

Russia Related Sanctions—Helpful Guidance on the Proper Application of a Force Majeure Clause

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Introduction

In response to the escalation of events in Ukraine, nations and international bodies including the United States, the United Kingdom and the European Union have imposed a sweeping series of financial sanctions and export controls on Russia.

For those who have commercial dealings with a Russian or Ukrainian nexus, now is a time to be looking closely at your contracts. As many parties have come to realise, the ever-expanding sanctions regimes in the UK and elsewhere—in particular Russia-related sanctions regimes—can create considerable uncertainty about how pre-existing commercial relationships are affected. Sanctions regimes are complex, fast-moving and sometimes ambiguous about which economic activities are prohibited. Contracts can also be a source of uncertainty because they may not provide clear and simple directions on when or in what circumstances a party may terminate or suspend performance in the event of sanctions. Ambiguous drafting can result in the unenviable position of having to decide quickly between terminating or suspending performance (potentially in breach of contract), or continuing to trade (potentially in violation of sanctions with very serious economic and reputational repercussions).

The first step for any party evaluating its commercial agreements in light of Russia-related sanctions is to determine the relevant prohibition. Some of the new sanctions which target particular types of trade or industries are broad and it may not be immediately obvious which specific commercial activities are affected. Due diligence may be required to determine the reach of sanctions and the effect on trade.

The second step is to review the contract to identify whether an illegality/force majeure /material adverse change clause has been triggered. These types of clauses tend to be broadly drafted, but the courts will assess the meaning and effect of a force majeure clause depending on the specific words of the agreement. A contract may provide for a number of actions including cancelling the contract, suspending all or part of a party's obligations, or extending time for performance under the contract. A party may also

need to follow prescribed steps to notify a counterparty of the imposition of sanctions in order to rely on the relevant contractual provisions.

The recent decision of *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm) provides some helpful guidance to parties on the proper application of a force majeure clause and how the courts may be expected to view a claim for breach of contract in the context of sanctions which could impact payment under a shipping/commodities contract. We note that the decision is subject to appeal.

Key takeaways are:

- Sanctions can be complicated and difficult to navigate. Please see the Debevoise & Plimpton LLP In Depth “[Developments in Ukraine: U.S., UK and EU Sanctions and Export Controls](#)”.
- A force majeure clause may relieve a party from performance of its contractual obligations and any associated liabilities for non-performance in circumstances where performance has been prevented or delayed as a result of an event or circumstances beyond its reasonable control.
- The meaning and effect of a force majeure clause will depend entirely on the specific wording. It is possible that the consequences of the parties being affected by sanctions have been directly catered for in the contract. Otherwise, parties should review their contracts to determine whether illegality / force majeure / material adverse change clauses have been triggered.
- A party does not have to perform the contract otherwise than in accordance with the contract in order to avoid a force majeure event.
- Care should be taken to notify a counterparty of an event of force majeure in accordance with the contractual requirements.

What Is the Relevant Prohibition?

The US, EU and UK have introduced sanctions against Russia which are unprecedented in breadth and scope. A more fulsome analysis of the current sanctions regime is found in the Debevoise & Plimpton LLP In Depth “[Developments in Ukraine: U.S., UK and EU Sanctions and Export Controls](#)”. Types of sanctions which may be relevant include:

- **Asset Freezes.** Prohibit persons from dealing with funds and economic resources of listed persons; and making funds or economic resources available to listed persons.
- **Other Financial Restrictions.** For example, EU prohibitions on the selling of securities or units in collective investment undertakings denominated in any official currencies of an EU member state and providing exposure to such investment to Russian Persons issued after 12 April 2022.
- **Capital Market Restrictions.** For example, the UK prohibits dealings in certain transferable securities or money market instruments, or new loans of ALL Russian companies or Russian-owned companies.
- **Trade Restrictions.** UK and EU import and export restrictions on a wide variety of goods when sent to / from Russia. Restrictions also relate to ancillary activities such as financing or providing other services in relation to such activities.

The identification of an asset-frozen person is not always straightforward. Due diligence may be required to identify the ultimate beneficial owner of an asset or security, in order to determine whether the assets are owned or controlled by an asset-frozen person.

Sanctions which target persons “*connected with Russia*” can also lead to uncertainty and the need for due diligence. For example, UK sanctions target certain vessels including those flying the Russian flag or registered in Russia or vessels that are owned, controlled, chartered or operated by a designated person or by “*persons connected with Russia*”. A person “*connected with Russia*” is potentially a broad category.

It is important when considering new sanctions, to identify the relevant prohibition that may prevent contractual performance. For example, do sanctions prevent payments being made in a particular currency or create logistical problems that make performance impossible? The contract may provide different routes to suspend or terminate performance depending on the situation.

Has the Force Majeure Clause Been Triggered?

Force majeure clauses are usually drafted to encompass a broad range of situations, but the meaning and effect of a force majeure clause will depend entirely on the specific wording. The English courts have long held that a force majeure clause should be construed in each case with a close attention to the words used, and with due regard to the nature and general terms of the contract (*Lebeaupin v Richard Crispin And Co* [1920] 2 K.B. 714).

A force majeure clause may entitle a party to suspend performance in a range of circumstances including where there has been a specified sanctions event. For example:

- where performance of the contract would “*expose [a contracting party] to any sanction, prohibition or restriction under...the trade or economic sanctions, law or regulations*” (see the sanctions clause in a marine insurance policy which was the subject of *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others* [2018] EWHC 2643 (Comm)); or
- for a broader range of unforeseen events including “*any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges*” (see the force majeure clause in *MUR Shipping BV v RTI Ltd*).

Such clauses will require a contracting party to determine whether a sanctions event will in fact prohibit or prevent contractual performance (not merely that there is uncertainty and therefore risk that sanctions will have such an effect). In *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others* the Court found that “exposure to sanctions” did not mean “at risk of being sanctioned”.

Other force majeure clauses are expressly drafted with uncertainty in mind. In some cases, a force majeure clause may allow a party to cancel or suspend performance where, on its own view, performance of the contract “*exposes [the contracting party] to the risk of being or becoming subject to or in breach of any sanction...*” (see the sanctions clause in a composite policy of marine insurance which was the subject of *Arash Shipping v Groupama* [2011] EWCA Civ 620). In such a case, the validity of a notice of cancellation or suspension of performance may depend on a contracting party’s individual opinion. However, the courts are unlikely to interpret a force majeure clause to extend to the mere risk that performance would be in breach of sanctions in the absence of a clear intention of the parties on the express contractual wording.

A broad force majeure clause may also entitle a contracting party to suspend performance in circumstances where sanctions result in practical restrictions (such as restrictions on monetary transfers while sanctions risks are investigated by the bank) even though the specific economic activity is not directly prohibited.

Relevant Principles from *MUR Shipping BV v RTI Ltd*

In 2018, Mur Shipping BV (the “Owners”) was faced with US sanctions imposed on RTI’s (the “Charterers”) parent company. The Owners said that the sanctions would prevent payment in USD which was required under the contract.

The Owners relied on a force majeure clause to temporarily suspend vessel nomination on the basis that it would be a breach of sanctions to continue performing the contract. The Charterers obtained alternative tonnage and brought a claim for the additional costs incurred.

An arbitral tribunal accepted that, but for one point, the Owners could rely on a force majeure clause in circumstances where the Owners needed to review the impact of sanctions and opt for caution before resuming their commercial activities. The tribunal was influenced by the practical effect of sanctions on the evidence that virtually all USD transactions are routed through US banks, and that “*common sense indicates that any US bank would exercise extreme caution before making a payment that could conceivably fall foul of sanctions legislation*”. The tribunal found that the Owner could, at least in principle, rely on the force majeure clause because of practical difficulties in making USD payments, notwithstanding that the performance of the agreement, including loading and discharge obligations, was not prohibited by sanctions.

The English courts have confirmed that there was no error of law in the tribunal’s findings that this situation met the criteria to suspend performance under the force majeure clause.

Situations Beyond a Party’s Reasonable Control

It is well established that when a party seeks to rely on a force majeure clause, it is necessary to show that the situation and the consequences are well beyond the party’s reasonable control (see *B&S Contracts v VG Publications* [1984] ICR 419). Although these situations may vary widely, the courts are clear that a situation will not be beyond a person’s control where the situation creates the “mere difficulty of additional expense” (*Brauer & Co v James Clark* [1952] 2 AER 497).

Can Alternative Steps Be Taken?

Some force majeure clauses may include a requirement that a party use its *reasonable endeavours* to avoid or circumvent the effect of the force majeure event (e.g., the imposition of sanctions on one of the parties). Such clauses may compel contracting parties to consider alternative ways to carry out their contractual obligations. For example, it may be possible to make payments in alternative currencies or take other steps to continue performance in compliance with the sanctions regime. However, the terms of the parties’ agreement will be paramount.

The decision of *MUR Shipping BV v RTI Ltd* highlights that, in exercising “*reasonable endeavours*” to overcome the impact of sanctions, a party is not required to accept

anything other than what has been agreed in the contract. So, a party would not be required to accept payment in an alternative currency to the extent that the contractual currency was specified in the agreement, and payment in that currency was prevented by a force majeure event. Jacobs J found that the contractual currency was an important contractual obligation, and a “reasonable endeavours” clause did not require a party to agree to new terms which were not provided for in the contract.

However, parties should be mindful that a duty to exercise reasonable endeavours to avoid or circumvent the prohibition may lead to a situation where it is more expensive or less commercially attractive to comply with the contract (see for example *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640). A greater risk of an unprofitable outcome is unlikely to be a matter which enables a contracting party to say that it has exercised its reasonable endeavours and excuse contractual non-performance resulting from a force majeure event.

What Steps Must Be Taken to Notify a Counter-party of a Force Majeure Event

A party seeking to rely on a force majeure event should carefully follow any requirements to notify the other party of a force majeure event. A common tactic adopted by a party seeking to recover its losses caused by a force majeure event is to scrutinise a force majeure notice for any deficiencies. While the courts may be slow to invalidate a notice which has been prepared in a hurry or is vaguely drafted, the courts may have no choice but to accept that a notice is invalid (and therefore void) if it fails to comply with the clear expectations of the parties set out in the agreement.

It can, in some situations, take time to investigate the impact of sanctions as a potential force majeure event. In these circumstances, it would be prudent to carefully document when a force majeure had been triggered (i.e., when the party became aware that a force majeure event had occurred) in circumstances where there is a short time-frame to serve a notice.

In *MUR Shipping BV v RTI Ltd*, the Charterers put the Owners to proof that they had sent their notice within the 48-hour period of a party becoming aware of a force majeure event. Further, they sought to challenge the force majeure notice by saying that the notice failed to identify the sanctions and their impact on both loading and payment.

The Court was not persuaded that a notice of a force majeure event required this detail. Jacobs J found that:

“[i]t is true that the notice did not spell out how the prevention of US dollar payments, in consequence of the sanctions, would impact upon loading and discharge. However, it is not necessary for a notice to spell out a detailed case in that regard. A force majeure notice need not contain or be equivalent to a detailed legal submission, particularly bearing in mind that it must be served in a short time-frame, namely within 48 hours of a party becoming aware of a force majeure event. Here, it was obvious that, by sending the notice, the Owners were saying that all of the requirements of the clause were satisfied.”

Jacobs J also relied on the decision of Aikens J in *Mamidoil-Jetoil Greek Petroleum v. Okta Crude Oil Refinery* [2003] 1 Lloyd’s Rep 1 at [134]:

“The reason for requiring notice to be given must be that the “other party” can then investigate the alleged force majeure at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking force majeure. Alternatively it can see if there are other means of enabling performance to be continued.”

A party seeking to uphold the validity of a force majeure notice should carefully consider how the counter-party responded and whether it is clear from the communications that they were able to investigate the alleged force majeure and its impact.

Is There Otherwise an Implied Right to Exercise Rights within a “Reasonable Time”?

The Owners in *MUR Shipping BV v RTI Ltd* referred to authorities supporting the conclusion that it may be reasonable to take time to review the implications of a contractual obligation where the source or lawfulness of an order was in doubt, citing *The Houda* [1994] 2 Lloyd’s Rep 541.

In *The Houda*, the Court of Appeal asked the question “*whether the owners of a vessel under a time charter were obliged immediately to comply with a charterers’ order or were entitled to a reasonable time for consideration, where the source or lawfulness of the orders was in doubt*”. In the case, concerns had been raised regarding the authority with which the order was given to sail, and other concerns about the ownership of the cargo in light of United Nations sanctions.

The Court of Appeal found that it was at least possible that the owners had reasonable grounds to pause in order to seek further information about the source and validity of any orders under a time charter. The Court of Appeal considered that “*it is necessary to*

take a broad and comprehensive view of the duties and responsibilities of owners and the masters and ask...[h]ow would a man of reasonable prudence have acted in the circumstances.” This principle has not been examined by the courts outside of a shipping/time charterparty agreement, and it is not clear whether the courts would find an implied right to “pause” in other situations. However, it provides some authority that a contract could contain an implied term to allow a party to take a reasonable time to consider the implications of complying with a contractual obligation in the event of sanctions or some other event that may prevent performance. It will be interesting to see if this point is tested in future cases which will inevitably arise following the fall out of the invasion of Ukraine.

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