

# THE ARREST news

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## Letters of Credit - New Uncertainties? by K. Murali Pany & Jolene Tan, JTJB (Singapore)

### Benefits of Letters of Credit

Letter of credits (LC) are a common and useful instrument in international trade transactions. It operates through the banking system and is essentially based on payment being made by a buyer in exchange for stipulated documents being presented by the seller showing that the goods of the contracted quantity and quality have been despatched.

Under Singapore law, the bank owes a contractual obligation to the seller to honour an LC as long as it fulfils the stipulated requirements. The banks have a very limited scope to decline payment.

JTJB Senior Partner, K. Murali Pany notes: "A key feature of LCs which facilitates international trade is

certainty. Payment is via banks and as long as conforming documents are presented by the seller to the bank, payment by the bank will ordinarily follow."

While payment can separately be stopped by an injunction from the Court, these are rare situations that would involve an element of fraud and/or unconscionability. A further exception exists where a beneficiary fraudulently presents the bank with documents that he/she knows to be untrue, also known as the 'Fraud Exception'.

LCs therefore provide a measure of reassurance for both parties, especially between buyers and sellers who may not know each other well or are from different jurisdictions; the seller can expect to receive payment for its goods and the buyer can expect to receive the goods for which it has paid.

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## New Uncertainties

Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corporation Limited [2023] SGHC 220

However, in August 2023, the case of Winson Oil broadened the applicability of the Fraud Exception such that beneficiaries and companies may no longer be safe in relying on a defence that they did not know about false representations made. The effect of this case was explored in our recent article.

JTJB Counsel, Jolene Tan commented that “The case of Winson Oil does not appear to suggest any evidential threshold to meet to satisfy the reasonableness requirement. There also does not appear to be a trade-wide accepted checklist for a beneficiary to mark against in trades. To this, we can only suggest that beneficiaries apply their minds carefully as to the representations of fact which they can ascertain, to any extent, and carry out these checks as best as they reasonably can in the circumstances.”

Kuvera Resources Pte Ltd v JP Morgan Chase Bank, NA [2022] SGHC 213

In an earlier [Insights article](#) we explored the recent Singapore case of Kuvera Resources where JP Morgan had confirmed a letter of credit issued in favour of Kuvera and this letter of credit contained the following sanctions clause:

*“[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 U.S. laws and regulations (“applicable restrictions”). Should documents be presented involving any country, entity, vessel or individual listed in or otherwise subject to any applicable restriction, we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information.”*

Subsequently, Kuvera presented documents relating to cargo laden on board a vessel, the OMNIA. JP Morgan conducted a search on the vessel, and the

search revealed that there was a sanctions nexus or concern associated with the vessel.

It was undisputed that the vessel was not listed in any “applicable restrictions” and that JPMorgan could only invoke the sanctions clause if it could show that it was “otherwise subject to any applicable restriction”.

JPMorgan argued that there was an “unresolved possibility” that the vessel might be caught under “any applicable restriction” upon which JPMorgan would be entitled to decline payment.

The Singapore High Court decided that the foreign sanctions clause was valid and enforceable and thus, JPMorgan’s refusal to make payment under the letter of credit was justified in this case.

However, the Singapore Court of Appeal (CA) recently overturned the lower court’s decision.

Commenting on the case, Pany concludes: *“The Singapore High Court allowed JPMorgan’s argument but the Singapore Court of Appeal subsequently rejected it, finding that the text of the sanctions clause had to be read strictly. The “unresolved possibility” that JPMorgan sought to rely on was not good enough. The takeaway from this case is that sanctions clauses will be construed strictly and should therefore be crafted carefully and comprehensively to enable such situations to be managed.”*

## Potential Issues

Concerns have been expressed that these cases have affected the fundamental value of LCs which is certainty of payment against conforming documents.

Parties in transactions that utilise LCs should be aware of these uncertainties and take steps such as:

1. Ensuring that clauses and documentary requirements in LCs are clear and precise;
2. Exercising greater caution prior to presenting documentation for payment under an LC, including ensuring that they have in their records any relevant trail which would assist in confirming the truth or veracity of any representation made in the conforming documents;

3. Applying (if the above is not possible) their minds carefully as to the representations of fact which they can ascertain, to any extent, and carry out these checks as best as they reasonably can in the circumstances.



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## Ship Attacks in the Red Sea Raise Alarms

by Wiwin Abdul Kahar & Deelora Ahmad, Rahayu Partnership (Malaysia)

A vital artery in global trade, the Red Sea is seeing tension rising in ship attacks stemming from the ongoing Israel-Gaza war since October 2023. This waterway connects the Mediterranean Sea and Indian Ocean via the narrow Suez Canal in the north and Bab El-Mandeb strait in the south. More than 17,000 ships pass through it each year as the link between Asia and the West.

According to the US Energy Information Administration, the Suez Canal transported 9.2 million barrels per day of oil and 4.1 billion cubic feet per day of liquefied natural gas (LNG) in the first half of 2023.

The Houthis were founded by a coup in 2015 against the Yemeni government. They conquered northern Yemen, including its capital, Sanaa. The Houthis deployed missile and drone attacks against ships passing through the Bab El-Mandeb strait which is a critical chokepoint in the Red Sea, aiming to end the Israeli war targeting Gaza.

US Defense Secretary, Lloyd Austin confirmed that more than 12 ships have been attacked/seized by the Houthis. 'MSC Palatinum III' for instance, turned around to Djibouti Port after being attacked in Bab El-Mandeb. 'Galaxy Leader' was seized on November 19, 2023 where 25 crew members were taken hostages. She is currently in the Hodeida's port area and all communications are lost.

Maersk instructed their vessels bound to affected areas to pause their journey until further notice after an aerial missile narrowly missed their vessel, 'Maersk Gibraltar'. Hapag-Lloyd also took a similar stance after their container ship, 'Al Jasrah', was hit by a projectile launched from an area controlled by the Houthis in Yemen.

Lloyd Austin announced a multinational force to protect vessels in the Red Sea. Ten nations have joined forces to uphold maritime security by intercepting missile and drone attacks fired from Yemeni ground.

These disruptions have affected more than 400 vessels and over 10,000 shipments as vessels bound for Asia-Europe avoid the Red Sea and reroute to Cape of Good Hope in South Africa, adding two weeks to their journey and USD1 million in fuel costs.

Longer journeys raise the price of imported goods, including shipments of grain from Asia and oil from Middle East. The price of Brent Crude oil already climbed 8% in mid-December 2023. Equally, claims under bills of lading from cargo holders may increase for the additional 10-14 days required to deviate via Cape of Good Hope.

Legally, conflict arises on the charterparty provision between the Owner's rights to avoid exposing the ships to war risk and the Charterer's entitlement in giving orders. The 'real likelihood' test is required where Owners/Charterers must form a reasonable judgement as to whether the vessel may be or likely to be attacked. While it is crucial to conduct the voyage safely, unreasonable deviation may result in loss of rights under the Hague-Visby Rules and potentially, the loss of P&I insurance coverage.

## Conclusion

Ship attacks in the Red Sea present a serious challenge to global trade and maritime security. As nations collaborate to protect vital shipping routes, Owners should consider giving relevant notices in invoking particular clauses when deciding to take alternative routes and work cooperatively with Charterers to mitigate any losses or delays caused by these disruptions.

## Malaysia's Ban on Israeli Ships

Malaysia recently announced a ban on Israeli ships and vessels hoisting Israeli flags from docking in all Malaysian ports, effective 20th December 2023. The ban has sparked debates within the international community, reflecting the existing tension in the Middle East.

Zim Integrated Shipping Services Ltd (ZIM) which is based in Israel, is among 20 of the largest shipping companies globally. It began docking at Malaysian ports as early as 2005. However, the current government decided to revoke all previous cabinet decisions and impose the ban.

The ban on Israel-linked vessels would have little to no impact on Malaysia's trade and economy as Malaysia has no diplomatic or formal trade ties with Israel. Although the US is one of Malaysia's largest trading partners, this decision would not have a significant effect on the ties between the two countries.

As a result of the docking ban, 4,000 shipping containers were left stranded at Port Klang. ZIM was forced to liaise with other shipping companies to remove its containers from Malaysia by buying slots from other shipping lines and will have to work with their partners.

According to the World Shipping Council, Port Klang was ranked 12<sup>th</sup> as the world's busiest port. The ban also extends to vessels calling at Malaysian ports that plan to later call at Israeli ports and any ships en route to Israel from loading cargo at Malaysian ports. Affected vessels need to reroute at other ports

situated in Thailand, Indonesia or Singapore, which will incur costs and further delay.

Standing firm on its decision, the ban on Israeli ships in Malaysian ports serves as a reminder of the intricate web of geopolitics, where maritime decisions can have far-reaching implications.



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## United States Marshals Service – Unsung Heroes of Ship Arrests

by Gary Seitz, GSBB Law (USA)

In the vast expanse of the world's oceans and ports, where law and order are challenged by the boundless horizons, a lesser-known group of heroes silently but stealthily operate to enforce justice. United States Marshals, renowned for their role in upholding law and order on land, extend their jurisdiction to the territorial seas, where they undertake the formidable task of arresting ships.

The United States Marshals Service occupies a uniquely central position in the federal justice system. It is the enforcement arm of the federal courts and is involved in virtually every federal law enforcement initiative. The Marshals Service provides security to the federal judiciary and manages the witness security

program. It manages and sells seized or forfeited assets of criminals, is responsible for the confinement and transportation of federal prisoners who have not been turned over to the Bureau of Prisons and is the primary federal agency responsible for fugitive investigations. But most important to maritime lawyers and their clients, an arrest or attachment of a vessel is performed by the US Marshals Service. One of the primary reasons ships are arrested is to ensure ultimate payment in disputes over maritime claims, liens and debts. These civil offenses not only undermine international laws but also pose significant threats to global economic stability.

The Office of the United States Marshals was created on September 24, 1789, with the passage of the Judiciary Act by Congress. The U.S. Marshals Service (USMS) was established in 1969 to provide guidance and assistance to U.S. Marshals throughout the nation. The U.S. Marshals Service is a bureau within the Department of Justice and receives direction from the Attorney General through the Director of the United States Marshals Service.

Presidentially appointed U.S. Marshals direct the activities of 94 districts — one for each federal judicial district. More than 3,752 Deputy Marshals and Criminal Investigators form the backbone of the agency.<sup>1</sup> The Honorable Ronald L. Davis was nominated by President Joseph R. Biden to lead the United States Marshals Service (USMS) on April 12, 2021.<sup>2</sup> The United States Senate confirmed his nomination on September 22, 2021, and Mr. Davis was sworn in as the 12th Director of the Marshals Service on September 27, 2021. As the leader of America's oldest federal law enforcement agency, Mr. Davis leads a workforce of over 10,000 professionals, including more than 5,000 operational and administrative employees, and close to 6,000 special deputized court security officers, spanning over 500 domestic offices within the 94 judicial districts, and four foreign field offices. The USMS fulfills its responsibilities with an annual operating budget of over \$3.8 billion.

<sup>1</sup> <https://www.usmarshals.gov/who-we-are/about-us>

<sup>2</sup> <https://www.usmarshals.gov/who-we-are/about-us/leadership>

While the image of US Marshals often conjures scenes of Wild West pursuits and courthouse security, their involvement in maritime law enforcement remains a less celebrated facet of their duties. Yet, their work in apprehending vessels for legal disputes is integral to maintaining justice and order in the global maritime industry. The US Marshals become involved in admiralty matters by carrying out orders of the federal courts as well as mandates found in the Supplemental Rules for Certain Admiralty and Maritime Claims. Upon authorization of the court or the clerk, the clerk will issue a warrant for the arrest of the vessel or other property that is the subject of the action or will issue a Writ of Maritime Attachment or Garnishment and deliver it to the US Marshal of the district for service. There are basic procedures that should be reviewed and followed to achieve the arrest, attachment, or garnishment.

The process of arresting a ship involves legal proceedings that mirror those conducted on land. US Marshals, armed with warrants issued by federal courts, board the vessels in question and secure the ship and turn it over to court appointed custodians until the legal issues are resolved. This can involve ensuring compliance with court orders, facilitating negotiations, or overseeing the auctioning of vessels to settle debts.

Although the Supplemental Rules for Certain Admiralty and Maritime Claims authorize persons or organizations other than the US Marshal to be named by the court to execute the warrant of arrest, or writ of attachment or garnishment, seizure of a vessel and tangible property on a vessel remain exclusively the task of the US Marshals Service. Seizure of other tangible or intangible property can now properly be undertaken by other persons or organizations if named by the court in the warrant of arrest, writ of attachment, or garnishment. In addition, many districts have local rules pertaining to admiralty procedures and these must be followed where applicable.

For the service of any writ or process by the Marshal, the instruction form "USMS-285" is utilized by the U.S. Marshals Service. One complete set of this form

(USM-285) and one copy of each writ for each individual, company, corporation, etc., to be served or property to be seized or condemned must be submitted. The applicable fees for such service(s) (Title 28, USC Sec. 1921 establishes the fees for service of process by the U.S. Marshal) may be required prior to said service.

Counsel will be asked to stay clear of the location at the time of arrest or execution. Once they clear the location and accomplish the mission, the Marshal will turn the ship over to the substitute custodian that counsel has arranged and obtained court approval for. Working with the Coast Guard, Customs and Border Patrol and others, the Marshal Service has protocols that they will follow to ensure that the job is completed in a safe and efficient manner.

Given the range of other more pressing matters in the offices of the Marshal, it is important for maritime attorneys to keep the office well informed of seizure intentions starting well before the target vessel arrives in the vicinity. Beyond their law enforcement duties, US Marshals involved in arresting ships must navigate complex international waters, cultural differences, and diplomatic sensitivities. Their ability to collaborate with other agencies, like the Coast Guard, Homeland Security, Customs and Border Patrol, foreign authorities, interpret international maritime laws, and maintain composure in high-pressure situations is a testament to their professionalism and dedication.

Moreover, the work of US Marshals in arresting ships often goes unnoticed by the public. Unlike high-profile criminal cases or dramatic rescues at sea, these operations unfold discreetly, with the focus squarely on upholding the rule of law rather than seeking recognition or acclaim.

Yet, the impact of their efforts reverberates far beyond the territorial sea. By apprehending vessels connected to maritime disputes, these matters may be resolved peacefully. US Marshals contribute to the safety and security of maritime trade routes, protect marine

ecosystems, and uphold the principles of justice on a global scale.

In an era marked by increasing transnational threats and complex legal challenges, the role of US Marshals in arresting ships remains indispensable. As guardians of the port and enforcers of the admiralty, they stand as unsung heroes, steadfastly upholding the rule of law and preserving the integrity of the world's maritime trade for generations to come.



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## The Rise in Registration of Shipping Vessels in Singapore

by Rafizah Gaffoor, JTJB (Singapore)

### Strong Shipping Foundations and Infrastructure

The Singapore Registry of Ships (SRS) is the administration responsible for executing the proper registration of ships sailing under the Singapore flag. With more than 4,400 ships that aggregate over 96 million gross tons (GT), the SRS is amongst the world's top ten registries with one of the youngest quality fleets. The fleet mainly comprises tankers, bulk carriers and container ships – many of which play a crucial role in moving a staggering 600 million tons of cargo around the world annually.

In addition to this fleet, Singapore has also seen an increase in the registration of offshore vessels such as floating production storage and offloading units in recent years due to the rise in support for the oil and gas industry.

Hong Kong is another option for ship registration in Asia but, in my opinion, Singapore has a number of advantages. For example, it is easier to meet the requirement of a Singapore-incorporated company as owner (it can take as little as a few hours to incorporate a Singapore company), an option for dual registration and various subsidies and schemes are available, such as the Block Transfer Scheme which we often assist clients with.

### **Benefits of a Singapore Ship Registration**

Singapore is seen as a stable and politically neutral place for ship registration. A range of other benefits exist, including:

- Recognition of international standards;
- Strong safety record and mark of quality;
- Business-friendly environment;
- Efficient infrastructure and administration;
- Pro-business schemes;
- Tax exemptions – profits are exempt from Singapore income tax;
- Flexibility on crew nationality;
- Recognition of foreign certificates of officers and crew;
- No capital gains tax when selling.

One further significant benefit of ships flying the Singapore flag is that it also offers easy streamlined processes for recording a mortgage, which in turn may make it more attractive to mortgagee banks for financing.

In this regard, when comparing Singapore to other jurisdictions, it is noteworthy that until recently when registering the mortgage instrument in certain countries, security documents such as the deed of covenants had to be translated into the national language of that country. Some registries also have the provisional vs. definitive mortgage registration process which can be confusing for vessel owners. Singapore offers a straight-forward, streamlined alternative.

Another reason for considering the SRS is that it is not a flag of convenience. Flags of convenience have in recent times faced backlash from seafarers' unions like the International Transport Workers' Federation (ITF).

We have seen a situation where the ITF tried to oppose our clients' registration with SMOU because our clients' vessels were registered with flags of convenience. They were placated when our clients committed to registering future vessels with the Singapore ship registry.

### **Staying Competitive in Today's Market and Promoting Greener Shipping**

Singapore's Maritime Port Authority (MPA) has issued incentives for Singapore-flagged ships to undertake decarbonisation efforts, including the Green Ship Programme (GSP). The GSP is one of four programmes offered under the Maritime Singapore Green Initiative (MSGI). The full list of programmes is as follows:

- Green Ship Programme
- Green Port Programme
- Green Energy and Technology Programme
- Green Awareness Programme

The initiative first launched in 2011 with a mission of encouraging Singapore vessels to reduce carbon emissions, whilst the GSP operates on one key principle – rewarding ship owners who voluntarily adopt solutions that enable ships to exceed environmental regulatory standards mandated by the International Maritime Organisation (IMO). Due to popular demand and positive feedback, the GSP has been extended until 31st December 2024.

The MPA is continually looking at how Singapore can remain both innovative and competitive. In line with this, GSP offers the following attractive incentives to shipowners (see table below).

In conclusion, with the recent surge in shipbuilding contracts and for the various reasons explored in this article, Singapore's ship registry should be carefully

Criteria	Reduction on Initial Registration Fee	Rebates on Annual Tonnage Tax
Adoption of zero-carbon fueled engine	100%	100%
Adoption of engine capable of using low-carbon fuels	75%	50%
EEDI reduction factor exceeds IMO's Phase 3 requirements by 10% or more	50%	20%

considered as the best option for shipowners looking to register newbuilds in the future.

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