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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III Justice

PART 56

Banco Nacional de Mexico

- v -

Societe Generale

INDEX NO. 603266/04

MOTION DATE 5/11/05

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
OCT 27 2005

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/20/05

HON. RICHARD B. LOWE, III J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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BANCO NACIONAL DE MEXICO, S.A., INTERGRANTE DEL GRUPO FINANCIERO BANAMEX

Plaintiff,

Index No., 603266/04
DECISION & ORDER

-against-

SOCIETE GENERALE,

Defendant,

----------X

RICHARD B. LOWE III, J.S.C.

In this commercial dispute centered on a letter of credit ("LOC"), plaintiff Banco Nacional de Mexico, S.A., Intergrante Del Grupo Financiero Banamex (hereinafter "Banamex"), moves for an order, pursuant to CPLR § 3212, granting summary judgment against defendant Societe Generale ("SG"). SG opposes the motion on several grounds.

BACKGROUND

The salient facts giving rise to this dispute centers on the issuance of the LOC by SG on behalf of nonparties Alstom Power Proyectos, S.A. de C.V. ("Alstom") and Rosarito Power, S.A., de C.V. ("Rosarito") and for the benefit of the Comision Federal de Electricidad ("CFE") up to the amount of $36,812,687.63. The LOC was issued in connection with an agreement between Alstom, Rosarito and CFE relating to the construction of a power plant in Mexico (the "Agreement") and to secure performance by both Alstom and Rosarito under the Agreement (see, Notice of Motion, Ex A). Alston, Rosarito, CFE and plaintiff are all Mexican corporations. The Agreement was executed in Mexico and the subject matter of the Agreement is located in Mexico. Moreover, the only New York nexus is Banamex's electronic transmission of funds at the request of CFE to a Citibank Account, located in New York and its request for reimbursement of those funds to a Banamex New York Citibank account. SG is a French corporation with offices in, among other places, Mexico City, Mexico and Paris, France.

The dispute - as amplified in the affidavit of Banamex's Head of International Trade, Luis Filipe De Jesús Rubio Cervantes ("Cervantes"), Banamex's complaint, and counsel's Rule 19-a Statement (see, Notice of Motion, Cervantes Aff.; J. Blackman Rule 19-a Statement; Complaint and Exhs., A-C), is whether as the conforming bank under the LOC, Banamex properly made payment as demanded by CFE when CFE hand-delivered its Payment Demand (the "Demand") for payment of monies under the LOC. SG disputes the same and maintains it promptly gave Banamex a notice of nonconformity (the "Notice") and/or has a reasonable and defensible excuse in staying its obligation to honor Banamex's reimbursement request (the "Request").

Banamex complains that CFE's September 1, 2004-Demand strictly conformed with the terms of the LOC and that it reasonably notified SG at the Paris office on September 1, 2004 and September 2, 2004 (Notice of Motion, Ex F), of the conforming payment request and then sent by DHL courier CFE's Demand with supporting documentation along with its Request for reimbursement to SG's Paris office. Banamex requested that SG remit reimbursement through a Citibank account maintained in New York (id., Ex E).

Banamex maintains that SG received the Demand and Request along with supporting documents on or about September 6, 2004 (Paris time [3:06 P.M.] or New York time [9:06 A.M.]) (Notice of Motion, Ex G). On September 8, 2004, Banamex paid CFE under the LOC and transmitted electronically the funds to a Citibank account located in New York. Banamex immediately requested reimbursement from SG and that the funds be electronically transmitted to its New York Citibank account.

Banamex commenced this action against SG after it refused to reimburse the $36,812,687.68 paid to CFE under the LOC (see, Notice of Motion, Ex E). SG has answered and denies the material allegations of the complaint. Moreover, SG maintains it is subject to valid foreign court orders (Mexico) preventing it from paying any funds under the LOC and that before

Banamex paid CFE, Banamex was aware that CFE had no right to demand payment under the LOC, rendering the payment to CFE "fraudulent" and that "upon information and belief [Banamex] was aware of this fraud prior to it making any payment under" the LOC (Answer, ¶ 23).

DISCUSSION

Banamex now moves for an order, pursuant to CPLR § 3212, granting summary judgment against SG. In support of the motion, Banamex has attached a copy of the LOC, other documents as well as supporting affidavits. Cervantes, referring to the documentation annexed to the motion, avers that when CFE presented its Demand (Notice of Motion, Ex C) it was reviewed by Banamex and conformed under the terms of the LOC. On September 1 and 2, 2004, Banamex's Mexico City office then informed SG's Paris office via "SWIFT" messages of CFE's Demand and that it had conformed the Demand under the LOC. Banamex conformed the Demand to CFE on September 2, 2004 and sent both Demand and Request with the supporting documentation to SG's Paris office viz-a-viz DHL courier. DHL delivered the documents to SG on or about September 6, 2004 (id., Ex G).

Prior to receipt of the DHL delivery, on September 3, 2004, SG acknowledges receipt of Banamex SWIFT message (Notice of Motion, Ex H), and informed Banamex that it had forwarded Banamex's September 2, 2004 SWIFT message to Alstom and Rosarito and that the two questioned the validity of the payment request "failing a final arbitration award rendered against" Alstom and Rosarito (id.,). Cervantes avers that as Banamex was the conforming bank it was of no consequence that the parties to the Agreement had a contract dispute and SG gave no Notice to Banamex of nonconformity of the Demand presented by CFE.

As to SG's defense of a pending action in the Mexican courts, Banamex concedes delivery of two orders from two different Mexican courts (the Administrative Court of the Fifth "A" District, Federal District of Mexico and the Fifth District Court in Civil Matters of the Federal

District, Mexico) on or about September 7, 2004, at its Mexico City offices staying all action in the execution or payment of the LOC (the "Mexican Orders") but seemingly does not acknowledge actual "service" (id., Cervantes 02/11/04 Aff., p 19 [confirms "delivery"]; see, Notice of Motion, Exs I [Order with Banamex Stamp - Unstamped] and J [Order with Banamex Stamp "2004 Sept 7" at 4:52 P.M.]). The Mexican Orders are dated September 6, 2004. Cervantes concedes the "service" of the Mexican Orders upon Banamex on September 8, 2004 at 10:59 A.M.(Notice of Motion, Ex K). However, coincidently Banamex paid CFE under the LOC earlier that same morning at 9:20 A.M.

In anticipation of the protocol regarding the "delivery" or "service" of the Mexican Orders either on September 7 or 8, 2004, coupled with the coincidence of payment of the LOC at 9:20 A.M., on September 8, 2004, and acknowledgment of the "service" of the Mexican Orders at 10:59 A.M., that same day, Banamex submits the affidavit of Javier Quijano-Baz, a member of the Mexican Bar and an attorney specializing in corporate litigation ("Quijano-Baz"). Quijano-Baz avers based on his understanding of the laws of Mexico that the Mexican Orders did not preclude Banamex from making payment under the LOC on September 8, 2004 to CFE nor does the Mexican Orders or subsequent order prevent SG from reimbursing Banamex under the LOC (Notice of Motion, Quijano-Baz 02/10/05 Aff.,).

In opposition to the motion, SG submits the affidavit of Sylvain Grealou ("Grealou"), Head of Foreign Trade in SG's Paris office, who affirms that SG learned of the Mexican Orders on or about September 7 and 8, 2004 and informed Banamex by SWIFT message of the fact on September 7 and 8, 2004, and that the Mexican Orders suspended Banamex's payment of the LOC as well as SG's obligation to reimburse payment until further notice (Grealou 03/11/05 Aff., Ex B).

Instead, Banamex responded with notice of payment of the LOC to CFE on or about September 8, 2004 (id., Ex C). In turn, SG informed Banamex by SWIFT message that payment

under the LOC was at Banamex's own risk and that the payment by Banamex was its sole responsibility in view of the Mexican Orders (id., Ex D).

In anticipation of Banamex's legal argument regarding the Mexican Orders, SG submits the affidavit of Juan Francisco Torres Landa Ruffo ("Torres Landa Ruffo"), who is a member of the Mexican Bar and an attorney specializing in corporate litigation. Torres Landa Ruffo avers based on his understanding of the laws of Mexico that the Mexican Orders were "served" on SG directing that no payment under the LOC be made and that subsequent to the commencement of this action, the Mexican Court (Administrative Court of the Fifth "A" District, Federal District of Mexico), issued an Interim Judgment, dated November 29, 2005, ordering SG not to pay on the LOC (Torres Landa Ruffo 03/16/05 Aff.,). It is noted that Torres Landa Ruffo further adds that SG gave notice to Banamex before payment of the LOC that "payment did not conform to the terms and the conditions of the [LOC] as no definitive arbitral award had been rendered in an ICC arbitration proceeding filed by" Alstom and Rosarito against CFE (id., ¶¶ 2, 18-23).

In response, Cervantes notes to the correspondence between Banamex and SG before payment under the LOC, reiterating a proper Request and Demand. Moreover, Cervantes notes to SG's SWIFT messages, reiterating the absence of a specific objection of nonconformity with the terms of the LOC and that the Mexican Orders were not a proper basis for Banamex to refuse to pay CFE under the LOC nor SG 's refusal to reimburse Banamex under the terms of the LOC (Cervantes 04/20/05 Reply Aff.,).

The LOC provides that it is governed by the Uniform Customs and Practice for Documentary Credits ("UCP") and if there are no contradictions, by the laws of New York. Although SG seeks to incorporate by reference a "definitive arbitral award" between CFE, Alstom and Rosarito and the contract dispute between them, it is not persuasive the subject letter of credit is a separate and independent contract *(First Commercial Bank v Gotham Originals, Inc.*, 64 NY2d

287; see also 3 J. White & R. Summers, Uniform Commercial Code § 26- 2, at 112-13 [4th ed.]). The Court must adhere to the principle that letters of credit must be strictly construed and performed in compliance with their stated terms (*United Commodities-Greece v Fidelity Intl. Bank*, 64 NY2d 449, 455, *rearg. denied* 65 NY2d 923; *Maurice O'Meara Co. v National Park Bank of N.Y.*, 239 NY 386, 396-397, *rearg.* denied 240 NY 607). The rule is rooted in the very purpose of a letter of credit: " [b]y conditioning payment solely upon the terms set forth in the letter of credit, the justifications for an issuing bank's refusal to honor the credit are severely restricted, thereby assuring the reliability of letters of credit as a payment mechanism" (*Voest-Alpine Intl. Corp. v Chase Manhattan Bank*, 707 F2d 680, 682).

Thus, to make an issuing bank's payment obligation conditional, as SG claims with respect to "a definitive arbitral award," and the contract dispute between CFE, Alstom and Rosarito, the parties must clearly and explicitly set forth the requirements on the face of the letter of credit (*Lamborn v National Park Bank of N.Y.*, 240 NY 520, 528-529; *Banque Worms, N.Y. Branch v Banque Commerciale Privee*, 679 FSupp 1173, 1180, *affd.* 849 F2d 787).

First, the LOC was automatically renewed and in effect at the relevant time. Second, the LOC unequivocally provides that "any dispute arising [from the LOC] shall be resolved exclusively" before the courts of New York (Notice of Motion, Ex A). Third, the LOC does not contain any provision with regard to disputes over the terms of the separate Agreement nor the condition of an "arbitral award." In short, the payment demand conforms with the LOC.

The record supports the finding that SG did not give timely notice of nonconformity. In fact, its response on September 3, 2004 is far from the requisite required under the LOC. SG was required to notify Banamex in writing the discrepancy in the payment demand and the documentary terms of the LOC. Moreover, under the terms of the LOC "immediate notice" was required as well as the reason why SG believed that the Request could not be serviced. Upon receipt of the Request

and the supporting documents on or about September 6, 2004, SG then had the obligation to give timely notice of nonconformity. There was no such notice on September 3, 2004, as SG's correspondence pre-dates receipt of the Request and supporting documents, the September 3 correspondence could not possibly serve as the basis for notice given the plain fact that the documents regarding payment were not in SG possession at that time. Thus, SG did not give timely notice of nonconformity and is prevented from claiming a discrepancy (UCP 55, Art., 14 [e]; UCC § 5-108 [c]; *J.P. Doumak, Inc. v Westgate Financial Corp.*, 4 AD3d 62; *City of New York v Delafield* 246 Corp., 236 AD2d 11, 22, *resettled in part* 244 AD2d 272, *lv. denied* 91 NY2d 811).

Under the UCP, SG as the issuer of the LOC is obligated to pay under the LOC and that duty is separate and independent from any underlying contract obligation of Alstom and Rosarito or the beneficiary CFE (*First Commercial Bank v Gotham Originals, Inc.*, 64 NY2d 287, 294-295). Therefore, SG must honor a demand for payment which complies with the terms of the LOC regardless of whether there is a contract dispute. Its obligation to pay is fixed upon presentation of the drafts and the documents specified in the LOC and any dispute on the underlying transaction is of no moment. Therefore, under the general rule, SG's obligation to pay is fixed.

With regard to the Mexican Orders and the Interim Judgment, the first two served on both SG and Banamex (arguably, September 8, 2004), and the third entered against SG, SG maintains it is barred from reimbursing Banamex under the LOC in Mexico. Although, SG argues that the Interim Judgment that followed is not challenged by Banamex, the record reveals that the Interim Judgment has been revoked by order of the Twelfth Federal Circuit Court, Federal District, Mexico on March 31, 2005 (Quijano-Baz 004/20/05 Aff., ¶ 22).

The record reveals a dispute as to whether the two provisional stays issued by the Mexican Courts were "served" on Banamex on September 7, 2004 before it paid on the LOC. There is no dispute from Banamex that is was "served" an hour after it paid under the LOC on September

8, 2004. There is also the dispute of whether SG is barred or stayed from "reimbursing" Banamex under the Mexican Orders.

Recognition of the foreign decrees is dependent on the doctrine of comity (*Hilton v Guyot*, 159 US 113), and although courts are not required to do so, courts of New York "will accord recognition to the judgments rendered in a foreign country under the doctrine of comity absent a showing of fraud in the procurement of the foreign judgment or unless recognition of the judgment would offend a strong [public] policy of New York" (*Lasry v Lasry*, 180 AD2d 488, 489; *Gotlib v Ratsutsky*, 83 NY2d 696). A "foreign court's decree restraining a party to a contract cannot excuse a performance [of a contract which is] to take place in the United States * * * [the foreign decree] will [only] excuse a performance to take place within that court's jurisdiction" (*RSB Manufacturing Corp. v Bank of Baroda*, 15 BR 650, 654; see also, 6A Corbin on Contracts, § 1351).

Therefore, where the performance of the LOC is to take place in New York, then the Mexican Orders, which prohibit that performance, cannot be given effect under the doctrine of comity.

Case law reveals that our State courts will not give effect to a foreign court order enjoining payment by an issuing bank to a confirming bank under a LOC where reimbursement is to take place in New York (see, J. *Zeevi & Sons, Ltd. v Grindlays Bank (Uganda) Ltd.*, 37 NY2d 220, 226, *cert. denied*, 423 US 866; *Canadian Imperial Bank of Commerce v Pamukbank Tas*, 166 Misc2d 647, 651-652), and enforcement of the injunction would run contrary to New York's strong public policy in favor of enforcing letter of credit agreements according to their terms (*First Commercial Bank v Gotham Originals, Inc.*, 64 NY2d 287, 298 *Cantrade Privatbank AG Zurich v Bangkok Bank Public Co. Ltd.*, 256 AD2d 11).

Banamex first argues that performance under the LOC is irrelevant in light of the LOC choice of law provision and New York forum provision. But, the LOC is governed by the UCP

and then by New York law only where there is no contradiction. Moreover, although New York is the forum to litigate disputes arising from the LOC, litigation is not the same as performance under the LOC. Furthermore, the LOC does not explicitly require performance under the LOC to take place in New York and the payment of United State Dollars is not required to be made in New York (but compare, *Sabolyk v Morgan Guaranty Trust Co.*, 1984 WESTLAW 1275; *RSB Manufacturing Corp. v Bank of Baroda*, 15 BR 650 [in both cases the letters of credit expressly provided for payment by the advising and paying banks to be made in New York]; see also, *J. Zeevi and Sons, Ltd. v Grindlays Bank (Uganda) Ltd.*, 37 NY2d 220, *cert. denied* 423 US 866 [rejecting the foreign decree, the Court held that, among other things, New York law applies where payment was to be made in New York with United States dollars and New York has vital interest to enforce international commerce transaction]; *Chuidian v Philippine Nat. Bank*, 976 F2 561, 563 [designation of place of payment under a letter of credit does not alter the rule that place of performance is to be place of issuance of the letter of credit, unless the paying bank is the confirming bank]; *Banco de Vizcaya, S.A. v The First Nat. Bank of Chicago,* 514 FSupp 1280, 128 [rejects foreign court's injunction since under the letter of credit, the paying bank was a confirming bank and payment was to be made in the state]).

It is clear from the record that CFE performed under the LOC in Mexico City and Banamex confirmed the performance in Mexico City with SG in Paris, France. There is no New York connection other than the unilateral acts by CFE and Banamex requesting the transmission of payment to New York accounts. In addition, SG is not required under the LOC to perform its obligations of LOC in New York. It is of no moment that CFE selected New York as the situs for the deposit of monies paid by Banamex under the LOC. It also follows that it is of no moment that Banamex transmitted payment under the LOC to New York and sought to be reimbursed via transmission of payment to a New York account. The requests for payment by the beneficiary of the

LOC (CFE) and the conforming bank (Banamex) do not constitute "performance" under the terms of LOC as there was no requirement in the LOC that payments be made in New York.

In short, the performance of the LOC, that is, presenting the Demand and then Request, the issuance of the Confirmation, the Notice by SG, not the method of payment, all took place in Mexico City, the locus of the performance under the LOC. There is no requirement under the LOC that reimbursement must take place in New York (but see, *Canadian Imperial Bank of Commerce v Pamukbank Tas,* 166 Misc2d 647). Accordingly, the Mexican Orders must be recognized under the doctrine of comity.[1]

However, the parties' contentions as to the scope and enforcement of the Mexican Orders with respect to Banamex's right to "reimbursement" and/or whether Banamex was "served" is disputed by competing affidavits and create questions of credibility which cannot be decided on a motion for summary judgment (*Ferrante v American Lung Assn*, 90 NY2d 623; *Treger v Ford Credit Titling Trust*, 11 AD3d 676).

In summary, the court finds no material disputed fact that SG would have to comply with the LOC and be required to reimburse Banamex but for the issuance of a provisional stay from the Mexican Courts. However, there is a material disputed fact as to the validity of the Orders with respect to SG's obligation to honor Banamex's Request or whether they are valid against Banamex's entitlement to reimbursement from SG is materially disputed (Quijano-Baz Affidavits; compare, Torres Landa Ruffo Aff).

[1] I note SG's alleged fraud allegation and find it to be without moment.

CONCLUSION

Based on the foregoing Banamex's motion is denied.

This constitutes the decision and order of the Court.

Dated: October 20, 2005

ENTER:

RICHARD B. LOWE III, J.S.C.

HON. RICHARD B. LOWE, III