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5. BANKING LAW

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I. Letters of credit

5.1 Of the relatively few banking cases that were decided in the Singapore courts in 2022, the most interesting ones related to letters of credit ("LCs"). Two of these cases involved the continuing fallout from the insolvency of oil trading companies Hin Leong Trading (Pte) Ltd ("Hin Leong") and Zenrock Commodities Trading Pte Ltd ("Zenrock"). The banks that had issued LCs upon the application of these two entities were unable to obtain reimbursement from them and consequently had to engage in litigation against the beneficiaries in order to recover or avoid their losses. Another interesting LC case decided in 2022 concerned sanctions, an area of law that has become of increased concern for banks in a time of growing global strife, where countries such as the US have "a suite of sanctions against many countries".[1]

A. Issues relating to commodities trade

(1) Facts of Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd

5.2 In *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd*[2] ("*CACIB v PPT*"), Crédit Agricole Corporate & Investment Bank ("CACIB") issued an LC upon the application of Zenrock in favour of PPT Energy Trading Co Ltd ("PPT"). The LC was to finance Zenrock's purchase of Djeno crude oil ("the Cargo") from PPT. Zenrock was, in turn, to on-sell the Cargo to Total Oil Trading SA ("TOTSA"). As security for the issuance of the LC, Zenrock executed a notice of assignment purporting to assign its receivables due under its sale contract with TOTSA ("the TOTSA Receivable") to CACIB. Unbeknownst to CACIB, the Zenrock-TOTSA sale contract that was furnished to support Zenrock's LC application was fabricated to reflect a higher sale price than the price in Zenrock's actual sale contract with

1 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [153].
2 [2022] 4 SLR 1.

TOTSA. Also unbeknownst to CACIB, Zenrock had already executed an earlier notice of assignment assigning the proceeds of the TOTSA Receivable to another bank, ING Bank NV. Further, and also unbeknownst to CACIB, the PPT-Zenrock sale contract was part of a series of contracts for the round tripping of the Cargo, comprising (a) a sale from Zenrock to Shandong Energy International (Singapore) Pte Ltd ("Shandong"); (b) an on-sale from Shandong to PPT; and (c) a further sale by PPT back to Zenrock, which was the subject of the current lawsuit. For the initial sale to Shandong, Zenrock had purchased the Cargo from SOCAR Trading SA ("SOCAR"). SOCAR in turn had purchased the Cargo from TOTSA. The LC was issued subject to the Uniform Customs and Practice for Documentary Credits[3] ("UCP 600") and provided that the original bills of lading and other shipping documents relating to the Cargo had to be presented to obtain payment. However, in the absence of the original bills of lading, the LC allowed PPT to present its signed invoice and its signed letter of indemnity ("LOI") in the prescribed format.

5.3 The Cargo was loaded on 6 April 2020. On 16 April 2020, PPT presented through its bank, Bank of China ("BOC"), its commercial invoice and a LOI to claim payment under the LC. On 22 April 2020, CACIB informed Zenrock that the invoice and the LOI had been received and that all the terms and conditions of the LC had been met for payment. That same day, CACIB also contacted TOTSA to reiterate its entitlement to the TOTSA Receivable and instructed TOTSA to pay the sale proceeds directly to CACIB as assignee on the due date, whereupon TOTSA informed CACIB about the double assignment of the sale proceeds. CACIB became concerned about whether PPT had marketable title to the Cargo and whether there were original bills of lading which could be produced by PPT and, on 24 April 2020, instructed BOC not to release payment to PPT under the LC. Subsequently, CACIB also found out about the inflated fabricated price in the Zenrock-TOTSA contract and the round tripping of the cargo. CACIB requested PPT to provide the original bills of lading and other shipping documents, but these were not provided by 26 May 2020, the date on which the Cargo was due to be discharged. On 27 May 2020, CACIB applied to the High Court for, and was granted, an *ex parte* interim injunction to prevent payment under the LC. The interim injunction meant that CACIB could not make payment under the LC on 5 June 2020, which was the due date for payment under the on Zenrock-PPT sale contract. The parties later entered into negotiations which resulted in the discharge of the interim injunction and payment being made under the LC by CACIB to PPT against PPT's provision of a bank guarantee from BOC, which would cover repayment

3 2007 Revision.

to CACIB should the court eventually decide that CACIB's refusal to pay under the LC had been justified.

5.4 In the hearing before Jeremy Cooke IJ in the Singapore International Commercial Court, CACIB sought a declaration that PPT was not entitled to receive any sums under the LC because its demand to be paid under the LC was fraudulent and/or unconscionable, having been part of a fraudulent scheme to inflate the value of the Cargo and to procure double financing for it. PPT in turn sought a declaration that it was entitled to payment of the sum due under the LC and argued that "CACIB had sought to manufacture a case against PPT in circumstances where they had been defrauded by Zenrock and were looking to make recovery from anyone they could blame in circumstances where there was no possibility of any real recovery from Zenrock itself".[4]

(2) Facts of the UniCredit Bank AG v Glencore Singapore Pte Ltd

5.5 In *UniCredit Bank AG v Glencore Singapore Pte Ltd*[5] ("*UniCredit v Glencore*"), Hin Leong contracted to buy high-sulphur fuel oil ("the Goods") from Glencore Singapore Pte Ltd ("Glencore") on 27 November 2019 ("the Sale Contract"), such goods to be shipped on board the vessel "MT New Vision" and delivered to Singapore in the period of 18 to 25 December 2019. Glencore simultaneously agreed to buy back the Goods from Hin Leong ("the Buyback Contract"), both parties agreeing that title to the Goods 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 an LC in the sum of more than US$37m in favour of Glencore to finance Hin Leong's purchase of the Goods under the Sale Contract. The LC was subject to the UCP 600 and stated that the credit would be available against the presentation of various stipulated documents, including a signed commercial invoice and set of original bills of lading issued or endorsed to the order of UniCredit. The LC further stated that, in the event that documents called for were not available at time of presentation, payment would be effected against the beneficiary's commercial invoice and the beneficiary's signed LOI in the prescribed format. On 2 December 2019, Glencore presented its commercial invoice LOI addressed also to Hin Leong. On 3 December 2019, Glencore was paid by UniCredit pursuant to the LC under a discounting agreement for early payment. At the time of issuance of the LC, UniCredit did not know about the Buyback Contract. UniCredit remained in the dark about this

4 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [33].

5 [2022] SGHC 263.

for some time as Hin Leong falsely told UniCredit several times, even until the date of maturity of the LC on 28 February 2020, that the Goods were unsold. On 13 April 2020, UniCredit demanded payment from Hin Leong of the outstanding advances for the purchase of the goods, but Hin Leong was insolvent and unable to pay. On 14 April 2020, UniCredit asked Glencore if it had the original bills of lading for the Goods and received the response that it did not. Being left in the unfortunate position of being without repayment from Hin Leong, without the goods and without the bills of lading, UniCredit sought recourse against Glencore, arguing, *inter alia*, that the LC should be rescinded and payment refunded because the Sale Contract was a sham or fictitious transaction.

(3) Sham or fictitious transactions?

5.6 The argument that the sale transaction between the applicant and the beneficiary was a sham or fictitious one was raised in both *CACIB v PPT* and *UniCredit v Glencore*. The alleged factual basis of this argument was the round-tripping transactions in the former case and the sale and buyback transaction in the latter. In *CACIB v PPT*, the sham argument was used to support the allegation of fraudulent misrepresentation – that by presenting the PPT invoice and the LOI to CACIB, the beneficiary's employees had dishonestly represented that the Zenrock-PPT sale contract was a genuine sale when in fact there was no intention that property in the Cargo should ever pass.[6] In *UniCredit v Glencore*, the sham argument was used to support the bank's claim for the rescission of the LC. The legal principles were set out by the courts as follows:

> (a) For a transaction to be a sham, it is necessary for all parties to that transaction to have a common subjective intention that the transaction documents are not to create the legal rights and obligations which they give the appearance of creating, that is, the creation of a pretence of a transaction in order to deceive others.[7]
>
> (b) There is a strong presumption that the parties to a contract intend to create legal relation by way of the contractual

6 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [29].

7 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 at [27] and [67]; *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [120]; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802.

documents, and that the onus to rebut this presumption lies on the party alleging the sham.[8]

(c) The motive for a transaction is not in itself determinative of whether it is a sham.[9] Motives such as making arbitrage profits, optimising working capital, leveraging on credit terms or making use of available financing do not make a transaction a sham if there was an intention to create legal relations in connection with genuine cargo.[10]

5.7 In both cases, there was an ulterior motive for the transactions. In *UniCredit v Glencore*, the LC enabled Hin Leong and Glencore to use banking facilities to their own financial advantage. In *CACIB v PPT*, PPT participated in the transaction solely to earn a commission. Nevertheless, these motives did not prevent the transactions from being genuine sale transactions. The respective courts applied the above principles to the facts of the cases before them and found that the round-tripping transactions in *CACIB v PPT* and the Sale Contract and the Buyback Contract in the back-to-back arrangement in *UniCredit v Glencore* were genuine sales and purchases under which the parties intended that the goods should be sold and paid for, and that title should pass.[11] The fact that original bills of lading were not presented to the banks did not point to a sham transaction. The terms of the LC in both cases allowed for the presentation of the seller's commercial invoice and the seller's LOI in cases where the original shipping documents were not available. Evidence was given that in pre-structured back-to-back transactions in the oil trade, original shipping documents were typically not passed down the chain, and the cargo would be delivered and title would pass to the ultimate buyer without the original documents ever reaching it.[12]

8 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 at [27]; *Goodwood Associates v Southernpec (Singapore) Shipping Pte Ltd* [2020] SGHC 242 at [40]; *Toh Eng Tiah v Jiang Angelina* [2021] 1 SLR 1176 at [80] and [83].

9 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 at [27]; *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [120].

10 *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 at [27]; *Goodwood Associates v Southernpec (Singapore) Shipping Pte Ltd* [2020] SGHC 242 at [48]; *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [123], [141] and [142].

11 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [123]; *UniCredit Bank AG v Glencore Singapore Pte Ltd* [2022] SGHC 263 at [34].

12 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [126].

(4) Reiteration of core principles of letter of credit law: Payment upon conforming documents, the doctrine of autonomy and the fraud exception

5.8 In *CACIB v PPT*, whether PPT had a right to be paid under the LC could be seen to essentially rest on two fundamental principles of LC law. First, did PPT present conforming documents? Second, if so, did the fraud exception apply for justify departure from the requirement of payment upon conforming documents? On the first question, Cooke IJ found that PPT had made a compliant presentation of documents. The terms of the LC allowed PPT to present its signed invoice and its signed LOI in the prescribed form in the absence of the original bills of lading, and it had done so. Under Arts 14 to 16 of the UCP 600, CACIB was obliged to accept the documents within five banking days, but it failed to do so; it also failed to give any notice of refusal to pay within the stipulated time. CACIB was therefore precluded from claiming that the documents did not constitute a complying presentation.[13] On the second question, Cooke IJ reiterated the basic principle of LC law that in the absence of fraud, the issuing bank must honour a complying presentation. He explained that:[14]

> … [s]ince any fraud capable of vitiating a demand for payment under a letter of credit must be in the *presentation of documents itself*, in my judgment, such fraud can only, by definition, encompass a beneficiary who acts *dishonestly*, in presenting otherwise facially compliant documents either with the knowledge that what is contained therein is false, or without belief that what is contained therein is true. [emphasis original]

Cooke IJ was of the view that, in the case before him, the fraud exception would only apply if CACIB could show that PPT had intended CACIB to be defrauded by Zenrock, that is, CACIB had to show that PPT was dishonest and intended to participate in the fraud which Zenrock perpetrated on CACIB.[15] The learned judge examined the various allegations that had been made by CACIB against PPT and concluded that "although PPT was hardly an 'innocent bystander', it could not properly be said that PPT had actual knowledge of, or was wilfully blind to, the fact that the PPT-Zenrock sale contract was part of a fraudulent scheme".[16] He agreed with CACIB that PPT's officers must have been aware about the round tripping of the Cargo, but was of the view that

13 Uniform Customs and Practice for Documentary Credits (2007 Rev Ed) Art 16(f).

14 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [20].

15 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [22].

16 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [115].

they did not know the reason for the round-tripping transactions and that they need not have to take the trouble to find out. It was part of PPT's usual business model to act as a "go-between" to be interposed in pre-structured back-to-back transactions like the present one, and its interest was always only the profit that it could make out of the transactions. The learned judge found that the fact that PPT did not act diligently in making any enquiry, investigation or consideration of the reasons for the round-tripping transactions did not mean that it was dishonest or fraudulent, and PPT therefore had not acted in such a way that there were grounds to restrain payment under the LC on the grounds of fraud.[17]

(5) What is the effect of recklessness on the part of the beneficiary?

5.9 In both *CACIB v PPT* and *UniCredit v Glencore*, the issuing bank had been defrauded by an applicant and could not obtain reimbursement from the applicant under the LC due to the latter's insolvency, so that the issuing bank had to turn its attention to the beneficiary: to seek to resist payment under the LC in one case; and seek to rescind the LC contract in the other. One question which arose in *CACIB v PPT* concerned the effect of recklessness on the part of the beneficiary. Could this potentially prevent the beneficiary from claiming on the LC despite the presentment of confirming documents? In *CACIB v PPT*, Cooke IJ was firm in rejecting the argument that recklessness on the part of PPT in not enquiring into the purpose of the round-tripping transactions was sufficient to establish a valid defence to a claim under the LC.[18] He rejected CACIB's attempt to rely on the Court of Appeal's view in *Arab Banking Corp (BSC) v Boustead Singapore Ltd*[19] that it would be fraudulent for a beneficiary under a demand guarantee to make a false representation if he was recklessly indifferent to the truth or the falsity of this assertion, and pointed out that there was a distinction between the law relating to LCs and the law relating to demand guarantees.[20] Cooke IJ concluded that "a failure, even a reckless failure to ascertain the truth of representations, which are made in the honest belief that they are true, will not amount to fraud for the purposes of non-payment under a letter of credit".[21] In any case, Cooke IJ was of the view that, on the facts, PPT had not been reckless in relation to any fraud by Zenrock as that possibility had not crossed

17 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [140] and [144].

18 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [22].

19 [2016] 3 SLR 557 at [63]–[64].

20 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [21].

21 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [21].

the minds of Zenrock's representatives, whose attention in relation to the pre-structured back-to-back deals had been focused solely on the commission under the LC.[22]

(6) Can the issuing bank sue the beneficiary in negligence?

5.10 In *CACIB v PPT*, Cooke IJ relied on the 2008 High Court decision in *DBS Bank Ltd v Carrier Singapore (Pte) Ltd*[23] ("*DBS v Carrier*") for the proposition that there is no duty of care owed by a beneficiary to the bank when presenting documents to the issuing bank.[24] In *DBS v Carrier*, the beneficiary prepared a packing list that did not accurately reflect the true state of the goods and was paid under the LC upon presentment of facially conforming documents. The judge, Andrew Ang J, considered whether the issuing bank had an action against the beneficiary for negligent misstatement and expressed the view, *obiter*, that an issuing or confirming bank had no cause of action in negligent misrepresentation against the beneficiary of an LC. His rationale was that if banks were allowed to rely on negligent misrepresentation to recover money they had paid to beneficiaries, it would also have to be accepted that banks were entitled to invoke negligent misrepresentation as a ground not to pay beneficiaries in the first place.[25] The judge was of the view that this would be undesirable as it would "unravel the narrow exception to the fraud principles" as "banks could refuse to pay the beneficiary once there was any inaccurate statement of material fact by simply alleging that the beneficiary had been negligent".[26]

5.11 The question of whether an issuing bank can sue a beneficiary in negligence was also considered by Andre Maniam JC in 2021 in *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd*[27] ("*BOC v BP*") and was discussed in the previous edition of the *Annual Review*. Maniam JC referred to the analysis in *DBS v Carrier* but reached a different decision. He did not agree with the approach taken in *DBS v Carrier* of equating the grounds for a bank refusing payment to the grounds for it recovering payment. Maniam JC was of the view that the rule that an issuing bank must pay upon facially conforming documents even if they contain negligent misstatements does not logically mean that the bank cannot recover payments that have been made. Based on this view, one could

22 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [140].
23 [2008] 3 SLR(R) 261 at [103]–[106].
24 *Crédit Agricole Corporate and Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd* [2022] 4 SLR 1 at [21].
25 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [99].
26 *DBS Bank Ltd v Carrier Singapore (Pte) Ltd* [2008] 3 SLR(R) 261 at [99].
27 [2021] 5 SLR 738. This case was discussed in (2021) 22 SAL Ann Rev 128 at 134–137.

make the opposite assertion, that allowing an issuing bank to sue a beneficiary for negligent misstatement does not necessarily mean that the issuing bank can refuse to pay the beneficiary under the LC. Maniam JC referred to the "pay now sue later" nature of LCs, which makes them the equivalent to cash in hand.[28] He persuasively drew an analogy with the situation where an account party could still sue the beneficiary for breach of contract and claim damages after the beneficiary had been paid upon conforming documents,[29] and stated that the same principle could apply to the issuer, so that it too could pay first and sue later.[30] Maniam JC was of the view that the question of whether the issuing bank can recover payment from the beneficiary on the ground of negligence should depend on the general principles of tort law laid down by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology*.[31]

5.12 *BOC v BP* was not referred to in *CACIB v PPT*,[32] which is unfortunate, as it would have provided a counterpoint to *DBS v Carrier* and provided more material for a fuller discussion of the important question of whether an issuing bank might have an action in negligence against the beneficiary for negligent misstatement. As it was, in *CACIB v PPT*, Cooke IJ merely aligned himself with the position taken in *DBS v Carrier* without much additional analysis. This question remains open for an authoritative decision at the High Court or the Court of Appeal. The views of Ang J were *obiter* in *DBS v Carrier*. In *BOC v BP*, the context was an appeal to the High Court against the Registrar's decision to strike out the issuing bank's claim on the basis that it disclosed no reasonable cause of action, and, in coming to his decision that the action should be reinstated, Maniam JC did not have to decide the question definitively, but was merely applying the principle that a claim should only be struck out if it was obviously unsustainable, the pleadings were unarguably bad, and it was impossible, not just improbable, for the claim to succeed.[33]

5.13 With the greatest respect, this author is of the view that there should be no obstacle to allowing an issuing bank to sue the beneficiary in negligence based on the normal principles of tort law. It does not necessarily follow, as asserted by the judge in *DBS v Carrier*, that if banks are entitled to recover money from beneficiaries based on negligent misrepresentation, they would also be entitled to refuse to pay on conforming documents based on the same ground. It is uncontroversial

28 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [33]–[34].
29 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [31].
30 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [35].
31 [2007] 4 SLR(R) 100.
32 See para 5.2 above.
33 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [21].

that the principle of autonomy requires the issuing bank to pay upon confirming documents even if there are disputes in the underlying contract. The only exception to this is fraud on the part of the beneficiary in relation to the documents. Applying these principles, this means that in the absence of fraud, an issuing bank would have to pay if a beneficiary presents conforming documents, even if those documents contain a negligent misstatement. As a practical matter, in the scenario where the issuing bank has paid upon conforming documents containing negligent misstatements, the issuing bank and the beneficiary would probably not have known about such inaccuracy at the time of the presentment of documents. If the bank had known, it would probably have tried to resist payment and informed the beneficiary about the inaccuracy; and if the beneficiary had known, either from being informed by the bank or otherwise, then a continued insistence on getting paid on these documents might be seen to be dishonest on the part of the beneficiary and thereby invoke the fraud exception. It might be difficult for the bank or the beneficiary to be sure about the inaccuracy of the statement, in which case, in the absence of fraud, the bank would have to pay without delay. In these circumstances, it would be unfair to prevent the bank from seeking redress later for negligent misstatement. Even if, on principle, an action in tort could be brought by the issuing bank against the beneficiary, the issuing bank must first show a duty of care on the part of the beneficiary in order to succeed. In *BOC v BP*, Maniam JC stated that "even if a beneficiary generally owed no duty of care to an issuing bank in presenting third party documents (such as shipping documents) to obtain payment under an LC, he may nevertheless be under a duty of care in the preparation of documents that he has himself issued".[34] There is potential for the law on this issue to be developed further. As Maniam JC pointed out in *BOC v BP*, the issue of whether a beneficiary of an LC owes the issuing bank any duty of care, particularly in relation to documents prepared by the beneficiary, has yet to be determined as the *ratio decidendi* of any English or local case.[35]

34 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [36]. In this case, Andre Maniam JC referred to *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 Lloyd's Rep 344, where a surveyor was found to owe a duty of care to the issuing bank in respect to an inspection certificate it had issued, and *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2002] 1 WLR 1975, where a beneficiary who was sued by the applicant was held to be under a duty of care in relation to the inspection certificates that the beneficiary had signed and presented.

35 *Bank of China Ltd, Singapore Branch v BP Singapore Pte Ltd* [2021] 5 SLR 738 at [52].

B. Sanctions

5.14 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA*[36] ("*Kuvera v JPMC*") is the first case in which the validity of a sanctions clause in an LC was tested in the Singapore courts. In this case, the plaintiff, Kuvera Resources Pte Ltd ("Kuvera"), was a company incorporated in Singapore and the beneficiary of two LCs for the purchase of coal. The LCs were issued by a bank in Dubai and confirmed by the defendant, JPMorgan Chase Bank, NA ("JPMC"), a US banking entity, through its Singapore branch. The defendant's confirmation contained a clause which provided that the defendant was not liable for any failure to pay against a complying presentation of documents if the documents involved a vessel subject to the sanctions laws and regulations of the US ("the Sanctions Clause"). When the plaintiff presented conforming documents under the confirmed LCs, the defendant refused to pay on the basis that such refusal was justified under the terms of its confirmation. The plaintiff regarded the defendant's refusal as a breach of the contract and brought an action to recover damages. As both parties accepted that the documents conformed to the requirements of the LCs, the spotlight was on the Sanctions Clause and its effect on the confirming bank's payment obligations.

5.15 In the High Court, Vinodh Coomaraswamy J examined two preliminary questions:

(a) What is the commercial purpose of an LC?

(b) What is the basis of the confirming bank's obligation to pay the beneficiary under the LC?

The judge stated that the commercial purpose of an LC is to serve as a payment mechanism that facilitates the international sale of goods. The judge explained that a typical LC transaction would consist of up to five separate contracts: between the buyer and the seller; between the applicant and the issuing bank; between the issuing bank and the beneficiary; between the confirming bank and the beneficiary; and between the issuing bank and the confirming bank.[37] Each of these contracts is separate and autonomous. Accordingly, a confirming bank's contract with a beneficiary under its confirmation is separate from and autonomous of the issuing bank's contract with the beneficiary. Article 8 of UCP 600 makes this clear by providing that "[c]onfirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation". The

36 [2022] SGHC 213.

37 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [34]–[39].

judge examined various bases for the binding nature of the confirming bank's obligation to pay the beneficiary and concluded:[38]

> In my view, the most satisfactory and complete contractual explanation for the binding force of a letter of credit and a confirmation (at least in a common law system) is that each of them functions in law as an offer of a unilateral contract subject to one, and only one, *sui generis* exception. That exception is that an issuing or confirming bank has a contractual obligation to the beneficiary not to revoke its offer, without any need for the beneficiary to receive, accept or supply consideration for the irrevocability of the offer. The offer is contractually irrevocable by reason of an accretion of judicial decision which has given contractual force to well-established principles of mercantile usage and banking custom.

On the facts of this case, the defendant made an irrevocable offer of a unilateral contract to the plaintiff when it added its confirmation to the two LCs. The bank's unilateral contract with the beneficiary was formed only when the beneficiary presented documents under the credit as it was at this point that the beneficiary accepted the bank's offer of and supplied consideration for the bank's promise to pay against a complying presentation.[39]

5.16 The plaintiff argued that the Sanctions Clause was not a term of the beneficiary's confirmations because it was not a term of the LCs. This argument was rejected by the judge who held that a confirming bank was not bound to confirm the LC in precisely the same terms as the issuing bank had issued it. It was entitled to condition or limit its confirmation undertaking.[40] The plaintiff also argued that the Sanctions Clause was not valid or enforceable. One of the reasons given by the plaintiff was that the Sanctions Clause was fundamentally inconsistent with the commercial purpose of the confirmations. The judge stated that the commercial purpose of a confirmation was to give the beneficiary an alternate paymaster to which it can look for payment, in addition to the issuing bank, and assessed that the Sanctions Clause did not contradict this purpose.[41] Even with the incorporation of the Sanctions Clause, the defendant's confirmations continued to give the plaintiff rights against the defendant which were additional to the plaintiff's rights against the issuing bank. Another reason given by the plaintiff for arguing that the Sanctions Clause was not valid or enforceable was that it imposed a "non-documentary condition" and should therefore be disregarded as being inconsistent with the documentary nature of an LC transaction. While the judge accepted that the Sanctions Clause did

38 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [61].
39 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [65].
40 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [81]–[82].
41 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [106].

not require the plaintiff to present a document, he pointed out that the Sanctions Clause did not come within the scope of the rule prohibiting non-documentary conditions. The purpose of that rule was to provide certainty to the beneficiary and the banks as to what the beneficiary must do to claim payment. The Sanctions Clause did not engage the purpose of that rule as it did not create any uncertainty as to what sort of presentation was required for payment. The Sanctions Clause operated post-presentation to allow the defendant not to pay the plaintiff against a complying presentation if the documents involved a vessel subject to the sanctions laws and regulations of the US.[42] At the relevant time, the US government had in place sanctions against Syria, and the defendant's sanctions screening process revealed that the vessel which shipped the goods covered by the LCs was likely to be beneficially owned by a Syrian entity. The judge accepted the testimony of the expert on US sanctions law called by the defendant that, on the balance of probabilities, paying the plaintiff under the LCs would have exposed the defendant to a penalty for breaching US sanctions laws and regulations, and concluded that the confirming bank was entitled to rely on the Sanctions Clause as a complete defence to the plaintiff's claim.[43]

5.17 *Kuvera v JPMC* provides useful guidance to financial institutions regarding the likely attitude of the Singapore courts towards sanctions clauses. In that case, the sanctions clauses were included by the confirming bank in its confirmation advice for the LCs. It is an open question whether a sanctions clause inserted by an issuing bank in an LC might similarly be valid and enforceable or whether this would be seen to be against the commercial purpose of an LC to provide the beneficiary with a guarantee of payment upon the presentment of conforming documents. When a bank decides not to pay against confirming documents for fear of breaching sanctions regulations, this would usually be a risk-based decision. If its assessment of the situation turns out to be wrong, the bank may be sued by the beneficiary for non-payment. Nevertheless, the financial institution may prefer to take this risk rather than the risk of breaching sanctions regulations. If there is a valid and enforceable sanctions clause that is upheld by the courts, a confirming or issuing bank will have a defence against non-payment. But what about the situation where there is no sanctions clause in the LC or in the confirmation? In such cases, a bank that fails to pay on conforming documents so as not to breach sanctions regulations of a particular country will have to rely on the applicable general law of illegality and public policy to excuse

42 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [123] and [124].

43 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2022] SGHC 213 at [151] and [193].

its non-payment, and this has not been the subject of judicial analysis in Singapore.

II. Other cases

5.18 In *Indian Bank v Green Mint Pte Ltd*[44] the court had to consider whether a bank could obtain payment on a loan that had been procured by the borrower by bribing the bank's officers, or whether such bribery would be a defence to the bank's claim. The judge highlighted the difference between a contract to pay a bribe, which is unenforceable as this is a contract for the commission of a crime, and a contract that has been procured by a bribe. It was argued that the latter situation formed a possible new category of contracts against public policy, but the judge decided that there is no Singapore public policy that would require a court to refuse to enforce a contract which was procured by bribery, and that such an extension would be undesirable as it would reward the wrongdoer and punish the victim.[45]

5.19 *Goldbell Engineering Pte Ltd v Etiqa Insurance Pte Ltd*[46] illustrates the operation of a clause that is sometimes found in performance bonds, which gives the beneficiary the right to request the issuer of a performance bond to extend the validity of the bond or to, in lieu of such extension, make payment upon the bond. The decision of the case turns very much on its own facts and need not be further discussed.

5.20 *Wang Fumin v Citibank Singapore Ltd*[47] concerned an action brought by a customer of a bank in respect of investment losses. The customer alleged misrepresentation and breach of duty on the part of the bank, but these claims were not made out on the facts and the plaintiff's case was dismissed by the High Court and, later, on appeal by the Appellate Division of the High Court with no written grounds of decision rendered.

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44 [2022] 4 SLR 634.
45 *Indian Bank v Green Mint Pte Ltd* [2022] 4 SLR 634 at [20]–[21].
46 [2022] SGHC 1.
47 [2022] SGHC 106.