

UK High Court Rules on Sanctions Clauses in Insurance Contracts and Considers Application of the EU Blocking Regulation

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A recent decision of the English Commercial Court (the “Court”) has significant repercussions for the interpretation of sanctions clauses and potential applicability of the EU Blocking Regulation to contractual obligations. In the case of *Mamancochet Mining Ltd v Aegis Managing Agency Ltd and Others* [2018] EWHC 2643 (Comm), handed down on 12 October 2018, Mr. Justice Teare held that an insurer could rely on a sanctions clause in a marine cargo insurance policy only if the payment under the policy would put the insurer in breach of applicable sanctions. The judge noted *obiter* that the insurer’s reliance on a sanctions clause in not paying under the policy would be unaffected by the EU Blocking Regulation. The judge observed that the suspension of payment would be based on reliance on a contractual term, and would not result from “*compliance*” with US sanctions law.

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Mamancochet Mining Ltd, an assignee of the benefit of the relevant insurance policy, brought the claim against the policy’s underwriters. Among other things, the policy insured against the risk of theft of two steel billet cargoes carried on two vessels. Those cargoes were carried from Russia to Iran in August 2012 and were subsequently stolen. The assured (and later the Claimant as assignee) made a claim under the policy in March 2013. It was common ground between the parties that the claim was valid. The Defendants resisted payment on the basis of the sanctions clause in the policy, which they argued was triggered by U.S. and EU sanctions against Iran.

INTERPRETATION OF THE SANCTIONS CLAUSE

The sanctions clause in question was based on standard wording of the Joint Cargo Committee. It stated that no (re)insurer would be deemed to provide cover or be liable for a claim where payment of such claim would “*expose that (re)insurer to any sanctions, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or the United States of America.*”

The Defendants (the underwriters) argued that the clause should be widely interpreted to preclude liability where payment to the assured exposed the insurer to a *risk* of breaching applicable sanctions laws. The Court disagreed, holding that the clause should be interpreted to mean only that the insurer is not liable to pay a claim where payment would be prohibited under the applicable sanctions laws. In other words, the insurer's obligation to pay would be suspended only if the payment would amount to a breach of applicable sanctions law. Having considered expert reports from U.S. lawyers, the Court found that payment of the insurance claim would not constitute a breach of U.S. or EU sanctions laws, at least not until 11.59pm EST on 4 November 2018, when the final tranche of U.S. secondary sanctions against Iran will come back into force.

Separately, the Court rejected the Defendants' argument that the sanctions clause extinguished liability to pay the claim. The Court held that the insurer was not liable to pay under the policy only for as long as the payment would expose it to a breach of applicable sanctions laws. Liability under the policy would therefore be suspended, not extinguished, during that time.

THE EU BLOCKING REGULATION

The Court considered the impact of the EU Blocking Regulation, Council Regulation (EC) 2271/96. The Blocking Regulation, as amended, forbids companies incorporated in the EU from complying with certain sanctions regimes, including U.S. sanctions against Iran. The Claimants argued that, to the extent that the Defendants' reliance on the sanctions clause would result in compliance with U.S. sanctions against Iran, it would constitute a breach of the Blocking Regulation. The Court did not have to address this argument given its findings regarding the effect of the sanctions clause, as set out above. Mr. Justice Teare nevertheless observed that he saw "*considerable force*" in the Defendants' counterargument that the Blocking Regulation does not apply when an insurer's liability is suspended under a contractual sanctions clause. He noted that, in such cases, an insurer would not be complying with U.S. sanctions laws but rather relying on a contractual provision.

On Mr. Justice Teare's interpretation, therefore, the Blocking Regulation will not apply when one party to a contract seeks to avoid performance on the basis of a sanctions clause linked to U.S. sanctions prohibitions. In other words, relying on a sanctions clause to avoid performance will not give rise to a breach of the Blocking Regulation. It is not clear whether this analysis would apply when parties enter into new contracts with sanctions clauses. At the time of executing the new contract, including the sanctions clause, the parties would be binding themselves to new contractual

obligations to comply with U.S. sanctions, which arguably could give rise to a breach of the Blocking Regulation.

SCOPE OF "FINANCIAL ASSISTANCE"

The parties agreed that the EU sanctions prohibition on providing "*financial assistance*" extended to the payment of insurance claims. This point has garnered controversy in the past. The European Commission encourages a wide interpretation of EU sanctions prohibitions. The UK's Department of Business, Innovations & Skills, however, has opined that the prohibition on financial assistance does not extend to insurance and re-insurance unless EU Member State legislation explicitly states so.

The Court's implicit approval of the parties' agreed position suggests that a distinction needs to be drawn between insuring an activity subject to EU "*financial assistance*" restrictions and making a pay-out on such a claim, particularly where the pay-out would go towards funding a restricted activity. In this regard, it would appear that whilst providing insurance would not in itself amount to a breach of the financial assistance prohibition, making a pay-out would.

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Please do not hesitate to contact us with any questions.

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