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English Court Considers Impact of Sanctions on Contractual Payment Obligation When Sanctions Prevent Payment

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In *Gravelor Shipping Ltd v GTLK Asia M5 Ltd* [2023] EWHC 131 (Comm), the English Court considered the impact of sanctions on a party's ability to fulfil its contractual obligation to make payment under a charterparty when meeting the contractual obligation would lead to a breach of sanctions.

In this case, the court found that the term "all necessary" steps required a contracting party to nominate an alternative bank account and accept payment in a different currency to enable its counterparty to pay sums due under the charterparty without breaching sanctions.

Background

Gravelor is another case arising out of the sanctions imposed by the EU and the US following Russia's invasion of Ukraine. This case concerned a dispute arising out of two bareboat¹ charterparties ("**Charterparties**") for two vessels (the "**Vessels**"). The Charterparties were essentially finance leases, providing Gravelor with a means of financing the purchase of the Vessels. The Charterparties contemplated that, at their expiry, title to the Vessels would be transferred to Gravelor.

The owners of the Vessels (GTLK Asia M5 Limited and GTLK Asia M6 Limited together the "**Owners**") are part of the GTLK group of companies. JSC State Transportation Leasing Company ("**JSC GTLK**") was the ultimate parent of the Owners. JSC GTLK is in turn owned and/or controlled by the Russian Ministry of Transport.

On 3 March 2022, Gravelor informed the Owners that it was expressing an intention to exercise its option, under the Charterparties, to purchase the Vessels. In April 2022, JSC GTLK and its associates were made the subject of EU sanctions. On 2 August 2022, the US State Department designated JSC GTLK and its subsidiaries as blocked under the relevant US executive order. Gravelor asserted its entitlement to exercise its option to purchase the Vessels in June 2022. The bank account that was nominated by the Owners to which Gravelor was to make payment for the Vessels was with JSC Gazprombank (“**Gazprom Account**”). Gravelor contended that the effect of the sanctions meant that it could not pay the sums due in the currency stipulated in the Charterparties (which was US Dollars) or into the account nominated by the Owners for payment, i.e., the Gazprom Account.

The Owners argued that Gravelor could only acquire title to the Vessels in accordance with the Charterparties if the sums due were paid in US Dollars into the Gazprom Account.

Clause 8.10 of the Charterparties entitled “Sanctions payment restrictions”, however, provided as follows:

*“Where a payment under this Charterparty is incapable of being processed by the relevant banking institution and has not been received by the Owner on the due date by virtue of the Owner becoming a Sanctions Target, the Owner and the Charterer shall cooperate and promptly **take all necessary steps** in order for the payments to be resumed. Any delay in payments resulting solely from the circumstances referred to in the immediately preceding sentence shall not be deemed an Event of Default contemplated by clause 17.1(a) of this Charterparty.”*

The court considered, among other issues, whether the sums due under the Charterparties had to be paid into the Gazprom Account and had to be made in US Dollars.

Court’s Decision

The Owners sought to argue that clause 8.10 of the Charterparties only applied when the receiving rather than the paying bank is incapable of processing a payment due to sanctions. The court rejected this argument and found that Clause 8.10 is intended to apply to an incapability at both the paying and receiving banks. In this situation, the incapability of the bank to process the payment was due to the Owners being designated as sanctions targets. The court noted that while Clause 8.10 only applies to

payments due to the Owners, it refers to "the relevant banking institution", which clearly contemplates that more than one bank may be incapable of processing a payment – paying or receiving. The court further found that there was no commercial reason why clause 8.10 would address the incapability of making a payment by virtue of the Owners becoming sanctions targets only in circumstances when the incapability caused difficulties on the part of the receiving bank.

The Owners also argued that clause 8.10 required measures to be taken which would enable "payments to be resumed" in the same manner as before the incapability prevented the payment. It did not oblige the Owners to bring about a situation in which the sums due could validly be paid into an alternative account (with the effect that the Owners would not be able to access the sums for a significant time due to sanctions), and in a currency not provided for in the contract.

The court rejected this and found that payment into an account at a bank that is complying with the EU and US sanctions regimes would still result in the payment being processed in compliance with clause 8.10. The Owners' difficulty in accessing the funds (or even the impossibility of doing so) would not be a result of the payment process. Rather, it would be due to an external limitation arising from the sanctioned nature of the payee.

The court noted that the Charterparties clearly contemplated that the Owners could become subject to sanctions. One obvious likely consequence of sanctions would include attempts to block the Owners' access to and use of funds held in bank accounts.

The court accepted that the Owners were required pursuant to clause 8.10 to take steps which materially impacted the obligations under the Charterparties as they existed before clause 8.10 was engaged. However, *MUR Shipping BV v RTI Ltd* [2022] EWCA Civ 1406 demonstrated that clauses which are intended to address extraneous circumstances which render performance in the manner anticipated impossible, while keeping the relevant obligations alive as a matter of substance or in a practical sense, may involve one party accepting performance otherwise than in strict accordance with the contractual terms.

The court thus concluded that the expression "all necessary steps" in clause 8.10 as a matter of construction required the Owners to nominate an alternative bank account into which the payment by Gravelor can be made and to accept payment in a different currency. This was even if the Owners would be restricted in their ability to access and use those funds following such payment.

Conclusion

It is important to note that each case will turn on its facts and set of circumstances. This decision, however, serves as an illustration of the uphill struggle a contracting party may have when alleging that sanctions prevents the making or receiving of payments under a contract, particularly where the contract contains provisions requiring parties to take “all necessary” steps to make payment.

In such circumstances, the courts have shown that they will carefully consider all the relevant contractual provisions and may well find that one party must accept performance that is not in strict accordance with the terms of the contract, in order to enable a party to fulfil its obligations under a contract.

1. A bareboat charter is the leasing of a ship where no crew or other provisions are provided by the owner of the ship to the charterer.↩

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