The “Sahand” and other applications
[2011] SGHC 27

Case Number	: Admiralty in Rem No 166 of 2010 (Summons Nos 5744 of 2010, 5800 of 2010 and 23 of 2011), Admiralty in Rem No 176 of 2010 (Summons Nos 5735 of 2010, 5799 of 2010 and 24 of 2011) and Admiralty in Rem No 178 of 2010 (Summons Nos 5734 of 2010, 5798 of 2010 and 25 of 2011)
Decision Date	: 31 January 2011
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Winston Kwek and Joseph Tang (Rajah & Tann LLP) for the plaintiff; Thomas Tan and Janice Choy (Haridass Ho & Partners) for the defendants; Ho Hsi Ming Shawn (Attorney-General's Chambers) for the Attorney-General; Jeyendran Jeyapal, Leong Weng Tat and Lionel Leo Zhen Wei for the Sheriff; Vivian Ang (Allen & Gledhill LLP) for one of the bidders.
Parties	: The "Sahand"

Admiralty and Shipping

International Law

31 January 2011

Quentin Loh J:

Introduction

1 These proceedings involved several applications in relation to three vessels arrested in Singapore waters – the “Sabalan”, the “Sahand” and the “Tuchal” (collectively, “the Vessels”). In addition to the usual questions arising under admiralty law and practice, the applications raised questions relating to the scope and effect of sanctions imposed on Iran and Iranian entities by the Security Council constituted under Chapter V of the Charter of the United Nations (“the UN Charter”), and the implementation of those sanctions in Singapore.

Facts

2 The plaintiff in all three actions is Crédit Agricole Corporate and Investment Bank, a French financial institution. The defendant owner of the “Sahand” in Admiralty in Rem (“ADM”) No 166 of 2010 is Thirteenth Ocean GmbH & Co KG (“13th Ocean”). The defendant owner of the “Sabalan” in ADM No 176 of 2010 is Fourteenth Ocean Gmbh & Co KG (“14th Ocean”). The defendant owner of the “Tuchal” in ADM No 178 of 2010 is Fifteenth Ocean GmbH & Co KG (“15th Ocean”). It was alleged by the plaintiff, and not denied, that the defendants are wholly owned subsidiaries of the Islamic Republic of Iran Shipping Lines (“IRISL”). Accordingly, for the purpose of this judgment, I treated the defendants as such.

3 There are several contractual arrangements involving the parties and others which are relevant here. Essentially, the contracts provide for a syndicated loan for the construction of several vessels (including the Vessels) and related mortgage and financing arrangements. The first contract is a Loan Agreement governed by English law dated 23 August 2006 (“the Loan Agreement”), and amended by

letter on 28 April 2008 and 10 September 2008. There are several relevant designations under the Loan Agreement, and they are as follows:

(a) the Lenders: the plaintiff, Société Générale, and The Export-Import Bank of Korea ("KEXIM");

(b) the Borrowers: the three defendants and Sixteenth Ocean GmbH & Co KG ("16th Ocean");

(c) the Guarantors: this included the IRISL, IRISL Europe GmbH and Darya Capital Administration GmbH;

(d) the Swap Banks: the plaintiff and Société Générale;

(e) the Agent: Société Générale; and

(f) the Security Trustee: the plaintiff.

For convenience, I will generally refer to the plaintiff, Société Générale, and KEXIM collectively as the Lenders, even though some of the transactions relate to the plaintiff and Société Générale in their capacities as the Swap Banks. Also, since 16th Ocean is not relevant to these proceedings, I will generally refer to the defendants instead of the Borrowers, even though some of the defaults and payments are attributable to the Borrowers.

4 The purpose of the Loan Agreement was to make available to the defendants a facility for providing financing for part of the contract price for building four 4,900 TEU (*ie*, twenty-foot equivalent unit) container carriers (including the Vessels) for the defendants, and further to provide for possible interest rate swap transactions between the Swap Banks and the defendants for the latter to hedge against their exposure to interest rate fluctuations under the Loan Agreement.

5 On 12 September 2007, the plaintiff and Société Générale each entered into an ISDA (*ie*, International Swaps and Derivatives Association) Master Agreement with the Borrowers. Pursuant to the ISDA Master Agreement between the plaintiff *qua* Swap Bank and the Borrowers, 13th Ocean and 14th Ocean entered into two swap transactions with the plaintiff. Pursuant to the ISDA Master Agreement between Société Générale *qua* Swap Bank and the Borrowers, 15th Ocean and 16th Ocean entered into two swap transactions with Société Générale.

6 On 21 April 2008, 13th Ocean executed a German law instrument entitled, as translated, "Abstract Acknowledgement of Debt and Document of Commission of a Ship Mortgage". According to the English translation of the instrument, 13th Ocean acknowledged a debt of US$110,408,100 and interest, and secured this by granting a first priority ship mortgage on the "Sahand". For convenience, I shall refer to this instrument as a "German Mortgage". 14th Ocean executed a German Mortgage on 16 July 2008 with respect to the "Sabalan", and 15th Ocean likewise on 29 August 2008 did the same with respect to the "Tuchal". According to the plaintiff, the purpose and effect of the German Mortgages was to secure the payment claims of the Lenders and the Swap Banks under the Loan

Agreement and the two ISDA Master Agreements. Presumably, they were executed after the Vessels were built.

7 On the respective dates they entered into the German Mortgages, each of the defendants also executed a German law instrument entitled, as translated, "Document of Submission into Immediate Enforcement". According to the plaintiff, this was a standard German law security document under which a borrower declares its mortgagee to have an immediately enforceable claim to a proportion of the full debt in order to facilitate summary enforcement in Germany.

8 It was alleged on behalf of the plaintiff that, between 26 April 2010 and 28 July 2010, the defendants failed to pay several sums under the Loan Agreement (as amended) and/or the two ISDA Master Agreements. As of 7 September 2010, the total outstanding sum was US$37,161,645.35. It was further alleged that the defendants failed, in breach of the provisions of the Loan Agreement, to renew hull and machinery and war risks insurance with an approved insurer and to maintain acceptable protection and indemnity insurance over the Vessels.

The procedural history

9 On 9 September 2010, the plaintiff filed admiralty actions *in rem* against the Vessels for the sum of US$37,161,645.35: against the "Tuchal" via ADM No 165 of 2010; against the "Sahand" via ADM No 166 of 2010; and against the "Sabalan" via ADM No 167 of 2010. The "Tuchal" was arrested on the same day; the "Sahand" and the "Sabalan" were arrested on 14 September 2010.

10 On 17 September 2010, the defendants entered appearances to the actions and applied for the release of the "Sabalan" and the "Tuchal", on the ground that the value of the "Sahand" alone was more than enough to cover the plaintiff's claim for US$37,161,645.35. On the same day, Société Générale, on behalf of the Lenders, accelerated the amounts owed under the Loan Agreement. According to the plaintiff, the accelerated amount, which did not include the sums already owing, was US$145,143,336.17. Together with the initial claim, the total amount alleged to be owing was US$182,304,981.52. A second set of admiralty actions *in rem* were filed in respect of this sum on 23 September 2010: ADM No 176 of 2010 for the "Sabalan"; ADM No 177 of 2010 for the "Sahand"; and ADM No 178 of 2010 for the "Tuchal". The "Sabalan" and the "Tuchal" were rearrested under these actions after they were released from arrest under the first set of actions.

11 In the meantime, the defendants attempted to make some payment – €4,754,463.91 was transferred to Société Générale on 10 September 2010 and a further €49,228.35 on 15 September 2010. These represented the Euro equivalent of certain amounts of principal, interest and swap payments which fell due on 28 July 2010. Clearly, these were far below the amounts claimed. The defendants also made several attempts to obtain security from Iranian, Swiss and Singapore banks but were ultimately unable to offer satisfactory security to compel the release of the Vessels, which according to admiralty practice meant a guarantee from a bank duly licensed to carry on business in Singapore or an undertaking from an acceptable protection and indemnity club. There was also some correspondence relating to providing security by making payment into court, but this also came to naught. It appears, especially from subsequent developments, that the defendants' principal difficulty lay not in lack of funds, but because of the European Union sanctions against Iran, which applied to them. Among other restrictions, authorisations from the relevant authorities, in this case the French Direction générale du Trésor (the Directorate General of the Treasury), had to be obtained before funds received from the defendants, such as the fund transfers described at the beginning of this paragraph, could be distributed or utilised in payment of the sums owing by the defendants.

12 The plaintiff, for its part, applied to sell the Vessels *pendente lite* – the relevant applications

were brought on 6 October 2010 for the "Sahand" and on 23 October 2010 for the "Sabalan" and the "Tuchal". It should be noted that, apart from the initial arrests of the "Sabalan" and "Tuchal", it was never disputed throughout the proceedings that the plaintiff had a sufficiently meritorious case to justify the arrests of the Vessels – the defendants' efforts were directed at trying to effect payment or to raise security so as to effect a release of the Vessels. Here, it should be clarified that the sums claimed by the plaintiff in the main admiralty actions comprised sums owing to it, KEXIM and Société Générale in their various capacities as Lenders and Swap Banks under the Loan Agreement and related contracts. In this connection, it would appear, and this was not disputed, that the plaintiff had the necessary standing as the Security Trustee under the Loan Agreement to maintain the actions against the defendants for the sums owing to KEXIM and Société Générale.

13 The plaintiff's applications for sale were first heard on 8 November 2010. The hearing was adjourned to 12 November 2010 for the defendants to raise security. On 12 November 2010, the High Court ordered the sale of the Vessels.

14 The Sheriff then proceeded to advertise the sale of the Vessels in the Straits Times, the Lloyd's List, and the TradeWinds. The deadline for submitting bids was set at 3.00pm on 14 December 2010. On 6 December 2010, the defendants' solicitors wrote to the Sheriff requesting the court's bank account information for payment into court, and requesting a postponement of the sale. The Sheriff promptly – and I should say quite rightly – replied that the court's order was required for making payment into court and for postponing the sale.

The postponement applications

15 On 9 December 2010, the defendants filed three applications, *viz*, Summons No 5734, 5735 and 5744 of 2010, one in respect of each of the Vessel, for a postponement of the sale to 4 January 2011. The ground for each application was, *inter alia*, to allow time for the defendants to raise security and because of a sudden increase in the sum claimed. On 10 December 2010, the plaintiff's London solicitors were instructed that the full amount owing by the defendants, including interest projected to 14 December 2010, was US$203,855,277, excluding payments which had been remitted but not cleared. The previous sum claimed was US$166.5m.

16 These applications came before me on 13 December 2010. After hearing counsel, I dismissed the applications with costs. I informed counsel of my intention to and proceeded to record my reasons immediately at the end of my notes of argument so that the parties could expeditiously bring an appeal if they so wished. My key reasons were as follows:

(a) As a general rule, an order for the sale of arrested vessels would only be postponed in exceptional circumstances: *The Acrux* [1961] 1 Lloyd's Rep 471. These applications were being made at the last minute.

(b) It was not disputed that the defendants were in default of their payment obligations under the Loan Agreement and other related contracts.

(c) I recognised that the defendants were having difficulty in making payment under the various contracts and furnishing security because of the European Union and United Nations ("UN") sanctions.

(d) However, these difficulties were known to the defendants at least since the Vessels were arrested, *ie* for over three months. The parties were also in constant correspondence over how the defendants would make payment or provide security. Despite this, the defendants were not

able to make any significant payment or offer sufficient or indeed any security to compel the release of the Vessels, even on the basis of the lesser sum originally demanded, *ie*, US$166.5m. The best that could be shown was a non-committal communication dated 5 December 2010 from an Iranian bank, Bank Tejarat, which stated: [note: 1]

> Without any engagement or responsibility on us – Bank Tejarat Tehran – we would like to inform you that I.R.I.S.L. has deposited an amount of Eur. 135,000,000/00 euro the cover of the settlement of it's [*sic*] loan with Messrs. Societe General Banque Paris with us.
>
> This information is only issued at the request of I.R.I.S.L. and does not bear any sort of involvement on our part in this relation.

This communication, at best, only illustrated the defendants' difficulty all along – they had the funds but could not get them across. In these circumstances, I doubted that a postponement of three or four weeks would make any difference.

(e) The increase in security required by the plaintiff was due to a mistake by the plaintiff's solicitors in calculation, chiefly taking into account a previous payment that had been frozen; but the defendants should know the extent of their indebtedness, and the fact remained that the defendants had not been able to effect payment or provide security to any significant degree at all since the arrests in September 2010.

(f) I gave some weight to the fact that the Sheriff had not provided for a postponement of the sale in his advertisements and a postponement of a Sheriff's sale had never occurred before.

(g) I also gave some weight to the fact that there were at least 10 parties interested in bidding for the Vessels and some of them had incurred the cost of underwater hull surveys, each of which would cost about S$30,000. Mr Thomas Tan for the defendants argued that this would not be abortive as a postponement of three weeks would not affect the validity of the surveys. I did not, with respect, agree as anything could happen to the vessels in three weeks and anyone bidding a substantial price for the Vessels would want a survey which was as current as possible.

I could therefore see no exceptional circumstances justifying the postponement sought.

17 On 14 December 2010, the day after I dismissed the postponement applications, the defendants filed a second set of applications, *viz* Summons Nos 5798, 5799 and 5800 of 2010, one for each of the Vessels, for, *inter alia*, the discharge of the order to sell the Vessels, and for the Vessels to be released. The ground for the application was that the defendants had transferred €155m to the plaintiff in satisfaction of the claims made against them (this was not entirely correct: the transferee was actually Société Générale).

18 These discharge and release applications stood in another light. The transfer of €155m to Société Générale, together with the earlier payments, appeared to be sufficient to cover the amounts said to be owing by the defendants (and indeed was later confirmed to be so by Mr Winston Kwek for the plaintiff). The defendants therefore took the position that there was no reason for the Vessels to remain under arrest, let alone be sold.

19 The plaintiff asked for and I granted a short adjournment for them to take instructions and to check whether the €155m had indeed been paid. When the parties returned on 16 December 2010, the plaintiff confirmed the receipt of €155m by Société Générale. Although this changed matters considerably, the defendants still could not be taken to have paid the Lenders because it remained an

open question whether the Direction générale du Trésor would give the necessary authorisations to enable the Lenders to be paid out of the sums received. In this regard, plaintiff's counsel asked for and I granted a further adjournment for the parties to ascertain the position. I further ordered that: (a) the Sheriff was not to open any sealed bids in the meanwhile and in any case until further order of the court; (b) the Sheriff was to write to all parties who submitted bids informing them of my order; (c) any bidder who wished to withdraw his bid was entitled to apply to court to do so and would be favourably considered in view of the changed circumstances; and (d) the plaintiff was to file an affidavit setting out what steps it had taken to obtain approvals from the relevant authorities to secure the release of the funds remitted by or on behalf of the defendants as well as any other relevant matters in connection thereto. I also gave the parties liberty to apply.

20 During the adjournment, I further considered the relevant domestic legislation as well as the relevant Security Council resolutions and formed the view that there were serious questions regarding the freezing of funds, other financial assets and economic resources imposed by the UN sanctions (which I will refer to compendiously as the assets freeze) and their applicability to the facts of this case. Specifically, I was concerned that the Vessels, which were arrested and held by the Sheriff in Singapore waters, might be subject to the assets freeze.

21 I therefore directed the parties, as well as the Attorney-General (in consultation with the relevant authorities), to make written submissions and file affidavits on a number of questions, which I will refer to in due course. Generally, my directions were aimed at clarifying the scope of the assets freeze imposed by the relevant Security Council resolutions and the implementing domestic legislation, as well as their application to the facts of the case. I must record my gratitude to counsel and to the Attorney-General for their written submissions which were put together over the holiday period.

My decision

22 On 5 January 2011, I heard the parties in open court. Having read their written submissions and the affidavits filed and after considering the matter, I reached the decision that the order to sell the Vessels should be rescinded and that the Vessels should be released from arrest. I now give the grounds for my decision. I will proceed as follows:

(a) an overview of the relevant Security Council resolutions;

(b) the relevant aspects of the relationship between international law and domestic law in Singapore;

(c) the domestic legislation implementing the assets freeze imposed by the relevant Security Council resolutions;

(d) whether the defendants are entities caught under the assets freeze;

(e) the treatment of the Vessels if the defendants are entities caught under the assets freeze;

(f) the issues arising under admiralty law; and

(g) other matters.

23 Given the way which the facts of the case turned out, it is not necessary for me to, and I will not, express a concluded view on all the legal issues on which I invited submissions. But given the general importance of the issues, and in deference to counsel's extensive submissions which were made at my direction, I will refer to them appropriately in these grounds.

The Security Council resolutions: overview

24 The sanctions under consideration arise from the international community's concern over the nuclear activities of Iran. On 27 December 2006, the Security Council adopted Resolution 1737. In the preamble of Resolution 1737, the Security Council expressed, among other things, its concern with Iran's nuclear programme. Against this background, the Security Council acted to impose a number of sanctions against Iran pursuant to Art 41 of Chapter VII of the UN Charter, which provides that:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The Security Council also established a Committee ("the Sanctions Committee") to perform certain specified functions relating to the measures taken.

25 The measures taken in Resolution 1737 were expanded in three further resolutions of the Security Council: Resolution 1747, adopted on 24 March 2007; Resolution 1803, adopted on 3 March 2008; and Resolution 1929, adopted on 9 June 2010. For convenience, I will refer to the four resolutions – Resolutions 1737, 1747, 1803 and 1929 – collectively as the "Iran Resolutions".

26 As a Member of the United Nations, Singapore acted to implement the Iran Resolutions. Of the various measures taken by Singapore, two pieces of subsidiary legislation are relevant for present purposes. The first is the Monetary Authority of Singapore (Sanctions and Freezing of Assets of Persons – Iran) Regulations 2007 (S 104/2007) ("the MAS Regulations"), made by the Managing Director of the Monetary Authority of Singapore ("MAS") pursuant to s 27A(1)(*b*) of the Monetary Authority of Singapore Act (Cap 186, 1999 Rev Ed) ("the MAS Act"), which confers upon MAS power to make such regulations concerning financial institutions as MAS considers necessary to discharge or facilitate the discharge of any obligation binding on Singapore by virtue of a decision of the Security Council. The second is the United Nations (Sanctions – Iran) Regulations 2007 (S 105/2007) ("the UN Regulations") made by the Minister of Law pursuant to s 2(1) of the United Nations Act (Cap 339, 2002 Rev Ed) ("the UN Act"), which empowers the Minister to make regulations to give effect to Art 41 of the UN Charter.

27 The UN Regulations were made on 28 February 2007, and the MAS Regulations on 1 March 2007 – just over two months after the adoption of Resolution 1737. Both regulations were later updated to reflect the rest of the Iran Resolutions as they were adopted.

28 Other implementing measures were taken under the Immigration Act (Cap 133, 2008 Rev Ed),

the Merchant Shipping Act (Cap 179, 1996 Rev Ed), the Regulation of Imports and Exports Act (Cap 272A, 1996 Rev Ed), and the Strategic Goods (Control) Act (Cap 300, 2003 Rev Ed) (see, in this regard, Singapore's reports to the Sanctions Committee of 6 March 2007 (UN Doc No S/AC 50/2007/45), and of 27 August 2010 (UN Doc No S/AC 50/2010/28)).

29 I should also record here the unequivocal submission by Mr Shawn Ho for the Attorney-General that Singapore will strive to give full effect to the Iran Resolutions.

International law and domestic law

30 Before considering the relevant implementing legislation, it would be necessary for me to consider three aspects of the relationship, in Singapore, between international law and domestic or municipal law.

31 The first aspect relates to whether international law can, of itself, be an independent source of rights and obligations, and powers and duties, in Singapore. In this regard, the Court of Appeal has recently affirmed that a rule of customary international law is not self-executing in the sense that it cannot become part of domestic law until and unless it has been applied as or definitively declared to be part of domestic law by a domestic court: *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 at [91]. However, the position with regard to treaty obligations, such as Singapore's obligation under the UN Charter to implement the Iran Resolutions, has not been subject to judicial consideration in Singapore. Mr Ho for the Attorney-General submitted, in the context of funds paid into court, that: [note: 2]

> [b]oth the court and the executive need to take into consideration and give effect to Singapore's domestic legislation and international obligations. If the funds are required to be frozen under the UNSC Resolutions, the Court may direct that these funds be frozen.

32 The position in the United Kingdom ("UK") is stated by Lord Oliver of Aylmerton in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry and others and related appeals* [1990] 2 AC 418 at 500 as follows:

> [A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

The English position appears to be founded on a constitutional objection against the Crown being able, through its treaty-making prerogative, to affect domestic law without the authority of Parliament: see *The Parliament Belge* (1879) 4 PD 129 at 154–155.

33 While our constitutional arrangements are not identical to those of the UK, the principle underlying the English position is equally applicable here. By virtue of Art 38 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), the legislative power of Singapore is vested in the Legislature. It would be contrary to Art 38 to hold that treaties concluded by the Executive on behalf

of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties. Accordingly, in order for a treaty to be implemented in Singapore law, its provisions must be enacted by the Legislature or by the Executive pursuant to authority delegated by the Legislature. In so far as a treaty is not implemented by primary or subsidiary legislation, it does not create independent rights, obligations, powers, or duties. I must therefore reject Mr Ho's submission, in so far as he meant to say that the court can directly give effect to Singapore's treaty obligations without them being implemented through legislation, as being inconsistent with the Constitution. That said, I should state unequivocally that the courts will always strive to give effect to Singapore's international obligations within the strictures of our Constitution and laws.

34 The second aspect is the use of international law in interpreting primary and subsidiary legislation. The English courts apply a rebuttable presumption that Parliament intends to legislate consistently with international law and specifically treaty obligations. In Singapore, s 9A(2) of the Interpretation Act (Cap 1, 2002 Rev Ed) permits consideration to be given to extrinsic materials in interpreting a provision of a written law, if such materials are capable of assisting in the ascertainment of the meaning of the provision. This is wide enough to encompass international law in appropriate cases, such as the present, where the MAS Regulations and the UN Regulations were expressly made to give effect to Singapore's international obligations. Further, s 9A(3)(*e*) specifically permits reference to any treaty or other international agreement that is referred to in the written law. The Singapore position does not appear to be precisely the same as the English position, but for present purposes it is not necessary to examine this further.

35 The third aspect is the consideration by the Executive of Singapore's international obligations when exercising discretionary powers conferred by law. For present purposes, I am content to confine myself to the truism that such consideration is permissible if it is not *ultra vires* the empowering law or the Constitution.

Implementing the assets freeze imposed by the Iran Resolutions

36 I now turn to consider the assets freeze imposed by the Iran Resolutions and how it has been implemented in Singapore.

37 The framework for the assets freeze is found in operative paras 12–15 of Resolution 1737, where the Security Council:

> 12. *Decide*[*d*] that all States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex, as well as those of additional persons or entities designated by the Security Council or by the Committee as being engaged in, directly associated with or providing support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means, and that the measures in this paragraph shall cease to apply in respect of such persons or entities if, and at such time as, the Security Council or the Committee removes them from the Annex, and *decide*[*d*] *further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to or for the benefit of these persons and entities;
>
> 13. *Decide*[*d*] that the measures imposed by paragraph 12 above do not apply to funds, other

financial assets or economic resources that have been determined by relevant States:

(a) to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant States to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) to be necessary for extraordinary expenses, provided that such determination has been notified by the relevant States to the Committee and has been approved by the Committee;

(c) to be the subject of a judicial, administrative or arbitral lien or judgement, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgement provided that the lien or judgement was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraphs 10 and 12 above, and has been notified by the relevant States to the Committee;

(d) to be necessary for activities directly related to the items specified in subparagraphs 3 (b) (i) and (ii) and have been notified by the relevant States to the Committee;

14. *Decide*[*d*] that States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 12 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

15. *Decide*[*d*] that the measures in paragraph 12 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that:

(a) the contract is not related to any of the prohibited items, materials, equipment, goods, technologies, assistance, training, financial assistance, investment, brokering or services referred to in paragraphs 3, 4 and 6 above;

(b) the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 12 above;

and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, ten working days prior to such authorization;

[emphasis in original]

Under this scheme, operative para 12 imposes the obligation on Member States to implement the assets freeze, while operative paras 13–15 set out permissible derogations thereto. The "extraordinary expenses" referred to in operative para 13(b) is not defined. The "activities" referred to

in operative para 13(d) relate to nuclear activities which are not likely to be relevant in Singapore's context.

38 Using the framework established by operative paras 12–15, subsequent resolutions expanded the assets freeze to other designated persons: see operative para 4 of Resolution 1747; operative para 7 of Resolution 1803; and operative paras 11, 12 and 19 of Resolution 1929.

The UN Regulations and private persons

39 The UN Regulations applies to persons in Singapore and citizens of Singapore, with the exception of financial institutions subject to the directions of MAS under s 27A of the MAS Act: see s 2(2) of the UN Act. Its stated object is to assist in giving effect to the Iran Resolutions: reg 2. By virtue of s 5(1) of the UN Act, violations of the UN Regulations are punishable by a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

40 Operative para 12 of Resolution 1737 appears to be implemented through regs 8 and 9 of the UN Regulations, which provide as follows:

> **Prohibition against dealing with property of designated person**
>
> 8. No person in Singapore and no citizen of Singapore outside Singapore shall deal, directly or indirectly, in any property (including funds derived or generated from such property) that is owned or controlled, directly or indirectly, by or on behalf of —
>
> (a) a designated person;
>
> (b) any entity or individual who acts on behalf of or under the direction of a designated person; or
>
> (c) any entity owned or controlled by a designated person.
>
> **Prohibition against provision of funds, financial assets and economic resources to or for benefit of designated person, etc**.
>
> 9. No person in Singapore and no citizen of Singapore outside Singapore shall make available any funds or other financial assets or economic resources, directly or indirectly, to or for the benefit of —
>
> (a) a designated person;
>
> (b) any entity or individual who acts on behalf of or under the direction of a designated person; or
>
> (c) any entity owned or controlled by a designated person.

Under s 2(1) of the Interpretation Act, a "person" to whom the UN Regulations apply would include any company or association or body of persons, corporate or unincorporate.

41 Operative paras 13–15 of Resolution 1737 are not individually implemented in the UN Regulations. However, they can be given effect to via the general power of exemption in reg 14:

> **Exemption**

14. The Minister or a person designated by the Minister may, if he considers that it is appropriate to do so in the circumstances of the case and that it is consistent with the intention of the Security Council of the United Nations under Resolution 1737 (2006), 1747 (2007) or 1803 (2008), by notice in writing exempt, subject to such conditions as he may specify —

(a) any person or class of persons; or

(b) any activity or class of activities,

from any or all of the provisions of these Regulations.

Significantly, the exceptions in reg 14 are conditional only upon the Minister's consideration and notice in writing. Therefore, as far as the domestic sphere is concerned, such consideration and notice would be sufficient. Here, I would stress that the determination is to be made by the Minister or the person he designates and not the court. As for the international sphere, Singapore may need to take further action, such as notifying the Sanctions Committee and/or seeking its approval, but that is outside the purview of the court.

The MAS Regulations and financial institutions

42 The MAS Regulations apply to all financial institutions in Singapore: reg 3. Its stated object is to assist in giving effect to the Iran Resolutions: reg 2. By virtue of s 27A(5)(*b*) of the MAS Act, any financial institution which contravenes the MAS Regulations shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1m.

43 In the MAS Regulations, operative para 12 is implemented in regs 5(1) and (2), which provide as follows:

Assets of certain persons to be frozen

5.—(1) Subject to paragraph (3), any financial institution that, on or after 7th March 2007, has in its possession, custody or control in Singapore, any funds, financial assets or economic resources owned or controlled, directly or indirectly, by any designated person shall —

(a) immediately freeze all such funds, financial assets or economic resources, as the case may be; and

(b) ensure that such funds, financial assets or economic resources are not made available, whether directly or indirectly, to or for the benefit of the designated person.

(2) For the purposes of paragraph (1), any funds, financial assets or economic resources that are held by —

(a) any entity owned or controlled, directly or indirectly, by any designated person; or

(b) any individual or entity who acts on behalf of or under the direction of any designated person,

shall be treated as funds, financial assets or economic resources owned or controlled by the designated person.

44 Operative para 13 is implemented in reg 5(3) of the MAS Regulations:

> (3) The requirement in paragraph (1) shall not apply to any funds, financial assets or economic resources that have been determined by the Authority —
>
> (a) to be necessary —
>
> (i) for the payment of basic expenses, including any payment for foodstuff, rent, the discharge of a mortgage, medicine, medical treatment, taxes, insurance premiums and public utility charges; or
>
> (ii) exclusively for —
>
> (A) the payment of reasonable professional fees and the reimbursement of any expenses in connection with the provision of legal services; or
>
> (B) the payment of fees or service charges imposed for the routine holding or maintenance of frozen funds, financial assets or economic resources;
>
> (b) to be necessary for the payment of any extraordinary expenses;
>
> (c) to be the subject of any judicial, administrative or arbitral lien or judgment, in which case the funds, financial assets or economic resources may be used to satisfy such lien or judgment, provided that the lien or judgment —
>
> (i) arose or was entered before 23rd December 2006; and
>
> (ii) is not for the benefit of a designated person; or
>
> (d) to be necessary for any activity directly related to a non-prohibited item.

Once again, I would note that the exceptions in reg 5(3) are conditional only upon the relevant determination of the MAS, which would be sufficient in the domestic sphere.

45 As for operative paras 14 and 15, I observed that they have not been expressly enacted in the MAS Regulations, which unlike the UN Regulations do not provide for a general power of exemption. I therefore invited submissions on this point. From Mr Ho's submissions, it does not appear that this was a deliberate attempt to disallow the exceptions permitted under those operative paragraphs. Rather, Mr Ho submitted that operative para 14 is merely "clarificatory" in nature and need not be enacted.

46 As for operative para 15, Mr Ho submitted that it had been enacted via reg 14 of the UN Regulations. I confess some difficulty in following this submission, since reg 14 of UN Regulations only empowers the Minister to make exemptions from the provisions of the UN Regulations, and not the provisions of the MAS Regulations. The position under the MAS Regulations can be contrasted to the UK position under the Iran (Financial Sanctions) Order 2007 (SI 2007 No 281) (UK) ("the UK Order"), made pursuant to s 1 of the United Nations Act 1946 (c 45) (UK). Under art 8(1) of the UK Order, a person may credit a frozen account with interest or earnings, as well as payments due under prior contracts, agreements or obligations. Under art 10, the UK Treasury is empowered to grant exempting licenses. This power extends to exempting payments under prior contracts in accordance with operative para 15 of Resolution 1737: see the Bank of England's press release of 24 March 2007 entitled "Financial Sanctions: Iran" <http://www.hm-treasury.gov.uk/fin_sanctions_iran.htm> (accessed 5 January 2011). Putting Mr Ho's submissions to one side, I think that the court may be

able to give indirect effect to operative para 15 in the present state of the law by applying the common law principle, described by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712 at 724 and approved by Lord Nicholls of Birkenhead in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [19], "that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears." While Staughton LJ's dictum was made with reference to statutes enacted by Parliament, I should think that the presumption applies equally to subsidiary legislation such as the MAS Regulations. However, the presumption cannot be applied inconsistently with the object of the MAS Regulations, which as mentioned is to assist in giving effect to the Iran Resolutions. This would be the case if the presumption is applied in its full force, since operative para 15 does not permit *all* payments under existing contracts, but only those payments which met the criteria stated therein. The presumption can therefore only apply to the extent that the stated criteria have been met. In this way, indirect effect can be given to operative para 15.

47 In any event, whatever the true position is under the present state of the law – and the facts do not require me to reach a concluded view – it would certainly be helpful, from a judicial perspective as well as for those who have to comply with the law, if operative paras 14 and 15 were expressly enacted.

Assets in the custody of the court or its officers

48 As mentioned, I was concerned on the facts with applicability of the assets freeze to Vessels, which while they were arrested were assets in the custody of the Sheriff, an officer of the court. More generally, the treatment of assets in the custody of the court and its officers is an important issue given that the court, in the ordinary course of its business, has to deal with all manner of parties and their assets. In this regard, it appears that assets in the custody of the court or its officers are not explicitly covered by the MAS and UN Regulations, which concern assets in the custody of financial institutions and other private entities. Similarly, there is no explicit power for the court to direct the freezing of any assets in its custody. However, if it comes to the attention of the court that assets in its custody are owned or controlled by sanctioned entities, it may well be that those assets would be subject to a *de facto* freeze. This is because: (a) if the assets were ordered to be released, the recipient of such assets, or his agent in Singapore, would have to act to freeze the assets in accordance with the MAS or UN Regulations; and (b) if there was a risk that the recipient or his agent would not comply with the MAS or UN Regulations, the court will pre-empt this possible illegality by not releasing the assets in the first place. Further, in the case of funds paid into court, which are deposited with the Accountant-General's bank accounts, the court can direct the financial institutions administering those accounts to comply with their obligations under the MAS Regulations. In these ways, a *de facto* freeze could be achieved. Of course, all this depends on the issue of sanctions and the identity of sanctioned entities being brought to the attention of the court. This is perhaps unlikely in ordinary civil litigation, since it is not in the interest of parties to point out to the court that the assets over which they are litigating may be frozen and put out of their reach. In this case, the issue of sanctions was only brought to the fore because they were clearly hampering the defendants' ability to make payment or provide security. Of course, if the authorities come to know that assets in the custody of the court should be frozen, I have no doubt that they will bring this to the attention of the court.

49 On the facts, two preliminary issues arose in relation to the possible application of the assets freeze to the Vessels. First, are the defendants, who own the Vessels, entities which are caught under the assets freeze? Secondly, assuming an affirmative answer to the first issue, how does the assets freeze affect the Vessels? I dealt with these two issues as follows.

Are the defendants entities caught under the assets freeze?

50 The answer to this question depended in large part on the more general question of which Iranian shipping entities are subject to the assets freeze imposed in operative para 12 of Resolution 1737.

51 The first three of the Iran Resolutions did not designate commercial entities as being subject to the assets freeze. This changed with the adoption of Resolution 1929, which amongst other things designated certain Iranian shipping entities as being subject to the assets freeze. This was done in operative para 19 of Resolution 1929, where the Security Council:

> 19. *Decide*[*d*] that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III and to any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means, or determined by the Council or the Committee to have assisted them in evading the sanctions of, or in violating the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution; [emphasis in original]

Operative para 19 is very precisely worded. It refers to the entities of the IRISL specified in Annex III of Resolution 1929, *ie*, Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran. It does not refer to Iranian shipping entities in general, or to IRISL, or to IRISL entities generally. On its face, therefore, operative para 19 only imposes the assets freeze on the three Annex III entities, as well as "any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means". This was the position taken by the defendants and the Attorney-General.

52 This view is confirmed by a perusal of the consolidated list, published by the Sanctions Committee on 19 August 2010, of the individuals and entities subject to the travel ban and assets freeze as a result of the Iran Resolutions. The three Annex III entities, *ie*, Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran, are the only shipping entities appearing on the consolidated list, which remains current at the time of these grounds.

53 Furthermore, general confirmation can also be found in operative para 18 of Resolution 1929, where the Security Council:

> 18. *Decide*[*d*] that all States shall prohibit the provision by their nationals or from their territory of bunkering services, such as provision of fuel or supplies, or other servicing of vessels, to Iranian-owned or -contracted vessels, including chartered vessels, if they have information that provides reasonable grounds to believe they are carrying items the supply, sale, transfer, or export of which is prohibited by paragraphs 3, 4 or 7 of resolution 1737 (2006), paragraph 5 of resolution 1747 (2007), paragraph 8 of resolution 1803 (2008) or paragraphs 8 or 9 of this resolution, unless provision of such services is necessary for humanitarian purposes or until such time as the cargo has been inspected, and seized and disposed of if necessary, and *underline*[*d*] that this paragraph is not intended to affect legal economic activities; [emphasis in original]

Operative para 18, by prohibiting the provision of bunkering services, *etc*, to Iranian owned or contracted vessels if there are reasonable grounds to believe that they are carrying prohibited items, clearly implies that such services may be provided to Iranian owned or contracted vessels if there are no such grounds. This regime would be redundant if all Iranian owned or contracted vessels were captured under assets freeze. Such a wide approach would also be inconsistent with the last clause

of operative para 18, which underlined that the paragraph is not intended to affect "legal economic activities", which in context must mean legal shipping activities.

54 Mr Kwek submitted that IRISL itself is a designated entity under operative para 19 of Resolution 1737. His reason for taking this position was that it would be a stretch to read operative para 19 as excluding IRISL itself, because there would otherwise be no necessity to specifically state the name of IRISL in operative para 19 and in the heading to Annex III. Further, Mr Kwek referred to European Union legislation implementing the Iran Resolutions as well as the Union's own measures, recently consolidated in Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L 281/1 ("the EU Regulation"). The relevant provisions are arts 16(1) and (2), which provide in material part as follows:

Article 16

> 1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010).
>
> 2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII...

Mr Kwek pointed out that IRISL is listed in Annex VIII.

55 I was unable, with respect, to agree with Mr Kwek's submission. Admittedly, it is not apparent why operative para 19 only designated three IRISL entities and not IRISL itself. But on the other hand it seems clear that this was precisely the intended effect. If IRISL was itself targeted, it would be redundant to specifically mention the three Annex III entities, which appear to be controlled by IRISL. Also, treating IRISL itself as designated by operative para 19 would be inconsistent with the consolidated list issued by the Sanctions Committee which I have just referred to. Mr Kwek's position was also contrary to the EU Regulation, which he relies on – if IRISL needs to be listed in Annex VIII pursuant to art 16(2), it cannot logically be designated under operative para 19 of Resolution 1929, which is already provided for in art 16(1).

56 It is therefore clear to me that the only Iranian shipping entities which are designated persons within the meaning of the MAS Regulations are Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran, *ie*, the three entities specified in Annex III of Resolution 1929. Other IRISL entities, including IRISL itself, are not designated persons. Likewise for Iranian shipping entities in general. The definitions of "designated person" and "UN List" in the MAS Regulations and UN Regulations (see reg 4 of both subsidiary legislation) should be interpreted accordingly.

57 However, the assets freeze does not stop at the designated IRISL entities only (or designated persons in general). As indicated in operative para 19 of Resolution 1929, and reflected in reg 5(2) of the MAS Regulations and regs 8(b) and (c) and 9(b) and (c) of the UN Regulations, the obligation extends to "any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means". Whether a person or entity falls under this description would have to be determined on the facts of each case. The exercise would be difficult, not least because the position of the three designated entities within the IRISL group is unclear. But

the precisely targeted nature of the UN sanctions requires that the exercise be undertaken in every case.

58 On the facts, and as mentioned, I noticed that the defendants had some links which concerned me. Specifically, I noticed that the defendants were wholly owned IRISL subsidiaries, and that IRISL and IRISL Europe GmbH were listed as guarantors under the Loan Agreement. I also noticed that Mr Mehrzad Soleymanifar, who affirmed the affidavit evidence on behalf of the defendants, was a director of Asia Marine Network Pte Ltd, which had been listed in the EU Regulation as an entity acting on behalf of IRISL in Singapore (see Annex VIII of the EU Regulation). Of course, these links to IRISL do not *ipso facto* mean that the defendants were linked to the three IRISL entities designated in Annex III of Resolution 1929. But I was sufficiently concerned about the possibility of Singapore's international obligations being engaged that I directed the parties, as well as the MAS and the Ministry of Foreign Affairs (through responsible officers), to file affidavits to indicate whether any of the defendants are designated persons within the meaning of the MAS Regulations, or owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. I framed my question with reference to the MAS Regulations because that was the main domestic legislation raised in argument before me during the December hearings. The scope of argument has clearly widened since then, but the affidavits would be relevant for the Iran Resolutions generally, since the definition of designated person in the MAS Regulations is made with reference to the UN List, which is in turn defined with reference to the Iran Resolutions (see reg 4 of the MAS Resolutions).

59 It is clear that the defendants are not designated IRISL entities under operative para 19 and Annex III of Resolution 1929. The main question is whether they are controlled, *etc*, by any designated person.

60 MAS's affidavit in answer to my questions was made by Ms Denise Wong Jin Hua, a Deputy General Counsel with MAS. The Ministry of Foreign Affairs' affidavit was made through Ms Long Li Shen, Lynette. Her designation was not indicated in her affidavit but the Government's directory, available publicly online, stated her to be the Deputy Director of the Counter Proliferation and International Security Branch of the International Organisations Directorate in the Ministry. Both Ms Wong's and Ms Long's affidavits stated that they have no personal knowledge that the defendants are designated persons on the UN List as defined in the MAS Regulations, or owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. I record the court's appreciation to both officers for attending to the matter so quickly.

61 The defendants affirmed two affidavits in response to my questions. Both were made by Mr Soleymanifar. The first affidavit did not answer my question on the defendants' links to designated persons. The second affidavit, which was expressed to be in response to Ms Wong's affidavit, confirmed that the defendants are not owned or controlled, directly or indirectly, by any designated person, or acting on behalf of or under the direction of any designated person. The plaintiff's affidavit was sworn by Mr Kwek. It was founded on the plaintiff's position that IRISL was a designated person, and stated that among other things that the defendants were subsidiaries of IRISL. But, as I have said, it is only the IRISL entities listed in Annex III of Resolution 1929 which are designated by operative para 19 of the same resolution, and not IRISL itself. Links to IRISL itself are, by themselves, neither here nor there.

62 In the circumstances, there was no evidence before the court that the defendants (or any of them) were controlled, *etc*, by any designated person. The assets freeze imposed by the Iran Resolutions would therefore not apply to assets owned by the defendants, specifically the Vessels in

the custody of the Sheriff. Consequently, there can be no question of applying the implementing legislation, whether directly or indirectly, to the defendants.

The extent of the assets freeze

63 My finding that the defendants were not entities caught under the assets freeze sufficiently disposed of any further issues in relation to the assets freeze. However, I considered, for completeness, the possible treatment of the Vessels had the defendants been found to be entities caught under the assets freeze.

64 In this regard, it should be recalled that operative para 12 of Resolution 1737, which imposes the assets freeze, is widely worded:

> States shall freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of this resolution or at any time thereafter, that are owned or controlled by the persons or entities designated ... or by persons or entities acting on their behalf or at their direction, or by entities owned or controlled by them, including through illicit means...

65 Mr Ho submitted that the assets freeze does not extend to what he called "property *in rem*", such as vessels. I find that difficult to accept. *Prima facie*, a ship, as Mr Kwek acknowledged, would seem to be an economic resource in the ordinary signification of the term – and indeed a most valuable economic resource – that would have to be frozen.

66 However, the true scope of operative para 12 of Resolution 1737 must be determined not just with reference to its wording, which is no doubt important, but also with reference to the relevant practice of States in implementing the obligation imposed by it: see Art 31 (especially Art 31(3)(b)) of the Vienna Convention on the Law of Treaties (23 May 1969), UNTS vol 1155, p 331 (entered into force 27 January 1980); see also Sir Michael C Wood, "The Interpretation of Security Council Resolutions", (1998) 2 Max Planck YB UN Law 73 at pp 94–95.

67 In this regard, it is instructive to refer again to arts 16(1) and (2) of the EU Regulation, which I set out in full below:

> Article 16
>
> 1. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VII shall be frozen. Annex VII shall include the persons, entities and bodies designated by the United Nations Security Council or by the Sanctions Committee in accordance with paragraph 12 of UNSCR 1737 (2006), paragraph 7 of UNSCR 1803 (2008) or paragraph 11, 12 or 19 of UNSCR 1929 (2010).
>
> 2. All funds and economic resources belonging to, owned, held or controlled by the persons, entities and bodies listed in Annex VIII shall be frozen. Annex VIII shall include the natural and legal persons, entities and bodies, not covered by Annex VII, who, in accordance with Article 20(1)(b) of Council Decision 2010/413/CFSP, have been identified as:
>
> (a) being engaged in, directly associated with, or providing support for Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems by Iran, including through involvement in the procurement of prohibited goods and technology, or being owned or controlled by such a person, entity or body, including through illicit means, or acting on

their behalf or at their direction;

(b) being a natural or legal person, entity or body that has assisted a listed person, entity or body to evade or violate the provisions of this Regulation, Council Decision 2010/413/CFSP or UNSCR 1737 (2006), UNSCR 1747 (2007), UNSCR 1803 (2008) and UNSCR 1929 (2010);

(c) being a senior member of the Islamic Revolutionary Guard Corps or a legal person, entity or body owned or controlled by the Islamic Revolutionary Guard Corps or by one of more of its senior members;

(d) being a legal person, entity or body owned or controlled by the Islamic Republic of Iran Shipping Lines (IRISL).

It shall be prohibited, pursuant to the obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL, to load and unload cargoes on and from vessels owned or chartered by IRISL or by such entities in ports of Member States. That prohibition shall not prevent the execution of a contract concluded before the entry into force of this Regulation.

The obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL shall not require the impounding or detention of vessels owned by such entities or the cargoes carried by them insofar as such cargoes belong to third parties, nor does it require the detention of the crew contracted by them.

As can be seen, arts 16(1) and (2) of the EU Regulation impose identically-worded obligations to freeze all funds and economic resources owned or controlled by persons designated by the Security Council and the European Union respectively. In this regard, the three IRISL entities designated in Annex III of Resolution 1929 are listed in Annex VII pursuant to art 16(1); IRISL itself (including all its branches and subsidiaries), as well as 23 other IRISL entities are listed in Annex VIII pursuant to art 16(2).

68 It will also be noticed that art 16(2)(d) goes on to provide, among other things, that the obligation to freeze the funds and economic resources of IRISL and of designated entities owned or controlled by IRISL shall not require the impounding or detention of vessels owned by such entities. At first sight, this appears to be a substantive exception which pertains only to IRISL entities designated by the European Union pursuant to art 16(2)(d) and which has nothing to do with art 16(1). If this is indeed the case, then, art 16(1), which imposes a freezing obligation identically worded with art 16(2), and which is not subject to any exception, must be understood as requiring the impoundment or detention of a vessel owned by an entity covered by it. It would further follow that an IRISL entity falling under art 16(1) could avoid having its vessel impounded or detained by the simple expedient of transferring the vessel to an IRISL entity falling under art 16(2). This would substantially undermine art 16(1), and in turn the freezing obligation imposed by the Iran Resolutions. It is extremely doubtful that the EU Regulation, which was evidently enacted in a robust spirit to implement the Iran Resolutions and to expand upon them, intended such a result. This is especially so given that operative para 20 of Resolution 1929 distinctly raised the possibility of transfers of IRISL-owned vessels to other companies to evade the UN sanctions. It is more likely that the proviso in art 16(2)(d) was not a substantive exception as such, but was inserted for the avoidance of doubt, to reflect the European Union's understanding that the obligation to freeze the economic resources of IRISL entities, whether designated by the Security Council or the European Union, did not extend to the impoundment or detention of vessels owned by them.

69 Support for this proposition can be found in the notice issued on 27 October 2010 by the UK Treasury in relation to the EU Regulation. The relevant part of the notice reads as follows:

> **SECTION I**
>
> **FREEZING OF FUNDS AND ECONOMIC RESOURCES (Chapter IV - Articles 16-20)**
>
> 7. Articles 16-20 of the Regulation replicate the previous asset freezing measures.
>
> 8. Article 16(2)(d) clarifies the effect of the asset freezing measures on the Islamic Republic of Iran Shipping Line (IRISL), and of designated entities owned or controlled by IRISL. It is prohibited to load and unload cargoes on and from vessels owned or chartered by IRISL or by such entities in ports of Member States. *However, the asset freeze imposed on IRISL does not require the impounding or detention of vessels owned by such entities or the cargoes carried by them if the cargoes belong to third parties*, nor does it require the detention of the crew contracted by them.
>
> [emphasis added in italics]

It is evident that the issue of impounding or detaining vessels was considered by the drafter of the Treasury notice. In the circumstances, it would seem natural for the notice to state that IRISL entities covered under art 16(1) remain liable to have their vessels impounded or detained, if indeed this was required. However, there is nothing to that effect.

70 In the circumstances, it seems clear, from its implementation efforts, that the European Union did not understand the assets freeze imposed by the Security Council to require the impoundment or detention of vessels owned by designated IRISL entities. This understanding is vital to the interpretation of the scope of the assets freeze imposed by operative para 19 of Resolution 1929 read with operative para 12 of Resolution 1737. This is not just because the membership of the European Union includes two permanent and veto-wielding members of the Security Council, *ie*, France and the UK, but also because the European Union as a whole has taken a very robust attitude in implementing UN sanctions against Iran, as well as adding further measures of its own. In this regard, I should add that, while the United States would also fall within this description, I could not derive much interpretive assistance from her domestic legislation because, judging from the United States' report to the Sanctions Committee dated 25 August 2010 (UN Doc No S/AC 50/2010/7), the United States' legislation made pursuant to her own foreign policy had completely anticipated operative para 19 of Resolution 1929. The relevant part of the United States' report reads as follows:

> **Paragraph 19**
>
> Under the authorities of Executive Order 13382 and the International Emergency Economic Powers Act, the United States designated IRISL and 17 other entities controlled by or acting or purporting to act on behalf of IRISL on 10 September 2008. Other IRISL-related entities have been designated subsequently under Executive Order 13382. All three entities included in annex III of resolution 1929 (2010) were so designated on 10 September 2008, prior to the adoption of the resolution. Individuals and entities that are designated under Executive Order 13382 are denied access to the United States financial and commercial systems, and United States persons, including United States citizens, permanent resident aliens, United States companies (wherever located), and any person or company in the United States, are prohibited from engaging in transactions with them. This national authority also allows the United States to implement effectively the provisions set forth in operative paragraph 19 of the resolution. In addition to

IRISL itself, the following IRISL-related entities have been designated under Executive Order 13382:

Valfajr 8th Shipping Line Co. SSK

Khazar Sea Shipping Lines

Irinivestship, Ltd.

Iran o Hind Shipping Company

Shipping Computer Services Company

Iran o Misr Shipping Company

IRISL Marine Services & Engineering Company

IRITAL Shipping SRL Company

South Shipping Line Iran

IRISL Multimodal Transport Co.

Oasis Freight Agencies

IRISL Europe GMbH

IRISL Benelux NV

IRISL (UK) Ltd.

IRISL China Shipping Co., Ltd.

Asia Marine Network PTE. Ltd.

CISCO Shipping Co. Ltd.

IRISL (Malta) Limited

Hafiz Darya Shipping (HDS) Lines

Safiran Payan Darya Shipping

Seibow Ltd.

Seibow Logistics Ltd.

Soroush Sarzamin Asatir Ship Management Co.

In addition to these designations, the United States has listed the names and International Maritime Organization (IMO) numbers of more than 90 IRISL-related vessels as a "blocked vessel".

> In accordance with domestic law and international legal frameworks, the United States cooperates closely with partner States to scrutinize the activities of the Islamic Republic of Iran Shipping Lines and other Iranian shipping-related companies that pass through airports, seaports, and other international borders, and takes steps to prevent transfers of items prohibited by this and by previous Iran-related resolutions, the United States cooperates closely with partner States to scrutinize the activities of IRISL as well as Iranian cargo shipping companies.

As can be seen, the United States had already designated Irano Hind Shipping Company, IRISL Benelux NV and South Shipping Line Iran pursuant to Executive Order 13382 and the International Emergency Economic Powers Act on 10 September 2008, with the attendant consequences described in the United States' report, almost two years before Resolution 1929 was adopted.

71 I also noted the parties' submissions that there has been no known case of ships being impounded or detained, in Singapore or elsewhere, pursuant to the Iran Resolutions. This is not what I would expect, some six months after the adoption of Resolution 1929, if there had been an obligation on Member States to impound or detain Iranian shipping, or any part thereof.

72 Therefore, it seemed to me that the assets freeze imposed by operative para 19 of Resolution 1929 read with operative para 12 of Resolution 1737 does not require the impounding or detention of vessels owned or controlled by the designated IRISL entities. Accordingly, even if I was wrong and the defendants were in fact entities caught under the assets freeze, the Vessels, which were the defendants' only assets in Singapore, would not need to be impounded or detained under the Iran Resolutions. Consequently, there can be no question of applying the implementing legislation, whether directly or indirectly, to the Vessels.

The admiralty aspect

73 I was therefore of the view that the assets freeze imposed by the Iran Resolutions was inapplicable on the facts because: (a) the defendants were not entities caught under the assets freeze; and (b) the assets freeze would not require the detention or impoundment of the Vessels, which were the defendants' only assets in Singapore. In the light of this, the applications fell to be disposed of as normal admiralty matters, albeit with rather exceptional facts. In this, my sole concern was whether the defendants had paid the sums claimed from them or provided sufficient security for the claims, such that the Vessels could be released. It is important to note here that the relevant fund transfers occurred in Europe, outside of Singapore. There was therefore no question of a Singapore court freezing the funds – that was up to the relevant European authorities. To reiterate, my only concern was whether the plaintiff's claims had been met or security provided for them.

74 In this regard, the defendants had made three transfers of funds to Société Générale in Paris:

(a) €4,754,463.91 on 10 September 2010;

(b) €49,228.35 on 15 September 2010; and

(c) €155m on 14 December 2010.

The last transfer was made by Bank Tejarat on behalf of IRISL and the defendants.

75 All three transfers were caught by art 16(2) of the EU Regulation (or its materially identical predecessor) relating to entities designated by the European Union on top on those designated under the Iran Resolutions. Therefore, the necessary authorisations under art 18 of the EU Regulation, which related to existing contracts such as the Loan Agreement and its related contracts, had to be obtained before the funds could be applied towards payment. Otherwise, the funds would remain frozen and could not be considered valid payments or tenders of payment at law. They would also not comply with the Loan Agreement, of which cll 16.12.1 and 16.12.2 provided:

> 16.12.1 The Agent may at any time at the request of any Lender require evidence satisfactory to the Agent that any payment under this Agreement is legally compliant and until such evidence has been provided to the Agent neither the Agent nor the Lenders (each a **beneficiary**) shall be obliged to accept any such payment but each beneficiary shall be entitled to place such payment into a suspense account and such payment shall not be an effective discharge of the liabilities of the Borrowers under this Agreement.
>
> 16.12.2 For the purposes of this Clause **legally compliant** means that the payment of any funds under this Agreement and their source (whether direct or indirect) and their receipt and handling is or will be in the opinion of the Agent in all respects in accordance with any law and regulatory requirements of any relevant jurisdiction and [*sic*], and the receipt of such funds by any beneficiary will not or is not reasonably likely in the opinion of the Agent to impose on any beneficiary any obligation to make a report to any authority or to repay such funds.
>
> [emphasis in original]

76 The relevant evidence in relation to the authorisations is set out by the plaintiff's English solicitors, SNR Denton UK LLP, in their letter of 4 January 2011, which was annexed to Mr Kwek's affidavit of 4 January 2011. Since it was not challenged or contradicted, I accepted its contents as correct for present purposes. Based on the letter, the parties had to obtain the following authorisations:

> (a) Société Générale, a French entity, needed the authorisation of the Direction générale du Trésor for it to receive the funds for its own benefit as well as on behalf of the plaintiff and KEXIM.
>
> (b) The plaintiff, also a French entity, similarly needed the authorisation of the Direction générale du Trésor for it to receive its share of the funds from Société Générale.
>
> (c) KEXIM, a Korean entity, also needed the authorisation of the Direction générale du Trésor for it to receive its share of the funds from Société Générale. However, because it was a Korean entity, KEXIM needed to obtain the authorisation of the Central Bank of Korea, a translated version of which was required to be submitted in support of the application for the Direction générale du Trésor's authorisation.

The position in relation to the authorisations was as follows:

> (a) Société Générale made an application on 12 August 2010 to the Direction générale du Trésor and was granted a license on 7 October 2010: (i) to receive funds transferred in payment of the sums due from the defendants under the Loan Agreement and related contracts; and (ii) to pay to itself the portion due to it out of the funds transferred.
>
> (b) In respect of the first two transfers of €4,754,463.91 and €49,228.35 made on 10 and

15 September 2010 respectively:

(i) The plaintiff applied on 19 October 2010 to the Direction générale du Trésor for authorisation to receive its portion of the funds and on 21 October 2010 such authorisation was granted.

(ii) KEXIM applied on 27 October 2010 to the Central Bank of Korea for authorisation to receive its portion of the funds and on 2 November 2010 such authorisation was granted. Further to this, Société Générale as Agent applied on 5 November 2010 to the Direction générale du Trésor for authorisation to pay KEXIM its portion of the funds and on 31 December 2010 such authorisation was granted.

(c) In respect of the third transfer of €155m made on 14 December 2010:

(i) The plaintiff applied on 15 December 2010 to the Direction générale du Trésor for authorisation to receive its portion of the funds and on 27 December 2010 such authorisation was granted.

(ii) KEXIM applied on 17 December 2010 to the Central Bank of Korea for authorisation to receive its portion of the funds and on 22 December 2010 such authorisation was granted. Further to this, Société Générale as Agent applied on 3 January 2011 to the Direction générale du Trésor for authorisation to pay KEXIM its portion of the funds. The application was pending when I heard parties on 5 January 2011.

77 In summary, the repayment position when I heard the parties on 5 January 2011 was that Société Générale and the plaintiff had been fully paid the sums owed to them, having received the requisite authorisations from the Direction générale du Trésor, while KEXIM was only awaiting the Direction générale du Trésor's authorisation for it to receive its portion of the €155m received on 14 December 2010.

78 Contrary to what I was told by counsel on 13 December 2010 when I heard the applications to postpone the sale of the Vessels, apart from the initial wait of 8 weeks before the 7 October 2010 license was granted to Société Générale, the Direction générale du Trésor only took a matter of 2 to 12 days to grant the various authorisations to the plaintiff. In the case of KEXIM's first application on 5 November 2010, there was a similar 8-week wait before authorisation was given on 31 December 2010. However, in fairness to counsel, a not insignificant portion of these authorisations came after the hearings in mid-December 2010 and I suspect that those instructing them had not forwarded the relevant facts and details until they were asked for by me.

79 As mentioned, the final obstacle to KEXIM receiving full payment was the Direction générale du Trésor's authorisation in respect of the €155m transfer. Once the authorisation was given, KEXIM would receive payment in full. In this connection, both Mr Tan and Mr Kwek accepted that there was no reason why such authorisation would not be forthcoming in light of the history set out above. Mr Kwek also submitted, quite candidly, that the €155m was sufficient security for the sums claimed by the plaintiff in the interim. According to him, Société Générale would certainly not repatriate the funds back to IRISL or Bank Tejarat no matter what happened.

80 In these rather unique circumstances, I rescinded the orders to sell the Vessels and ordered them to be released.

81 I conditioned the release upon the defendants' solicitors filing the usual release papers and

undertaking to pay the Sheriff's expenses and this will extend to reimbursing the Sheriff for his time and expenses incurred in respect of the abortive sale of the Vessels. I also ordered the Sheriff to return the sealed bids unopened along with all cheques deposited with him.

82 Mr Tan informed me that the defendants reserved their rights against the plaintiff in respect of any overpayment, disputed amounts and/or wrongful maintenance of arrests. I noted this when giving my decision, and stated for the avoidance of doubt that I was not making any decision on these issues.

Applications for crew to join the Vessels

83 The defendants had also made three applications on 4 January 2011, *viz*, Summons Nos 23, 24 and 25 of 2011, one for each of the Vessels, for eight crew members to join each of the Vessels for the purposes of familiarisation, so that the Vessels could resume operation in the shortest time possible if and when they are released. Since I had ordered the release of the Vessels, I made no order on these applications.

Bidder's request for compensation

84 After I rescinded the order for sale, Ms Vivian Ang, who appeared for one of the bidders (whose identity was not known because the bids remained sealed), asked that the defendants compensate the bidder for the expenses it incurred in relation to the bid, *eg*, the costs of inspections and underwater surveys of the Vessels. I did not accede to this request. The defendant in an admiralty action *in rem* is entitled to compel the release of the *res* at any time before its sale by paying the amount claimed or by providing satisfactory security, and paying the Sheriff's costs, expenses and disbursements. Even if I assume that the defendants in this case somehow owed a duty to the bidders in the aborted sale, all that each bidder would have lost was a speculative chance to purchase the Vessels. Also, the Sheriff's notice of sale had expressly reserved his right not to sell to the highest bidder or at all. In these circumstances, an order to compensate Ms Ang's client would set an altogether wrong precedent.

Costs

85 Mr Kwek informed me that the sums paid to Société Générale were sufficient to cover the plaintiff's costs in the present applications and that in the light of this the plaintiff was not seeking a separate order as to costs. Mr Tan submitted that there should be no order as to costs all round. So, as between the plaintiff and the defendants, there was no disagreement that there should be no order as to costs.

86 As for the others, Mr Jeyendran Jeyapal said that the Sheriff was not seeking costs. Ms Ang said she was not seeking costs. Mr Ho said that he was instructed to seek $5,000 in costs, including disbursements. I could not accede to this as the Attorney-General's submissions were made at the direction of the court in furtherance of the public interest in clarifying the scope of the Iran Resolutions, their domestic impact, and their applicability to the facts of this case.

87 In the result, I made no order as to costs.

Concluding observations on the assets freeze and ship arrests

88 In this case, the defendants were not entities caught by the assets freeze, and so the arrest of the Vessels fell to be treated as an ordinary admiralty matter. However, I wish to emphasise, in

concluding, that the general point should not be lost that the full application of the Iran Resolutions would seriously impact the arrest, pursuant to the court's admiralty jurisdiction, of vessels owned by designated persons and persons or entities controlled, *etc*, by designated persons. The vessels are not themselves subject to impoundment or detention. However, financial institutions covered by the MAS Regulations would effectively be unable to receive any funds or other financial assets from designated persons as consideration for furnishing a guarantee to secure the release of arrested vessels, because such funds or other financial assets would have to be frozen once received. Also, the proceeds from selling the vessels, and any payment into court to secure the vessels' release, would have to be frozen by the financial institutions administering funds held by the court. This means that, while the arresting party may be able to obtain a judgment, he may not be able to enforce it against the relevant funds.

89 In respect of contracts entered into with a person *after* it has been designated, this effect is as it should be – the assets freeze imposed by the Iran Resolutions is clearly intended to discourage dealing with designated persons, and those who do so should not be surprised that their rights cannot be efficaciously enforced. The only exceptions applicable in such situations are the exceptions found in operative para 13 of Resolution 1737. However, I should observe, without prejudice to the relevant authorities' discretion, that these exceptions are unlikely to have very wide application in a commercial context.

90 In respect of contracts entered into with a person *before* it has been designated, the proper way would be to obtain an exception pursuant to operative para 15 of Resolution 1737, provided of course that the criteria imposed therein are satisfied.

91 Finally, as a matter of practicality, parties should take legal advice and if necessary apply for the relevant exemptions before committing themselves to a course of action which may end up with their funds, financial assets or economic resources being frozen.

Postscript

92 Counsel came before me on 31 January 2011 to settle some orders. They informed me, and I am glad to record, that KEXIM was authorised by the Direction générale du Trésor to receive its share of the €155m transfer on 10 January 2011; the Lenders have therefore been fully paid, and the German Mortgages over the Vessels are in the process of being discharged.

[note: 1] Affidavit of Mehrzad Soleymanifar dated 9 December 2010 at p 66.

[note: 2] The Attorney-General's written submissions dated 3 January 2011 at para 3(e).