THE ARREST news

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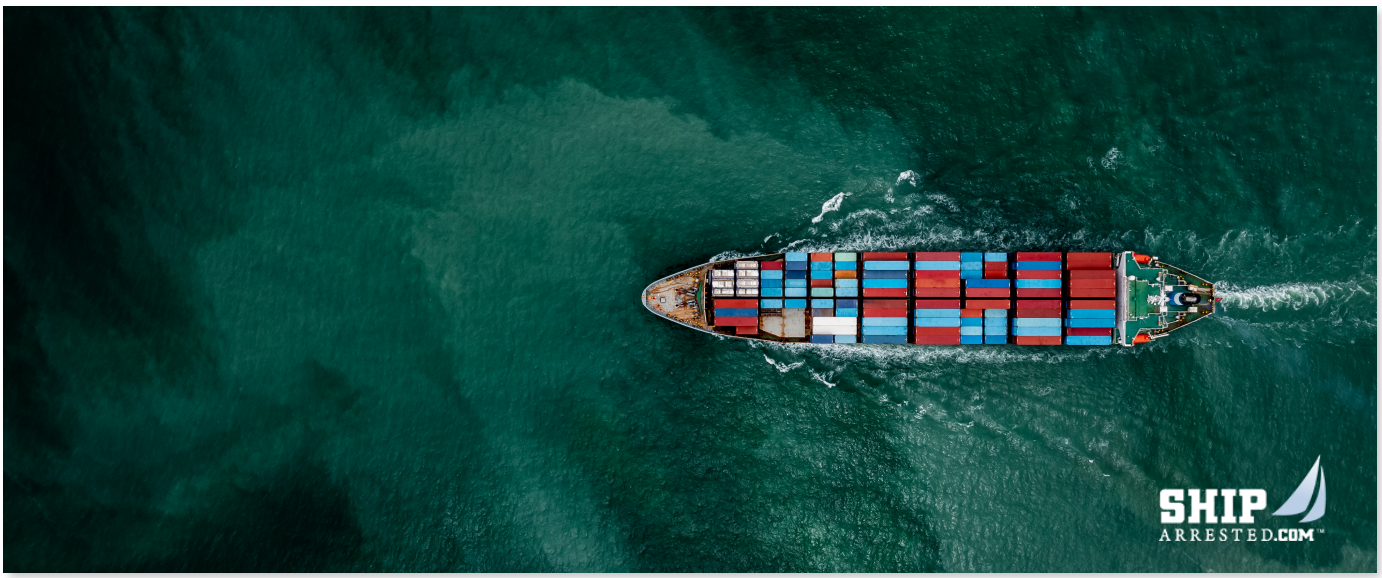

In this issue of *The Arrest News:*

Top 5 Vessel Arrests During Martial Law by Kostiantyn Morlakov, ANK Law Firm (Ukraine)

No. 5: M/V MILA (IMO 8865987, flag of Togo)
Compromise as a way to resolve a conflict
Maritime claim: > USD 696 000

Reason: cargo damage due to the water ingress to the cargo holds
Port: Izmail
Case: № 916/2708/22

In October 2022, the M/V MILA had a voyage from the Turkish port of Haydarpaşa to the seaport of Izmail for the carriage of PET raw materials in big bags for the largest Ukrainian PET packaging manufacturer. During the unloading of the cargo, it was discovered that part of the cargo was damaged due to contact with seawater in the cargo holds.

At the consignee's request, the vessel was initially detained by the Harbour master with further arrest by the Commercial Court of Odesa Region.

It should be noted that in this case, the shipowner did not hesitate to appoint local lawyers immediately after discovering the damaged cargo and offered all interested parties to conduct a joint survey, and finally entered into negotiations for an amicable settlement.

A constructive approach resulted in a quickly found compromise by the parties and a settlement

agreement signed on mutually beneficial terms. The arrest was lifted and the harbour master allowed the vessel's departure.

Peaceful negotiations are the best alternative to lengthy and, in some cases, financially burdensome litigation provided that the parties are able to reach an agreement and, most importantly, are willing to do so.

No. 4: m/v "YASEMIN" (IMO 9136838, flag of Panama)
A deterrent to abuse? Counter security!
Maritime claim: > USD 47 000
Reason: breach of C/P
Port: Mykolaiv
Case: № 915/1550/21

Although this case began in October 2021, the legality of counter-security covering the shipowner's losses caused by the arrest had been finally resolved during the martial law period, and this is an illustrative case.

According to the case, during a call at the port of Mykolaiv, the m/v YASEMIN was arrested at the request of one of the previous charterers. The maritime claim was based on the fact that there were no legal grounds to pay the demurrage charged by the shipowner for violation of the laytime, which the charterer had paid. Therefore, the charterer demanded a refund of the USD 47 000 paid.

Attempts to release the vessel through negotiations failed due to the ultimatum of the charterer's representatives.

Taking into account the amount of the maritime claim, the shipowner decided to use the possibility provided by Ukrainian law to replace one security measure with another, namely to deposit USD 47 000 into the court's deposit account. This is an unconditional ground for the release of the vessel.

After the issuance of the Release Ruling by the court, the charterer's representatives tried to abuse their rights and pressure the harbour master to extend the detention of the vessel. Instead, the departure was permitted and the vessel moved to the next voyage.

On another hand, the shipowner, who suffered losses due to the vessel's arrest and its idle time beyond the planned time, after the vessel's release filed a motion for counter-security to the Commercial Court of Mykolaiv Region demanding to oblige the charterer to deposit more than USD 40 000 into the court's deposit account.

As a result of the court examination, the court sided with the shipowner and satisfied the motion partially, ordering the charterer to deposit more than UAH 778 000, which at the time was equal to about USD 29 000.

The charterer complied with the counter-security order and deposited the funds in the amount determined by the court into its deposit account, but disagreed with the court's decision and filed an appeal.

In May 2022, the South-Western Commercial Court of Appeal ruled that the court of first instance had lawfully applied counter-security, and therefore the ruling had been left without changes and the charterer's appeal was dismissed.

It should be noted that all the deposited funds of both the shipowner and the charterer continue to be held in the court's deposit account, as the substantive dispute between them, which is being considered by the London Maritime Arbitrators' Association (LMAA), has not yet been resolved.

No. 3: m/v "BERK" (IMO 8519942, flag of Togo)
The deposit is a strong argument

Maritime claims: > USD 34 600
Reason: overpaid freight, breach of the contract of carriage of goods

Port: Ust-Danube
Cases: № 916/952/22, 916/1072/22

In this case, the vessel m/v BERK was arrested during a call at the port of Ust-Danube in May 2012 at the maritime claim of the charterer, who demanded a refund of overpaid freight.

The parties were unable to reach an agreement on a peaceful settlement through negotiations, and therefore the shipowner had to decide on the best way to lift the arrest in order to release the vessel.

Taking into account the amount of the maritime claim, the shipowner decided to deposit the funds into the court's deposit account and submit a Release Motion.

The Commercial Court of Odesa Region satisfied the Release Motion, as noted above, this is an unconditional ground for the vessel's release.

During the registration of the vessel's departure, the charterer's representatives tried to arrest the vessel repeatedly but motivated their demands referring to a different maritime claim, which, like the first one, arises from the Charter Party.

The shipowner's representatives notified the court that the vessel had already been arrested at the charterer's maritime claim, which was lifted due to the deposit, and therefore there were no legal grounds for a second arrest, as this is expressly prohibited by the 1952 Brussels Convention (see part 3 of Article 3 of the Convention).

Thanks to the efficiency of the maritime agent, the vessel quickly received permission for the departure from the port and left the territorial waters of Ukraine, and therefore the charterer's representatives were forced to withdraw their repeated Arrest Motion.

The latter two cases show that depositing funds with the court is an indisputable and unconditional argument for lifting the arrest, which is very helpful in releasing the vessel quickly. Of course, given the usually increased amounts of maritime claims, this option is not always acceptable to shipowners, and in this case, other methods should be used, such as a bank's LOGU or P&I Club's LOI. However, the first alternative is complicated and rather time-consuming due to the requirements of the Ukrainian banking system, which requires opening a representative office of a foreign legal entity in Ukraine, while the second alternative requires the consent of the other party, which is rejected in most cases.

No. 2: m/v "MEGA D" (IMO 8206791, flag of Turkey)
Arrest as a tool for abuse
Maritime claims: USD 990 000
Reasons: breach of the vessel sale and purchase agreement, illegal use of the vessel
Port: Izmail
Cases: № 2023/56 E (Turkey); № 916/1596/23; № 916/2137/23; № 916/2551/23; № 916/2613/23; № 916/3229/23; № 916/4925/23; 757/5763/23-k.

In April 2023, during a call to the port of Izmail, the m/v MEGA D was arrested at the request of a representative of a foreign legal entity on the basis of a maritime claim relating to a breach of the ship sale and purchase agreement.

According to the Arrest Ruling, in order to preserve the arrest's validity, the applicant then filed a court claim to the Commercial Court of Odesa Region.

After some time, it became known that the foreign legal entity on whose behalf the Arrest Motion was filed had been liquidated in the country of registration since July 2022, and a similar case was considered by the Istanbul Commercial Court. As a result of the proceedings in Turkey, the Arrest Motion was dismissed, and the case against the shipowner was closed due to the Claimant's liquidation.

The representatives of the shipowner informed the court of the above circumstances, providing duly certified and legalized documents from the Registrar of the Republic of the Marshall Islands and the Turkish court, demanding to refuse to open proceedings against the shipowner and to lift the vessel's arrest, which was satisfied by the court.

Additionally, refusing to open the proceedings had been grounded by the court based on the fact that Ukrainian courts have no jurisdiction to examine such disputes. This conclusion was subsequently confirmed by the Supreme Court.

However, the next day after the arrest had been lifted, a new Arrest Ruling was “born” at the request of the same representative of the liquidated foreign legal entity, but this time grounded by another maritime claim, namely a dispute between co-owners over the ownership of the vessel, its operation or income from its operation.

The shipowner's Release Motion, citing the prohibition on re-seizure of a ship under the 1952 Brussels Convention, especially at the request of a person whose legal personality has been terminated, was dismissed by the court.

Meanwhile, in order to preserve the effectiveness of the second arrest, a representative of the liquidated legal entity filed a second claim with the Commercial Court of Odesa Region.

However, it was also returned without consideration, and after appeal proceedings, the second arrest had also been lifted.

Notwithstanding the above, a few days later, the Commercial Court of Odesa Region arrested the vessel for the third time but then lifted it on its own due to the applicant's failure to provide evidence of the claim.

Interestingly, by a "mysterious coincidence", the court became concerned about the applicant's fulfilment of its obligation only the day after the fourth arrest was issued by the Pechersk District Court of Kyiv, while the deadline for its enforcement had expired more than a week earlier.

In total, the dispute over the M/V MEGA D resulted in the initiation of 8 cases, 4 of which concerned the arrest of the vessel. As of now, 3 arrests have been lifted, however, the validity of the last, fourth arrest does not allow the vessel to leave Ukrainian waters.

It is illustrative that the shipowner repeatedly raised the issue of abuse of procedural rights by the representative of the liquidated foreign legal entity before the Ukrainian court, but the court did not pay due attention to it.

Unfortunately, this case is a negative example of what is still allowed in our country:

- Accept applications from any foreign legal entities, even without proof of their good standing (active/normal status);
- Impose an infinite number of arrests on ships on the basis of the same maritime claim (including a contrived one) of the same claimant, despite the prohibition contained in part 3 of Article 3 of the Brussels Convention of 1952;
- Use the repeated arrest of the vessel, even though it was previously cancelled on a similar claim, to "renew" the thirty-day period for filing a claim set out in part 3 of Article 138 of the Commercial

Procedural Code of Ukraine, in essence artificially creating the effect of its infinity;

- Abuse of procedural rights with impunity.

I hope that the Ukrainian courts will start to take into account that the arrest of a vessel is one of the most burdensome measures to secure a claim. The losses from which, due to excessive vessel detention, may force the shipowner to satisfy even an unreasonable and illegal claim in order to release the vessel. Therefore, more attention will be paid to the justification of such claims, as well as to the issue of the applicant's good standing (active/normal status) and the need for counter-security, thereby limiting the scope for procedural abuse.

No. 1 TOP Vessel Arrest: m/v "BEDFORD CASTLE" (IMO 9189926, flag of Panama)
Good faith is an unconditional standard of behaviour for the parties
Maritime claim: > USD 870 000
Reason: cargo damage due to the water ingress to the cargo holds
Port: Chornomorsk
Cases: № 916/477/22, 916/548/22

The day before the full-scale invasion, the Commercial Court of Odesa Region arrested the m/v BEDFORD CASTLE at the maritime claim of the consignee, based on cargo damage caused by uncontrolled seawater ingress to the vessel's cargo holds during a voyage from China to Ukraine.

However, despite the court arrest, on the night of 23-24 February 2022, at 01:15 a.m., i.e. before the aggression against our country, the said vessel which was anchored in the Black Sea port, without authorisation, unanchored and left the port area and the territorial sea of Ukraine, heading for Varna (Bulgaria).

In view of the shipowner's failure to comply with the Arrest Ruling, the consignee's representatives demanded before the court to replace the arrest with an obligation to deposit more than USD 871 000 which was equal to the claim amount. Despite the first judicial precedent by the South-Western Commercial Court of Appeal, which in our opinion was absolutely justified and fair, the shipowner's obligation to deposit funds into the court's deposit account was not supported by the Supreme Court.

Due to the fact that the existing (de jure) arrest of the vessel, according to Article 3 of the 1952 Brussels Convention, prevented the claimant from demanding a similar arrest in other jurisdictions where the shipowner continued to operate the vessel without interference, the consignee was forced to file a motion to lift the arrest, which was satisfied by the court.

It seemed that the Ukrainian court would ignore the fact that the party to the case had failed to comply with a lawful court decision, as the motion for a separate ruling to bring the Master of the vessel to justice was also dismissed, which generally set a dangerous precedent and violated the principle of the binding nature of court decisions.

However, at the end of the proceedings, during the examination of the motion on the reimbursement of legal fees, the Commercial Court of Odesa Region took into account the violation committed by the shipowner and dismissed its motion, making a fair conclusion worthy of quotation:

> *"Compensation of court costs to a person who has deliberately grossly violated the norms of Ukrainian and international law will be clearly unfair and, therefore, contrary to the objectives of commercial proceedings. In addition, the recovery*

of court costs in favour of such a person will mean that the commercial court, formally exercising its powers to allocate court costs, leaves without a proper response the fact of a party's failure to comply with a court decision that has entered into force, which is unacceptable, as it will indicate that the court approves of the illegal conduct of the party to the case."

Nevertheless, this case demonstrates, although not to the fullest extent, that good faith of the parties to the court proceedings is a basic and unconditional standard of conduct. Failure to comply with which should result in appropriate consequences in the form of a proper response by the court, both on its own initiative and at the request of other parties of the case, in order to increase respect for the Ukrainian court and the court's decisions, as well as to prevent similar dishonest acts in the future.

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Foreign client recovered ship repair costs via ship arrest in PRC court — parallel proceedings in Korea court by Xinwei Zhou, HiHonor Law Firm (China)

Our client as Claimant ITS, is a company registered in The Commonwealth of Dominica, via instruction of Korean counsel, approached HiHonor Law Firm for arrest of Russian owners' vessel in China.

Following legal advice of HiHonor lawyers, client applied to Qingdao Maritime Court of PRC (QMC) to arrest MV "Fxx Mxx", one sister ship owned by the same Russian Owner company, for huge outstanding claims over US$5.68 million arising from ship repair and supply contracts which were performed in Busan of the Republic of Korea.

Lawsuit filed in Korea Court

Prior to approaching HiHonor Law Firm for ship arrest in early April, ITS had already filed lawsuit against the Russian owners in Seoul Central District Court on 15th March 2024 according to the exclusive jurisdiction agreement in the ship repair and supply contracts between ITS and the Russian owners, and the service process of Korea court onto the Russian owners was underway.

Although main proceedings were filed in Korea court, contracts were performed in Korea and contractual parties were not related to PR China, in theory, it is possible to arrest a ship in China. As it is provided in Article 21 of the Special Maritime Procedure Law of PRC (SMPL) that

"in case a foreign court or foreign arbitral tribunal already entertained the case of maritime claims when related assets to be attached are within the territory of PR China, and if a party applied to PRC court where concerned asset is located, for purpose of preservation/attachment for maritime claims, the

maritime court of PRC shall entertain such application".

In practice, it is popular to arrest a ship in China for purpose of obtaining security to secure enforcement of foreign arbitration award. Nevertheless, there seems no reported case in PR China that a foreign party applies to PRC court for arrest of ship after a foreign court has seized jurisdiction based on the exclusive foreign jurisdiction clause.

Risk Assessment

Under the above circumstances, related issues and risk have to be considered well in advance, including whether the parallel proceedings in Korea court would have any impact on the ship arrest in China? whether the respondent/Russian owners are entitled to raise objection to the ship arrest based on the exclusive jurisdiction clause of Korea court existed in ship repair and supply contracts? Whether the Claimants are required to commence another main action in QMC court, so as to maintain the ship arrest? If so, whether PRC court would refuse to entertain such lawsuit filed in China according to the doctrine of *Forum Non-Convenience*?

After several rounds of discussion and risk assessment, ITS finally determined to proceed the arrest in China.

Ship Arrest by QMC court on Friday Evening

HiHonor Law Firm learned that after completing discharge of fish cargo, *MV "Fxx Mxx"* berthed at Dagang of Qingdao port on 12 April 2024, and she was likely to leave over the weekend. However, notarization and apostille of POA documents and counter-security for ship arrest and translation of claims documents had not been completed until it was approaching 16:00hrs LT on Friday. When HiHonor lawyers submitted ITS's Application to QMC court for ship arrest, it was approaching end of the court's office hours.

HiHonor lawyers explained the desperation and urgency of arresting the vessel on a Friday. QMC court immediately conducted review of the materials and considered that ITS's application was in line with the PRC law and should be granted. The signature for granting ship arrest was also approved by the competent court leader as a matter of urgency. Court staff rushed to MSA Qingdao (Maritime Safety Administration) on that Friday evening, and the ship was arrested around 20:00hrs LT on 12 April 2024. From submission of ship arrest application to successful arrest of the ship, it took less than four hours.

Post Ship Arrest

After the vessel was arrested by PRC court on 12 April 2024, the Russian owners did not provide security in the first two weeks.

In accordance with Art.28-29 of the Special Maritime Procedure Law of PRC (SMPL), ship arrest period is 30 days for preservation of maritime claims, if the respondent fails to provide security and it is not appropriate to keep the ship under arrest after the expiry of the time limit, the claimant/applicant, who has brought an action or applied for arbitration, may apply to the court for auction of the ship.

To apply for Judicial Sale of Vessel

As the max. ship arrest period of 30 days was fast approaching while the Respondent/Russian owners kept failing to provide sufficient security as ordered by PRC court, in order to exert more pressure onto the Owner side to speed up resolving the matter, our client ITS submitted Application for Judicial Sale of vessel to Qingdao Maritime Court, with supporting evidence of the Korea court case-registry certificate (case filing on 25/3/2024 in Seoul Central District Court), trying to convince QMC to proceed to judicial sale of the ship. In addition, as per the SMPL of PRC, once arbitration or court proceeding is filed, arrest period shall not be subject to the max. 30 days, it can indeed exceed 30 days. Hence, given proceedings

were already filed in court, the vessel under arrest should not be released even after the expiry of 30 days on 12 May 2024.

Ship arrest by PRC court exerted much pressure onto the Russian Owners, the owners had no choice but to resume negotiation with claimant, and reluctantly furnished cash security USD3.6mil, so as to release the vessel from arrest by PRC court.

Ship Release was utmost efficient

The continuous ship arrest by PRC court forced the Russian Owners resumed negotiation with the Claimant, settlement was finally reached on May 22, 2024. On the morning of May 22, 2024, after receiving ITS's application for release of ship, QMC court immediately issued court order for Releasing Ship from Arrest. Judges and staff gave up their lunch break, served documents of ship release as soon as possible to authority MSA and relevant parties. It took less than one hour from the submission application for ship release to QMC lifted the arrest.

Letter of Appreciation

After release of the vessel, QMC court received Letter of Appreciation from the Claimant, which expressed their heartfelt thanks and respect to the PRC Court for their responsibility, efficiency and hard-work. The Claimant's Korean counsels involved in this matter, also highly appreciated the Chinese maritime judges for their dedication, responsibility, efficiency, and fairness in handling this matter, and expressed good will to consider Qingdao Maritime Court of PRC as a good venue for dispute-resolution when future occasions arise.

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Tougher Verification Protocols for Beneficiaries in Letter of Credit Payments

by Jolene Tan, JTJB (Singapore)

In Singapore, it is an accepted position in law that a confirming bank owes a contractual obligation to the seller to honour an LC as long as the documents presented to the confirming bank conform on their face with the requirements of the credit as notified to the seller by the confirming bank.

The rationale for this is to give sellers an assured right to be paid before they part with control of the goods that does not permit any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

An exception to this rule exists where a beneficiary, for the purposes of drawing on the credit and in presenting documents for payment, fraudulently presents the bank with documents that contain representations which the beneficiary knows to be untrue, or where he makes the representation "without belief in its truth". This is known as the Fraud Exception.

In August this year, in the case of *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corporation Limited* [2023] SGHC 220 ("***Winson Oil***"), the Singapore court considered the question slightly further: Is a bank obliged to make payment out under letters of credit ("**LCs**"), where, to draw on an LC, a beneficiary makes a representation recklessly, without caring whether the representation is true?

Facts

Winson Oil Trading Pte Ltd ("**Winson**") commenced proceedings against Oversea-Chinese Banking Corporation ("**OCBC**") and Standard Chartered Bank ("S**CB**") for non-payment under LCs issued to finance the purchase of gasoil from Winson by Hin Leong Trading (Pte) Ltd ("**Hin Leong**").

The sales were circular trades that took place in the same afternoon on 27 March 2020. In these sales, Hin Leong sold a quantity of gasoil in two shipments to Trafigura Pte Ltd. Trafigura Pte Ltd then sold the same gasoil in two shipments to Winson. Winson then sold the same quantity of gasoil back to Hin Leong.

Using documents from this trade, Winson attempted two presentations for payment to OCBC and SCB. The first presentation by Winson to OCBC was for cargo on board the vessel Ocean Voyager, and the first presentation to SCB was for cargo on board the vessel Ocean Taipan. OCBC rejected the first presentation on the ground that it found that no cargo had been shipped. Upon receipt of this rejection, Winson prepared a second presentation to OCBC and SCB, after switching the names of the vessels in the documents. This second presentation to OCBC was for cargoes on board the Ocean Taipan, and to SCB was for cargoes on board the Ocean Voyager. Winson sued the banks for payment pursuant to these second presentations.

The banks contended that there was no cargo shipped for these transactions and argued that the copy non-negotiable Bills of Lading ("**BLs**") were forged. The banks relied on the Fraud Exception to resist the claim for payment under the LCs by Winson and contended that the sale between Winson and Hin Leong was a sham, and that no cargoes had been shipped in any event.

These were the representations of material fact that were asserted by the respective banks as untrue:

Representations of material fact asserted by OCBC (as untrue)	Representations of material fact asserted by SCB (as untrue)
1. The existence and validity of a full set of 3/3 original BLs 2. That at the time of delivery (to Hin Leong), Winson had good title to the cargo onboard the Ocean Taipan 3. That at the time of delivery, Winson had passed good title to the cargo to Hin Leong	1. That the cargo onboard the Ocean Voyager existed and was loaded onboard the Ocean Voyager from Tanjung Pelepas, Malaysia on or around 31 March 2020 and bound for Rotterdam, Netherlands 2. the existence and validity of a full set of 3/3 original BLs 3. that Winson was entitled to possession of the original BLs 4. That at the time of delivery (to Hin Leong), Winson was entitled to possession of the cargo 5. That at the time of delivery, Winson had good title to the cargo onboard the Ocean Taipan 6. That at the time of delivery, Winson had passed good title to the cargo to Hin Leong

Whether the representations were false

The shipment information in the Letters of Indemnity ("LOIs") provided for by Winson was based on two copy non-negotiable BLs that Winson received. There was no dispute between the parties that the BLs which were relied on were not authentic BLs.

There was evidence from the IJMs for Hin Leong that the BLs in question were marked "null and void", with no endorsements on the reverse side of the BLs, and were signed by Hin Leong staff rather than the Master/ carrier. There was also evidence that the cargo onboard both vessels were meant for a third party, Unipec.

The Court found as fact that the copy non-negotiable BLs and the original counterparts of the BLs were forgeries, and therefore there were no valid BLs pursuant to which cargo was shipped for the Winson-Hin Leong sale. Winson's representations to the banks, as set out in the table above, were thus false.

The next question to be determined was thus, where the representations were false, whether Winson had made them fraudulently.

Whether Winson acted fraudulently

In determining a party's state of mind at a point in time, events both before and after that point may be relevant. In testing whether Winson held an honest belief in the truth of the representations made in its LOIs, the Court considered how reasonable that belief would be in the circumstances.[1]

In finding that Winson did not hold such an honest belief, the Court found on the evidence that:

1. there was a pre-structured circular trade between Hin Leong, Trafigura, and Winson, and that Hin Leong (both original seller and ultimate buyer) would decide on the vessels and cargo with no nomination or substitution rights actually held by Trafigura and Winson;[2]
2. Given the worsening market conditions on the day of the sales, it made no commercial sense for Hin Leong to repurchase the goods at a loss; [3]
3. Winson never received any loading documents for the shipments onboard the vessels, but did not follow up in asking Hin Leong for the documents;[4]
4. There was a change in the BL quantity for the Ocean Taipan BL after the BL was issued and vessel had sailed. This was uncommon. Further, an operator would have been expected to check on the reasons for discrepancy and that the earlier set of BLs with the original quantity had been cancelled. However, Winson did not ask for any explanation or documentation for this change, nor confirm that the earlier set of BLs were cancelled;[5]
5. Winson was not open to a subsequent request by OCBC to repurchase of the Ocean Voyager cargo. Instead, it made multiple suggestions that Winson did not know whether the title to the cargo was clean;[6]
6. When OCBC rejected Winson's first presentation for payment for the Ocean Voyager on the basis that "there was no physical cargo shipped to the Ocean Voyager", Winson did not question why this position was taken, nor check if that was the case. [7] Instead, Winson prepared new invoices and new LOIs to make a second presentation to OCBC for Ocean Taipan instead, and to SCB for the Ocean Voyager;[8]
7. Winson did not do necessary checks to confirm that cargo had been shipped to the Ocean Voyager as represented in its LOIs.[9] Winson also never checked with OTPL, which had issued the copy BLs that Winson had relied upon for its LOIs, on the belief that cargo had been shipped as described in the copy BLs, and did not confirm whether cargo had been shipped as stated in the copy BLs.[10] Winson also did not ask OTPL or Hin Leong for the loading documents.

1 Winson Oil at [107].
2 Id, at [110]
3 Id, at [111]
4 Id, at [112] – [114]
5 Id, at [115]
6 Id, at [119] – [122]
7 Id, at [128] – [130], [136]
8 Id, at [138].
9 Id, at [144] – [145], [149]
10 Id, at [159], [160]

The Court was drawn to the conclusion that Winson did not believe in the truth of the representations in its LOIs by the time it made the second presentation to the banks, or at the very least, was indifferent to whether the representations were true or not, which the Court found showed that it did not believe in their truth.[11] The Court found that the belief Winson claimed to have held in the circumstances at the time was unreasonable, and that Winson's conduct in responding to the circumstances was similarly unreasonable. As such, the Court found that the false representations in Winson's LOIs were made fraudulently.

The Court also made the point that recklessness under the Fraud Exception was not based in negligence and did not require showing a duty of care owed to the bank. Instead, recklessness here would be shown where the representor is "recklessly indifferent to the truth or falsity of which he was asserting", and meant "indifference to the truth", rather than "failing to take care".

Comments and conclusions

The *Winson Oil* case is an important one to note as, practically, it broadens the applicability of the Fraud Exception to the rule that a confirming bank owes a contractual obligation to a seller to honour the LC as long as the confirming bank presents documents which conform on their face to the requirements of the LC.

Beneficiaries and companies may no longer be safe in relying on the defence that they did not know about false representations made, and should exercise 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, lest they find themselves in an unenviable position of being denied payment under the LC.

Some problems that a beneficiary may face however are that beneficiaries can only check against the limited information provided by LOIs passing through the chain of contracts and may only be able to perform basic retrospective checks on loading operations. A carrier is not obliged to respond to requests to check on the cargo if the requestor does not possess the bills of lading. It may not be possible for a beneficiary to guarantee the presence of cargo, and even if a beneficiary probes for details to verify representations it must make under an LOI, they may face issues with intermediaries and traders who wish to obscure their trade margins not being forthcoming with information. An exercise in tracing title to the cargo through a long string of sale contracts may be impractical in most cases, particularly if this problem is exacerbated by a lack of time – such as where the LC is about to expire.

This then begs the question as to the threshold to which a beneficiary must carry out the relevant checks. 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 it can ascertain, to any extent, and carry out these checks as best as it reasonably can in the circumstances.

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11 Winson Oil at [164]

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