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5. BANKING LAW

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I. Letters of credit

A. The fraud exception

5.1 2023 has been an interesting year as far as the law on letters of credit is concerned. A number of significant judgments have been delivered by the Court of Appeal as well as by the General Division of the High Court, mostly concerning the fraud exception in the law relating to letters of credit.

5.2 It is a well-established rule in the law on letters of credit that where the beneficiary of a letter of credit[1] acts fraudulently in presenting to the paying bank documents that contain false statements, the bank is entitled to refuse to pay on the letter of credit.[2] This is so despite the fact that the documents are on their face in conformity with the requirements of the letter of credit.

5.3 The so-called fraud exception generally involves the beneficiary making statements to the bank which the beneficiary knows to be false. Knowing a statement to be false is, in turn, generally accepted to include not believing in the truth of the statement that the person makes. In recent years, there have been a number of cases where the precise boundaries of the fraud exception have been tested – particularly, the extent to which the beneficiary must be shown to have been complicitous with the fraud, before the bank is able to justify refusal to pay on the grounds of the fraud exception.

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1 The beneficiary would typically be the seller of the goods that is to be paid for by means of the letter of credit, that would have been procured by the buyer (as applicant for the letter of credit).

2 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168. The decision in *United City Merchants* was accepted to be part of Singapore law by the Singapore Court of Appeal in *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146.

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5.4 In *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd*[3] ("*Winson Oil v OCBC*"), the General Division of the High Court was presented with the issue of whether the fraud exception could also encompass the situation where the beneficiary, in the course of presenting documents for payment, makes a statement to the bank that is false, and which the beneficiary has made recklessly without caring whether the statement was true or false.

5.5 *Winson Oil v OCBC* was a spin-off litigation arising from the insolvency of Hin Leong Trading (Pte) Ltd ("Hin Leong"). Winson Oil Trading Pte Ltd ("Winson") was the beneficiary of two letters of credit issued respectively by Oversea-Chinese Banking Corporation Ltd ("OCBC") and by Standard Chartered Bank (Singapore) Ltd ("SCB") and it sued the banks for non-payment of the respective letters of credit. The applicant for the letters of credit and the purported buyer of the cargo to which the letters of credit related was Hin Leong.

5.6 In this case, the documents that were presented by Winson to the two banks had included letters of indemnity and it was the defence of both banks that the letters of indemnity had contained false representations. Justice Andre Maniam found as a matter of fact that the cargo was indeed not shipped onboard the vessels as described in the letters of indemnity, and accordingly, there were indeed false representations in the letters of indemnity when they were presented to the banks for payment.[4] The crucial question then was whether the false representations on the part of Winson were made fraudulently, and this in turn depended on Winson's state of mind at the time when the documents were presented. The banks' argument was that Winson either did not believe in the truth of the representations or was reckless as to whether or not the representations were true or not.

5.7 On the facts, there were actually two attempts at presentation by Winson to each of OCBC and SCB. While the claims against the banks were in each case based on the respective second presentation of documents, the judge nevertheless decided it was necessary to take into account the circumstances of the first presentations in each case, since this would be relevant for the purposes of assessing the state of mind of Winson at the time it made the second presentations.[5] It was noted that at the time when Winson made the first presentation of the documents

3 [2023] SGHC 220.
4 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [72].
5 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [77].

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to OCBC, there were already various red flags. In particular, in the first presentation to OCBC, OCBC had rejected the documents because it had received information that indicated that the cargo had not in fact been shipped on the vessel *Ocean Voyager* as indicated in the letter of indemnity (that was part of the documents presented to OCBC). Despite being told of this by OCBC, Winson made no attempt to make its own further inquiries. Instead, Winson abandoned the first presentation to both banks, and switched around the names of the vessels named in the two letters of indemnity, so that the letter of indemnity given to OCBC as part of the documents presented to OCBC indicated the shipment to have been onboard the vessel *Ocean Taipan*, while the letter of indemnity given to SCB as part of the documents presented to SCB indicated the shipment to have been onboard *Ocean Voyager*.

5.8 In these circumstances, the issue was whether, at the time of the second presentations, Winson had honestly believed in the truth of the representations within the letters of indemnity, and this in turn depended on how reasonable that belief was, given the circumstances prevailing.

5.9 Given all of the evidence, the judge found as a fact that, by the time Winson had made its second presentation to OCBC, it could not have honestly believed that its representations to OCBC were true. The judge noted that when OCBC rejected the first presentation, it had already informed Winson that it was rejecting the presentation because it had information that the cargo had not been shipped on the vessel specified in the letter of indemnity (which in the first presentation was the *Ocean Voyager*). However, Winson did not enquire of OCBC why OCBC said this.[6] Instead, Winson proceeded to switch the name of the vessel to the *Ocean Taipan* and made a second presentation to OCBC. In these circumstances, the judge took the view that an honest trader in Winson's position would at least have sought to understand why OCBC had said that no physical cargo was shipped and to check for itself if this was in fact the case.[7] The judge also thought that Winson had not been honest with OCBC as to its reasons for making a second presentation. What Winson had told OCBC was that there had been an internal mix-up discovered in the course of its standard procedures, but in truth the change was because Hin Leong had designated OCBC to finance the *Ocean Taipan* cargo rather than the *Ocean Voyager* cargo.[8]

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6 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [128]–[135].
7 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [136].
8 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [137]–[138].

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5.10 Accordingly, the judge's finding was that, by the time Winson made the second presentations to the two banks, it no longer believed in the truth of the representations within the letters of indemnity or was, at the very least, indifferent as to whether or not the representations in the letters of indemnity were true or not. The judge accordingly held the fraud exception to be established and dismissed Winson's claims against the banks.

5.11 So, does the judgment of Maniam J in *Winson Oil v OCBC* stand for the proposition that the fraud exception can be made out on the basis of the beneficiary being only reckless?

5.12 In the leading case on the tort of deceit, *Derry v Peek*,[9] Lord Herschell had observed that false representations could be categorised into three groups: (a) where the false statement was made knowingly; (b) where the false statement is made without any belief in its truth; and (c) where the false statement is made by the person who does not care as to whether it might be true or false.[10] The decision in *Winson Oil v OCBC* would certainly appear at first glance to be a case involving the third category of false statements. However, the third category of false statements is clearly very broad and could cover a variety of scenarios. At one end of the spectrum, there could be a scenario where the person is not in the least concerned as to whether his statement was true or false, and at the other end, there could be a scenario where the person is concerned but had been careless in checking the accuracy of his statement. In *Derry v Peek,* Lord Herschell himself had also observed that the third category of false statements ought really to be considered to be an instance of the second category, and in *Winson Oil v OCBC*, Maniam J had said he specifically agreed with this.[11] This also appears to be the view taken by the Court of Appeal in *Panatron Pte Ltd v Lee Cheow Lee*.[12]

5.13 Given the specific findings of fact by Maniam J (namely, that Winson could not be said to have honestly believed in the truth of the representations made in the documents submitted as part of the second presentations to both banks), in this author's view, the type of false statement considered in *Winson Oil v OCBC* ought to fall within the second category of Lord Herschell's classification.

9 (1889) 14 App Cas 337.
10 *Derry v Peek* (1889) 14 App Cas 337 at 374.
11 *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2023] SGHC 220 at [13].
12 [2001] 2 SLR(R) 435.

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5.14 Accordingly, the *Winson Oil v OCBC* decision does not give an answer to the question as to whether the fraud exception can be made out when the beneficiary does not care (and consequently, does not check) if the documents presented or the representations given to the issuing bank are true or false. This particular question came up for more direct consideration in the first instance judgment of Justice Sir Jeremy Cooke, sitting in the Singapore International Commercial Court ("SICC"), in *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*[13] ("*CACIB v PPT (HC)*"). While the decision of the SICC has since been reversed by the Court of Appeal on other grounds, for present purposes, what is of interest is the response of Cooke IJ to the argument raised by counsel for the bank that the fraud exception could be made out on the basis of recklessness on the part of the beneficiary. Rejecting this argument, Cooke IJ emphasised that for the fraud exception to apply, there had to be dishonesty on the part of the presenter of the documents which vitiated the presentation,[14] and that recklessness as to fraud could not give grounds to restrain payment under a letter of credit.[15] Accordingly, Cooke IJ's view was firm that it was not enough that to show that the beneficiary had only been reckless.

5.15 In the author's view, this aspect of Cooke IJ's judgment is compelling. As Andre Maniam J in *Winson Oil v OCBC* had pointed out, the recklessness that Cooke IJ had in mind in *CACIB v PPT* was of a form that remained compatible with the beneficiary having an honest belief in the truth of the documents. If the beneficiary still believed the documents to be true, then as a matter of principle, it would indeed be hard to see how a bank could invoke the fraud exception. A beneficiary who seeks payment under a letter of credit should not be required to investigate the circumstances behind the issuance of the letter of credit. Nor should the beneficiary be required to check the authenticity of the documents if there was nothing untoward in the circumstances to suggest that they might be irregular.

5.16 2023 also saw the Court of Appeal giving its judgment in the appeal against the decision of Cooke IJ in the SICC[16] ("*CACIB v PPT (CA)*"). While the appeal against Cooke IJ's decision was allowed, Cooke IJ's decision on the issue of the fraud exception was affirmed.

13 [2022] 4 SLR 1.
14 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [139].
15 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [144].
16 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2023] SGCA(I) 7.

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5.17 The facts of *CACIB v PPT* have been discussed in detail in the 2023 edition of the Annual Review[17] and for present purposes it suffices to set out only a brief summary. One important factual issue at trial was the extent to which PPT Energy Trading Co Ltd ("PPT"), as the beneficiary of the letter of credit, knew of the fraud of Zenrock, who was the applicant of the letter of credit. While Crédit Agricole Corporate & Investment Bank ("CACIB") had argued that PPT knew of the fraud or had shut its eyes to it, on the evidence before him, Cooke IJ concluded that while PPT was not an innocent bystander, it could not be said to have been a participant in Zenrock's fraud. This finding of fact was not challenged on appeal, and the issue left before the appellate court was whether CACIB could nonetheless refuse to pay on the letter of credit that it was induced to issue on the basis of the fraud of Zenrock, its own customer.

5.18 Addressing CACIB's argument that the fraud exception encompassed a situation where a bank was induced by the buyer (its customer) to issue a letter of credit in favour of the seller (the beneficiary), the Court of Appeal began its analysis by first pointing out that in the leading decision on the subject – namely, the case of *United City Merchants (Investments) Ltd v Royal Bank of Canada*[18] ("*United City Merchants*") – the House of Lords had specifically rejected the broad proposition that a bank could refuse payment if an otherwise complying presentation of documents contained a material misrepresentation of fact, of which the beneficiary was unaware, as well as a second, narrower proposition that a bank could refuse payment if an otherwise complying presentation of documents contained a material misrepresentation of fact that was false to the knowledge of the person who had issued the document and intended to deceive persons into whose hands the document might come.[19]

5.19 The Court of Appeal further noted that neither the precedent cases nor Art 4 of the Uniform Customs and Practice for Documentary Credits 600[20] ("UCP 600") offered any support for CACIB's argument.[21] Amongst other things, Art 4 provides that a credit was by its nature a separate transaction from the sale or other contract on which it may be based and that the bank's undertaking to honour the credit was not subject

17 *Banking Law* (2022) 23 SAL Ann Rev 104 at paras 5.2–5.4.
18 [1983] 1 AC 168.
19 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2023] SGCA(I) 7 at [20]–[22].
20 International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits 600* (2007).
21 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2023] SGCA(I) 7 at [24]–[28].

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to claims or defences by the applicant resulting from its relationship with the issuing bank or the beneficiary.[22]

5.20 Ultimately, the Court of Appeal considered that CACIB's arguments could not be sustained because it ran contrary to the very system of documentary letters of credits. If CACIB's case had been correct in law, then to be assured of payment, a beneficiary would have had to investigate the integrity of the applicant in its relationship with the issuing bank. Plainly, said the Court of Appeal, this would be a practical impossibility. There was simply no feasible way for a beneficiary (as the seller of the goods) to be assured that the bank had not been misled by its own customer (as the buyer of the goods).[23]

5.21 In 2023, the Court of Appeal also handed down its decision in *UniCredit Bank AG v Glencore Singapore Pte Ltd*[24] ("*UniCredit v Glencore*"). The decision at first instance was also discussed at length in last year's edition of the Annual Review.[25]

5.22 One interesting feature of *UniCredit v Glencore* is that the bank who had issued the letter of credit had sued the beneficiary of the letter of credit on the basis of, amongst other things, the tort of deceit. By the time the case came before the Court of Appeal, only this particular claim was left to be decided.

5.23 *UniCredit v Glencore is* yet another spin-off case from the saga of the Hin Leong insolvency. What happened here was that Hin Leong had, on 27 November 2019, contracted with Glencore Singapore Pte Ltd ("Glencore") to buy over a cargo of high-sulphur fuel oil, to be shipped on a vessel and delivered to Singapore. Glencore simultaneously entered into an agreement to buy back the cargo from Hin Leong with the parties agreeing that title to the cargo would pass from Glencore to Hin Leong and immediately back to Glencore at 12.01am on 2 December 2019. On 29 November 2019, upon the application of Hin Leong, UniCredit Bank AG ("UniCredit") issued a letter of credit in favour of Glencore to finance Hin Leong's purchase of the cargo under the first contract. The letter of credit provided that the documents to be presented would include a signed commercial invoice and original bills of lading issued or endorsed to the order of UniCredit. The letter of credit further provided that, as an alternative, the beneficiary could present its commercial invoice

22 International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits 600* (2007), Art 4.

23 *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2023] SGCA(I) 7 at [31].

24 [2023] 2 SLR 587.

25 *Banking Law* (2022) 23 SAL Ann Rev 104 at para 5.5.

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and a signed letter of indemnity in a prescribed format. The format for the letter of indemnity had specified that the letter would be addressed to Hin Leong. At the point when the letter of credit was issued, UniCredit was not aware of the concurrent buy-back arrangement. In due course, Glencore presented to UniCredit its commercial invoice and a signed letter of indemnity that was addressed to Hin Leong, and UniCredit duly paid on the letter of credit. At the point of payment, UniCredit remained unaware of the buy-back, and indeed, at all material times, UniCredit had been repeatedly falsely informed by Hin Leong that the cargo was unsold.

5.24 Seeking subsequently to recover what it had paid out, UniCredit argued that in tendering the letter of indemnity, Glencore had made two false representations to it. The first was that Glencore intended to, and would, locate and surrender the original bills of lading to Hin Leong, as provided for in the letter of indemnity itself, and the second was that the purchase of the cargo by Hin Leong was genuine, and that the cargo had not been resold by Hin Leong.

5.25 In support of his argument, counsel for UniCredit cited *DBS Bank Ltd v Carrier Singapore (Pte) Ltd*[26] ("*DBS v Carrier*"). In *DBS v Carrier*, the bank had similarly sued the beneficiary for deceit. In that case, the beneficiary, as the seller, had presented a delivery order wherein it was stated that a certain quantity of goods was delivered to the buyer on 30 June 2006. Together with a packing list (that was also required), the impression that was given by the beneficiary was that all of the goods were delivered on 30 June 2006. In fact, this was not the case. In actuality, only a proportion of the goods was delivered on 30 June 2006. The beneficiary had in fact added into the delivery order several deliveries that were made earlier. Given that the documents presented appeared on their face to conform with the letter of credit, the bank paid the beneficiary. The buyer subsequently became insolvent and when it transpired that the goods were not delivered all at once on 30 June 2006 (as represented in the delivery order), the bank sued the beneficiary for deceit. The Court of Appeal in *UniCredit v Glencore*, however, held that *DBS v Carrier* was distinguishable.[27] The Court of Appeal explained that in *DBS v Carrier*, the bank had been successful in its claim because the false statement, being contained in the delivery order, related to the state of affairs of the transaction. On the facts of *UniCredit v Glencore,* however, the letter of indemnity that UniCredit had relied upon was in accordance with the terms of the letter of credit addressed to Hin Leong rather than to UniCredit. This was because the letter of indemnity was intended to be a substitute for the bills of lading in the event that Glencore was unable

26 [2008] 3 SLR(R) 261.
27 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 at [51].

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to obtain and deliver the bills of lading. As such, the letter of indemnity was for the benefit of Hin Leong only, and was to be accepted by Hin Leong as the basis to make payment in lieu of the bills of lading. It made sense that the letter of indemnity should be addressed only to Hin Leong. Consequently, whatever might have been stated as representations within the letter of indemnity, these could only have been representations from Glencore to Hin Leong and not from Glencore to UniCredit.[28] The Court of Appeal also found it significant that in specifying the documents required to be presented under the letter of credit, UniCredit was content to accept a letter of indemnity that in form was to be issued by Glencore and addressed only to Hin Leong. The Court noted that the outcome might have been quite different if UniCredit had stipulated for the letter of indemnity to be addressed to itself.[29] In conclusion, the Court of Appeal held that UniCredit could not rely on something that was only between Glencore and Hin Leong and to which it was not privy.[30]

5.26 As to the scope of the representations, the Court of Appeal held that one had to look to the text of the letter of indemnity to determine what sort of representation could be reasonably implied and to whom the implied representation could have been intended. UniCredit had argued that a banker in its position would have understood from the wording used that Glencore was representing that it would locate and surrender the bills of lading to Hin Leong through UniCredit. This argument was roundly rejected. The Court of Appeal felt that, when the letter of indemnity was read in its entirety, it was clear that the parties had envisaged that it could transpire that no bills of lading would be available to be delivered and, if so, what the parties were agreeing to was for Glencore to deliver to Hin Leong the letter of indemnity in order to obtain payment. In such circumstances, there was no room for Glencore to have made any such implied representation to Hin Leong, let alone to UniCredit.[31]

5.27 The Court of Appeal also noted that a core part of UniCredit's case rested in challenging the legitimacy of the simultaneous sale and buy-back. However, the findings of the Judge at first instance have not been challenged on appeal. In any case, the Court of Appeal felt that the sale and buy-back was quite legitimate because Glencore, in entering into such an arrangement, was able to optimise its working capital by getting

28 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 at [55].
29 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 at [57].
30 In delivering the judgment of the Court of Appeal, Belinda Ang JA very colourfully described this as "effectively, an attempt to muscle in, under the guise of the tort of deceit, on a contractual obligation between Glencore and Hin Leong". *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 at [56].
31 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 at [60].

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more favourable lending terms for the buy-back as compared with the lending terms it was able to get when it first bought the cargo from the original seller. The sale and buy-back was certainly not a sham aimed at defrauding UniCredit.

5.28 The facts of *UniCredit v Glencore* also raises the interesting issue as to whether, when a promisor makes a promise to a promisee, there could arise concurrently an implied representation of fact by the promisor in favour of the promisee that the promisor intends to fulfil his promise. This is an intriguing question because the promisee could then potentially bring an action for misrepresentation on top of suing for breach of the promise. In this regard, while there is case law that suggests that a broken promise can give rise to an action for misrepresentation, the Court of Appeal felt that the issue of whether a person who makes a promise can also be inferred to have made a representation that he intends to fulfil the promise, must necessarily depend on what the promise was and what was the context in which the promise was made.[32]

B. Sanctions clauses

5.29 In 2023, the Singapore Court of Appeal also handed down its decision in *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA*[33] ("*Kuvera v JPMorgan*"). The first instance decision of Justice Vinodh Coomaraswamy was discussed in the 2023 edition of the Annual Review.

5.30 The facts in *Kuvera v JPMorgan* were that JPMorgan was the confirming bank for two letters of credit issued by a bank in Dubai. JPMorgan's confirmations, however, incorporated, in each case, a sanctions clause in the following terms:[34]

> [JPMorgan] must comply with all sanctions, embargo and other laws and regulations of the U.S. and of other applicable jurisdictions to the extent that they do not conflict with such U.S. laws and regulations ('applicable restrictions'). Should documents be presented involving any country, entity, vessel or individual listed in or otherwise subject to any applicable restriction, we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information.

5.31 The beneficiary duly made a presentation of documents to JPMorgan through its presenting bank. It was not disputed that the documents were a complying presentation under UCP 600. JPMorgan then sent the documents for internal screening, and, at that point,

32 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2023] 2 SLR 587 at [81]–[87].
33 [2023] 2 SLR 389.
34 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank NA* [2023] 2 SLR 389 at [7].

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JPMorgan was uncovered that the vessel on which the cargo had been shipped was a vessel that was identified within an internal JPMorgan list, which was referred to as the "Master List". The Master List was an internal compilation by JPMorgan of various persons, entities and vessels which JPMorgan had internally decided would raise concerns or have connection with US sanctions. The Master List was entirely distinct from a publicly accessible sanctions list published by the US Treasury's Office of Foreign Asset Control ("OFAC"). OFAC is one of the US government departments with responsibility for implementing US sanctions measures. At trial, JPMorgan gave evidence that even though a particular entity might not have been identified in the OFAC list, as part of its own due diligence process, JPMorgan might nevertheless determine that US sanctions law prohibited it from dealing with a particular entity, and if so, then this particular entity would then be added into the Master List. On the basis that the vessel was identified within its Master List, JPMorgan rejected the presentation and declined to make payment.

5.32 At first instance, the judge upheld JPMorgan's reliance on the sanctions clause, ruling that the sanctions clause had qualified JPMorgan's obligation to make payment under the letters of credit, and therefore that JPMorgan was entitled to refuse to pay the beneficiary.

5.33 Before the Court of Appeal, the beneficiary raised a number of points. First of all, it challenged JPMorgan's position that the sanctions clause had been incorporated and had qualified JPMorgan's obligation to pay under the letters of credit. This argument was rejected. The Court of Appeal referred to a commentary on the UCP 600 by James Byrne, Vincent Maulella, Soh Chee Seng and Alexander Zelenov,[35] and agreed with the authors that the principle of autonomy meant that the undertaking of a confirming bank was independent of the transaction that gave rise to the confirmation, including the undertaking of the issuing bank to the confirming bank. Accordingly, within a confirmation, it would only be the confirming bank who would be liable to the beneficiary when the beneficiary makes a complying presentation to the confirming bank, and it would be possible for the confirming bank to qualify its own liability to pay under the confirmation by means of including conditions (such as a sanctions clause) that might not have been contained in the original letter of credit from the issuing bank.

5.34 As regards the main issue of whether the sanctions clause entitled JPMorgan to refuse payment, in a bid to show that OFAC would have held JPMorgan to be in breach of US sanctions regulations if it had paid

35 James E Byrne *et al*, *UCP600: An Analytical Commentary* (The Institute of International Banking Law & Practice Inc, 2010).

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the beneficiary, JPMorgan introduced into evidence its correspondence with OFAC. At first instance, the judge accepted this to be rational and justified. The Court of Appeal, however, held that the posture of OFAC was immaterial. While it might be rational from a risk management perspective for JPMorgan to prefer to be sued by the beneficiary for breaching its obligation under the letter of credit than to be penalised by OFAC for breaching US sanctions laws, JPMorgan's approach was not permitted by the wording of its own sanctions clause. The question of whether the vessel was subject to any applicable sanctions must, said the Court of Appeal, be determined on an objective basis without third-party input from entities such as OFAC. Afterall, the inquiry ultimately turned on who were the owners of the vessel, and this was something that was capable of objective determination.[36]

5.35 The proper approach to the sanctions clause, said the Court of Appeal, was not by means of deciding the likelihood of JPMorgan being held by OFAC to have breached US sanctions law. This would inherently involve speculation and arbitrariness, since one would then be extrapolating what findings OFAC would have arrived at from circumstantial evidence.[37]

5.36 Indeed, the Court of Appeal noted that one witness from JPMorgan had even admitted to the judge at first instance that JPMorgan would have added the vessel into the Master List even if the risk of violation of US sanctions was judged to be less than 50%.[38] The Court of Appeal further noted that after the beneficiary began legal action against JPMorgan, JPMorgan even wrote to OFAC to obtain support from OFAC for its decision not to pay. JPMorgan also sought to rely on expert evidence on US law to the effect that OFAC would have found JPMorgan to be in breach of US sanctions law if it had paid on the letter of credit. However, the Court of Appeal ruled that neither the evidence as to OFAC's response to JPMorgan nor the expert evidence on US law had any material bearing on the interpretation of the effect of the sanction clause.[39] Such measures would only have shown that *there were risks* that the vessel might be subject to an applicable sanctions restriction but they would not prove it so. On the whole of the evidence before it, the Court of Appeal concluded that JPMorgan had failed to prove that the vessel was subject to an applicable sanctions restriction. Ultimately, said the Court of Appeal, JPMorgan's decision to refuse payment was very much the outcome of its own risk-management considerations, rather than

36 *Kuvera v JPMorgan* [2023] 2 SLR 389 at [42]–[43].
37 *Kuvera v JPMorgan* [2023] 2 SLR 389 at [44].
38 *Kuvera v JPMorgan* [2023] 2 SLR 389 at [45].
39 *Kuvera v JPMorgan* [2023] 2 SLR 389 at [51].

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the evidence (which JPMorgan itself had admitted to be inconclusive). Accordingly, the Court of Appeal held that JPMorgan could not rely on the sanctions clause as the basis to refuse payment.

5.37 Having decided that JPMorgan could not rely on the sanctions clause to avoid payment, the Court of Appeal went on to consider, in passing, the question of whether a sanctions clause could in concept be compatible with the commercial purpose of a letter of credit or a confirmation of a letter of credit.[40]

5.38 In this regard, the Court of Appeal observed that there was little authority as to when a term ought to be considered incompatible with the commercial purpose of letters of credit, but from a survey of academic literature,[41] English case law[42] and commentary from the International Chamber of Commerce,[43] the Court of Appeal noted that there was an observable trend towards judicial recognition of sanctions clauses in commercial transactions. However, none of the cases to date have concerned letters of credit governed by the UCP 600. Significantly, in the final closing comments on this point, the Court of Appeal expressed the view that if the sanctions clause did have as wide an effect as that which JPMorgan had claimed (namely that it entitled JPMorgan to deny payment against a complying presentation, so long as JPMorgan found, on a risk-based assessment, that it preferred to be sued by the beneficiary than be penalised by OFAC), it would have considered the sanctions clause to indeed be incompatible with the commercial purpose of a confirmation of a letter of credit, because of the significant degree of unpredictability that such a clause would have introduced.[44]

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40 *Kuvera v JPMorgan* [2023] 2 SLR 389 at [69]–[77].

41 Cayle S Lupton, "A Critical Evaluation of the Use of Sanctions Clauses in Letters of Credit" (2022) 25 PER/PELJ 1; Damien Smith, "Sanctions Disclaimers in Letters of Credit" [2014] *Journal of International Commercial Law* 259.

42 *Mamancochet Mining Ltd v Aegis Managing Agency Ltd* [2018] EWHC 2643 (Comm); *M/V Pacific Pearl Co Limited v Osios David Shipping Inc* [2021] EWHC 2808 (Comm); *Banco San Juan Internacional Inc v Petróleos de Venezuela SA* [2020] EWHC 2937 (Comm).

43 International Chamber of Commerce, *Guidance Paper on the Use of Sanctions Clauses in Trade Finance-Related Instruments subject to ICC Rules* (Document No. 470/1238) where it was stated that a sanctions clause that allowed the issuer a level of discretion on whether to pay and that went beyond statutory or regulatory requirements applicable to the issuer, could call into question the irrevocable and documentary nature of the letter of credit.

44 *Kuvera v JPMorgan* [2023] 2 SLR 389 at [78]. It seems that the Court of Appeal was heavily influenced by the fact that a beneficiary would be faced with the uncertainty of not knowing whether a sanctions clause could be invoked by the bank to deny it payment, and this would strike at the security of payment that is at the heart of a letter of credit.

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5.39 This comment has tremendous significance and in this present author's view, is not without controversy. While it is understandable that banks should not be allowed to get away with excessively broad sanctions clauses that effectively give them the discretion to decide when to pay and when not to pay on a complying presentation, on the flip side, if banks were to be denied the ability to rely on sanctions clauses, this author would argue that this could have equally detrimental consequences.

5.40 Modern sanctions measures are primarily driven by political considerations and are also typically enacted or implemented by the executive branch of a government. They are rarely worded in a manner that facilitates easy compliance by a bank. Just as a beneficiary would not be in a good position to check whether the documents it presents pursuant to a letter of credit might be somehow tainted by some connection to a sanctions subject, an issuing bank or a confirming bank which has received a presentation of seemingly complying documents would equally not be in a good position to check whether it might end up being penalised by a regulatory authority for paying out on a letter of credit in a transaction that ultimately did turn out to be tainted by sanctions. And given the heavy-handedness with which sanctions laws are nowadays enforced, a bank may simply decide that it would not be worth the risk to subject itself to this sort of enforcement exposure by participating in issuing or confirming a letter of credit. The result may be to impact the current broad availability of letters of credit as a secure means of payment in international commerce.

5.41 In Singapore, banks are already expected to undertake robust due diligence when they participate in a trade financing transaction.[45] In relation to import letters of credit, the Monetary Authority of Singapore ("MAS") has said that the issuing bank should make inquiries of the applicant as to the countries with which the applicant trades, the trading routes used, the goods traded and the type and nature of the customers or suppliers that the applicant does business with. MAS also added that the bank should, where possible, enquire as to the role and location of other third parties that may be involved (such as shipping agencies, inspection companies and warehouses). And, in relation to export letters of credit, MAS has said that where the advising or confirming bank has a pre-existing ongoing relationship with the issuing bank, the advising or confirming bank could rely on the due diligence measures performed by the issuing bank; but in cases where the advising or confirming bank does not have a pre-existing, ongoing relationship with the issuing bank,

45 Monetary Authority of Singapore, *Guidance on Anti-Money Laundering and Countering the Financing of Terrorism Controls in Trade Finance and Correspondent Banking* (October 2015).

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the advising or confirming bank should take the additional steps of authenticating the letter of credit and subjecting the relevant parties to its sanctions screening process. If a bank is already required or expected by its regulator to screen a beneficiary and other related parties and to undertake various due diligence measures, it must logically follow that the bank ought in principle to be able to decline payment if the outcome of these due diligence measures suggests to it that making payment on the letter of credit could cause it to breach an applicable sanctions law.

II. Banking secrecy – The bankers' books exception

5.42 In *Ong Jane Rebecca v Lim Lie Hoa*,[46] the applicants, who were the private trustees of the estate of a deceased bankrupt, had applied, pursuant to s 335 of the Insolvency, Restructuring and Dissolution Act 2018[47] ("IRDA"), for court orders to require three banks to permit the applicants to inspect certain bank statements, in order that the applicants could investigate and ascertain the affairs, dealings and property of the bankrupt's estate. The banks declined to provide the bank statements except pursuant to a court order, and accordingly the application was made to the court.

5.43 Judicial Commissioner Goh Yihan (as he then was) in the General Division of the High Court held that an application under s 335 of the IRDA in relation to personal bankruptcy ought to be decided on the same legal principles that would govern an application under s 244 of the IRDA in relation to corporate insolvency. In *PricewaterhouseCoopers LLP v Celestial Nutifoods Ltd*[48] ("*Celestial*"), the Court of Appeal has held that the question of whether to grant an order under what is now s 244 of the IRDA should involve a two-stage test – firstly, the applicant for the order had to show that there was a reasonable basis for believing that the person against whom the order was sought would be able to assist in obtaining relevant information and that such information was reasonably required; and secondly, the court has to be satisfied that, upon balancing all the competing or conflicting interests involved, an order ought indeed to be made.

5.44 Goh JC proceeded to apply the two stages of the *Celestial* test to the s 335 application that was before him. As regards the first stage, Goh JC considered, after surveying the circumstances, that the information in the possession of the banks was indeed reasonably

46 [2023] SGHC 33.
47 2020 Rev Ed.
48 [2015] 3 SLR 665.

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required and the applicants did have a reasonable basis to believe that the information would assist them in their work of investigating the affairs of the deceased bankrupt. As regards the second stage, the obstacle that the applicant faced in this regard was banking secrecy. By s 47(1) of the Banking Act 1970[49] ("BA"), neither a bank nor its officers were allowed to disclose customer information to any person, except as expressly provided in the BA. On the facts, it was clear that the information sought by the applicants was customer information, and as such, banking secrecy would initially have prevented the banks from giving the information to the applicant. However, the obligation of banking secrecy is subject to a number of exceptions as provided in the Third Schedule of the BA. In particular, para 7 of Pt 1 of the Third Schedule of the BA provides that a bank may disclose customer information if such disclosure is necessary for compliance with a court order made pursuant to Pt 4 of the Evidence Act 1893[50] ("EA"). Section 175 of the EA is a provision contained within Pt 4 of the EA and it provides that any party to a legal proceeding may apply to the court or a judge for an order that it be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of that legal proceeding. On the facts, Goh JC ruled that an application pursuant to s 335 of the IRDA would qualify as a legal proceeding for the purposes of s 175 of the EA. In arriving at his decision, the Judicial Commissioner endorsed a previous ruling of the High Court in *Success Elegant Trading v La Dolce Vita Fine Dining Co Ltd*[51] to the effect that s 175 of the EA in and of itself did not afford a party the right to gain access to information in bankers' books but only provided the means for a court to make an order that would override banking secrecy. In the case before him, since para 7 of Pt 1 of the Third Schedule of the BA provided a pathway through which a bank could share customer information without breaching banking secrecy, Goh JC considered that the respondent banks would not be at risk of any potential liability for breaching banking secrecy. Accordingly, he ruled that the balance of interests was clearly in favour of making the disclosure orders and he duly granted the applications.

III. On-demand performance guarantees

5.45 Finally, it would be worthwhile to mention the decision of Assistant Registrar Desmond Chong in *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd*[52] ("*TA v UD*") which concerned the classification of various forms of guarantees and indemnities.

49 2020 Rev Ed.
50 2020 Rev Ed.
51 [2016] 4 SLR 1392.
52 [2023] SGHCR 1.

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5.46 In this case, the assistant registrar delivered a judgment in an interlocutory application by the plaintiffs to strike out the defences of the defendants. The plaintiffs had sued the defendants on a document that was entitled "Guarantee" and which had been entered into between the first defendant and the second defendant. The plaintiffs brought the claim on the Guarantee because the second defendant had purportedly assigned its rights under the Guarantee to the plaintiffs. In making their claim, the plaintiffs' main submission was that the Guarantee was an on-demand performance guarantee by the first defendant and, accordingly, the first defendant was obligated to pay upon a simple demand made by the plaintiffs.

5.47 What is significant about *TA v UD* was that the assistant registrar had helpfully restated the legal principles for distinguishing between a guarantee, an indemnity and an on-demand performance guarantee.

5.48 In brief, the judgment points out that the distinction between a contract of guarantee and a contract of indemnity lies in the fact that with a contract of guarantee, the obligor is guaranteeing to the beneficiary the performance of the payment obligation by the principal debtor, whereas with a contract of indemnity, the obligor is assuming a direct obligation to make payment to the beneficiary. It follows that under a contract of guarantee, the guarantor's obligation is a secondary liability that is co-extensive with the underlying primary obligation of the principal debtor. Therefore, if the principal debtor's obligation is discharged or no longer exists for any other reason, the guarantor's liability will also correspondingly be discharged or cease to exist. By contrast, under a contract of indemnity, the beneficiary remains entitled to be paid so long as he makes a valid demand in accordance with the terms of the contract of indemnity. To the extent that such a payment results in the beneficiary making a windfall, it would be for the obligor to find a separate means of recovering the amount paid.

5.49 An on-demand performance guarantee is a specialised form of a contract of indemnity. The on-demand performance guarantee is usually issued by a bank, insurer or other financial institution, and by such an instrument, the issuer undertakes to pay a specified amount of money to a specified third party upon the occurrence of a specified event.

5.50 In the UK, as an aid in deciding whether a document is an on-demand performance guarantee, the courts have developed certain evidential presumptions of fact. In *Marubeni Hong Kong and South China Ltd v Mongolian Government*,[53] the English Court of Appeal held that,

53 [2005] 1 WLR 2497.

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outside of the banking context, the absence of express language creates a strong presumption that the document would not be construed as an on-demand performance guarantee. This is the so-called "Marubeni presumption". On the flip side, in *Gold Coast Ltd v Caja de Ahorros del Mediterraneo*,[54] another bench of the English Court of Appeal also held that an instrument would be presumed to be an on-demand guarantee if all of the following factors identified in *Paget's Law of Banking*[55] ("the Paget factors") were found to be present:

(a) the instrument must relate to an underlying transaction between parties in different jurisdictions;

(b) the instrument must be issued by a bank;

(c) the instrument must contain an undertaking to pay on demand; and

(d) the instrument must not contain clauses excluding or limiting defences available to the guarantor.

5.51 On the facts of *TA v UD*, the distinction between an on-demand performance guarantee and a simple guarantee was particularly crucial. The plaintiffs had relied on the characterisation of the document as an on-demand performance guarantee specifically in order to block the first defendant from raising other grievances or defences as a basis for resisting payment. Interpreting the document before him, the assistant registrar noted that while cll 3.1.1 and 3.1.2 were worded in terms that had the effect of a simple guarantee, cl 3.2 was worded in terms that had the effect of an on-demand performance guarantee. The obligation to pay in cl 3.2 was framed as a separate and independent stipulation in the event that any amount was not recoverable on the footing of a guarantee. Accordingly, the first defendant's liability to pay pursuant to cl 3.2 had the effect of an on-demand performance guarantee because the first defendant's liability to pay was a liability arising from being a primary debtor rather than a secondary debtor.[56]

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54 [2002] 1 Lloyd's Rep 617.

55 John Odgers KC & Ian Wilson KC, *Paget's Law of Banking* (LexisNexis Butterworths, 6th Ed, 2023).

56 The decision of Assistant Registrar Desmond Chong has recently been upheld by Coomaraswamy J in chambers: *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2024] SGHC 11. Although the judge did not agree that the guarantee signed by the first defendant was an on-demand performance guarantee, the judge did expressly recognise the Marubeni presumption and the Paget factors to be part of Singapore law.

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