

LETTERS OF CREDIT AND SANCTIONS

CELESTIAL AVIATION SERVICES LTD V UNICREDIT BANK GMBH, LONDON BRANCH [2024] EWCA CIV 628; Kuvera Resources Pte Ltd v JPMorgan Chase Bank, N.A. [2023] SGCA 28

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In *Celestial Aviation Services Ltd v UniCredit Bank GmbH, London Branch* and *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, N.A.*, the English and Singaporean courts, respectively, entertained disputes regarding the intersection of letters of credit and sanctions. This note examines how the two core developments arising from these cases (that is, a prohibition against payment arising from sanctions laws and regulations and the use of sanctions clauses, respectively) have introduced uncertainty and unpredictability to payment in international trade. It investigates salient aspects of both cases and offers support for the appeal court judgments insofar as they promote harmony between sanctions laws and regulations on the one hand, and established principles of international trade on the other. It is suggested that both cases may serve as useful guidance for other legal systems in pursuing such harmony, particularly insofar as letters of credit are concerned.

I. INTRODUCTION

Targeted financial sanctions (“TFS”) frameworks have been implemented domestically by most jurisdictions globally, in accordance with the resolutions of the United Nations Security Council (“UNSC”) and the recommendations of the Financial Action Task Force (“FATF”). These measures are a cornerstone of the fight against money laundering, terrorist financing and the proliferation of weapons of mass destruction. As TFS are intended to prevent designated individuals and entities,¹

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¹ See the definition of “targeted financial sanctions” in FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* <<https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf>> (2012–2025) at 138.

as opposed to entire countries,² from accessing funds, financial assets and, more broadly, the financial system, they are enforced with reference to sanctions lists. Sanctions lists are maintained by national authorities on public platforms, such as official websites, to ensure easy access and integration into the compliance systems of regulated entities. In this regard, banks and other regulated entities integrate sanctions screening protocols into compliance processes to give effect to their TFS obligations. The sanctions lists of the United States' ("US") Office of Foreign Assets Control ("OFAC") and the United Kingdom's ("UK") Office of Financial Sanctions Implementation ("OFSI") are especially important as US and UK sanctions regulations are increasingly unilateral³ in nature, while US sanctions regulations also mostly necessitate extraterritorial compliance — in other words, compliance by entities operating outside the US.⁴

While effective in principle, the implementation of TFS — especially by banks and financial intermediaries — has complicated critical aspects of international trade. In particular, the impact on letters of credit has become increasingly apparent in recent years. Letters of credit, also known as documentary credits, are strong payment instruments used in international trade.⁵ Owing to the critical role of banks and documents in the operation of these instruments, letters of credit are historically recognised as secure and reliable trade finance instruments. However, drawing on the recent cases of *Celestial Aviation Services Ltd v UniCredit Bank GmbH, London Branch*⁶ (UK) and *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, N.A.*⁷ (Singapore), this note examines how two core developments (that is, a prohibition against payment arising from sanctions laws and regulations and the use of sanctions clauses) have introduced uncertainty and unpredictability to payment in international trade.

² The use of broad-based or comprehensive sanctions has been discouraged by the United Nations ("UN") as their impact typically extends beyond targeted entities and persons to civilian populations and the broader economy. See Cayle Selwyn Lupton, "Letters of Credit and Demand Guarantees: A Legal Study on the Impact of Targeted Financial Sanctions from a South African Perspective" (2022) University of Johannesburg Institutional Repository <<https://ujcontent.uj.ac.za/esploro/outputs/doctoral/Letters-of-credit-and-demand-guarantees/9923608407691>> at 71 [Lupton, "Letters of Credit and Demand Guarantees: A Legal Study on the Impact of Targeted Financial Sanctions from a South African Perspective"].

³ Unilateral sanctions, not to be confused with extraterritorial sanctions, refer to those sanctions which emerge independently of UN sanctions regimes. Although sanctions laws and regulations may in principle give effect to both unilateralism and extraterritoriality, these are distinct concepts not to be used interchangeably.

⁴ This is particularly true of the sanction regimes administered by the OFAC.

⁵ These instruments operate on a similar footing to demand guarantees, the latter being strong security instruments used in commercial transactions. The International Chamber of Commerce ("ICC") plays an influential role in letter-of-credit practice through the widespread adoption of its frameworks. See ICC, *Uniform Customs and Practice for Documentary Credits (UCP 600)*, ICC Publication No 600 (Paris: ICC, 2007), which invariably governs letters of credit worldwide [UCP 600].

⁶ *Celestial Aviation Services Ltd v UniCredit Bank GmbH, London Branch* [2024] EWCA Civ 628 [*Celestial*].

⁷ *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, N.A.* [2023] SGCA 28 [*Kuvera*].

II. THE CELESTIAL CASE

A. Introductory Remarks

In a letter-of-credit transaction, it is expected that payment must be made upon presentation of conforming documents — in other words, a documentary presentation that complies with the requirements of the letter of credit.⁸ This expectation rests on two legal foundations, namely, the principle of autonomy⁹ and the doctrine of strict compliance.¹⁰ In cases where sanctions regulations are determined to apply, sanctions obligations may be at odds with established commercial principles. This much is evident in the *Celestial* case, a landmark case decided by the English judiciary.

B. Facts and Ratio Decidendi

Between 2017 and 2020, Sberbank, a Russian bank, issued several letters of credit in favour of Celestial Aviation (“Celestial”) and Constitution Aircraft Leasing (Ireland) 3 Ltd and Constitution Aircraft Leasing (Ireland) 5 Ltd (together, the “beneficiaries”), which were Irish-incorporated companies. The underlying contract concerned leases of aircraft to Russian companies.¹¹ The letters of credit incorporated the UCP 600, were governed by English law, and payment was nominated in US dollars.¹² The letters of credit were confirmed by UniCredit, a German bank acting through its London branch.¹³ Following the termination of the underlying contract in March 2022, the beneficiaries presented documents to UniCredit that were in conformity with the requirements of the letters of credit. UniCredit’s position was, however, that it was unable to make the payment(s) due to the application of UK sanctions regulations. Specifically, Regulation 28(3) of the Russia (Sanctions) (EU Exit) Regulations¹⁴ (“the Regulations”) precluded it from performing since the

⁸ UCP 600, *supra* note 5 at Art 2 defines the term “complying presentation” to mean “a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.”

⁹ This means that the question of payment must be determined with reference to the documents only and not also the underlying contract of sale. UCP 600, *supra* note 5 at Art 4 explains the independence principle as follows: “a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary.”

¹⁰ This refers to the standard used to determine documentary compliance. It must be stressed, however, that there is a growing shift towards an emphasis on giving effect to the mandate embodied in the documentary credit (contract), as opposed to a particular standard of compliance. See generally ICC, *International Standard Banking Practice (ISBP 821)*, ICC Publication No 821 (Paris: ICC, 2023).

¹¹ *Celestial*, *supra* note 6 at [3]. The facts of this case have been simplified to allow for an analysis of the main aspects of the case.

¹² *Ibid* at [4].

¹³ *Ibid* at [1].

¹⁴ The Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019 No 855) (UK), Reg 28 <<https://www.legislation.gov.uk/uksi/2019/855/regulation/28>> [Regulations].

sanctions screening process revealed the use of restricted goods — goods intended for Russian use.¹⁵ Regulation 28(3)(c) reads as follows:

- (3) A person must not directly or indirectly provide financial services or funds in pursuance of or in connection with an arrangement whose object or effect is ...
 - (c) directly or indirectly making restricted goods or restricted technology available
 - (i) to a person connected with Russia, or
 - (ii) for use in Russia ...¹⁶

The resultant dispute between the parties led the beneficiaries to institute legal proceedings in the English High Court against UniCredit, claiming the amount owed, including interest. In the meantime, UniCredit applied successfully to the EU sanctioning authority for licences regarding both export restrictions and Sberbank's apparent status as a designated entity.¹⁷ Consequently, the principal amounts due under the credits were settled. Liability for costs and interest, however, remained in dispute. The dispute gave rise to four legal questions:

- (i) Whether payment under the credits by UniCredit would have been “in connection with” an arrangement the object or effect of which is the supply of aircraft to or for use in Russia, or to a Russian person, and so prohibited by Reg 28(3);
- (ii) If that prohibition did not apply, whether UniCredit nonetheless had a defence under s 44 of the Sanctions and Anti-Money Laundering Act¹⁸ (“SAML A”), based on its belief that it was complying with Reg 28(3) when it refused payment and that such compliance was reasonable;
- (iii) Whether the question of illegality under the US sanctions regime was engaged under the so-called *Ralli Bros* principle,¹⁹ on the basis that effecting payment in US dollars required the involvement of a US correspondent bank; and
- (iv) If the US sanctions regime had been engaged, would payment in accordance with the demands have been illegal under that regime?²⁰

The High Court held that Reg 28(3) had not been engaged and that UniCredit could not rely on s 44 of SAML A since its belief, though subjective, was not reasonable

¹⁵ *Celestial*, *supra* note 6 at [5].

¹⁶ Regulations, *supra* note 14, Reg 28(3)(c).

¹⁷ *Celestial*, *supra* note 6 at [6].

¹⁸ Sanctions and Anti-Money Laundering Act 2018 (c 13) (UK), s 44.

¹⁹ This was established in the English case of *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287. The *Ralli Bros* principle states that a contract governed by English law will not be enforced if its performance is unlawful in the place where it is to be performed. Such a place may be within or outside of England. Hence, this principle embraces foreign illegality in determining the enforceability of a contract.

²⁰ *Celestial*, *supra* note 6 at [8].

for purposes of SAMLA.²¹ In a separate hearing on consequential matters, the same court decided that UniCredit could and should have avoided any issue with US sanctions by paying in cash if necessary and that, in any event, it had not established that either of the relevant US sanctions provisions would have been engaged if payment had been made timeously.²² Consequently, UniCredit was not excused from fulfilling its payment obligations under the credits and, on that basis, the beneficiaries were entitled to interest and costs. Unsatisfied with this outcome, UniCredit applied successfully to the Court of Appeal.

The High Court's decisions were overturned on appeal based on the Court of Appeal's differing interpretation of the Regulations. Specifically, the phrases "in connection with" and "restricted goods" were contentious.²³ The Court of Appeal held that "in connection with" has a broad meaning in law and that "restricted goods" is wide enough to include aircraft,²⁴ the implication being that Reg 28(3) was engaged. Although this meant that the remaining legal questions did not require determination, the Court considered them since the parties fully argued them. As regards the application of s 44 of SAMLA, UniCredit's belief that it was complying with Reg 28(3) when it refused payment was held to be reasonable,²⁵ and that s 44 would not have precluded an award of interest.²⁶ Regarding the question of illegality under the US sanctions regime and the *Ralli Bros* principle, the Court held that "even if the *Ralli Bros* principle is engaged so that US sanctions are potentially relevant, UniCredit is precluded from relying on them because it did not make reasonable efforts to obtain a licence from the US authorities".²⁷

Consequently, the appeal was upheld in part, and UniCredit was excused from paying under the letters of credit. The beneficiaries successfully applied to the Supreme Court,²⁸ but had their appeal dismissed on the issue of the interpretation of Reg 28(3)(c). The Supreme Court did, however, allow UniCredit's cross appeal on the SAMLA issue, as it was of the view that "section 44 would have provided protection to [UniCredit] against an action to recover a debt, an award of interest on the amount of the debt, and an award of associated costs."²⁹

C. Analysis

The *Celestial* case turned on statutory interpretation. It illustrates the broad scope of UK sanctions regulations and the willingness of the English judiciary to interpret the Regulations accordingly. In the current era of routine adjustment and expansion

²¹ *Ibid* at [9].

²² *Ibid* at [9].

²³ *Ibid* at [54]–[67].

²⁴ *Ibid* at [63].

²⁵ *Ibid* at [72].

²⁶ *Ibid* at [95].

²⁷ *Ibid* at [103].

²⁸ *UniCredit Bank GmbH, London Branch (Respondent) v Constitution Aircraft Leasing (Ireland) 3 Ltd and another (Appellants); UniCredit Bank GmbH, London Branch (Respondent) v Celestial Aviation Services Ltd (Appellant)* [2026] UKSC 10.

²⁹ *Ibid* at [93] and [95].

of extraterritorial sanctions regulations, particularly those of the US, the risk of non-performance of contractual obligations due to sanctions compliance is heightened in international trade.³⁰

As the UN has not taken substantive action against Russia in the context of the war with Ukraine,³¹ the sanctions envisaged under the Regulations are properly characterised as unilateral measures. Unilateral sanctions are commonly distinguished from sanctions implementing UNSC resolutions on the basis that the former derive exclusively from domestic legislative authority, whereas the latter give effect to multilateral obligations assumed under the UN Charter. The implication is that unilateral sanctions regimes go beyond UN sanctions regimes, and they do not necessarily impose legal obligations on foreign persons and entities situated outside the jurisdiction of the sanctioning state.³² In the context of letters of credit, this means that a foreign bank is prohibited from making payment only where it is itself bound by the relevant sanctions regime; where no such legal obligation exists, there is no legal duty to refuse payment. In the *Celestial* case, however, the bank was bound by the Regulations since it (the Regulations) applied directly by virtue of the governing law and accordingly operated as a binding legal prohibition on performance under the letters of credit. The essential point, therefore, is that in contemplating cases involving sanctions interferences under letters of credit, emphasis should be placed on whether the bank is bound as a matter of (sanctions) law in relation to the payment obligation.

The question of legal recourse is dependent on whether there is a legal basis for sanctions compliance. In the *Celestial* case, because UniCredit was bound by the Regulations, it could conceivably have raised as a defence to payment the general English principles of illegality or unlawfulness,³³ or a contractual defence based on impossibility of performance (legislative prohibition),³⁴ in support of its refusal to perform under the letters of credit.

This position must be contrasted with the situation where a legal obligation to comply with the sanctions regulations of a particular foreign country (*ie*, foreign sanctions) is not readily apparent. In many legal systems, a legal mechanism akin to the *Ralli Bros* principle, which may conceivably enable compliance with foreign sanctions, may not be available. Private international law, however, offers a solution through so-called mandatory rules. Mandatory rules are those rules that apply irrespective of the parties' chosen law or the law of the country in which the case is being heard.³⁵ These are rules the respect for which is regarded as absolutely

³⁰ Cayle Lupton, "Sanctions compliance as a basis for non-performance of contractual obligations" (2024) *Journal of Economic Criminology* 1 at [1]–[7].

³¹ This is ascribed to the fact that Russia is a permanent member of the UNSC with veto power. Consequently, any UN action contemplated against Russia is likely to fail. This applies also to the other permanent members, namely China, France, the UK and the US.

³² In contrast, extraterritorial sanctions impose compliance expectations on foreign persons and entities.

³³ See in this regard Dora Neo "Banking law" (2022) SAL Ann Rev 104 at 114–117 [Neo].

³⁴ In Singapore, this enquiry may be regulated by the principles of the common law, in combination with the Frustrated Contracts Act 1959 (Cap 115, 2020 Rev Ed) <<https://sso.agc.gov.sg/Act/FCA1959>>.

³⁵ Jan Neels & Eesa Fredericks "Covid-19 regulations as overriding mandatory provisions in private international law. A comparison of regional, supranational and international instruments with the proposed African Principles on the Law Applicable to International Commercial Contracts" in Murdoch Watney,

necessary by a particular legal system for preserving its public interests, such as political, social or economic organisation.³⁶ Within the context of letters of credit, sanctions regulations may apply as mandatory rules in several situations:³⁷ (i) As the law applicable to the bank or, if relevant, the branch that issued the relevant undertaking in the trade finance instrument; (ii) as the law applicable to the currency of payment of the relevant undertaking in the trade finance instrument; (iii) as the law governing the performance of the relevant undertaking in the trade finance instrument as a result of a choice of law clause, or of the determination of the applicable law in accordance with the conflict of law rules in the competent jurisdiction; and (iv) as international public policy where the arbitral tribunal or the court with jurisdiction characterises the particular sanctions regulations as mandatory. This is by no means a closed list.

In cases where sanctions regulations apply as mandatory rules, the regulations may override any applicable ICC rules and will prevail over the contractual terms of the instrument. On this legal basis for sanctions compliance, a bank may conceivably raise illegality and impossibility of performance as a defence to its non-performance under the letter of credit, as discussed above.

In cases where sanctions regulations do not apply as mandatory rules and no other legal basis for foreign sanctions compliance is present, the bank's risk assessment will probably be informed to a large degree by the business and reputational risks associated with a decision of non-compliance.³⁸ In the case of extraterritorial US sanctions, the business-related penalties that may be imposed on non-US banks for non-compliance are many and include: substantial monetary fines, asset forfeitures and freezes, bank account closures, termination of correspondent banking relationships, suspension of banking licences, and disconnection from international banking channels such as SWIFT.³⁹ On the reputational front, the negative perception of a contravention of US sanctions regulations may lead to adverse media reports and limited investment opportunities for non-US banks. Given the significance of these business and reputational risks, they are likely to play a significant role in the bank's risk assessment.

If a bank's refusal to pay under a letter of credit is not rooted in law, the bank risks being sued for breach of contract by the beneficiary, in which case it will not

ed. *The Impact of COVID-19 on the Future of Law and Related Disciplines* (South Africa: UJ Press, 2021) 1 at 1–25.

³⁶ See the definition of “overriding mandatory rules” in EC Regulation No 593/2008 Art 9(1), Doc 32008R0593, [2008] OJ L 177/6 at 13, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593>>.

³⁷ ICC, *Consolidated ICC Guidance on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules* <https://iccwbo.org/wp-content/uploads/sites/3/2024/12/2024_ICC_Use-of-Sanctions_rev_2024_vi.pdf> (2022) at 6 [ICC, “Consolidated ICC Guidance on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules”].

³⁸ Lupton, “Letters of Credit and Demand Guarantees: A Legal Study on the Impact of Targeted Financial Sanctions from a South African Perspective”, *supra* note 2 at 197–202.

³⁹ Karl Marxen “Traditional trade finance instruments a high risk? a critical view on current international initiatives and regulatory measures to curb financial crime” in Charl Hugo, ed. *Annual Banking Law Update* (Cape Town: Juta, 2018) 161 at 174–175.

be able to raise illegality or impossibility of performance as a defence.⁴⁰ Neo postulates, however, that “the financial institution may prefer to take this risk rather than the risk of breaching sanctions regulations”,⁴¹ since the risks associated with a breach of sanctions regulations may have far greater consequences for banks.

III. THE *KUVERA* CASE

A. *Introductory Remarks*

The use of sanctions clauses in commercial transactions appears to be growing. These measures are intended to manage the risks associated with a breach of sanctions laws and regulations. In the letter-of-credit context, they may preclude payment if the transaction involves an individual, entity, vessel, or country designated for purposes of the applicable sanctions’ regulations.⁴² The *Kuvera* case is the *locus classicus* on the use of sanctions clauses in this context and accordingly warrants scrutiny.

B. *Facts and Ratio Decidendi*

An Indonesian company (seller) contracted to sell coal to a company in the United Arab Emirates (buyer). The coal would be shipped on a vessel known to the parties at the relevant time as “the Omnia”.⁴³ Kuvera Resources Pte Ltd (“Kuvera”), a Singapore-incorporated company in the business of trading coal sourced from Indonesia, advanced funds to the seller so that the seller could purchase the coal, which would then be sold to the buyer.⁴⁴ In return, the buyer agreed to pay for the coal through two letters of credit in which Kuvera was named as the beneficiary.⁴⁵ The two letters of credit were issued by Bank Alfalah Limited (issuing bank).⁴⁶ The issuing bank appointed JPMorgan Chase Bank, N.A. (“JPMorgan”), a US-registered bank with a Singapore branch, as both the advising and nominated bank.⁴⁷ JPMorgan also confirmed the letters of credit through two letters of confirmation.

The letters of confirmation included a clause stating that JPMorgan must comply with all US sanctions laws and regulations and that the bank reserves the right to

⁴⁰ For a comprehensive treatise of this issue from a South African perspective, see Lupton, “Letters of Credit and Demand Guarantees: A Legal Study on the Impact of Targeted Financial Sanctions from a South African Perspective”, *supra* note 2 at 193–234.

⁴¹ Neo, *supra* note 33 at 116.

⁴² Cayle Lupton “A critical evaluation of the use of sanctions clauses in letters of credit” (2022) PELJ 1 at 1 [Lupton, “A critical evaluation of the use of sanctions clauses in letters of credit”].

⁴³ *Kuvera*, *supra* note 7 at [3]–[5].

⁴⁴ *Ibid* at [6]. The facts of this case have been simplified to allow for an analysis of the main aspects of the case.

⁴⁵ *Ibid* at [4].

⁴⁶ *Ibid* at [6].

⁴⁷ *Ibid* at [6].

withhold payment if the documents involved a designated country, entity, vessel or individual. The clause read as follows:

[JPMorgan] must comply with all sanctions, embargo and other laws and regulations of the U.S. and of other applicable jurisdictions to the extent they do not conflict with such US 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.⁴⁸

Upon receipt of documents that complied with the terms of the confirmed credits, JPMorgan sent the documents for sanctions screening. The sanctions screening process revealed that the vessel was included on an internal list containing the details of entities determined by JPMorgan to present a sanctions risk. Specifically, it was discovered that in 2015 the vessel was operating under the name of “Lady Mona” and was likely to be owned by a Syrian entity — the US government had sanctions regulations against Syria at the relevant time.⁴⁹ At the time of the conclusion of the letters of confirmation in 2019, the vessel’s name had already been changed to the Omnia, and ownership was transferred to an entity in Barbados.⁵⁰

While investigating the vessel’s beneficial ownership, JPMorgan learned that the Omnia was not included on the OFAC’s specially designated nationals and blocked persons list (“SDN list”).⁵¹ Moreover, JPMorgan communicated directly with the OFAC to clarify the vessel’s ownership status, but this exercise proved to be of little value.⁵² Since there was also no information in the ship registry of its beneficial ownership, the lack of ownership information was ultimately considered a red flag suggesting that the vessel might still be beneficially owned by a Syrian entity, and accordingly, potentially subject to US sanctions.⁵³ JPMorgan, on that basis, refused to process the payment. Kuvera approached the High Court of Singapore for recourse against JPMorgan, claiming that the bank acted unlawfully in not paying under the confirmed letters of credit.

The High Court agreed with JPMorgan’s assessment that the sanctions clause entitled JPMorgan to refuse payment to Kuvera. In construing the phrase “or otherwise subject to any applicable restriction”, the Court held that the sanctions clause was valid and enforceable because it was not inconsistent with the commercial purpose of the confirmations.⁵⁴ The Court also stated that the clause was sufficiently narrow as it did not render the confirmations unworkable.⁵⁵ Against this background, the Court held that JPMorgan discharged the burden of proof to rely on the sanctions clause based on their own assessment of the circumstantial evidence

⁴⁸ *Ibid* at [7].

⁴⁹ *Ibid* at [46]–[49].

⁵⁰ *Ibid* at [47].

⁵¹ *Ibid* at [39].

⁵² *Ibid* at [46]–[49].

⁵³ *Ibid* at [52].

⁵⁴ *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, N.A.* [2022] SGHC 213 at [106]–[107].

⁵⁵ *Ibid* at [117]–[119].

regarding the beneficial ownership of the Omnia.⁵⁶ The High Court, therefore, interpreted the sanctions clause with reference to a subjective approach. Kuvera applied successfully to the Court of Appeal of Singapore.

On appeal, the Court rejected the High Court's subjective approach. The Court of Appeal held that JPMorgan was in fact under a legal duty to prove its defence on the facts and that the bank had to objectively determine whether a *bona fide* change in ownership of the vessel had occurred.⁵⁷ Put differently, JPMorgan could rely on the sanctions clause only if it could present objective evidence demonstrating that the vessel had Syrian beneficial ownership at the material time. While relevant for compliance purposes, red flags and internal considerations were deemed insufficient as legal justifications for non-payment under the confirmed letters of credit. *As obiter*, the Court ventured into whether the sanctions clause is compatible with the commercial purpose of the confirmations. Appreciating the absence of authority in point,⁵⁸ the Court stated that an interpretation of the sanctions clause that enables JPMorgan to deny payment under a complying presentation based on a subjective determination of the Omnia's beneficial ownership would "most likely be incompatible with the commercial purpose of the confirmations due to the significant unpredictability such an interpretation would introduce into the Confirmations".⁵⁹ The Court, ultimately, allowed the appeal and awarded damages to Kuvera.⁶⁰ It stated as follows:

In light of the 'inconclusive' evidence before the court, we do not think that JPMorgan's decision based on its own risk-taking calculus to refuse payment to Kuvera was sufficient to establish that the Omnia was subject to 'any applicable restriction' under the Sanctions Clause. As such, JPMorgan was not entitled to invoke the Sanctions Clause to deny payment to Kuvera upon a complying presentation of documents. It is on this basis that we allow the appeal.⁶¹

C. Analysis

The *Kuvera* case illustrates the Singaporean judiciary's approach to sanctions clauses.⁶² In evaluating the validity and enforceability of the sanctions clause *in casu*, the judgments of both the High Court and the Court of Appeal emphasise the commercial purpose of the confirmations. At its core, the commercial purpose of letters of credit (and, by implication, confirmations) is to provide the beneficiary with an assured right to be paid on a complying presentation, before departing with the goods.⁶³ On the Courts' line of reasoning, a decision, undertaking or development that undermines this assurance may bring into question the validity

⁵⁶ *Ibid* at [192]–[193].

⁵⁷ *Kuvera*, *supra* note 7 at [42]–[52].

⁵⁸ *Ibid* at [70].

⁵⁹ *Ibid* at [78].

⁶⁰ The issue of damages is not discussed in this note as it was not material to the outcome of the case. The Court of Appeal in *Kuvera*, *ibid* deals with this issue at [79]–[88].

⁶¹ *Ibid* at [68].

⁶² Neo, *supra* note 33 at 116.

⁶³ *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168.

and enforceability of a sanctions clause. It is submitted that sanctions clauses that refer to unilateral discretion or the bank's internal policies are more likely to be inconsistent with the commercial purpose of letters of credit or confirmations. In its 2014 *Guidance Paper on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules*,⁶⁴ the ICC distinguishes between such discretionary clauses and policy clauses with reference to examples. The following clause is quoted by the ICC as an example of a discretionary clause:

... Please contact [the] issuing bank for clarification before presenting documents to [the] issuing bank for negotiation or undertaking any dealings regarding this credit involving countries or persons affected by sanctions. [The] [i]ssuing bank is not and will not be liable for any loss or damage whatsoever associated directly or indirectly with the application of sanctions to a transaction or financial service involving [the] issuing bank. [The] [i]ssuing bank is not required to perform any obligation under this credit which it determines in its discretion will, or would be likely to, contravene or breach any sanction. This clause applies notwithstanding any inconsistency with the current edition of the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits [emphasis added].⁶⁵

This clause provides the bank with unilateral discretion to withhold payment in cases where a credit will, or would be likely to, breach sanctions laws and regulations. The phrase "or would be likely to" is ambiguous and implies a subjective assessment of sanctions risk. On a sensible interpretation, it could enable the bank to refuse payment on a mere suspicion of a breach of sanctions regulations — a position which the Court of Appeal in the *Kuvera* case rejected. The implication is that the beneficiary and the nominated bank and/or confirming bank would be without certainty insofar as the performance of the issuing bank's contractual obligations towards them is concerned. The following sanctions clause is quoted by the ICC as an example of a policy clause:

[The Bank] complies with the international sanction laws and regulations issued by the United States of America, the European Union and the United Nations (as well as local laws and regulations applicable to the issuing branch) and in furtherance of those laws and regulations, has adopted policies which in some cases go beyond the requirements of applicable laws and regulations. Therefore [the Bank] undertakes no obligation to make any payment under, or otherwise to implement, this letter of credit (including but not limited to processing documents or advising the letter of credit), if there is involvement by any person (natural, corporate or governmental) listed in the USA, EU, UN or local sanctions lists, or any involvement by or nexus with Cuba, Sudan, Iran or Myanmar, or any of their governmental agencies.⁶⁶

⁶⁴ ICC, *Guidance Paper on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules*, Document No 470/1238 <https://www.icc-switzerland.ch/images/8.Guidance-Paper-on-The-Use-Of-Sanctions-Clauses_2014.pdf> (2014).

⁶⁵ *Ibid* at 4.

⁶⁶ *Ibid*.

This clause allows the bank to decide whether to pay based on internal policies unknown to the beneficiary and the nominated bank and/or confirming bank. This uncertainty undermines the strength of the bank's payment undertaking towards the beneficiary and, if the bank is an issuing bank, its reimbursement undertaking towards the nominated and/or confirming bank. From the above, it is clear that policy and discretionary clauses may introduce uncertainty and unpredictability in performance under letters of credit (and confirmations). In the case of significant uncertainty and unpredictability, a court may be inclined to classify such clauses as a violation of the commercial purpose of letters of credit.

A violation of the commercial purpose of letters of credit may, in certain legal systems, bring into question the contractual validity and enforcement of the sanctions clause. This specific issue has been investigated with reference to South African law.⁶⁷ In particular, the question of whether discretionary and policy clauses would satisfy the South African contractual requirement of consensus has been answered in the negative, as a "meeting of the minds" on the specific clause is improbable.⁶⁸ Likewise, the contractual requirement of certainty of performance would likely not be met because the bank's obligations may be rendered undeterminable due to the internal policies or a discretion based on the mere likelihood of a breach of sanctions regulations.⁶⁹ Where the contractual requirements are not met, the parties may opt to have the sanctions clause severed from the letter of credit (contract), provided the severance requirements are met.⁷⁰ If a clause is properly severed, the remainder of the contract is valid and enforceable. In the *Kuvera* case, such contractual possibilities were not explored, probably because the sanctions clause *in casu*, on my interpretation, was neither a policy nor a discretionary clause, but instead a type of informative clause.

Informative clauses recite applicable laws and generally do not introduce abstract or new conditions. These clauses are harmless to the extent that the applicable sanctions laws and regulations will apply irrespective of the contractual reference. Hence, the ICC endorses the use of informative clauses in cases where a sanctions clause is deemed necessary.⁷¹ In the *Kuvera* case, reliance was placed on an internal sanctions list that was not well-aligned with the latest OFAC sanctions

⁶⁷ Lupton, "A critical evaluation of the use of sanctions clauses in letters of credit", *supra* note 42 at 13–18. South Africa has a mixed legal system, comprising civil law, common law and (African) customary law. The English common law is highly influential in the development of the South African law of documentary credits. See Michelle Kelly-Louw & Heindrich Schulze, "The nature and incorporation of UCP 600 under South African Law" in Agatha Brandão de Oliveira, Lauro Gama & Geneviève Saumier, eds. *Soft Law in International Trade Finance* (Leiden: Brill, 2025) 543 at 543, and Charl Hugo "Payment in and financing of international sale transactions" in Robert Sharrock, ed. *The Law of Banking and Payment in South Africa* (Cape Town: Juta, 2016) 394 at 403.

⁶⁸ Lupton, "A critical evaluation of the use of sanctions clauses in letters of credit", *supra* note 42 at 18.

⁶⁹ *Ibid* at 19. For a discussion of the application of English contract law requirements to discretionary and policy clauses, see *ibid* at 19–20.

⁷⁰ Lupton, "A Legal Study on the Impact of Targeted Financial Sanctions from a South African Perspective", *supra* note 2 at 250, with reference to *Sasfin (Pty) Ltd v Beukes* [1989] 1 All SA 347 (A) at 16–17 (SC(A)) and *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (AD) at 180–190 (SC(A)).

⁷¹ ICC, "Consolidated ICC Guidance on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules", *supra* note 37.

developments. In particular, the red flags concerning the Omnia's beneficial ownership could not be supported in relation to OFAC sanctions or on any other objective standard. It follows that it was not the content of the sanctions clause that was contentious, but the strength of the evidence presented to support its application.

A salient question that emerges against this background is whether there are circumstances under which informative clauses, such as the clause in the *Kuvera* case, could defeat the commercial purpose of the credit or confirmation. While the nature of the uncertainty arising in the case of discretionary clauses or policy clauses (where the bank can simply decide not to pay) is extreme, there is some degree of uncertainty arising from the bank's inability to pay if sanctions laws and regulations are triggered under an informative clause. If the commercial purpose is seen to be defeated by such a clause, this may bring into question the enforceability of the clause. The enforceability of an informative clause was not directly considered in the *Kuvera* case, as the bank, JP Morgan, could not prove that the situation fell within the scope of the clause in the first place. It is, however, an important issue. Where the bank complies with sanctions laws and regulations, non-payment or refusal to reimburse could open the door to a claim for breach of contract. However, if the informative clause is deemed to be valid and enforceable, this would absolve the bank from liability for breach of contract.

Another aspect to consider is the standard of proof, on which the High Court and Court of Appeal were divided. The High Court favoured a subjective approach to determining the Omnia's beneficial ownership, while the Court of Appeal endorsed a strict, objective approach instead. The Court of Appeal's requirement of a high threshold of acceptable evidence should, it is respectfully submitted, be supported as it underscores the need for sanctions compliance decisions pertaining to trade finance to be grounded in demonstrable facts — not mere red flags and internal considerations. The requirement is also consistent with conventional letter-of-credit law, particularly as it relates to the well-established defence of fraud by the beneficiary.⁷² Fraud, in this context, invariably manifests in the documents and requires clear and convincing proof for a bank to be excused from making payment. In Singapore, this was reaffirmed in the recent case of *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corporation Limited*,⁷³ where the Court of Appeal referred to a "higher standard"⁷⁴ of fraud concerning letters of credit, in terms of which it would be "seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands".⁷⁵

In a sense, therefore, embracing a high standard of proof by the Court of Appeal in the *Kuvera* case upholds the integrity of letters of credit, as it prevents banks from pursuing frivolous cases based on sanctions regulations and other similar considerations. It is, therefore, a welcome development.

⁷² Commonly known as the fraud exception (to the independence principle).

⁷³ *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corporation Limited* [2024] SGCA 31.

⁷⁴ *Ibid* at [51]. With reference to the case of *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 (HC), the Court contrasted this standard with the "less onerous test of a 'strong *prima facie* case' of fraud applied for performance guarantees".

⁷⁵ *Ibid* at [51], as adapted from the judgment of Ackner LJ in *United Trading Corporation SA v Allied Arab Bank* 1985 2 Lloyd's Rep 554 at [561] (CA). See also *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862 at [870b]–[870d] (QB).

Finally, at a practical level, this case illustrates the importance of drafting sanctions clauses in precise and objective terminology. Clauses that grant a bank broad discretion, rely on ambiguous standards, or incorporate internal policies risk being invalidated or narrowly construed by courts. Clarity is therefore important, both to preserve documentary-credit functionality and to ensure that parties understand the circumstances under which payment may lawfully be withheld.

IV. CONCLUSION

The *Celestial* and *Kuvera* cases highlight the tension between legal certainty and predictability in trade finance, on the one hand, and the imperative of sanctions compliance, on the other hand. As geopolitical conflict and regulatory assertiveness continue to grow, so will the complexity of trade finance compliance. This will, hopefully, impress upon lawmakers and regulators the need to critically explore, as an area of prioritisation, the harmonisation of sanctions laws and regulations with the needs of international trade. Courts also have an essential role in balancing regulatory compliance with the established principles of international trade. The appeal judgments in the *Celestial* and *Kuvera* cases may, it is suggested, serve as useful guidance for other legal systems in pursuing such a balance, particularly insofar as letters of credit are concerned.