

FALSE REPRESENTATIONS IN LETTERS OF CREDIT: KEY DEVELOPMENTS IN SINGAPORE

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INTRODUCTION

"The Singapore courts have had an opportunity to consider issues in relation to a bank's obligation to make payment under letters of credit, in particular where such obligation is tainted by false and/or fraudulent representations made by the beneficiary."

In light of the recent spate of defaults in the commodities sector involving so-called 'circular trades', the Singapore courts have had an opportunity to consider issues in relation to a bank's obligation to make payment under letters of credit, in particular where such obligation is tainted by false and/or fraudulent representations made by the beneficiary.

In this article, we consider two such cases: (a) *Crédit Agricole Corporate & Investment Bank, Singapore Branch v PPT Energy Trading Co Ltd and another suit* [2022] 4 SLR 1 ("Crédit Agricole"); and the more recent matter of (b) *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corporation Limited* [2023] SGHC 220 ("Winson Oil").

These cases are of particular interest as the Singapore courts have taken divergent approaches in relation whether a bank may rely on the Fraud Exception (defined below) to resist making payment under letters of credit.

THE TRADITIONAL LEGAL POSITION

It is a well-established principle under English law that banks are contractually obliged to honour letters of credit and make payment upon the presentation of certain documents, so long as the said documents are, on their face, compliant with the terms of the letters of credit.

Notwithstanding the foregoing, it was held in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 that there is an established exception where a bank may resist payment under a letter of credit if the beneficiary, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that are to its knowledge untrue (the "Fraud Exception").

However, how the Fraud Exception should be construed remains to be decisively determined in Singapore, with the cases of Crédit Agricole and Winson Oil demonstrating the seemingly divergent positions adopted by the Singapore courts on this issue.

THE CRÉDIT AGRICOLE CASE

This was a case brought before the Singapore International Commercial Court (“SICC”), relating to the now-defunct Singaporean trading company, Zenrock Commodities Pte Ltd (“Zenrock”).

In the proceedings before the SICC, Crédit Agricole Corporate & Investment Bank, Singapore Branch (“CACIB”) sought, amongst others, declarations that: (a) the beneficiary, PPT Energy Trading Co Ltd (“PPT”), was not entitled to receive payment under the letter of credit; and (b) PPT was in breach of warranties given to CACIB as stated in the letter of indemnity, and so liable to pay damages corresponding to the sum that CACIB was required to pay under the letter of credit. On the other hand, PPT counterclaimed for, amongst others, a declaration that it was entitled to payment under the letter of credit and/or damages for CACIB’s breach of the contract under the letter of credit.

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DECISION OF THE SICC IN CRÉDIT AGRICOLE

The main issue before the SICC was whether PPT acted fraudulently in presenting the commercial invoice and letter of indemnity to CACIB for payment under the letter of credit. The SICC held that:

- a demand for payment under a letter of credit can be vitiated by fraud where the beneficiary has acted dishonestly as part of a scheme to defraud a bank, or presented facially compliant documents for payment, either with knowledge that a representation contained therein is false, or without belief that the same is true;
- on the other hand, a failure, even a reckless failure, to ascertain the truth of the representation, which was made in the honest belief that the documents are true, will not permit the bank to invoke the Fraud Exception. This is because there is no duty of care owed by a beneficiary to a bank when presenting documents;
- on the facts, the SICC found that while PPT had been aware of the circular nature of the transactions, PPT had no knowledge (nor was it willfully blind to the fact) that the sale contract was part of the fraud perpetrated by Zenrock. The transactions were also not a sham; they were genuine sales and purchases between parties; and
- accordingly, the SICC held that neither the commercial invoice nor the letter of indemnity could be said to be false or fraudulent in themselves, nor could it be said that PPT had misrepresented the position on title or was involved in a scheme to defraud CACIB. In such circumstances, the documents should have been accepted by CACIB and payment should have been made under the letter of credit.

WHAT HAPPENED IN WINSON OIL

This was a dispute which arose out of the circular trading saga involving Hin Leong Trading (Pte) Ltd (“HLT”). The claim by Winson Oil Trading Pte Ltd (“Winson”) was in relation to the final leg of the trade between Winson and HLT wherein Winson sold the same parcel of gasoil back to HLT, despite there being no underlying cargo of gasoil being shipped for the transactions involved in the subject trade. Winson relied on copy bills of lading (“BLs”) issued in preparing the letters of indemnity, which it then presented to Oversea-Chinese Banking Corporation Ltd (“OCBC”) and Standard Chartered Bank (Singapore) Ltd (“SCB”) (collectively, the “Banks”) for payment under the letters of credit.

The Banks resisted payment under the letters of credit on several grounds, including:

- that Winson had fraudulently made false statements in its presentations for payment under the letters of credit, on the basis that the Winson – HLT sale was a sham and, in any event, no cargoes had been shipped for that sale; and
- that the letters of indemnity presented by Winson were nullities, given that no cargoes had been shipped for the Winson – HLT sale.

DECISION OF THE SINGAPORE HIGH COURT IN WINSON OIL

A key issue in the case was, therefore, whether Winson had acted fraudulently, such that the Banks were entitled to resist payment under the letter of credits.

The Singapore High Court (the “High Court”) first considered the principles in relation to the Fraud Exception, i.e. the exception pursuant to which a bank may resist payment under letters of credit where a false representation has been made for the purpose of drawing on the credit.

- the High Court observed that the Fraud Exception has long been accepted as part of the law in Singapore. In this regard, it is uncontroversial that a beneficiary acts fraudulently where: (a) it presents to the bank documents that contain material representations of fact that to its knowledge are untrue and/or (b) it makes a false presentation “*without belief in its truth*”; however
- the parties were in dispute over whether a false representation made *recklessly*, without regard to the truth of the said representation, could be sufficient to give rise to the Fraud Exception.

The High Court found that the Fraud Exception is satisfied if, in presenting the documents for payment, a beneficiary makes a false representation of material fact knowingly, **or without belief in the truth of the representation, which includes the beneficiary being reckless in the sense of being indifferent to the truth**. In doing so, the High Court declined to follow the ruling in *Crédit Agricole*.

- the High Court disagreed with the SICC’s findings in *Crédit Agricole* on the basis that the Fraud Exception did not hinge on the existence of a duty of care owed to the banks – fraud on a beneficiary’s part is a basis on which the bank can deny payment, and that a beneficiary cannot be allowed to rely on whether or not it has a duty of care to the bank to “*improve [its] position*”;

- the High Court noted that recklessness in this context was not merely a more serious type of negligence – there is recklessness in relation to the Fraud Exception where the representor is “*recklessly indifferent to the truth or falsity of that which he was asserting*”, and that “[n]ot caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth”; and
- the High Court therefore dismissed Winson’s claims on the ground that Winson had made false representations in its letters of indemnity and was fraudulent in the sense that it did not believe in (or was at least indifferent to) the truth of the representation in its letters of indemnity.

OUR THOUGHTS

Our observations in relation to the above are as follows:

- in light of the divergence in *Crédit Agricole* and *Winson Oil*, it remains to be seen if the category of representations made recklessly without regard to the truth of the same will consistently be accepted as being sufficient to give rise to the Fraud Exception under Singapore law;
- the reasoning of the Courts in *Crédit Agricole* and *Winson Oil* is not entirely incompatible. To this end, the difference between the basis of the analysis in the aforesaid cases appears to lie in the extent and nature of the belief in which a beneficiary asserts its representations to be true. It is one thing for a beneficiary to have made representations in the honest belief of their veracity, it is quite another to have made representations where there can be no belief whatsoever that such representations are true. In *Crédit Agricole*, the facts suggest that PPT may not have been aware of the fraud being perpetuated by Zenrock, whereas, in *Winson Oil*, the facts lend themselves toward there being objectively no possibility where Winson could have any belief whatsoever as to the truthfulness of the representations made in the letters of indemnity;
- we wonder if the decision in *Winson Oil* marks a trend where the Singapore courts seek to recognise the commercial practicalities of international trade and commodities, in that there may be situations where banks are placed in the unenviable position of dealing with documents which may seem compliant on their face, yet do not correspond to the factual circumstances of the trade/sales. In any event, we consider that the widening of the Fraud Exception per *Winson Oil* tilts the balance in favour of banks. Beneficiaries of letters of credit may be unable to safely rely on the defence that they have unwittingly and/or unknowingly made false representations to the banks in the documents presented for payment and may instead be required to take reasonable steps to ascertain the truth behind such representations, lest they risk being denied payment by the banks under letters of credit; and
- as a key takeaway from the foregoing, in order to protect their position going forward, we would recommend that commercial parties ensure (or at least undertake reasonable steps to ensure) that they are in a position to demonstrate that they possess a reasonable belief in the truthfulness of any representations made in underlying documentation and, where there arise suspicions as to the truth, to immediately alert the banks of the same. These steps may include checks with all relevant parties on the veracity of the representations (such as whether the cargo has indeed been shipped in accordance with the relevant bills of lading) and to request further documents where information is lacking or appears inconsistent.

"We would recommend that commercial parties ensure (or at least undertake reasonable steps to ensure) that they are in a position to demonstrate that they possess a reasonable belief in the truthfulness of any representations made in underlying documentation."

Please do get in touch if you would like to discuss any of the issues canvassed in this article further.

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