

# Supreme Court Rules that Debt Under a Letter of Credit is Situated Where the Debtor is Resident.

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The Supreme Court's landmark decision in *Taurus Petroleum Ltd (Appellant) v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq (Respondent)*[2017] clarifies where a debt is situated under a letter of credit ("**LoC**").

## Background to the appeal to the Supreme Court

The case concerned an international arbitration award of USD \$8,716,477 to Taurus against the State Oil Marketing Company of the Ministry of Oil, Republic of Iraq ("**SOMC**").

SOMC did not make payments to Taurus as it should have under the arbitration award made in London.

Taurus learned that Shell International Eastern Trading Co had purchased crude oil from SOMC and that the price for the crude oil was payable under two LoCs which had been issued by the London branch of Credit Agricole (a French bank) to the Central Bank of Iraq in the form of a telex. The LoCs identified SOMC as the beneficiary, but stated that payment was to be made through a New York bank (the Federal Reserve Bank of New York – in favour of the Central Bank of Iraq), to the Iraq Oil Proceeds Account held by the Federal Reserve Bank of New York.

## High Court decision

Taurus obtained an order from the High Court to enforce the arbitration award as a judgment in England under s. 66(1) of the Arbitration Act 1996.

Taurus also obtained an interim third party debt order ("**TPDO**") in respect of the proceeds of sale due to be paid under the LoC and appointed a receiver to recover the debt from Credit Agricole.

This was because the High Court applied Article 4(2) of the Rome I Regulation, which says that a "*contract shall be governed by the law of the country where the party required to effect the*

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*characteristic of performance has his habitual residence*". As such, the London branch of Credit Agricole was held to be the entity undertaking the "*characteristic of performance*" – by instructing payment to be made. This meant that the High Court considered that the debt under the LoC was situated in England, giving it the power to grant a TPDO in respect of that debt. As such, Credit Agricole paid just under USD \$9.5 million into Court.

SOMC did not challenge the order under s. 66 (1) of the Arbitration Act 1996, or the Court's jurisdiction to make it. However, SOMC did challenge the other orders with an appeal to the Court of Appeal, arguing that the English Court had no jurisdiction to make them, on the grounds that the debts were situated in New York and that the Court had wrongly construed the LoC (SOMC arguing that the debts were the property of the Republic of Iraq and were immune from execution).

The High Court rejected SOMC's arguments with regard to state immunity.

### **Court of Appeal decision**

The case was heard by the Court of Appeal, which disagreed with the High Court at first instance and considered that *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] was binding authority for the fact that a debt under a LoC is situated in the country where payment is to be made (i.e. New York, USA in Taurus' case).

The Court of Appeal therefore held that the English court had no jurisdiction to make the TPDO. The decision was appealed to the Supreme Court by Taurus.

### **Supreme Court decision**

The Supreme Court allowed Taurus' appeal.

Important points of note from the Supreme Court's judgment are:

- **Construction:** The Court held that SOMC remained the sole owner of the debts created under the LoC. This was in response to an argument by SOMC that payment to a nominated bank account in another entity's name (in this case, in favour of the Bank of Iraq) meant that the account holding entity became the beneficiary under the LoC. Therefore, SOMC was the beneficiary of the LoC and as such, was the sole entity to which Credit Agricole was obligated to make payment. The Central Bank of Iraq had no proprietary interest in the debt and any promise to the Central Bank of Iraq as to how the debt in favour of SOMC would be paid was "*no bar to those debts being taken in execution at the instance of Taurus as a judgment creditor*". (The argument of state immunity had been previously rejected by the Court of Appeal and was therefore not pursued by SOMC before the Supreme Court);
- **Location of debt:** Credit Agricole's London branch was held by the Court to be separate to the French branches and as such, the location of the debt was England (the principle being that separate branches of banks in different countries were taken to be separate banks – see Uniform Customs and Practice for Documentary Credits, Rule 600); and
- **TPDO:** It was correct to reject SOMC's submission that Credit Agricole's undertaking to pay the debts due under the LoC to a New York account should be sufficient to prevent the Court from making TPDO. SOMC had a long term trading history which connected it to the English jurisdiction – the Court noted that the international oil trade is conducted

predominately by means of LoC. Enormous numbers of LoC are issued by international banks from their London branches. Therefore, it would have been entirely foreseeable by SOMC that the majority of the LoC against which they sold oil would be issued out of London and subject to English law. In addition the Court held that, "*it seems inconsistent to allow an international arbitration award to be turned into an English judgment for the purpose of enforcing the award and then to limit the means available for enforcement of the grounds of there being an insufficient connection with the jurisdiction*".

As such, the Supreme Court restored the TPDO and the receivership order against SOMC.

The Supreme Court concluded that the reasoning in *Power Curber* was wrongly decided and whilst the Court of Appeal had been bound by the decision in that case, the Supreme Court was not. As such, the Supreme Court disapproved *Power Curber* and decided that the location of the debt under a LoC is the place where the debtor **is resident**. As the LoC were issued by Credit Agricole's London Branch, it was held that the sole residence of the debtor under the LoC was London and a TPDO was available in relation to it.

### Comment

In a landmark decision, the Supreme Court has changed what the Court of Appeal considered to be a binding precedent in *Power Curber*, a case decided some 35 years ago. The decision will come as great news for English judgment creditors seeking to intercept payments under LoC's through TPDO's. Letters of credit issued by a London bank, even if the London bank is a branch of a foreign bank, can now be legitimately pursued according to this decision.

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