Sanctions, insurance and the case of Mamancochet Mining Limited v Aegis Managing Agency Limited and others

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Mamancochet Mining Limited (the **Claimant**) *v Aegis Managing Agency Limited & Others* (the **Defendants**) is a case concerning a sanctions clause, with wording widely used in industry, within a marine cargo insurance policy. The insurers, being the defendants, sought to avoid payment, of what on the face of it was a valid claim, on grounds that payment would expose it to sanctions.

The three main issues that arose for the judge (Mr Justice Teare) to consider were:

1. The proper interpretation of the phrase in the insurance policy "*to the extent that … payment of such a claim … would expose that insurer to any sanction, prohibition or restriction under … the trade or economic sanctions, laws, or regulations …*"

2. *As a matter of fact, whether payment of the claim would expose the Defendants to US and/or EU sanctions, within the meaning of the sanctions clause in the policy; and*

3. If the answer to question (ii) was yes, would the Defendants be prevented from relying on the sanctions clause by virtue of the EU Blocking Regulation?

Brief Background

The Claimant, by way of assignment, had the benefit of a marine cargo insurance policy (the "**Policy**") that protected the assured against the risk of theft of two cargoes of steel billets shipped from Russia to Iran. On arrival in Iran the cargoes were put into bonded storage, and as the purchaser did not pay for them, the assured arranged for substituted bills to be issued to an Iranian national, as consignee (the consignee was not a 'Specifically Designated Person' subject to specific US sanctions). In 2012 the goods were stolen while in storage.

The assured made a claim under the Policy sometime in March 2013 but after 8 March 2013. It has never been disputed that the assured (latterly the Claimant as assignee) in principle had a valid claim under the Policy. The matter in issue was that the Defendants resisted payment on the basis of the sanctions clause in the Policy.

Nine of the eleven Defendants that relied on US sanctions were established and maintained in the UK and ultimately owned or controlled by a US person. The remaining two Defendants solely relied on EU sanctions.

The Position of US Sanctions Against Iran

At the time the Policy was taken out, US sanctions against Iran did not apply to the nine US owned or controlled foreign entity Defendants.

A change to the US sanctions regime against Iran in 2012 and further enactment of legislation meant that from 9 March 2013 those Defendants, being US-owned or controlled foreign entities, would have been prohibited from paying the claim under the Policy.

In 2015, the five permanent members of the UN Security Council, Germany, the EU and Iran agreed the Joint Comprehensive Plan of Action ("**JCPOA**") that provided Iran with relief from various international sanctions in return for Iran agreeing to curb its nuclear activities. The JCPOA contained commitments by the US to lift sanctions in relation to non-US persons (not including US-owned or controlled foreign entities). It provided for sanctions to be lifted in respect of insurance and re-insurance provisions, and committed to "*License non-US entities that are owned or controlled by a US person to engage in activities that are consistent with this JCPOA.*" The JCPOA was implemented on 16 January 2016.

In May 2018 the US announced its withdrawal from the JCPOA. The sanctions affecting US-owned or controlled foreign entities became effective again from 27 June 2018 subject to a wind-down period ending on 4 November 2018 for transactions "*ordinarily incident and necessary to the wind down of … transactions … that would otherwise be prohibited by* [the sanction]."

Consequently, despite the age of the insurance claim (the theft took place in 2012), this case was heard on an expedited basis because its resolution was in part dependent upon the effect of the US President's decision to end the US's participation in JCPOA and the relevant sanction being re-imposed. US sanctions on Iran were brought back into full effect at 23:59 EST on 4 November 2018.

Issue 1 – Construction of the Policy

The Court had to decide on the proper interpretation of the sanctions clause in the Policy:

"*No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or United States of America.*"

The argument put forward by the Defendants (the insurers) was that they were not liable to pay the claim if they were at risk of being sanctioned by OFAC (the Office of Foreign Assets Control of the US Department of the Treasury). On the other hand, the Claimant argued that the Defendants must establish, on the balance of probabilities, that payment would put them in breach of sanctions and would lawfully expose them to sanction.

The judge decided that the meaning of the clause is "*that the insurer is not liable to pay a claim where payment would be prohibited under one of the named systems of law and thus "would expose" the Defendants to a sanction.*"

The Defendants were not liable to pay a claim if payment would be prohibited under one of the named systems of law. If that were to arise, the Defendants' obligation to pay would be suspended rather than extinguished. The mere risk of being

sanctioned was not sufficient to invoke the clause.

Issue 2 – Exposure to US and/or EU Sanctions

The Court had to decide, as a matter of fact, whether the payment of the claim (before 23:59 EST on 4 November 2018) would expose the Defendants to US and/or EU sanctions, within the meaning of the sanctions clause in the Policy.

The judge decided that until 23:59 EST on 4 November 2018 payment of the insurance claim was not prohibited by the US and so payment made by that date would not expose the Defendants to sanction.

The judge reached this conclusion on the basis of finding that the wind-down period applied to operations that were consistent with the lifting of sanctions under the JCPOA and the insurance claim was consistent with JCPOA.

Further, based on his decision on the sanctions clause, the judge held that the Defendants were not exposed to any EU sanction as it was common ground between the parties that payment of the claim was not prohibited by EU law. The fact that the relevant authorities had failed and/or refused to confirm that the payment could be safely made, in Justice Teare's view, did not expose the Defendants to sanction.

Issue 3 – The EU Blocking Regulation

The Claimant sought to rely on the EU Blocking Regulation in the event that it was decided that the Defendants were entitled to rely on the sanctions clause to resist payment. However, the judge's conclusions meant the issue did not arise for decision.

Notwithstanding, the judge did comment that he did see considerable force in the Defendants' position that if the contractual sanctions clause applied then the EU Blocking Regulation would not be engaged, as the insurer would not be complying with a third country's prohibition but would simply be relying upon the terms of the policy to resist payment.

Client Tips

The sanctions clause in the Policy was based on standard wording widely used in the industry. The decision of the Court indicated that it will interpret contractual clauses by looking at the language and context and considering the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contracting. If the purpose of a particular clause is to achieve a particular outcome (in this case it was argued that the insurer need not pay an otherwise valid claim where there was merely a risk that payment would incur a sanction), the draftsperson must ensure that the wording of it is clear and unambiguous to establish common intention of that outcome.

If the intended effect of a sanctions clause is to extinguish any liability of the person relying on it, the wording should be clear and unambiguous on that point.

Understanding the implications of sanctions on an action or transaction can be complicated, if in doubt seek legal advice.

For more information please contact:

Nin Ritchie

Partner | Guernsey

t: +44 (0) 1481 734273 | **e:** nin.ritchie@collascrill.com

Jack Crisp

Professional Support Lawyer | Guernsey

t: +44 (0) 1481 734837 | **e:** jack.crisp@collascrill.com