinction between performance requiring an act to be done which is unlawful "*by the law of the country in which, according to its express*

or implied terms, the contract must be performed" (where the *Ralli Bros* principle applies) and performance which would "*infringe the laws of the foreign country in which that person [the performing party] is resident or carries on business ... or in the case of a company is incorporated, if the law of that country is neither the governing law of the contract nor the (sole) lex loci solutionis*" (*Dicey* at paragraph 32-259). Alternatively, the distinction between an act of performance and an act equipping the relevant party to perform includes the distinction between an act illegal at the contractual place of performance and an act illegal in a different jurisdiction.

83. *Kleinwort Sons & Co* decided that the illegality must be illegality **at the contractual place of performance** and that illegality in a different jurisdiction is not relevant (as summarised in the passage from *Banco San Juan* I have set out above). That is the case even if (in Teare J's words in *Deutsche Bank v Unitech*) "*steps necessary to enable a party to perform its obligation would be illegal in the country where such steps would be taken*".

84. I therefore consider that BEA's argument on this basis has no real prospect of success. If there were no other issue over the application of the *Ralli Bros* principle in this case, this would be a freestanding basis on which I would find that BEA has no real prospect of successfully relying on the *Ralli Bros* principle to defend Litasco's claim. In the event, it provides further support for the decision I have already reached.

Conclusion

85. Accordingly, I will order summary judgment in favour of Litasco and dismiss BEA's application to amend and for a stay of these proceedings.