IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 213

Suit No 57 of 2020

Between

Kuvera Resources Pte Ltd

… Plaintiff

And

JPMorgan Chase Bank, NA

… Defendant

GROUNDS OF DECISION

[Banking — Letters of credit — Confirming bank — Sanctions clause — Whether sanctions clause incorporated in a confirmed letter of credit]
[Banking — Letters of credit — Confirming bank — Sanctions clause — Whether sanctions clause valid and enforceable — Whether sanctions clause fundamentally inconsistent with the commercial purpose of a confirmation — Examination of terms of letter of credit according to applicable the Uniform Customs and Practice for Documentary Credits, 2007 Revision]
[Banking — Letters of credit — Confirming bank — Sanctions clause — Whether sanctions clause valid and enforceable — Whether sanctions clause unworkable]
[Banking — Letters of credit — Confirming bank — Sanctions clause — Whether sanctions clause valid and enforceable — Whether sanctions clause is non-documentary condition]

TABLE OF CONTENTS

Kuvera Resources Pte Ltd
v
JPMorgan Chase Bank, NA

[2022] SGHC 213

General Division of the High Court — Suit No 57 of 2020
Vinodh Coomaraswamy J
19–22, 26–28 October 2021, 28 February 2022

31 October 2022

Vinodh Coomaraswamy J:

Introduction

1 The plaintiff brings this action to recover from the defendant the principal sum of US$2.42m, alternatively US$0.22m, as damages for breach of contract.[1] The plaintiff's case is that the defendant was in breach of contract when it refused to pay the plaintiff against a complying presentation of documents under a confirmed letter of credit. The defendant accepts that the

[1] Statement of Claim (Amendment No. 2) filed on 28 October 2021 ("SOC") at p 10, prayers (A), (B) and (B2).

plaintiff made a complying presentation of documents. The defendant's defence is that the terms of its confirmation entitled it to refuse to pay the plaintiff.

2 The cornerstone of the defendant's case is a clause which appears in the defendant's confirmations.[2] The clause provides, in summary and for present purposes, that the defendant is not liable for any failure to pay against a complying presentation of documents if the documents involve a vessel subject to the sanctions laws and regulations of the United States of America ("US"). I shall refer to this clause as "the Sanctions Clause". The full text of the Sanctions Clause provides as follows:[3]

> [The defendant] 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.

3 The parties' opposing submissions on the Sanctions Clause define the central issue in this action. The plaintiff's submission is that the Sanctions Clause: (a) is not a term of its contract with the defendant; alternatively (b) is fundamentally inconsistent with the commercial purpose of a confirmed letter of credit or is so broad as to be unworkable; and therefore (c) ought not to be construed so as to detract from the defendant's fundamental obligation to pay against a complying presentation.[4] The defendant's submission is that the Sanctions Clause: (a) is indeed a term of its contract with the plaintiff; (b) is

---

2 1AB638 and 2AB867.

3 1AB630 and 2AB867.

4 Plaintiff's Closing Submissions at paras 230 and 269.

neither fundamentally inconsistent with the commercial purpose of a confirmed letter of credit nor so broad as to be unworkable; and (c) does, on the facts of this case, permit the defendant to refuse to pay the plaintiff against a complying presentation.[5]

4 Having heard the parties' submissions, I have dismissed the plaintiff's action with costs.

5 The plaintiff has appealed against my decision. I now give the reasons for my decision.

Factual background

The parties

6 The plaintiff is a company incorporated in Singapore. It is in the business of trading coal exported from Indonesia.[6]

7 The defendant is a national banking association chartered under the laws of the US.[7] It has its head office in New York[8] and operates worldwide through a large network of branches. One of those branches is in Singapore.[9] It was the defendant's Singapore branch which confirmed the two letters of credit.

---

5 Defendant's Closing Submissions at paras 136 and 148–149; Defendant's Reply Submissions at para 44; Certified Transcript, 21 October 2021, pp 91:7–25, 126:20-127:11 and 128:3–16.

6 SOC at para 1; Plaintiff's Closing Submissions at para 14.

7 Alisha Burke's AEIC at para 5.

8 SOC at para 2.

9 Defendant's Bundle of Documents for Trial dated 13 October 2021 ("DBOD"), Tab 3, pp 6–9; Defence (Amendment No. 3) filed on 23 July 2021 ("Defence") at para 2 (SDB at p 62).

The letters of credit and the confirmations

8 I now set out the circumstances in which the letters of credit came to be issued and confirmed.

9 In July 2019, a company in Indonesia contracted to sell 35,000 metric tonnes of coal, plus or minus 10%, to a company in Dubai for delivery in Pakistan. The price of the coal was US$2.35m, plus or minus 10%.[10] The contract obliged the seller to deliver the coal to the buyer in two parcels. The contract also obliged the buyer to pay for each parcel by a confirmed, irrevocable, non-transferable and workable letter of credit payable at sight.[11]

10 The plaintiff advanced funds to the seller to enable it to purchase the coal which it was on-selling to the buyer.[12] The contract for the sale of the coal[13] was therefore structured to give the plaintiff a form of security for its advance. Thus, the contract was a tripartite contract between the buyer, the seller and the plaintiff. This was no doubt so that the plaintiff would have a direct cause of action against the buyer for a breach of the contract. Further, the contract expressly obliged the buyer: (a) to pay for the coal by two letters of credit to be issued in precisely the same terms as two draft letters of credit attached to the contract;[14] (b) to name the plaintiff (rather than the seller) as the beneficiary in both letters of credit;[15] (c) to procure that a major or international bank in

---

10 Plaintiff's Closing Submissions, paras 15–16; 1AB119–147.

11 1AB123, cl 10.

12 1AB134, cl 27(i).

13 1AB119.

14 1AB123, cl 10.1.

15 1AB137 and 1AB142.

Singapore confirmed both letters of credit;[16] and (d) to procure that both letters of credit were issued subject to the Uniform Customs and Practice for Documentary Credits, 2007 Revision ("the UCP600") issued by the International Chamber of Commerce ("the ICC").[17]

11 The buyer duly procured a bank in Dubai to issue the two letters of credit in favour of the plaintiff. As stipulated in the contract, both letters of credit were issued expressly subject to the UCP600.[18] The first letter of credit was issued in August 2019 for US$0.7m, plus or minus 10%. The second letter of credit was issued in September 2019 for US$1.65m, plus or minus 10%.[19] Save for the value and the date of issuance, the two letters of credit are identical in all material respects.

12 The issuing bank asked the defendant to act as the advising bank for both letters of credit. It also permitted the defendant to act as the nominated bank for both letters of credit.[20] The defendant duly advised both letters of credit to the plaintiff.[21] Both of the defendant's advices to the plaintiff contained the Sanctions Clause.[22]

---

16 1AB123, cl 10.7.

17 SOC at para 8; Defence at para 8 (SDB at p 64); 1AB124, cl 10.11.

18 SOC at para 8; Defence at para 8 (SDB at p 64).

19 Lim Geok Lian's AEIC at para 26.

20 Lim Geok Lian's AEIC at para 28.

21 Defence at paras 7 and 10–11 (SDB at pp 63–65).

22 1AB262.

13 In September 2019, the defendant added its confirmation to both letters of credit.[23] Both of the defendant's confirmations contained the Sanctions Clause.[24]

14 Both letters of credit were amended a number of times, both before and after the defendant confirmed them. The defendant duly advised all of these amendments to the plaintiff[25] and added its confirmation to them when necessary. All of the defendant's advices and confirmations of these amendments also contained the Sanctions Clause.[26]

15 The Sanctions Clause is a bespoke clause which the defendant invariably includes when it advises or confirms a letter of credit.[27] There is no provision in the UCP600 which covers the subject-matter of the Sanctions Clause. There is equally no such provision in the draft letters of credit attached to the contract for the sale of the coal or in the letters of credit as issued.

---

23 Lim Geok Lian's AEIC at paras 30 and 32.

24 1AB630 and 2AB867.

25 Lim Geok Lian's AEIC at paras 29 and 31.

26 Defence at paras 10–11 (SDB, pp 64–65); Reply (Amendment No. 3) filed on 6 August 2021 ("Reply") at paras 8–9 (SDB, pp 100–101); Lim Geok Lian's AEIC at paras 13 and 28–33; 1AB638 and 2AB868; see also 1AB342, 1AB552, 1AB630, 1AB635, 2AB810, 2AB834, 2AB917, 2AB943, 2AB984, 2AB1093 and 2AB1097; 2AB919, 2AB956 and 2AB992.

27 1AB262, 1AB341, 1AB552, 1AB630, 1AB635, 1AB638, 2AB802, 2AB834, 2AB867, 2AB920, 2AB943, 2AB956, 2AB982, 2AB992, 2AB1091, 2AB1097; Lim Geok Lian's AEIC at paras 13 and 33; Certified Transcript, 21 October 2021, p 91:7–25; p 126:20–127:11; p 128:3–16.

The plaintiff's complying presentation

16 In late November 2019, the plaintiff made a presentation of documents to the defendant under the letters of credit.[28] It made this presentation through a presenting bank. This first presentation of documents was discrepant. A day later, the defendant rejected the presentation.[29] The defendant does not suggest that the plaintiff was in breach of contract in doing so.

17 One day after the rejection, the plaintiff made a second presentation of documents to the defendant under the letters of credit.[30] The defendant accepts that this second presentation was a complying presentation within the meaning of the UCP600.[31] The defendant therefore also accepts that, but for the Sanctions Clause, this presentation would have obliged the defendant pay the plaintiff against the documents.[32]

18 The face value of the drafts which the plaintiff presented to the defendant was US$2.42m.[33] This is the principal sum which the plaintiff claims from the defendant as damages for breach of contract.

The defendant's sanctions screening

19 After the defendant had determined that the plaintiff's presentation was a complying presentation, it sent the documents for sanctions screening.

---

28 SOC at para 13; Defence at para 21 (SDB at p 67).

29 Defence at para 21 (SDB at p 67).

30 Defence at para 21 (SDB at p 67).

31 Defence at para 21 (SDB at p 67); Opening Statement at para 13.

32 Defence at paras 21–23, 31 and 37.

33 SOC at para 15.

Sanctions screening is one of the defendant's standard post-presentation procedures.[34] The purpose of sanctions screening is to ensure that the defendant complies with US sanctions laws and regulations.[35] I describe those laws and regulations in more detail below.

20 The coal in the sale contract was shipped on a vessel known as "Omnia". The defendant's sanctions screening revealed that the Omnia was an exact match for a vessel known as "Lady Mona". The defendant had determined – once in June 2015[36] and once again as recently as August 2019[37] – that Lady Mona fell within the scope of US sanctions on Syria because it was likely to be beneficially owned by a Syrian entity.[38] The defendant made these determinations in the course of its continuing procedures for ensuring that it complies with US sanctions laws and regulations.

21 In early December 2019, the defendant informed the presenting bank that the defendant was unable to accommodate the plaintiff's presentation of the documents because the transaction did not comply with applicable US sanctions laws or with policies designed to promote compliance with those laws.[39] At the same time, the defendant also informed the plaintiff directly that the defendant could not obtain internal approvals to pay the plaintiff against the complying

---

34 Lim Geok Lian's AEIC at para 18.

35 Defendant's Closing Submissions at para 21; Lim Geok Lian's AEIC at para 36; Chong Lip Fah's AEIC at para 26.

36 Alisha Burke's AEIC at para 57.

37 Alisha Burke's AEIC at paras 78 and 80.

38 Defence at paras 24 and 30 (SDB at pp 68 and 71); Chong Lip Fah's AEIC at para 27; Alisha Burke's AEIC at paras 52–80.

39 Defence at para 32 (SDB at pp 72–73); Law Hiu Tsing Cynthia's AEIC at paras 38–49; Lim Geok Lian's AEIC at para 42.

presentation.[40] In early December 2019, the defendant returned the plaintiff's documents to the presenting bank.[41] The defendant did not make any determination at any time that the plaintiff's second presentation was a non-complying presentation. Indeed, the defendant's determination was quite the opposite: that it was a complying presentation which the defendant could nonetheless not pay against because the transaction did not comply with applicable US sanctions laws or with policies designed to promote compliance with those laws. Article 16 of the UCP600 and its requirements are therefore of no application.

22 The letters of credit expired at the end of December 2019.[42] The plaintiff began efforts to secure payment direct from the buyer. In January 2020, the plaintiff entered into negotiations with the issuing bank and the buyer. The outcome of these negotiations was a written Memorandum of Understanding. In February 2020, pursuant to the Memorandum of Understanding, the buyer paid US$2.2m to the plaintiff in exchange for the plaintiff's documents.[43]

23 It is part of the defendant's case in this action that – even if it is in breach of contract for failing to honour its confirmations – the plaintiff fully mitigated any loss that may have been caused by the breach when it received US$2.2m directly from the buyer in February 2020. That sum of US$2.2m is not, of course, the entire sum of US$2.42m which the plaintiff claims in this action. But the defendant submits that the difference of US$0.22m is not a loss caused

---

40 Defence at para 33 (SDB at p 73).

41 Defence at para 34 (SDB at p 73); 4AB2384–2385; Lim Geok Lian's AEIC at paras 43–45; Chong Lip Fah's AEIC at para 40; 5AB2674–2675; Certified Transcript, 19 October 2021, p 94:16–19.

42 Defendant's Closing Submissions at para 49.

43 Defendant's Closing Submissions at para 56; 5AB2935–2940; 5AB2963.

by any breach of contract on the defendant's part because it arises largely from a deficiency in the quality of the coal.[44]

24 This aspect of the defendant's case is relevant only to the issue of damages. As I have found that the defendant is not in breach of contract at all, I need not and do not deal with damages.

Issues

25 The parties accept that each of the defendant's confirmations gave rise to a contract between the plaintiff and the defendant. They also accept that those contracts are governed by Singapore law.[45]

26 There are three broad issues of Singapore law which I must decide in order to resolve the parties' dispute:[46]

(a) Whether the Sanctions Clause was a term of the defendant's confirmations.[47]

(b) Whether the Sanctions Clause is valid and enforceable.[48]

(c) Whether, on the facts of this case, the Sanctions Clause entitled the defendant to refuse to pay the plaintiff against a complying presentation.[49]

---

44 Defendant's Closing Submissions at para 61.

45 Plaintiff's Opening Statement at paras 20–30; Defendant's Closing Submissions at para 172.

46 Defendant's Closing Submissions at para 3.

47 Plaintiff's Opening Statement at para 12.

48 Plaintiff's Opening Statement at para 19.

49 Plaintiff's Opening Statement at para 31.

27 A summary of my findings of fact and holdings of law on these issues is as follows:

(a) The Sanctions Clause is a term of the contract between the plaintiff and the defendant. There was no legal impediment to the defendant incorporating the Sanction Clause as a term of its confirmations even though it did not appear in the letters of credit. Further, there was no need for the plaintiff to accept the Sanctions Clause or for the defendant to supply consideration for it in order for it to be incorporated into the confirmations. Finally, on the facts, the defendant included the Sanctions Clause in the advices by which it added its confirmations to the letters of credit.

(b) The Sanctions Clause is valid and enforceable. The Sanctions Clause is not fundamentally inconsistent with the commercial purpose of a confirmed letter of credit because it leaves the issuing bank's separate payment obligation to the beneficiary under the letter of credit entirely unaffected. Equally, the phrase "…all sanctions … laws and regulations of the U.S and of other applicable jurisdictions to the extent that they do not conflict with such U.S laws and regulations…" is not so wide as to render the confirmation unworkable. On the facts, that form of words points to the sanctions laws and regulations of only two jurisdictions: the US and Singapore.

(c) The Sanctions Clause did, on the facts of this case, operate to permit the defendant to refuse to pay the plaintiff against a complying presentation. The uncontradicted and unchallenged evidence of the defendant's expert witness on US sanctions law establishes on the balance of probabilities that paying the plaintiff would have exposed the

> defendant to a penalty for breaching US sanctions laws and regulations as those laws and regulations are published, interpreted, applied and enforced.

28 Logically anterior to the three broad issues which I have identified at [25] above is a deeper analysis of the contract between the plaintiff and the defendant. Two issues in particular require deeper analysis: (a) first, the legal nature of a letter of credit transaction; and (b) second, how the plaintiff's contract with the defendant was formed.

29 I therefore begin by analysing these two anterior issues before analysing the three broad issues set out at [25] above in turn.

The contract between the plaintiff and the defendant

The commercial purpose of a letter of credit

30 The analysis of the legal nature of a letter of credit transaction is driven by its commercial purpose.

31 The commercial purpose of a letter of credit is to serve as a payment mechanism. But it is not merely a payment mechanism. It is a payment mechanism which has played and continues to play a critical role in facilitating trade, typically the international sale of goods.

32 A letter of credit facilitates the international sale of goods primarily by offering assurance to a seller that it will be paid and offering a measure of assurance to a buyer that it will get what it has paid for. This bilateral assurance is necessary commercially because the international sale of goods involves a buyer and a seller in different jurisdictions who will very often be dealing with

each other for the first time. Each of them will therefore have little reason to trust the other to perform its obligations under their contract. The letter of credit interposes a trustworthy and a creditworthy paymaster between the buyer and the seller in the form of a bank.

33 There is another way in which a letter of credit facilitates the international sale of goods. Where a seller of goods requires financing to purchase the goods which it has contracted to sell on to the buyer – as in the present case – the seller can use the assurance of payment which a letter of credit provides as security, or at the very least as a form of comfort, to raise the necessary financing.

A letter of credit transaction comprises five contracts

34 The critical role that the letter of credit plays in facilitating the international sale of goods means that it is of fundamental commercial importance that the rights and obligations created by a letter of credit operate in a manner which is predictable, stable and reliable. To meet these commercial expectations, the law treats a letter of credit not as a single contract but as a compound transaction comprising up to five interconnected contracts (see Michael Brindle and Raymond Cox, *Law of Bank Payments* (Sweet & Maxwell, 5th Ed, 2018) at para 7-030).

35 The first of these five contracts is between the buyer and the seller of the goods. It is typically in this contract that buyer and seller agree to use a letter of credit as their payment mechanism. The buyer will be the applicant for the letter of credit; the seller will be the beneficiary.

36 The second contract is between the applicant and the issuing bank. This contract governs: (a) the issuing bank's obligation to issue a letter of credit by which it undertakes to pay the beneficiary against a complying presentation; and (b) the applicant's obligation to repay the issuing bank any sums which the bank pays the beneficiary.

37 The third contract is between the issuing bank and the beneficiary. This contract governs the obligation which the issuing bank owes to the beneficiary to pay the beneficiary against a complying presentation. It is this contract which is the defining feature of a letter of credit, and which therefore lies at its legal and commercial core. It is therefore only this contract which should properly be called "the letter of credit".

38 The fourth contract is between the confirming bank and the beneficiary. This contract governs the obligation which the confirming bank owes to the beneficiary to pay the beneficiary against a complying presentation. This contract is referred to as the "confirmation".

39 The fifth contract is between the issuing bank and the confirming bank. This contract governs the issuing bank's obligation to reimburse the confirming bank once the confirming bank has paid the beneficiary against a complying presentation.

40 An applicant, a beneficiary and an issuing bank are essential in every letter of credit. The first three contracts are therefore always present in every letter of credit transaction. A confirming bank is not essential in a letter of credit transaction but is frequently used for commercial convenience and utility. The fourth and fifth contracts are therefore present only if the parties have agreed to use a confirming bank.

41 The dispute between the parties in this action arises out of the fourth contract (the confirmation) and involves its interaction with the third contract (the letter of credit).

Each contract is separate and autonomous

42 To ensure that the rights and obligations created by a letter of credit transaction operate in a manner which is predictable, stable and reliable, the law treats each of these five contracts as being separate from and autonomous of the other four contracts (see *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 182–183; *Kredietbank NV v Sinotani Pacific Pte Ltd (Agricultural Bank of China, third party)* [1991] 1 SLR(R) 274 at [18]; *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 at [19]).

43 Each contract is separate from the other contracts in that each is a contract formed between a different combination of two of the three or four parties who may be involved in a letter of credit transaction, and between *only* those two parties. Each contract is autonomous of the other contracts in that each is a self-contained contract which operates independently of the others, *ie* in accordance only with its own terms and conditions and, unless otherwise expressly agreed, regardless of the terms of any of the other four contracts and regardless of the performance, breach or discharge of any of those contracts.

44 A confirming bank's contract with a beneficiary under its confirmation is therefore *separate* from the issuing bank's contract with the beneficiary under the letter of credit. Article 8 of UCP600 makes this clear. It expressly imposes on a confirming bank an obligation to honour its confirmation which is

additional to the issuing bank's obligation under Art 7 of the UCP600 to honour the letter of credit:

> UCP 600 – Article 2
>
> Definitions
>
> For the purpose of these rules:
>
> …
>
> **Confirmation** means a definite undertaking of the confirming bank, *in addition to* that of the issuing bank, to honour or negotiate a complying presentation.
>
> [emphasis added]

45 A confirming bank's contract with a beneficiary is not only separate from but also *autonomous* of the issuing bank's contract with the beneficiary. As the authors point out in James E. Byrne *et al*, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2010) ("*UCP600 Commentary*") at p 394:

> **12. In Addition to the Issuer's Undertaking.** UCP600 Article 8(b) notes that the time at which the confirmer is bound is as of the time that it "adds it[s] confirmation to the credit." This oblique reference reinforces the more complete statement in the definition of "Confirmation" in UCP600 Article 2 (Definitions) ¶ 6 that the confirmer's undertaking is in addition to that of the issuer. This notion is important for LC jurisprudence, signaling that *the obligation of the confirmer is separate and independent from that of the issuer.*
>
> [emphasis added]

46 Thus, a beneficiary under a confirmed letter of credit has a contractual right *either* to seek payment from the issuing bank under the letter of credit *or* from the confirming bank under the confirmation.

47 The plaintiff's director, Mr Arjan Bhisham Chotrani ("Mr Chotrani"), was its only witness at trial. Mr Chotrani. Mr Chotrani accepted all of these preceding points in cross-examination.[50]

48 It is, of course, theoretically possible for the parties expressly to agree that the confirmation should not, in some respect, be separate from or autonomous of the other contracts. But any such agreement would in practical terms be very unlikely, given the commercial purpose of a letter of credit and of a confirmation. In any event, there is no suggestion that there was any such agreement between this plaintiff and this defendant.

49 I therefore accept the defendant's submission that the defendant's contract with the plaintiff under the confirmation is separate from and autonomous of the issuing bank's contract with the plaintiff under the letter of credit.

Contract formation

50 The second anterior issue is how the plaintiff's contract with the defendant was formed.

51 For a confirmed letter of credit to fulfil its commercial purpose as a predictable, stable and reliable payment mechanism, it is essential that an issuing and a confirming bank are obliged to pay the beneficiary against a complying presentation. It is mercantile usage and banking custom that the bank is obliged to do so. The difficulty lies in explaining how the law obliges the bank to do so. The specific difficulty lies in explaining how the contract between the bank and the beneficiary is formed even if, as is typically the case, the

---

[50] Certified Transcript, 19 October 2021, pp 14:6–15:6.

beneficiary does not accept the bank's offer to pay and does not supply consideration for the bank's promise to pay.

52 This difficulty does not arise when analysing contract formation for the other three contracts in a letter of credit transaction. Those contracts are classic bilateral contracts. Each is formed when offer, acceptance and consideration combine. The letter of credit and the confirmation, on the other hand, appear to bind the bank in law *without* any need for the beneficiary to accept the bank's offer and *without* any need for the beneficiary to provide any consideration to the bank for its promise.

53 One explanation is that the law obliges the bank to pay the beneficiary as a *sui generis* legal obligation (see Peter Ellinger and Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ("*Ellinger & Neo*") at p 111). Contract law simply declines to interfere with established mercantile usage and banking custom, given that an elaborate commercial system has been built upon it (see *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 at 129).

54 But if the law were to leave the bank's obligation to pay a beneficiary as a *sui generis* legal obligation, that would be to allow it to operate entirely outside the law of contract. The bank's and the beneficiary's legal rights and obligations would depend on mercantile usage and banking custom which may vary from place to place or over time. The nature and scope of those rights and obligations would not predictable, stable or reliable. To address this difficulty, several alternative explanations have been suggested to bring the bank's obligation to pay a beneficiary within the law of contract.

55 One explanation that has been suggested is that the applicant, when it asks the issuing bank to issue the letter of credit, supplies consideration at that time not only on its own behalf to support its contract with the issuing bank (the second contract (see [36] above)) but also as agent for the beneficiary to support the beneficiary's separate contract with the bank (the third contract (see [37] above)). But, as *Ellinger & Neo* point out quite correctly, this explanation is not consistent with the intention of the parties. It is artificial to say that it is the objectively ascertainable intention of the applicant and the beneficiary – when they agree to use a letter of credit as the payment mechanism under their contract – that the applicant should then act as the beneficiary's agent when dealing with the issuing bank.

56 Another suggested explanation is that the Contracts (Rights of Third Parties) Act 2001 (2020 Rev Ed) ("CRTPA") operates to extend the contractual benefit of the bank's payment undertaking to the beneficiary. But the existence of a legal obligation owed by an issuing bank directly to a beneficiary under a letter of credit was established long before the CRTPA was enacted in Singapore, and long before its legislative equivalents were enacted in other jurisdictions. Furthermore, Art 4(a) of the UCP600 operates to exclude the CRTPA by expressly providing that a beneficiary cannot avail itself of the contracts between banks or between the applicant and the issuing bank. Yet the entire premise of the UCP600 is that an issuing and a confirming bank are obliged to pay a beneficiary against a complying presentation.

57 Yet another suggested explanation is that a bank makes an offer of a unilateral contract to the beneficiary when it issues or confirms a letter of credit. The contractual rules applicable to unilateral contracts then operate to locate both acceptance and consideration in the beneficiary's act of making a

complying presentation under the letter of credit (see *Raiffeisen Zentralbank Osterreich AG v China Marine Bunker (Petrochina) Co Ltd* [2006] EWHC 212 (Comm) at [31]).

58 The unilateral contract explanation is the most satisfactory explanation of all of the explanations that have been suggested. But even this explanation is not complete. Three well-established principles of contract formation pose difficulties when applied to a letter of credit transaction. First, an offer must be received by the offeree before it can be accepted so as to form a contract (see *Henthorn v Fraser* [1892] 2 Ch 27 at 37). Second, an offeror may revoke its offer at any time before the offeree accepts it (see *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428 at 1432D). Third, an offer of a unilateral contract is revocable at any time before the offeree commences performance in reliance on the offer (see *Errington v Errington and Woods* [1952] 1 KB 290 at 295).

59 These well-established principles of contract formation pose difficulties in a letter of credit transaction because they contradict principles which are equally well-established in mercantile usage and banking custom. Thus, it is well-established that an issuing or a confirming bank's offer to pay a beneficiary is irrevocable once it has made the offer, even if there is no indication to that effect in the offer itself (see Art 3 of the UCP600). The offer is irrevocable even

if it is not in fact received by the beneficiary and even if the beneficiary has not commenced performance.

60 Looking specifically at the position of a confirming bank, the effect of a confirmation is as follows (see *Benjamin's Sale of Goods* (Michael Bridge gen ed) (Sweet & Maxwell, 11th Ed, 2021) at para 23-073):

> **Time at which credits and amendments binding on the banks**
>
> … The confirming bank is bound under the original credit "as of the time it adds its confirmation to the credit" … It does not, however, specify precisely when … a confirmation is considered to have been added. … International banking practice, therefore, considers the simple sending or transmitting of an advice of … confirmation … to constitute a legally binding, irrevocable unilateral offer.
>
> …
>
> … A confirmation would be "added" as at the time of sending or transmission of the advice of the credit including the confirmation to the beneficiary. *Nothing in the term "add" imports that the advice should have to be received by the beneficiary. …*
>
> …
>
> It is suggested, therefore, that … *confirming banks are bound from the moment that the advice communicating the … confirming of a credit … is sent or transmitted by the relevant bank. As a matter of legal analysis, at that point the bank is bound by an irrevocable unilateral offer. There is no need for communication to or acceptance by the beneficiary.* Nor is there any requirement for the beneficiary to provide consideration in return for the banks' promises, which would be impossible prior to receipt of the relevant advice. This of course is incompatible with the principles of orthodox contract law, but documentary credits constitute a sui generis exception to such principles, based on internationally recognised mercantile usage.
>
> [emphasis added]

61 In my view, the most satisfactory and complete contractual explanation for the binding force of a letter of credit and a confirmation (at least in a common

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

62 In that sense – and only in that sense – are the letter of credit and the confirmation *sui generis*. In all other senses, each is to be analysed as an offer of an orthodox unilateral contract. This has three consequences.

63 First, an issuing or confirming bank is at liberty to make its offer on terms. These terms can include an expiry date after which the offer will expire. Once that date has passed, on ordinary contractual principles, the beneficiary can no longer accept the offer. The bank can also incorporate terms into its offer by reference, *eg* by making its letter of credit or confirmation subject to the UCP600 (see *Kredietbank NV v Sinotani Pacific Pte Ltd (Agricultural Bank of China, third party)* [1999] 1 SLR(R) 274 at [17]).

64 Second, at the time a bank issues or confirms a letter of credit, the only contractual content of the bank's act is its obligation to the beneficiary not to revoke its offer. This includes by implication an obligation not to alter the terms of its offer. That would amount to revoking the existing offer and making a new offer on the altered terms. Further, this means that the beneficiary owes no obligations whatsoever to the bank. The beneficiary is thus in the same position as the holder of an option, save only that it need not have supplied any

consideration to the bank for the option and, indeed, need not even know about the option.

65 Third, the bank's unilateral contract with the beneficiary is formed when, and only when, the beneficiary makes a complying presentation to the bank. It is only at that point that the beneficiary accepts the bank's offer of a unilateral contract and supplies consideration for the bank's promise to pay against a complying presentation. Until that point, there is no contract in existence. All that exists is the irrevocable offer of a unilateral contract. Despite this being the true position in law, I refer for convenience on occasion (see *eg* [34] above) to the relationship between a bank and a beneficiary as a contract from the moment the bank issues or confirms a letter of credit.

66 Applying this analysis to the facts of this case, the defendant made an irrevocable offer of a unilateral contract to the plaintiff in September 2019 when it added its confirmation to each letter of credit. Each of those offers was separate from and autonomous of the offers of a unilateral contract which the issuing bank had made to the plaintiff in August and September 2019 when it had issued the letters of credit. Therefore, the contract which was to arise from the defendant's offer was likewise separate from and autonomous of the contract which was to arise from the issuing bank's offer.

67 This is the fundamental point at the heart of the parties' dispute, and one which the plaintiff has failed to grasp.

The Sanctions Clause was a term of the defendant's confirmations

The plaintiff's submissions

68 Having analysed and determined the anterior issues identified at [28] above, I now turn to analyse and determine the three broad issues identified at [25] above. The first broad issue I must determine is whether the Sanctions Clause was a term of the defendant's confirmations.

69 The plaintiff submits that the Sanctions Clause was not a term of the defendant's confirmations for three reasons. First, the Sanctions Clause was not a term of the letters of credit and therefore cannot be a term of the confirmation.[51] Second, the defendant failed to draw the Sanctions Clause to the plaintiff's attention.[52] Third, the Sanctions Clause was not itself the subject of any offer, acceptance or consideration.[53]

70 I reject all of the plaintiff's submissions. I deal with them now in turn.

The Sanctions Clause did not need to be a term of the letters of credit

71 The plaintiff's first submission is that the Sanctions Clause was not a term of the defendant's confirmations because it was not a term of the letters of credit.[54] The substance of the submission is that a confirming bank is obliged,

---

51 Reply at para 13; Plaintiff's Closing Submissions at para 133(b).

52 Plaintiff's Closing Submissions at paras 48, 133(c) and 266(a)–(g).

53 Plaintiff's Closing Submissions at para 273.

54 Reply at para 13; Plaintiff's Closing Submissions at para 133(b).

as a matter of law, to confirm a letter of credit in precisely the same terms as the issuing bank has issued it, without any additions, alterations or omissions.[55]

72 As authority for this submission, the plaintiff cites the following passages from *Ellinger & Neo* (at pp 11, 36 and 113):

> … The [confirming bank] advises the beneficiary that letter of credit is confirmed by him. … [The confirming bank's] duties are defined in article 8 of UCP 600, under which the confirming bank's undertaking is to be understood in the same manner as the issuer's. …
>
> …
>
> The undertaking and duties of a confirming bank mirror the issuer's, except that the confirming bank is bound as of the time it adds its confirmation and not from the time of the issuing of the credit. …
>
> …
>
> … the confirming bank's obligations to the beneficiary will *generally* be the same as the issuing bank's obligations towards the beneficiary. That is the purpose of confirmation: the beneficiary can look to the confirming bank as an alternate paymaster under the credit. …
>
> [emphasis added]

73 The plaintiff's reliance on *Ellinger & Neo* is misconceived for two reasons.

74 First, *Ellinger & Neo* is not making the normative statement that a confirmation must be in precisely the same terms as the letter of credit being confirmed. *Ellinger & Neo* is merely making the descriptive statement that a confirmation is *generally* in the same terms as the letter of credit. That statement is entirely uncontroversial. The confirmation is, after all, a derivative of the letter of credit.

---

[55] Reply at para 13; Plaintiff's Closing Submissions at para 133(b).

75 Second, in so far as *Ellinger & Neo* says that the undertaking and duties of a confirming bank under its confirmation mirror those of the issuing bank under its letter of credit, it is simply making the uncontroversial point that the content of Arts 7(a) to (c) of UCP600 (which set out the undertaking and duties of an issuing bank to a beneficiary) mirror the content of Arts 8(a) to (c) of UCP600 (which set out the undertaking and duties of a confirming bank to a beneficiary). *Ellinger & Neo* is not making any normative point about the content of a confirming bank's undertakings and duties outside the context of these articles of the UCP600.

76 As further authority for this submission, the plaintiff cites the following *dictum* of GP Selvam J in *Agritrade International Pte Ltd v Industrial and Commercial Bank of China* [1998] 1 SLR(R) 322 ("*Agritrade International*") (at [20]–[21]):

> **A meta-principle**
>
> 20 I shall now outline an important meta-principle of law governing letters of credit. Banks' letters of credit were designed to operate within a narrow sphere. It is that banks and beneficiaries do not have any obligations or rights outside the four corners of the terms of the credit. *The direct effect of this is that banks turn a blind eye to the underlying contract and the substance of the transaction even though there may be a reference to the underlying transaction. Thus the law erects a wall of separation between the credit contract and the sale contract. It is done to facilitate the smooth operation of international trade.*
>
> …
>
> 21 A necessary corollary of the above two articles [*ie,* Arts 3 and 4 of the UCP (1985 Revision)] is that the contractual relationship between the issuing bank and the applicant for the credit cannot affect the relationship between the issuing bank and the beneficiary and his assignee.
>
> [emphasis added]

77 GP Selvam J's *dictum* is not authority for the plaintiff's submission. The proposition that the plaintiff derives from this *dictum* is that the rights and obligations of any bank involved in a letter of credit transaction are only those rights and obligations found within the four corners of the letter of credit. But the letter of credit in *Agritrade International* was an unconfirmed letter of credit. GP Selvam J's *dictum* was not intended to and does not address the position of a confirming bank in a letter of credit transaction. His *dictum* merely restates the meta-principle that the contract between the beneficiary and the issuing bank under a letter of credit is entirely separate from the contract between the beneficiary and the applicant. That statement too is entirely uncontroversial.

78 Indeed, if I were to extend GP Selvam J's *dictum* beyond the position of an issuing bank to address the position of a confirming bank, it would support the defendant's case rather than the plaintiff's. In the light of my analysis at [30]–[66] above, the proposition as extended would be that the law equally erects a wall of separation between the letter of credit and the confirmation in order to facilitate the smooth operation of international trade. Therefore, the contractual relationship between the beneficiary and the issuing bank cannot affect the contractual relationship between the beneficiary and the confirming bank. This is a proposition which I accept to be correct in law. It flows from the analysis at [42]–[49] above.

79 The plaintiff's submission is therefore fundamentally misconceived. It rests on the false premise that a confirmed letter of credit is a single contract between multiple parties. If that were true, that would mean that a bank asked to confirm a letter of credit always has and only has a binary choice. It can confirm the letter of credit, in which case it adopts the terms of the letter of credit in their entirety – and no other terms – to govern its obligation to the

beneficiary. Or, if it is unwilling or unable to adopt those terms in their entirety, it must decline to confirm the letter of credit at all.

80 That is not the position in law. The position is that a confirmed letter of credit transaction comprises multiple contracts, each of which is separate from and autonomous of all the other contracts (see [42]–[49] above). When an issuing bank advises a letter of credit to a beneficiary, it makes an offer of a unilateral contract to the beneficiary. When a confirming bank adds its confirmation to the letter of credit, it makes a separate offer of a separate unilateral contract to the beneficiary. That separate offer may adopt in their entirety the terms of the issuing bank's offer. Indeed, it may very often do so. But there is no legal rule that it must do so.

81 That is also not the position as a matter of mercantile usage and banking custom. The *UCP600 Commentary* makes this point as follows (at pp 397 and 414):

> **17. The Undertaking of a Confirming Bank.**
>
> …
>
> c. Although UCP600 Article 8 is structured to parallel the undertaking of the issuer as stated in UCP 600 Article 7, *the undertaking of a confirmer need not exactly parallel that of the issuer*. The confirmer, for example, may add its undertaking for a lesser time, a lesser amount, or otherwise modify it. …
>
> …
>
> **37. Further Qualifications to the Confirmer's Undertaking.** As stated in addition to the conditions stated and unstated in UCP600 Article 8, *a confirmer may condition or otherwise limit its undertaking in other respects*. If the additional condition is express and unambiguous, it should be enforced unless it disaffirms any definite liability by the purported confirmer. UCP600 Article 1 (Application of UCP) indicates that each article of UCP600 is binding "unless expressly modified or excluded in the credit". The confirmation may, for example,

> limit the undertaking of the confirmer to a lesser amount, a lesser time, refuse to allow it to be automatically revolved, and require certain additional documents. It can also exclude certain types of risk, e.g. issuer insolvency, but not country or currency risks, which are to be otherwise covered by insurance. *Such modifications are consistent with the nature of a confirmation.* Were the confirmer, however, to advise its confirmation and indicate that its obligation is subject to it having been reimbursed by the issuer, that undertaking would be fundamentally inconsistent with the nature of a confirmation. While UCP600 can be modified by the terms of the confirmation, any attempt to alter the fundamental character of the letter of credit undertaking of the confirmer raises serious difficulties and, unless it is unambiguous that it is not a confirmation of a letter of credit, should be construed against the confirmer.
>
> [emphasis added]

82 There is therefore no legal impediment to a confirming bank adding a term to its confirmation of a letter of credit which is not found in the letter of credit itself. That is so even if, in reality, there are undoubtedly very real commercial and even reputational constraints which will operate on banks to limit any such variance. This is subject only to one qualification: the term cannot be fundamentally inconsistent with the commercial purpose of a confirmation. I deal with this qualification at [102]–[107] below.

The Sanctions Clause was drawn to the plaintiff's attention

83 The plaintiff's second submission is that the Sanctions Clause was not a term of the confirmations because the defendant failed to draw the Sanctions Clause to the plaintiff's attention.[56] I reject the plaintiff's submissions for three reasons.

---

[56] Plaintiff's Closing Submissions at paras 48, 133(c) and 266(a)–(g).

84 First, the defendant set the Sanctions Clause out expressly in its confirmations of the letter of credit. It was these confirmations which set out the terms of the defendant's offer of a unilateral contract to the plaintiff. The defendant made it objectively and abundantly clear in the confirmations that the Sanctions Clause was a term of those two offers. Further, the defendant set the Sanctions Clause out expressly in all of its advices to the plaintiff of the post-confirmation amendments to the letters of credit. In other words, even if it could be argued that the defendant made a fresh offer of a unilateral contract to the plaintiff every time it advised the plaintiff of an amendment to the letter of credit, the Sanctions Clause formed a term also of those fresh offers.

85 Mr Chotrani confirmed that he received and read all of these advices and confirmations at or about the time the defendant issued them. He accepted that he had therefore seen the Sanctions Clause at or about that time. He also confirmed that he understood the effect of the Sanctions Clause to be simply what it says on its face: that the defendant would not liable for any failure to pay the plaintiff against a complying presentation of documents if the documents involve a vessel subject to the sanctions laws and regulations of the US.[57]

86 It is true that a longer version of the Sanctions Clause – containing the words which I have italicised below – appears in three of the advices[58] which

---

57 Certified Transcript, 19 October 2021, pp 25:20–26:5; p 29:5–8; p 29:15–19; pp 31:2–32:1; pp 32:20–33:13; p 37:7–13; p 39:4–7; pp 39:12–40:8.

58 2AB919, 2AB956 and 2AB992.

the defendant issued to the plaintiff in October 2019 when effecting amendments to the letters of credit:

> [The defendant] 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 reserve the right not to effect payment under or in connection with the [letter of credit] and not to handle or process the presented documents even if we have added confirmation to, or have agreed to honour or negotiate, the [letter of credit] and* we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information.
>
> [Emphasis added]

But neither party suggests that these italicised words appearing only in three post-confirmation amendment advices are material in any way to the resolution of their dispute.

87 I therefore hold that the defendant made it objectively and abundantly clear that the Sanctions Clause formed a term of its offer of a unilateral contract to the plaintiff from the time the defendant confirmed the letters of credit in September 2019 until the time the plaintiff made its complying presentations under the confirmations in November 2019.

88 Second, the defendant drew the plaintiff's attention sufficiently to the Sanctions Clause. The content of the Sanctions Clause was not objectively unusual, onerous or obscure. The defendant did not in any objective sense conceal or "camouflage" the Sanctions Clause in the confirmations, as the

plaintiff alleges.[59] The Sanctions Clause was printed in the confirmations with the same prominence as all the other terms of the confirmations.

89 My findings as to the objective nature of the Sanctions Clause are supported by Mr Chotrani's own evidence in three respects. First, he acknowledged that the plaintiff's own bank included a "standard" sanctions clause in its covering letter to the plaintiff enclosing the advised second letter of credit.[60] Second, he conceded that he understood the Sanctions Clause to mean exactly what it said: that the defendant would not be liable for any failure to pay if the transaction involved a vessel subject to US sanctions.[61] Finally, he conceded that he saw the Sanctions Clause at the time he received and read the confirmations and advices.

90 For all these reasons, I hold that the defendant was under no obligation to draw the Sanctions Clause specifically to the plaintiff's attention or to give the text of the Sanctions Clause any additional prominence in its confirmations in order to incorporate the Sanctions Clause as a term of its offers.

91 Third, the plaintiff submits that the Sanctions Clause is not a term of the defendant's confirmations because the only contractually "operative" [62] part of the confirmations was the first paragraph.[63] The basis for this submission is that it is only in the first paragraph that the defendant expressly confirmed that it

---

59 Defendant's Closing Submissions at para 266(c).

60 Certified Transcript, 19 October 2021, p 42:4–24.

61 Certified Transcript, 19 October 2021, pp 22:24–26:13, pp 28:15–29:8, pp 32:2–33:8, p 33:9–16, pp 39:12–40:8.

62 Plaintiff's Closing Submissions at paras 52, 54 and 169.

63 Plaintiff's Closing Submissions at paras 52–54 and 64–66; Certified Transcript, 19 October 2021, pp 30:6–16, 32:2–33:5, 39:20–40:8.

would pay the plaintiff against a complying presentation. The plaintiff characterises the remainder of the defendant's confirmations as mere "verbiage,[64] which I assume to be a submission that it was without contractual force.

92 I reject the plaintiff's submission. In objective terms, the entirety of the text of the confirmations constituted the defendant's offer of a unilateral contract to the plaintiff. The Sanctions Clause was included in the confirmations as an express term of the defendant's offer. If Mr Chotrani chose to disregard the terms of the defendant's offer beyond its first paragraph, his conduct is objectively unreasonable, and he did so at his own peril. His subjective, and in any event erroneous, view of what were the operative terms of the defendant's offer is no basis in law for the plaintiff's submission that the Sanctions Clause is not an operative term of the confirmations. The Sanctions Clause is just as much an express term of the defendant's offer to the plaintiff as the defendant's express undertaking in the first paragraph of the confirmations.

The Sanctions Clause did not need to be the subject of any offer, acceptance or consideration

93 The plaintiff's third submission is that the Sanctions Clause was not a term of the defendant's confirmations because the Sanctions Clause was not itself the subject of any offer, acceptance or consideration.[65] In the plaintiff's own words, the Sanctions Clause could become a term of the confirmations only if it was "specifically negotiated and bargained for and expressly agreed to by the parties".[66]

---

64 Plaintiff's Closing Submissions at paras 52, 54 and 169.

65 Plaintiff's Closing Submissions at para 273.

66 Plaintiff's Closing Submissions at para 209.

94 I reject the plaintiff's submission. The submission frames the Sanctions Clause as a variation of an existing contract. That is not the correct position in law. As I have established, each of the defendant's two confirmations was in law an offer of a unilateral contract, separate from and autonomous of the letter of credit being confirmed. The confirmation was not a variation of the letter of credit. Nor is the Sanctions Clause a variation of the confirmations.

95 The confirmations expressly set out the text of the Sanctions Clause. It was thereby a term of the defendant's offer from the time the defendant made the offer. There was no need for the plaintiff to offer the Sanctions Clause separately, for the defendant to accept the Sanctions Clause separately or for the defendant to supply consideration for the Sanctions Clause separately. The Sanctions Clause simply existed from the time the defendant confirmed the letter of credit as a term of the defendant's offer, together with all of the other terms of the offer. If and when the plaintiff made a complying presentation to the defendant, a unilateral contract would come into existence on all of those terms. Those terms would include the Sanctions Clause.

96 This analysis of a confirmation does not put a beneficiary in an invidious or uncommercial position. In accordance with ordinary contractual principles, a beneficiary comes under no obligation to the confirming bank by virtue of the confirmation. It is therefore open to the beneficiary: (a) to consider the terms of the confirmation; (b) to compare those terms to terms which are customary or available from other banks; and (c) to compare those terms to the terms of the letter of credit. Having made that comparison, it is open to the beneficiary to do any one of the following: (a) to accept the confirming bank's offer; (b) to bargain with the confirming bank for a fresh offer on improved terms; (c) to reject the confirming bank's offer and to bargain with the applicant and the

issuing bank to permit a different bank to confirm the letter of credit on improved terms; or (c) to ignore the confirmation and accept the issuing bank's offer. If the beneficiary chooses to accept the confirming bank's offer, it makes a presentation to the confirming bank. If the presentation is a complying presentation, a unilateral contract is formed between the beneficiary and the confirming bank. If the remaining terms of the confirmation are satisfied, the confirming bank becomes contractually obliged to pay the beneficiary against the presentation.

97 For the foregoing reasons, there is no need in law – and indeed there is no opportunity in fact – for a beneficiary to accept expressly one out of the many terms of a confirming bank's offer or to provide consideration for that term.

Conclusion

98 In conclusion, I hold that the Sanctions Clause was duly incorporated, on the law and on the facts, as a contractual term of both of the defendant's confirmations. The defendant was at liberty to introduce the Sanctions Clause as a term of its confirmations even though that clause was not found in the letter of credit itself. The defendant made the Sanctions Clause manifest in the defendant's confirmations with the necessary prominence. The Sanctions Clause thereafter operated as a term of the defendant's offer of a unilateral contract, not as variation either of the letter of credit or of the confirmations.

The Sanctions Clause is valid and enforceable

99 The second broad issue I must determine is whether the Sanctions Clause is valid and enforceable. I take this as the plaintiff's submission that the

Sanctions Clause ought not to be construed so as to detract from the defendant's fundamental obligation to pay against a complying presentation.

100 The plaintiff submits that the Sanctions Clause is not valid or enforceable for any one of four reasons:

(a) First, the Sanctions Clause is fundamentally inconsistent with the commercial purpose of the confirmations.[67]

(b) Second, the Sanctions Clause confers on the defendant a high level of discretion in deciding whether to pay against a complying presentation.[68]

(c) Third, the Sanctions Clause is a "non-documentary condition" and should therefore be disregarded as it is inconsistent with the documentary nature of a letter of credit transaction.[69]

(d) Finally, the Sanctions Clause is worded so broadly as to be unworkable.[70]

101 I reject all four of the plaintiff's submissions.

---

67 Plaintiff's Closing Submissions at paras 266(f) and 266(g).

68 Plaintiff's Closing Submissions at paras 124, 133(b), 252, 276(c) and 519.

69 Plaintiff's Closing Submissions at paras 278 and 280–281.

70 Plaintiff's Opening Statement at para 19.

The Sanctions Clause is not fundamentally inconsistent with the commercial purpose of the confirmations

102 The plaintiff's first submission is that the Sanctions Clause is not valid or enforceable because it is fundamentally inconsistent with the commercial purpose of a confirmation.[71]

103 The commercial purpose of a confirmation is to give the beneficiary an alternate paymaster to which it can look to for payment, in addition to the issuing bank. I accept that a confirming bank cannot add a term to its confirmation which is fundamentally inconsistent with this commercial purpose. This constraint is suggested by the italicised words in the passage from para 37 of the *UCP600 Commentary* which I have quoted at [81] above.

104 In my view, a term is fundamentally inconsistent with the commercial purpose of a confirmation only if the effect of the term is directly contradictory to that purpose, *ie* if it renders a confirmed letter of credit no different in substance from an unconfirmed letter of credit. Thus, for example, a confirming bank cannot include a term in its confirmation which entitles it not to pay the beneficiary against a complying presentation unless and until the issuing bank reimburses the confirming bank. A term to this effect is directly contradictory to the confirming bank's status as an alternate paymaster. The intended contractual purpose of a confirming bank becomes completely illusory. A term

71 Plaintiff's Closing Submissions at paras 266(f) and 266(g).

to this effect is therefore fundamentally inconsistent with the commercial purpose of a confirmation.

105 As the authors of the *UCP600 Commentary* put it (at p 397):

> **17. The Undertaking of a Confirming Bank.**
>
> …
>
> c. … There is, however, a limit beyond which the confirmer may not pass, namely it cannot confirm a credit while refusing to make payment unless it is reimbursed by the issuer. Such an undertaking is a contradiction in terms and the qualification should not be given effect where the undertaking purports to be a confirmation.
>
> …

106 The Sanctions Clause does not contradict the fundamental commercial purpose of a confirmation. Even with the Sanctions Clause incorporated as a term of the defendant's confirmations, the confirmations continued to give the plaintiff rights against the defendant which were in substance additional to the plaintiff's rights against the issuing bank. The defendant remained in substance an alternate paymaster to the issuing bank.

107 I therefore hold that the Sanctions Clause is not invalid or unenforceable on the ground that it is fundamentally inconsistent with the commercial purpose of a confirmed letter of credit.

The Sanctions Clause does not confer a high level of discretion

108 The plaintiff's second submission is that the Sanctions Clause is invalid or unenforceable because it confers on the defendant a high level of discretion in deciding whether to pay against a complying presentation based on its

internal sanctions policy.[72] This level of discretion, the plaintiff submits, amounts to rendering illusory the irrevocable nature of the confirmation.[73]

Narrow and wide sanctions clauses

109 It is a legal and regulatory reality that a bank is obliged to comply with the general law. A given jurisdiction's general law includes its sanctions laws and regulations. A bank's obligation to comply with applicable laws and regulations can affect its ability to perform its contractual obligations. These obligations can include those which arise from a letter of credit or a confirmation. A bank which operates in multiple jurisdictions thereby subjects itself to multiple applicable sanctions laws and regulations which may have cumulative, overlapping or even contradictory effect.

110 The ICC recognises this legal and regulatory reality. In an ICC paper titled "The Use of Sanctions Clauses in Trade Finance-Related Instruments Subject To ICC Rules, Including Documentary and Standby Letters of Credit, Documentary Collections and Demand Guarantees" ("the ICC Guidance Paper").[74] the ICC says (at para 1.3):

> 1.3 Sanctions may restrict a bank's ability to perform its role under ICC rules. International banks may be confronted with different sanctions regimes imposed in the multiple jurisdictions in which they operate. As a result, those banks may be subject to conflicting regulatory requirements, and consequently be amenable to formulating internal policies to mitigate the resulting legal risks. Some banks have chosen to control these legal risks by use of sanctions clauses.

---

72 Plaintiff's Closing Submissions at paras 124, 133(b), 252, 276(c) and 519.

73 Plaintiff's Closing Submissions at paras 252 and 523.

74 Plaintiff's Closing Submissions at paras 275–276; Plaintiff's Supplementary Bundle of Authorities dated 31 December 2021, Tab 20.

111 To avoid breaching an applicable jurisdiction's sanctions laws and regulations by performing a contractual obligation, a bank may incorporate a clause in its letters of credit and in its confirmations permitting it to refuse to pay against a complying presentation if doing so would breach an applicable jurisdiction's sanctions laws and regulations. I shall call this type of sanctions clause a "narrow sanctions clause". The ICC Guidance Paper expressly acknowledges that banks use narrow sanctions clauses (at para 2.1):

> 2.1 Concerned about the implications of sanctions for their own obligations under trade-related transactions, and seeking to notify their counterparties, whether correspondent banks or beneficiaries, banks sometimes include so-called "sanctions clauses" in transaction documents.

112 To eliminate any possibility of breaching an applicable jurisdiction's sanctions laws and regulations by performing a contractual obligation, a bank may be tempted to go beyond a narrow sanctions clause and incorporate what I shall call a "wide sanctions clause". A wide sanctions clause entitles the bank to refuse to pay against a complying presentation simply because doing so may breach the bank's own internal sanctions policy, regardless of whether it would breach any applicable sanctions laws and regulations.

113 A wide sanctions clause is clearly capable of introducing wholly undesirable uncertainty into the operation of a letter of credit or a confirmation. A bank's internal sanctions policy is, by definition, internal. Unlike an applicable jurisdiction's sanctions laws and regulations, an applicant and a beneficiary will not know, and indeed cannot know, a bank's internal sanctions policy. The level of discretion that a wide sanctions clause affords to a bank to decline payment might well amount in substance to rendering a letter of credit or a confirmation *de facto* revocable even if it remains *de jure* and on its face irrevocable. Further, to the extent that even a nominated bank will not know and

cannot know an issuing bank's internal sanctions policy, a wide sanctions clause can introduce banking uncertainty as against the nominated bank. The ICC Guidance Paper makes this entirely valid point at paras 2.4 and 2.5:

> 2.4 If the sanctions clauses in … letters of credit … allow the issuer a level of discretion as to whether or not to honour beyond the statutory or regulatory requirements applicable to that issuer, they bring into question the irrevocable and documentary nature of the letter of credit or guarantee. …
>
> 2.5 Where sanctions clauses that refer to banks' internal policy requirements appear in the letter of credit … the nominated bank is in a difficult position as it is not aware of the internal sanctions policy that the issuing bank might elect to apply. … As a result, a nominated bank's risk assessment is likely not only to include the issuing bank and the country risk, but also the assessment of the likelihood of a prohibited reimbursement due to sanctions regulations or an internal, sanctions-related policy. This may result in increased costs, delays and potential disputes.

114 The plaintiff submits that the ICC Guidance Paper "condemns" the use of sanctions clauses.[75] That is not correct. In fact, the Guidance Paper notes the use of narrow sanctions clauses (see [111] above) without *condemning* them. And, in so far as the ICC Guidance Paper deprecates the use of narrow sanctions clauses, it does so not because they render a letter of credit or a confirmation *de facto* revocable. It does so only because they are in the authors' view unnecessary in that they do no more than state the obvious, *ie* that a bank is entitled not to pay against a complying presentation if that would put it in breach of the general law. The authors' concern is that including a narrow sanctions clause, given that it is unnecessary, may cause confusion or may even expose the bank to legal liability (at paras 1.4 and 2.2):

> 1.4 Sanctions laws and regulations to which a bank engaged in a trade finance-related instrument is subject may include those of its country of operation, its country of

---

75 Plaintiff's Closing Submissions at paras 274–277.

> incorporation or registration, the country of the currency or the place of payment, and any other jurisdiction whose laws govern the transaction. Where they are determined to be applicable to the instrument, sanctions laws and regulations are generally considered as being mandatory and thus may override the ICC rules applicable to that instrument and, more generally, the contractual terms of the instrument. If these are the only sanctions laws and regulations applicable to the parties, adding a clause in a trade finance-related instrument stating the bank's commitment to respect such sanctions law or regulation applicable to it by law may be unnecessary and lead to confusion. In some circumstances, banks may even face legal liability in some countries if mandatory laws prohibit the use of such clauses on grounds of discrimination …
>
> …
>
> 2.2 There is no standard for these clauses and they vary considerably in their scope. Where they simply state: "[The bank] is under a statutory duty to comply with sanctions laws and regulation mandatorily applicable to [it]", they are merely informational and do not extend beyond applicable laws and regulation.

115 As for wide sanctions clauses, it is true that the ICC Guidance Paper expresses greater concern about their use. But even then, it does not *condemn* wide sanctions clauses. It merely recommends against their use (see para 4.1):

> 4.1 It is recommended that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements. …

116 The question which now arises is whether, and to what extent, the ICC Guidance Paper affects the contractual force to be given to the Sanctions Clause.

The Sanctions Clause is a narrow sanctions clause

117 The defendant's Sanctions Clause, in so far as it is relevant for present purposes, entitles the defendant not to pay the plaintiff against a complying

presentation if the documents presented involve a vessel subject to US sanctions laws and regulations. In my view, this is a narrow sanctions clause. It is clear beyond doubt that, as a US bank, the defendant is subject to US laws and regulations, including US sanctions laws and regulations. The content of the Sanctions Clause does not go beyond the statutory or regulatory obligations imposed on the defendant by US sanctions laws and regulations. The clause does not amount in substance to giving the defendant a discretion whether to pay against a complying presentation which renders its confirmation *de facto* revocable.

118 Furthermore, in so far as the defendant did in fact rely on its internal sanctions policy when it carried out the sanctions screening, it did so merely to ascertain whether the documents presented involved a vessel subject to US sanctions laws and regulations. Put another way, the defendant did not rely on its sanctions policy to go beyond the content of US sanctions laws and regulations. Instead, it relied on its sanctions policy merely for the procedure which it used to identify whether the vessel carrying the coal sold to the buyer came within the content of US sanctions laws and regulations.

119 I therefore hold that the Sanctions Clause is not invalid or unenforceable on the ground that it confers a discretion on the defendant which makes the defendant's confirmation *de facto* revocable.

The Sanctions Clause is not a non-documentary condition

120 The plaintiff's third submission is that the Sanctions Clause is a "non-documentary condition" and is therefore invalid or unenforceable as being inconsistent with the documentary nature of a letter of credit transaction.[76]

121 A non-documentary condition is a term of a letter of credit or of a confirmation which does not relate to the presentation of a document. The plaintiff's submission is that the Sanctions Clause is a non-documentary condition because it is a term of the defendant's confirmation which does not require the beneficiary to tender a stipulated document in order to make a complying presentation. It is true that the Sanctions Clause does not require the plaintiff to tender a document. But the plaintiff's submission that the Sanctions Clause is on that ground a non-documentary condition is based on a fundamental misunderstanding of the scope and purpose of the rule against non-documentary conditions.

122 For a letter of credit transaction to fulfil its commercial purpose as a payment mechanism, it is essential: (a) that the beneficiary know with certainty what it must do to secure payment from the issuing or confirming bank; and (b) that the issuing and confirming banks know with equal certainty when they are obliged to pay the beneficiary. It is for that reason that the governing principle as between the banks and both the applicant and the beneficiary is that banks deal with documents, not with goods, services or the performance of any obligations to which the documents may relate (see Art 5 of the UCP600). Furthermore, Art 16 of the UCP600 obliges banks to examine only the documents which the beneficiary presents to determine whether the beneficiary

---

76 Plaintiff's Closing Submissions at paras 278 and 280–281.

has made a complying presentation. In this way, the issuing bank (together with the letter of credit) and the confirming bank (together with its confirmation) are insulated legally and commercially from any dispute between applicant and beneficiary under their contract or between one or both of them and a third party such as an insurer or a shipper. The rule against non-documentary conditions exists because these conditions create a high risk of puncturing that insulation and undermining the certainty which all parties require.

123 The Sanctions Clause does not come within the scope of the rule prohibiting non-documentary conditions and does not engage the purpose of that rule. The Sanctions Clause does not govern what the plaintiff must do in order to make a complying presentation under the letter of credit or under the confirmation. Indeed, it is not in dispute that the plaintiff did make a complying presentation in November 2019, at least on the second attempt. The Sanctions Clause therefore creates no uncertainty about what sort of presentation entitles the plaintiff to be paid and obliges the defendant to pay. The Sanctions Clause operates post-presentation to permit the defendant not to pay the plaintiff against a complying presentation if the documents involve a vessel subject to the sanctions laws and regulations of the United States of America. That is a condition of payment, but is not a non-documentary condition of payment in the sense that that term is used as a term of art.

124 I therefore hold that the Sanctions Clause is not invalid or unenforceable on the ground that it is a non-documentary condition.

The Sanctions Clause is not unworkable

125 The plaintiff's final submission is that the Sanctions Clause is worded so broadly as to be unworkable.[77] That is because the phrase "…all sanctions … laws and regulations of the U.S and of other applicable jurisdictions to the extent that they do not conflict with such U.S laws and regulations…" makes the laws of every jurisdiction in the world applicable to permit the defendant not to pay against a complying presentation, excluding only those that conflict with US sanctions laws and regulations.[78]

126 I reject this submission for two reasons.

127 First, the plaintiff appears to think that this phrase sets out the governing law of the confirmations. It does not. This phrase serves to delineate the *sanctions* laws and regulations with which the defendant is obliged to comply when it issues a letter of credit or confirms a letter of credit. This phrase does not make any of those laws, let alone all of them, the governing law of the confirmations. There is no dispute that the governing law of the confirmations is Singapore law.[79]

128 Second, this submission gives no meaning to the word "applicable" in this phrase. The plaintiff submits that, on the facts of this case, there are four possible sanctions laws and regulations involved: Dubai, where the issuing bank is located; (b) Indonesia, where the coal was loaded; (c) Pakistan, where the coal was delivered; and (d) Singapore, where the plaintiff and the defendant are

---

77 Plaintiff's Opening Statement at para 19.

78 Plaintiff's Opening Statement at para 19.

79 Plaintiff's Opening Statement at paras 20–30; Defendant's Closing Submissions at para 172.

located.[80] This argument is misconceived. In interpreting this phrase in the Sanctions Clause, I must bear in mind the commercial purpose of the clause (see *MCH International Pte Ltd and others v YG Group Pte Ltd and others and other appeals* [2019] 2 SLR 837 at [26]). The commercial purpose of the clause is to address an extra-contractual legal and regulatory compliance risk which the defendant undertakes when confirming a letter of credit. That risk is multiplied for the defendant for two reasons. First, because it is incorporated and has its head office in a jurisdiction which has a long and growing suite of sanctions laws and regulations. Second, because of the number of jurisdictions worldwide in which the defendant operates. As such, the phrase "other applicable jurisdictions" must mean the sanctions laws other than US sanctions laws which are applicable to the branch of the defendant which issues or confirms a letter of credit.

129 That narrows the applicable sanctions laws regulations in any given case to those of a finite number of readily ascertainable jurisdictions. In this case, there are only two applicable sanctions laws: (a) US sanctions laws and regulations, because the defendant is a bank incorporated and regulated in the US; and (b) Singapore sanctions laws and regulations, because it is the defendant's Singapore branch which confirmed the letters of credit. On no reasonable interpretation of the Sanctions Clause are the sanctions laws and regulations of Dubai, Indonesia or Pakistan within the scope of the clause on the facts of this case.

130 I therefore hold that the Sanctions Clause is not unworkably wide by reason of the phrase "…all sanctions … laws and regulations of the U.S and of

---

80 Plaintiff's Closing Submissions at para 119.

other applicable jurisdictions to the extent that they do not conflict with such U.S laws and regulations…".

The Sanctions Clause entitles the defendant to refuse to pay the plaintiff

131 I have found thus far that the Sanctions Clause is not only a term of the defendant's confirmations but is a valid and enforceable term of the confirmations.

132 The final broad issue I must determine is whether, on the facts of this case, the Sanctions Clause entitled the defendant to refuse to pay the plaintiff against its complying presentation. I have determined this issue in favour of the defendant for three reasons: (a) the defendant's Singapore branch is not a legal entity distinct from its US branches; (b) the defendant is subject to US sanctions laws and regulations in relation to its operations worldwide including through its Singapore branch; and (c) paying the plaintiff would have exposed the defendant to a penalty for breaching US sanctions laws and regulations as those laws and regulations are published, interpreted, applied and enforced.

133 I now set out my reasons for coming to these conclusions.

The defendant is a single legal entity worldwide

134 The Sanctions Clause comprises two sentences. The first sentence states that the defendant is obliged to comply with US sanctions laws and regulations. The second sentence, for present purposes, entitles the defendant to refuse to pay the plaintiff against a complying presentation if the documents involve a vessel subject to US sanctions laws and regulations.

135 The first sentence of the Sanctions Clause is merely a statement. It grants no rights and imposes no obligations. It has no contractual content. It is only the second sentence of the Sanctions Clause which grants the defendant an entitlement. It is only the second sentence which has contractual content.

136 As the Sanctions Clause is drafted, the first sentence is not expressed to be a condition precedent to the defendant's entitlement under the second sentence. Whether the defendant is in fact obliged to comply with US sanctions laws and regulations therefore has no contractual bearing on whether the defendant is entitled to refuse to pay the plaintiff against a complying presentation. It is not a condition precedent to relying on that contractual entitlement that the defendant prove that the statement which the first sentence makes is true. The plaintiff has nevertheless taken the point that that statement is not true, and the defendant has responded to it. I therefore begin with an analysis of this point.

137 The plaintiff's submission on this point is as follows. The defendant is the Singapore branch of a bank incorporated and regulated in the US. There is therefore a legal distinction between the defendant's Singapore branch and the defendant's US branches. Only the defendant's US branches have an obligation to comply with US sanctions laws and regulations. The defendant, being the defendant's Singapore branch, has no such obligation. The first sentence of the Sanctions Clause is therefore untrue in respect of the defendant's Singapore branch.

138 To the extent that this point is relevant at all, I reject the plaintiff's submission on it. I accept instead the defendant's submission that a branch of a bank – just like the branch of a foreign corporation carrying on any other business – is not a legal entity separate from the foreign corporation itself. The

head office of a foreign corporation in its place of incorporation and all of its branches worldwide are simply geographically distributed manifestations of a single legal entity (see *TMT Co Ltd v The Royal Bank of Scotland plc (trading as RBS Greenwich Futures) and others* [2018] 3 SLR 70 at [53]).[81]

139 The plaintiff cites Art 3 of the UCP600 in support of its submission on this point. Article 3 provides that branches of a bank in different countries are considered to be separate banks. The plaintiff argues that the effect of Art 3 is that the defendant's Singapore branch is a legal entity distinct from its US branches for the purposes of the Sanctions Clause. It is therefore obliged to comply only with Singapore law and has no obligation to comply with US law, including US sanctions laws and regulations.[82]

140 Article 3 of the UCP600 does not support the plaintiff's submission. Article 3 merely prescribes that, for the purposes of a letter of credit transaction, the branches of a bank in different countries are to be considered separate banks (see *UCP600 Commentary* at p 241). The effect of Article 3 is purely contractual: it is a legal fiction which takes effect only as a term of a contract which is subject to the UCP600. Further, it applies only to rights and obligations which arise under the contract. Article 3 has no application to questions of status or to obligations which arise under the general law. Article 3 does not – and indeed cannot – prescribe as a matter of general law that the branches of a bank in a particular country have for all purposes the status of a legal entity which is separate from the bank's branches in every other country.

---

81 Defendant's Closing Submissions at para 131.

82 Plaintiff's Opening Statement at paras 24–25 and 27; Plaintiff's Closing Submissions at paras 23–32.

141 The plaintiff also relies for this submission on the fact that: (a) the defendant is registered in Singapore as a foreign company under the Companies Act 1967 (2020 Rev Ed); and (b) the defendant's branches in Singapore are licensed and regulated collectively as a "bank in Singapore" under the Banking Act 1970 (2020 Rev Ed).[83] But the only effect of these provisions is to require a foreign corporation which intends to carry on business as a bank in Singapore to do so in compliance with both Singapore's company law and Singapore's banking law. It is misconceived to argue that these provisions give a foreign bank's Singapore branch the status of a legal entity separate from the foreign bank's branches in every other jurisdiction. It is even more misconceived to argue that these provisions somehow insulate a foreign corporation carrying on business in Singapore as a bank from the law of every other jurisdiction in respect of its activities in Singapore.

142 I therefore hold that the defendant's branches outside the US, including its Singapore branch, and its US branches are a single legal entity. I hold also that the fact that the defendant's Singapore branch is licensed and regulated in Singapore does not insulate the defendant's activities through its Singapore branch from being subject to a law other than Singapore law.

The defendant is subject to US sanctions laws

143 The next question which arises is whether US sanctions laws and regulations are intended to apply to the defendant's activities though its branches in Singapore. This is a question of US law, *ie* foreign law.

---

83 Plaintiff's Closing Submissions at paras 25 to 28.

Proof of foreign law

144 The principles relating to proof of foreign law are not disputed, and can be briefly stated:

(a) The content of foreign law is a question of fact which must be proved (see *Malayan Banking Bhd v Bakri Navigation Co Ltd and another* [2020] 2 SLR 167 at [59]). That is because the court lacks knowledge of foreign law and must be informed of its content by the evidence of witnesses. The court cannot simply take judicial notice of foreign law (see *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [57]), at least not in the absence of a statutory basis for doing so.

(b) The party asserting foreign law bears the burden of proving it as an issue of fact (see *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 2 SLR(R) 183 at [77]).

(c) Foreign law can be proved either by directly adducing raw sources of foreign law in evidence where permitted by statute (see ss 39(*b*), 39(*c*), 40, 59(1)(*b*), 80(1)(*c*) and 80(2) of the Evidence Act 1893 (2020 Rev Ed)) or by adducing the opinion of an expert in the foreign law (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [54]).

(d) The court is not obliged to accord raw sources of foreign law any evidentiary weight. This is because the content of the raw source, approached on its own, may mislead persons not familiar with that system of law (see *Pacific Recreation* at [60] and [78]).

(e) As such, raw sources of foreign law should be accompanied by expert evidence on the foreign law. Expert evidence may be especially helpful where, for instance, the foreign legislation has no equivalent in our own legislation, or where the issue is of great complexity or is the subject of controversy in the foreign jurisdiction (see *Pacific Recreation* at [60]).

(f) Where expert evidence of the foreign law is uncontradicted, the court will normally be reluctant to reject it. In any event, the court is not entitled to do so based on its own research. A court will normally accept uncontradicted expert evidence unless it is, for example, obviously false, obscure, extravagant, lacking in obvious objectivity and impartiality or patently absurd (see *Re Gerald Martin Smith Serious Fraud Office and another v Litigation Capital Ltd (a company incorporated in the Marshall Islands) and others* [2021] EWHC 1272 (Comm) at [512]).

The expert evidence of US law

145 The plaintiff chose not to call an expert witness on US sanctions laws and regulations. The sole expert witness on US sanctions laws and regulations was therefore the defendant's expert, Mr Brian James Egan ("Mr Egan").

146 Mr Egan is an attorney at law admitted to practice in the District of Columbia. He was a partner in the US law firm Steptoe & Johnson LLP at the time of his report. By the time of the trial in October 2021, he had left Steptoe & Johnson LLP to join the US law firm Skadden, Arps, Slate, Meagher & Flom LLP.

147 Mr Egan has considerable expertise in public international law and in US law relating to economic sanctions, export controls and national security.

Mr Egan also has experience working in the US Department of the Treasury.[84] That is the arm of the US government which implements, administers and enforces US sanctions laws and regulations. It carries out this function through a division known as the Office of Foreign Assets Control ("OFAC").[85]

148 Mr Egan's expert evidence is set out in his affidavit of evidence in chief and supplementary affidavit of evidence in chief. At trial, Mr Egan supplemented his affidavits with oral evidence in chief, given with leave. I also put some questions to Mr Egan in the course of his oral evidence in chief, without objection from either party.

149 The substance and content of Mr Egan's expert evidence is uncontradicted and unchallenged. The plaintiff did put written questions to Mr Egan before trial. The written questions which the plaintiff chose to put to Mr Egan did not in any way touch on the substance or the content of his expert evidence. The questions went instead solely to his credibility. They related principally to: (a) Mr Egan's terms of reference and the circumstances in which he had produced his expert report; (b) any prior connection Mr Egan might have with the defendant; and (c) the remuneration which Mr Egan's firm had already received and was going to receive for his expert opinion. None of the answers which Mr Egan gave to these questions affected his credibility in the slightest.

150 At trial, the plaintiff elected not to put any questions by way of *viva voce* cross-examination to Mr Egan at all,[86] whether in relation to his affidavits of

---

84 Brian Egan's AEIC at pp 4–5.

85 Brian Egan's Expert Report at para 4(a).

86 Certified Transcript, 28 October 2021, p 29:11–14.

evidence in chief, in relation to his oral evidence in chief or in relation to the answers he gave at trial to my questions to him.

151 I accept Mr Egan's evidence in its entirety. I make my findings on US law entirely in accordance with his evidence. I do so not just because the substance and content of his evidence is uncontradicted and unchallenged. I do so also because I found him to be a thorough, knowledgeable, credible and impartial witness. His evidence was accordingly of great assistance on the issues of fact about the content of US sanctions laws and regulations and how those laws and regulations are published, interpreted, applied and enforced.

152 All statements about US sanctions laws and regulations in the remainder of this judgment amount to my findings of fact arising from my decision to accept Mr Egan's evidence in its entirety.

The implementation of US sanctions against Syria

153 The US government maintains a suite of sanctions against many countries. These sanctions are imposed either by an order issued by the executive of the US federal government or by a statute passed by the legislature of the US federal government. But these orders and statutes impose sanctions only in broad terms. The detailed content of US sanctions, regardless of who imposes them, is implemented through comprehensive regulations published by OFAC. These regulations also set out the procedures by which OFAC investigates and, if warranted, imposes civil penalties for any breach of US sanctions.[87]

87 Brian Egan's Expert Report at paras 9 and 11.

154 The content of US sanctions against Syria is set out in Executive Order 13582 (August 17, 2011) issued by the US President and the Syrian Sanctions Regulations 31 CFR (US) § 542 (2014) ("SySR") issued by OFAC.[88]

The persons obliged to comply with US sanctions against Syria

155 The SySR applies only to a "US person". Section 319 of the SySR defines a US person as, *inter alia*, any "entity organised under the laws of the United States or any jurisdiction within the United States (including foreign branches)".[89] Therefore, the defendant and all of its branches worldwide is a "US person" within the meaning of the SySR.[90] This includes the defendant's Singapore branch.

156 OFAC may exempt a US person from the SySR or authorise a US person to participate in transactions despite the sanctions.[91] The defendant did not at any time have a relevant exemption or authorisation from OFAC.

157 On the basis of Mr Egan's evidence, I accept that the SySR requires the defendant's Singapore branch to comply with the US sanctions programme against Syria, even in respect of its activities in Singapore, even with persons with no connections to the US, and even in respect of activities which are governed only by Singapore law as a matter of private law. I have already rejected the plaintiff's misconceived submission (see [141] above) that the defendant's Singapore branch – as a foreign corporation carrying on business

---

88 Defence (Amendment No. 3) at paras 24–30; Brian Egan's Expert Report at paras 15–31.

89 Brian Egan's Expert Report at para 26; Defendant's Bundle of Authorities ("DBOA"), Tab 1, p 17. See also Executive Order 13582 at Section 8(c) (DBOA, Tab 2, p 38).

90 Brian Egan's Expert Report at paras 7, 26 and 32–35.

91 Brian Egan's Expert Report at paras 28–29.

as a bank in Singapore licensed and regulated under Singapore law – is entitled to do so *only* in compliance with Singapore law and therefore without regard for US law.

158 For the foregoing reasons, in so far as there is any contractual content to the first sentence of the Sanctions Clause whatsoever, I am satisfied that the statement which that sentence makes is true: the defendant is obliged as a matter of US law to comply with US sanctions laws and regulations.

Paying the plaintiff would have breached US sanctions

159 The next issue I must determine is whether the defendant can avail itself of the benefit of the Sanctions Clause. Each party frames the defendant's burden on this issue in fundamentally different terms. The plaintiff submits that the defendant must prove on the balance of probabilities that Omnia was in fact owned by a Syrian entity at the material time.[92] The defendant submits that it suffices for it to prove that OFAC would have held that paying the plaintiff against its complying presentation would be a breach of the SySR.[93]

160 On the proper interpretation of the Sanctions Clause, I accept that the defendant's framing of the factual question is correct. To analyse that factual question, I begin by summarising the content of the US sanctions against Syria. Once again, the summary which follows is taken from Mr Egan's evidence and represents my findings of fact.

---

92 Plaintiff's Opening Statement at para 36; Plaintiff's Closing Submissions at para 283.

93 Defendant's Closing Submissions at para 199.

The content of US sanctions against Syria

161 The SySR prohibits US persons from being involved, directly or indirectly, in several broad categories of transactions and related activities with respect to Syria, the Government of Syria, and specific persons who are blocked under US sanctions on Syria.[94]

162 Section 207 of the SySR prohibits a US person, wherever located, from supplying services directly or indirectly to Syria.[95] The term "services" includes financial services. Supplying services to Syria includes rendering services anywhere in the world where "the benefit of such services is…received in Syria".[96]

163 Section 210 of the SySR prohibits a US person from financing, facilitating or guaranteeing a transaction by a foreign person where that transaction, if undertaken by a US person, would be prohibited by the SySR.[97]

164 A confirming bank who pays a beneficiary against a complying presentation of documents, where the documents relate to goods which are or were carried on a vessel owned by a Syrian entity, breaches the SySR because it thereby supplies financial services either directly or indirectly where the benefit of the financial services is received in Syria.[98]

---

94 Brian Egan's Expert Report at para 25; DBOA, Tab 1, pp 8–10 and 13.

95 Brian Egan's Expert Report at para 25(c); paras 55–56.

96 Brian Egan's Expert Report at para 25(c); para 55.

97 Brian Egan's Expert Report at para 25(e) and para 56.

98 Brian Egan's Expert Report at para 55.

The rules relating to contractual interpretation

165 I now turn to the proper interpretation of the Sanctions Clause. The applicable principles of contractual interpretation are not disputed and can be briefly restated:

(a) The purpose of contractual interpretation is to give effect to the objectively ascertained intention of the contracting parties as it emerges from the relevant contractual language read in context (see *Yap Son On v Ding Pei Zhen* [2017] 1 SLR 219 at [30]).

(b) The starting position is to consider the relevant text of the contractual term (see *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187 ("*Y.E.S. F&B Group*") at [32]).

(c) In determining whether the text of the term is plain and unambiguous, the court can consider the context in which it was used. However, the context must be clear, obvious and known to both parties. Accordingly, the subjective intention of the parties is irrelevant (see *Y.E.S. F&B Group* at [33], [39] and [74]).

(d) Where the text is plain and unambiguous, the court ought to give effect to that meaning since it will usually not lead to an absurd result (see *Y.E.S. F&B Group* at [31]).

(e) It is only where, in light of extrinsic material which is evidence of its context, the plain language of the term becomes absurd or ambiguous (*ie*, it takes on another plausible meaning) that the court will be entitled to put an interpretation on the term in question which is different from that demanded by its plain language (*Zurich Insurance*

(Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029 at [130]).

Interpreting the Sanctions Clause

166 I now apply these principles to the Sanctions Clause.

167 The Sanctions Clause entitles the defendant to refuse to pay the plaintiff against a complying presentation if the documents involve a vessel subject to "any applicable restriction". The first sentence of the Sanctions Clause defines "applicable restrictions" to mean, on the facts of this case, "all sanctions…laws and regulations of the U.S.".

168 The question which arises is this: what is the scope of the phrase "all sanctions…laws and regulations of the U.S."? The SySR and the executive order under which it has been published are clearly within the scope of the phrase. But I must also have regard to the commercial purpose of the Sanctions Clause. That purpose is to mitigate or eliminate the regulatory, reputational and financial risk that bank faces if it breaches US sanctions laws and regulations or is found by OFAC to have breached US sanctions laws and regulations.

169 I therefore accept the defendant's submission[99] that the scope of the phrase "all sanctions…laws and regulations of the U.S." – read in context and in light of the commercial purpose of the Sanctions Clause – must include the entire regulatory superstructure and infrastructure of the US sanctions laws and regulations. On the facts of this case, the phrase must therefore include not only the SySR which implements the content of US sanctions on Syria but also OFAC's guidelines on the standards it expects US persons to adhere to in order

[99] Certified Transcript, 28 February 2022, p 60:6–26.

to avoid breaching US sanctions and OFAC's approach to investigating and penalising breaches of US sanctions, as summarised at [171]–[182] below.

170 Therefore, I hold that the defendant can avail itself of the benefit of the Sanctions Clause if the defendant can prove that OFAC would have found that the defendant's act of paying the plaintiff against its complying presentation would be a breach the SySR.

OFAC's approach to investigating and penalising breaches of the SySR

171 I must now consider OFAC's approach to investigating and penalising breaches of the SySR. That approach must also be seen in light of OFAC's expectations of the conduct of US persons in order to avoid any such breach. The position can be summarised as follows, again from Mr Egan's evidence.[100]

172 OFAC has very wide powers to investigate what it calls "apparent violations" of the SySR. These powers include the power to issue subpoenas to gather evidence.[101]

173 If, as a result of OFAC's investigations, it forms the view that a US person has committed a wilful breach of US sanctions, it is empowered to refer the breach to the US Department of Justice for further investigation through the US Federal Bureau of Investigation. If warranted, the Department of Justice will then prosecute the US person for a criminal breach of the sanctions in federal court.[102]

---

100 Brian Egan's Expert Report at paras 6 and 25.

101 Certified Transcript, 28 October 2021, pp 6:2–17.

102 Brian Egan's Expert Report at paras 9, 11 and 62; Certified Transcript, 28 October 2021, pp 3:18–4:14.

174 Having said that, OFAC deals with most breaches of US sanctions by exercising its power to impose a civil penalty. The first step towards imposing a civil penalty is for OFAC to issue what it calls a "pre-penalty notice" to the US person suspected of the breach. The pre-penalty notice will set out: (a) why OFAC considers that the US person has breached the sanctions; and (b) the civil penalty which OFAC proposes to impose on the US person for the breach.

175 The US person can respond to the pre-penalty notice by providing exculpatory or mitigating information to OFAC in an effort to persuade it either: (a) to withdraw the pre-penalty notice altogether; or (b) to reduce the proposed penalty. If OFAC considers that the US person's response does not warrant withdrawal of the pre-penalty notice, it will issue what is called a final penalty notice. This notice will set out OFAC's determination that the US person is in breach of US sanctions and fix the civil penalty payable for the breach.[103] Liability for a civil penalty is strict. A US person can be liable to suffer a civil penalty even if that US person breached US sanctions without any fault whatsoever.

176 A pre-penalty notice signals OFAC's view that the US person has in fact breached US sanctions and that the breach warrants the issue of a final penalty notice. Therefore, any US person who is the subject of an OFAC investigation into an apparent violation will attempt to forestall even a pre-penalty notice from being issued. It will do this by co-operating from the earliest stages with OFAC's investigation and by volunteering evidence.[104]

---

103 Certified Transcript, 28 October 2021, pp 6:16–7:10.

104 Certified Transcript, 28 October 2021, pp 9:14–10:5.

177 A US person who is subject to a final penalty notice has a right to challenge OFAC's determination in the federal courts. A challenge to a final penalty notice is very likely to fail. That is because the challenge takes place under US federal administrative law. The approach on a challenge is that the federal court gives great deference to OFAC, as the administrator of the US sanctions programme, to state authoritatively the US Government's position on the interpretation of its regulations unless the interpretation is manifestly unreasonable, arbitrary or capricious.[105]

178 OFAC also issues guidance on the standards of due diligence it expects US persons to adhere to in order to identify sanctioned entities and to avoid breaching US sanctions.[106] Under these guidelines, OFAC expects a US person to conduct due diligence on its customers, supply chain, intermediaries, and counterparties. The guidance also identifies common causes of sanctions breaches, including improper or incomplete due diligence checks and inadequate awareness or knowledge of US sanctions law and OFAC regulations.

179 Mr Egan provides two illustrations of OFAC's approach to enforcing US sanctions. In 2020, OFAC took enforcement action against the Deutsche Bank Trust Company ("Deutsche Bank"). Deutsche Bank failed to take steps of its own to ensure that a sanctioned entity was not involved in a particular transaction despite several red flags giving the bank reason to know that the sanctioned entity continued to be involved in the transaction. On that basis, OFAC imposed a civil penalty on Deutsche Bank for breach of US sanctions.

---

105 Brian Egan's Expert Report at para 11; Certified Transcript, 28 October 2021, pp 7:11–8:9.

106 Brian Egan's Expert Report at paras 45–52.

180 In 2018, in a case against the defendant unrelated to this action, OFAC imposed a civil penalty of US$5m on the defendant. In describing the defendant's breaches of US sanctions in that case, OFAC identified one of the key aggravating factors as the defendant's failure to take heed of several red flags and other warning signs that entities subject to sanctions were participating in transactions which the defendant processed.

181 In the specific context of the shipping industry, OFAC has published several advisories placing US persons on notice of deceptive shipping practices undertaken to evade US sanctions. These practices include changing the name of a vessel, changing its ownership and using layered ownership structures to mask the fact that the true ultimate or beneficial ownership of the vessel is a sanctioned entity. OFAC specifically identifies the changing of the name of a vessel as a common practice of vessels owned by Syrian entities in order to evade sanctions.

182 In my view, the entire regulatory infrastructure and superstructure which I have just described comes within the meaning of the phrase "sanctions … laws and regulations of the US". All of this is therefore within the scope of the phrase "applicable restriction" in the second sentence of the Sanctions Clause.

The defendant's risk-based approach to sanctions compliance

183 The regulatory, reputational and financial risk of being subject to an OFAC investigation of even an apparent violation of US sanctions – let alone being the subject of a pre-penalty notice – coupled with OFAC's expectations of the due diligence to be conducted by US persons to avoid any breach of US sanctions means that US persons are highly incentivised to exercise due diligence whenever engaging in transactions which carry a risk of breaching US

sanctions. This incentive also explains why a US person may prefer to err on the side of caution and decline to participate in a transaction despite the risk of its due diligence flagging a false positive. This was clear from the responses of Ms Alisha T. Burke ("Ms Burke") to the questions which I put to her. Ms Burke heads the Governance and Oversight team within the defendant's Sanctions Compliance department:[107]

> Court: … Are you saying that an entity or a vessel could be included on your master list if the risk to the bank was less than 50 per cent of a violation of US sanctions?
>
> A: … if we have a sanctions nexus found in our evidence, we will add the entity to the list if we find supporting documentation.
>
> Court: In that sense, is it correct that you would prefer a false positive to a false negative? You would prefer the risks associated with a false positive to the risks associated with a false negative?
>
> A: Yes.

184 When asked about the approach to analysing Omnia's ownership status and how high the risk was that it had a Syrian nexus, Ms Burke testified that the defendant's approach was not to associate a "risk score" with its analysis or to view the assessment from a "percentage perspective". Instead, the defendant's approach is to ask whether – having regard to its obligations under US sanctions laws and regulations and informed by OFAC's sanctions compliance guidance and approach to enforcement action – the defendant's documentation and research supports a sufficient risk of a Syrian nexus.[108]

---

107 Certified Transcript, 27 October 2021, pp 33:17–34:6 and 35:12–18.

108 Alisha Burke's AEIC at paras 14 and 16; Certified Transcript, 27 October 2021, pp 30:15–33:25 and 34:19–24.

185 As Ms Burke herself candidly accepted in response to a question from me, the defendant took a risk-based decision in December 2019, following the plaintiff's complying presentation, that it would rather be sued by the plaintiff for failing to pay against a complying presentation than to be found by OFAC to have breached US sanctions.[109] Although this puts the bank's risk analysis in the starkest of terms, it is nevertheless a wholly accurate reflection of the position in which US banks find themselves as a result of their obligation to comply with US sanctions. I find this to be a rational and contractually justified approach.

The defendant was entitled to refuse to pay the plaintiff

186 I accept Mr Egan's expert evidence that OFAC would have found the defendant to have breached the SySR if the defendant paid the plaintiff against its complying presentation.

187 To explain why, I begin by finding as a fact that Omnia was beneficially and ultimately owned in 2015 by an entity known as Ali Samin Group, a Syrian entity carrying on business in Syria.[110] The defendant secured that information as a result of its due diligence in 2015.

188 I find further that OFAC would have taken the view that Omnia continued to be beneficially and ultimately owned by a Syrian entity in 2019 and therefore continued to be subject to US sanctions. It would have taken that

---

109 Certified Transcript, 27 October 2021, p 42:11–16.

110 Alisha Burke's AEIC at para 54.

view because of a number of red flags discovered by the defendant when it conducted due diligence on Omnia again in August 2019:[111]

(a) The vessel had changed its name to Omnia in February 2019.

(b) At the same time, it changed its registered owner and reported its beneficial owner as "unknown owners" in place of the Ali Samin Group.[112]

(c) The new registered owner of Omnia was reported to be Omnia Maritime Limited, an entity incorporated in Barbados. But there was very limited information in the public domain on Omnia Maritime Ltd.[113]

(d) The technical manager of the Omnia was reported to be Serenity Ship Management JTL, an entity incorporated in the United Arab Emirates. But the beneficial owner of Serenity Ship Management JTL was also reported as "unknown".

(e) The defendant's searches on publicly available sources suggested that Omnia continued to have links to Syria.[114]

189 Consistently with OFAC's guidance and past enforcement action (see [178] to [181] above), OFAC would see the results of the defendant's due diligence as suggesting that the change of the vessel's name and the change of its registered owner were simply intended to mask the vessel's continuing Syrian ownership. Further, the lack of information about the beneficial

---

111 Alisha Burke's AEIC at paras 77–78.

112 Alisha Burke's AEIC at paras 74(c)–(e).

113 Alisha Burke's AEIC at paras 74(f)–(g); 1AB459.

114 Alisha Burke's AEIC at paras 74(i)–(k).

ownership of the vessel and of the ship management company would be seen as suggesting that the registered owner was a shell company and that the beneficial owners of the vessel were using multiple ownership layers in order to disguise Syrian beneficial ownership and evade US sanctions on Syria.

190 In my view, the due diligence which the defendant conducted on Omnia in 2015 and again in August 2019, its decision in August 2019 to continue to treat Omnia as having a Syrian nexus and its refusal to pay the plaintiff in a transaction relating to goods carried on Omnia after applying its risk-based assessment are all entirely consistent with OFAC's expectations of the steps a US person must take in order to comply with the SySR.

191 I am satisfied that OFAC would have regarded the red flags which the defendant discovered as a result of carrying out the expected due diligence as pointing towards continued Syrian beneficial ownership of Omnia. It follows that I am satisfied that OFAC would have considered the defendant to be in breach of the SySR if it had paid the plaintiff against its complying presentation. Indeed, OFAC confirmed that this would have been its position in formal guidance which it gave to the defendant in June 2020 for the purposes of this litigation.[115]

Omnia continued to be owned by a Syrian entity

192 In any event, to the extent that it is the plaintiff's framing which is correct, I am also prepared to find that the red flags I have identified above are sufficient circumstantial evidence to discharge the defendant's burden of

---

115 Defendant's Closing Submissions at paras 67–69; Brian Egan's Expert Report at paras 63–67.

proving on the balance of probabilities that Omnia was in fact owned by a Syrian entity at the material time.

193 I am therefore satisfied that paying the plaintiff would have violated s 207 of the SySR in that it would have amounted to the defendant indirectly providing financial services to Syria.[116] I am also satisfied that paying the plaintiff would have violated s 210 of the SySR in that the defendant would have been financing or facilitating a transaction involving activities undertaken by non-US persons where such activities if undertaken by a US person would violate the SySR.[117]

Conclusion

194 Considering the evidence in totality, I am satisfied that, if the defendant had paid the plaintiff against its complying presentation, OFAC would have held that doing so was a breach of the SySR. In any event, I am also independently satisfied that paying the plaintiff would have been a breach of the SySR. The defendant is therefore entitled to rely on the Sanctions Clause as a complete defence to the plaintiff's claim.

Conclusion

195 For all the foregoing reasons, I have dismissed the plaintiff's claim in its entirety with costs. The defendant is entitled to recover its costs in full as between party and party, with such costs to be assessed on the standard basis. The defendant is entitled to its costs in full as between party and party because it has been wholly successful in this action. There are no grounds on which to

116 Brian Egan's Expert Report at para 55.

117 Brian Egan's Expert Report at para 56.

deprive the defendant of any part of its costs. Equally, there are no grounds on which to make an issue-based order for costs, *ie* for awarding to the defendant the costs of some of the issues in this action and awarding to the plaintiff the costs of some of the other issues. The defendant's costs are to be assessed on the standard basis because there are no grounds on which to make an award of indemnity costs against the plaintiff.

196 I have therefore fixed the costs which the plaintiff must pay the defendant on the standard basis at $200,000 plus the defendant's disbursements, such disbursements to be agreed by the parties or fixed by the court.

A coda on costs

197 Following my decision in this matter awarding costs to the defendant, the plaintiff paid the defendant in full the costs of $200,000. But the parties were unable to agree on disbursements. It therefore became necessary for me to fix the disbursements. I now do so.

198 When assessing costs on the standard basis, the burden rests on the receiving party – in this case the defendant – to show that each item of costs which it claims was reasonably incurred and is reasonable in amount.

199 The defendant claims total disbursements of $135,474.13. The plaintiff challenges only four items of these disbursements. The four items are:

(a) $89,362.03, being the equivalent of US$64,343.16, which are the fees which the defendant has paid to Mr Egan for his expert evidence;

(b) $22,617.15 being disbursements such as filing fees, service fees, printing charges, binding charges and other items;

(c) $17,419.73 being transcription fees for the trial including the oral closing submissions; and

(d) $4,182.47 being oath, attendance and transport fees for the swearing or affirmation of the defendant's affidavits.

200 The plaintiff challenges these four items either on principle, on quantum or both. I deal with these items in turn.

Mr Egan's fees

201 The defendant claims $89,362.03 for Mr Egan's fees. The defendant supports this claim with six invoices which Mr Egan rendered to the defendant for work done from February to October 2021. The defendant submits that Mr Egan's fees are recoverable in full because they were reasonably incurred and are reasonable in amount. To support the latter point, the defendant relies on the amount of research and other work that Mr Egan had to do to produce his affidavit of evidence in chief and supplementary affidavit of evidence in chief and to prepare for and give his oral evidence in chief at trial.

202 The plaintiff accepts that Mr Egan's fees were reasonably incurred, and that the defendant is therefore entitled in principle to recover his fees. However, the plaintiff submits that the defendant has failed to discharge its burden of showing that Mr Egan's fees are reasonable in amount. The defendant's submission is that US$14,000, being 14 hours at a rate of US$1,000 per hour, would be a reasonable amount for Mr Egan's fees.

203 Other than in a general qualitative sense, the defendant has not produced any evidence to satisfy me that Mr Egan's fees are reasonable in amount. Mr Egan's invoices are not detailed invoices. They are merely summary invoices

and are described as such. Each invoice simply set out in three lines: (a) a lump sum fee for Mr Egan's services during a specified period; (b) any discount that Mr Egan has applied to those fees; and (c) a lump sum for his disbursements over the same period. The invoices do not provide any quantified breakdown of the lump sums, whether for fees or for disbursements. The invoices do not set out a narrative describing the work which Mr Egan has done to justify the lump sum invoiced. The defendant has not produced Mr Egan's timesheets. The defendant has not even produced any evidence of Mr Egan's hourly rate or of what would be a reasonable hourly rate for a practitioner of Mr Egan's seniority and expertise. I would have expected the defendant to do at least some of these things to discharge its burden. In effect, the defendant is seeking to recover Mr Egan's fees on the indemnity basis: as though the burden were on the plaintiff to show that Mr Egan's fees are unreasonable in amount.

204 I therefore accept the plaintiff's submission that the defendant has failed to discharge its burden of proving that the sum claimed for Mr Egan's fees is reasonable in amount. This item of disbursement cannot therefore be allowed in full. Having said that, I consider that the plaintiff's figure of US$14,000 is a derisory underestimate of what would be a reasonable amount for the work that Mr Egan did. I have no doubt that Mr Egan did far more than 14 hours work in this matter and that it was reasonable for him to do so. He had to do all of the following: (a) review the documents disclosed in discovery; (b) conduct legal research into US sanctions laws and regulations and the role of OFAC in administering those sanctions, both generally and as they apply to US sanctions against Syria and to banks; (c) draft and revise his two affidavits; (d) prepare to give his oral evidence at trial; (e) give his oral evidence at trial and respond to my questions. Further, Mr Egan's evidence was of considerable assistance to

me. I have found his evidence to be correct in its entirety. That finding of fact has had a decisive effect on the outcome of this action.

205 The question then is what a reasonable amount for Mr Egan's fees would be. The defendant has failed to address in any quantitative or objectively verifiable manner its burden to establish that the sum that Mr Egan has invoiced is reasonable. It is therefore impossible to deconstruct the defendant's claim for his fees in any quantitative or objective manner in order to assess its reasonableness and to arrive at a figure for his fees which is reasonable. I therefore have no alternative but to make a broad-brush assessment of what would be a reasonable amount of fees for the defendant to have incurred in engaging Mr Egan.

206 In my view, that reasonable amount is $60,000. That figure is the equivalent of US$43,200, applying the implied exchange rate that the defendant has used. In effect, I consider a deduction of roughly one-third from the sum that the defendant has claimed to be sufficient to account for the defendant's failure to discharge its burden of proving that $89,362.03 is a reasonable amount for Mr Egan's fees. That discount reflects my finding that the defendant is attempting, in effect, to recover Mr Egan's fees on the indemnity basis even though my award of costs to the defendant was on the standard basis.

Printing and binding charges

207 The defendant claims a total of $22,617.15 for filing fees, service fees, printing charges and binding charges. Out of this item, the plaintiff challenges only the claim for printing and binding charges, and even then only on quantum. The plaintiff's challenge, in summary, is that the defendant printed and bound many more copies of the documents in this matter than were reasonably

necessary. These documents include the affidavits of evidence in chief of the witnesses on both sides, the bundles of documents, the bundles of authorities and the written submissions.

208 I reject the plaintiff's submission. The defendant is a large, sophisticated multinational corporation. Although the amount claimed in this action is not of significant monetary value to the defendant, the outcome of this action had significant non-monetary value for the defendant for two reasons. First, it was a test case on the validity and enforceability of the Sanctions Clause. Second, a finding that the defendant was in breach of contract for failing to pay the plaintiff against a complying presentation carried reputational consequences for the defendant in Singapore and internationally in the market for trade financing. The defendant's interest in this action was therefore substantial and extended beyond Singapore. All of this means that it was perfectly reasonable for the defendant's internal and external legal advisers, not just in Singapore but also in New York, to monitor this action closely. That would have required multiple physical sets of documents to be prepared. Further, two of the defendant's witnesses gave evidence remotely, by video link from different locations. That would have required the defendant to give those witnesses not only a physical copy of their own affidavit of evidence in chief but also of the entire set of trial bundles for the cross-examination.

209 For the foregoing reasons, I find that the defendant did not print more sets of these documents than were reasonably necessary. The defendant is entitled to recover the printing and binding charges in full.

Transcription costs

210 The defendant claims $17,419.73 for the costs of real-time transcription at trial and 24-hour transcription for the closing submissions. The plaintiff challenges this item both on principle and on quantum.

211 The relevant facts are as follows. Before trial, the plaintiff and the defendant discussed the type of transcription services to be engaged for trial. The defendant proposed that the parties pay for real-time transcription. The plaintiff counter proposed that the parties pay for transcription with a delay of 14 working days. The plaintiff also offered to share the costs for 14-day transcription. The parties could not agree. The defendant therefore told the plaintiff that each side should engage its preferred type of transcription and bear its own costs of doing so.

212 The plaintiff's submission on principle is as follows. When the defendant told the plaintiff pre-trial that each party should bear its own costs for engaging its preferred type of transcription, that amounted to the defendant' agreement that it would not seek to recover transcription costs from the plaintiff under a post-judgment award of costs. Having agreed to bear its own costs of transcription, the defendant cannot now recover any sum from the plaintiff for transcription costs as party and party costs.

213 I do not accept the plaintiff's submission on principle. When the defendant said that each party should bear its own costs for engaging its preferred type of transcription, that was in the context of a discussion about the arrangements for paying the transcription costs in the first instance, before judgment and as a matter of contract with the service provider. The discussion was not about either party's right to recover transcription costs under a post-

judgment award of costs as between party and party. The defendant perhaps ought to have made this explicit by saying expressly that it reserved the right, if it were to succeed at trial, to recover its transcription costs from the plaintiff. But saying that pre-trial in the context of the discussion which was then ongoing between the parties was unnecessary. The fact remains that the parties were not then discussing the recovery of transcription costs as between party and party.

214 The plaintiff's alternative submission is that the defendant should recover only $2,392.06 towards its transcription costs. That submission proceeds as follows. The defendant has failed to discharge its burden of showing that the transcription costs it seeks to recover from the plaintiff are reasonable in amount, given that the cost of real-time transcription is more than four times the cost of 14-day transcription. Further, the plaintiff made a pre-trial offer to the defendant to share the costs for 14-day transcription. The defendant should therefore recover only 50% of the costs of 14-day transcription for this item of disbursements. That sum is $2,392.06.

215 I accept the plaintiff's submission on quantum. In my view, this was not a dispute in which it was reasonable to engage real-time transcription for trial. I say that for five reasons. First, this was not a fact-sensitive dispute where the witnesses were to be subjected to searching cross-examination in minute detail. In a dispute of that nature, it may be necessary for counsel cross-examining a witness to demonstrate beyond argument and in real time that a witness has changed his evidence or is guilty of recent invention. And it is may equally be necessary for counsel calling a witness to have immediate access to a verbatim transcript for re-examination. Second, this was not a dispute where it was essential to challenge the evidence of one witness with a verbatim record of the evidence of another witness given on the same day or just a few days earlier.

Third, this was not a dispute with witnesses giving evidence by a fragile video link from a remote location where a real-time transcript may be necessary to compensate for anticipated technical difficulties with the audio. Fourth, this was not a dispute where there was any urgency or some other factor warranting the court proceeding straight from the close of the defence case to oral closing submissions. Finally, this was not a case where – in the absence of any of these factors – the parties agreed that real-time transcription was reasonably necessary. The trial of this dispute, certainly on liability, proceeded largely on undisputed facts and questions of law. The parties sought and were given over two months after trial to file their written submissions. The plaintiff took the position at the outset that real-time transcription was not reasonable and maintains that objection now. I therefore accept that the cost of 14-day transcription is the measure of the reasonable sum that the defendant should be able to recover from the plaintiff for transcription costs. The plaintiff has estimated this figure to be $4,784.11. The defendant has not provided an alternative figure. I therefore accept the plaintiff's figure of $4,784.11 as a reasonable amount for the transcription costs of this action.

216 The plaintiff, however, goes on to submit that the defendant should be entitled to recover only 50% of this figure. The basis of this submission is the plaintiff's pre-trial offer to bear 50% of the cost of 14-day transcription. I do not accept this submission. Once again, the plaintiff is confusing a pre-trial agreement on how to share the costs of transcription in the first instance with a post-judgment entitlement to costs as between party and party under an award of costs. The defendant succeeded entirely in the trial. It is entitled to recover from the plaintiff the entire sum that it should reasonably have incurred for transcription services.

217 The defendant is therefore entitled to recover $4,784.11 from the plaintiff towards the transcription costs it incurred at trial. The remainder of the transcription charges which the defendant incurred were unreasonably incurred and are irrecoverable.

Oath, attendance and transport fees

218 The defendant claims $4,182.47 for oath, attendance and transport fees for the swearing or affirmation of the defendant's affidavits. The plaintiff accepts that the defendant is entitled to recover oath fees but submits that the defendant is not entitled to recover attendance or transport fees.

219 It appears that the attendance and transport fees in question are for a commissioner for oaths to come either to the defendant's solicitors' office or to the defendant's own office for the deponents of the defendant's affidavits to swear or affirm their affidavits there rather than at the office of the commissioner for oaths. This is undoubtedly a convenience for the defendant, for the deponents of its affidavits and for its solicitors. But I accept that the costs associated with this convenience is an element of solicitor and client costs, and are not recoverable as between party and party.

220 The defendant has not supplied a breakdown to show how much of the $4,182.47 claimed is attributable only to oath fees and how much is attributable to attendance and transport fees. Once again, therefore, I find that I must take a broad-brush approach. Applying that broad brush, I hold that the defendant is entitled to recover only 50% of this sum from the plaintiff. Rounded off, that amounts to $2,200. The remaining $1,982.47 is irrecoverable.

Conclusion on costs

221 For the foregoing reasons, I hold that the defendant is entitled to recover the disputed items of disbursements from the plaintiff as follows:

(a) Mr Egan's fees: only $60,000.

(b) Transcription fees: $4,784.11.

(c) Printing and binding fees: in full as claimed.

(d) Oath, attendance and transport fees: $2,200.

Vinodh Coomaraswamy
Judge of the High Court

Mahmood Gaznavi s/o Bashir Muhammad and Rezza Gaznavi
(Mahmood Gaznavi Chambers LLC) for the plaintiff;
Chia Voon Jiet, Charlene Wong Su-Yi and Grace Lim Rui Si
(Drew & Napier LLC) for the defendant.