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RUSSIAN SANCTIONS - PART 1
SANCTIONS ENTITIES SUING

The UK Government introduced a range of sanctions as a response to the Russian invasion in Ukraine. The regime has two central features: (1) all the assets of a designated person are frozen, meaning that no person may deal in them; (2) no person may make available any assets to a designated person. Non-compliance with these requirements gives rise to criminal offences.

In PJSC National Bank Trust v. Mints litigation commenced in June 2019. The Second Claimant PJSC Bank Otkritie was later sanctioned by the Secretary of State and thus became subject to an asset freeze since the Secretary of State was satisfied Bank Otkritie was "supporting and obtaining a benefit from the Government of Russia".

The First to Fourth Defendants argued that the First Claimant, National Bank Trust was also subject to the same asset freeze because it is owned or controlled by at least two designated persons, Vladimir Putin, the President of Russia and Elvira Nabiullina, the governor of the Central Bank of Russia, of which NBT is a 99% owned subsidiary.

The Second and Third Defendants submitted that entering judgment for the Claimants on the causes of action advanced would be unlawful, that various interlocutory stages could not be completed as a licence was required, there was no relevant ground for licensing and the Defendants would be seriously prejudiced if the proceedings were allowed to continue while sanctions remained in force as the Claimants could not lawfully satisfy adverse costs orders, provide security for costs or pay any damages awarded under their cross-undertakings.

The Defendants sought a stay of the proceedings and release from the undertakings they had given to the Court in connection with the freezing orders obtained by them.

The two main issues for determination were: (1) the effect of sanctions on the litigation given that at least one of the Claimants was a sanctioned person and (2) whether that question applied to only one of the Claimants or to both.

Mr Justice Cockerill dismissed the Defendants' applications. It was held that:

i) Sanctioned Claimants can sue for damages and judgment can lawfully be entered in their favour without the regulations being contravened - a licence is not required.

ii) Payment of costs to and by sanctioned persons and security for costs to be provided by sanctioned persons are licensable activities for which a sanctioned Claimant can apply to the Office of Financial Sanctions Implementation for a licence to conduct such activities in connection with the litigation.

iii) NBT was not owned or controlled by Vladimir Putin and Elvira Nabiulina, despite being 99% owned by the Central Bank of Russia. In determining the issue, the Judge had to consider Regulation 7(4) of the Russia Regulations and whether a designated person can be deemed to control a company through their office, rather than personally. The Judge considered the Regulation was concerned with ownership, direct or indirect, and that the Regulations were designated to operate at a personal level and were not aimed directly at the Russian State.

The judgment contains significant other commentary on the area of sanctions.

RUSSIAN SANCTIONS - PART 2
PAYMENT INTO A SANCTIONED ACCOUNT

Havila Kystruten Operations SA commissioned the building (of four vessels at a Turkish shipyard, the lease financing of which involved back to back sales and bareboat Charterparties with the Defendants, Irish registered indirect subsidiaries of GTLK, a Russian state-owned and controlled financing house.

On 8 April 2022 GTLK was sanctioned by the EU. The Defendants relied on the consequences arising as a result of this to give notice under clause 28 of the charterparties demanding payment of Termination Sums on the occurrence of Termination Events although no time limit was given for payment. The Defendants also sent notices under clause 7 of the charterparties seeking to enforce their security over the vessels even though these had not yet been delivered by the yard.

The Claimants did not pay the Termination Sums being of the view that such payments would be a breach of sanctions. GTLK attempted to sell the vessels elsewhere. An interim injunction was obtained by the Claimants preventing the Defendants from enforcing the security over the vessels.

The Claimants sought a Court order, recognisable and enforceable in other jurisdictions, to the effect that they were entitled to the vessels free of GTLK's security interests as without such an order they could not obtain alternative finance for the vessels.

The Claimants applied for summary judgment on two preliminary issues:

(1) Whether the election by the Defendants to invoke clause 28 precluded the effective exercise of their rights notified under clause 7;

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(2) Whether payment of the Termination Sums into a nominated bank account which was frozen by sanctions nevertheless constituted good discharge for liabilities under the lease financing arrangements.

Stephen Houseman KC sitting as a Deputy Judge answered both questions in the affirmative and awarded ownership of the vessels to the Claimants. The Court held that while there were Termination Events there had been no default since clause 4.3 of the same contract excused performance that would be in breach of sanctions. Payment of the Termination Sums to the Defendants' nominated, but frozen, bank account if accepted by the Bank would constitute good discharge of the Claimants' obligations. Under the wording of the lease making payment was sufficient: the lessors need not be given free use of the funds.

LIMITATION OF LIABILITY UNDER HAGUE VISBY RULES FOR ECONOMIC LOSS

In May 2018 a bulk cargo of zinc calcine with a gross weight of 10,287.07 MT was loaded on board the vessel "Thorco Lineage" for carriage from Baltimore, United States to Hobart, Australia. The contract of carriage was governed by English law and subject to the Hague-Visby Rules. Whilst en route to the discharge port, the vessel suffered an engine failure. On 23 June the vessel grounded on Raroia Atoll in French Polynesia and sustained extensive damage. Several ballast tanks were punctured, the rudder was lost and the propeller was damaged beyond repair. On 25 June the Master signed LOF with salvors. The vessel was refloated and taken first to Papeete, Tahiti for inspection and temporary repair and thereafter was towed still under LOF to South Korea for repairs. The cargo owners provided General Average security.

The cargo owners sought to recover from the Owners in respect of several types of loss:
(1) their liability to salvors (2) physical loss and damage to the cargo (3) onshipment costs and (4) costs of sale/disposal of damaged cargo. As a preliminary point of law the English Court was asked to rule upon whether the Owners were entitled to limit their liability under Article IV 5 (a) of the Hague-Visby Rules and if so the applicable limit in respect of each head of loss.

Sir Nigel Teare classified the issue as whether in Art IV 5(a) the words "goods lost or damaged" refer only to physically lost or damaged goods or include goods that suffer economic damage. The Judge observed that where the safe place to which the salvors take the vessel and cargo is not the port of discharge the owners of the cargo may be obliged to incur costs to remove the cargo to the port of destination, such as salvage payable under LOF or the cost of onshipping cargo to the port of discharge. In such cases the cargo, though it may still be in sound condition, will have a diminished value to the cargo owner because of the additional expense and in such cases the cargo has suffered economic damage as a result of the casualty. The ordinary meaning of "lost or damaged goods" in Article IV 5(a) of the Hague-Visby Rules can include goods which have been economically damaged and therefore means "goods lost or damaged physically or economically". In consequence the limitation amount was to be calculated on the whole cargo and not solely upon the portion of cargo that was physically damaged. The Judge also observed that the imposition of a salvor's maritime lien upon the cargo constituted physical damage to the whole cargo.

NO LIMITATION BY CHARTERERS AGAINST OWNERS

The Owners of "MSC Flaminia" sought to recover from MSC as Charterers the cost of damage suffered following an explosion caused by cargo inside a container. MSC sought to limit its liability under the Convention on Limitation of Liability for Maritime Claims 1976.

Andrew Baker J, sitting in the Admiralty Court, considered the application of Article 2.1(a) of the Convention which provides that claims shall be subject to limitation of liability if they are:

in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom

The Owners' primary argument was that Article 2.1 applied only in respect of losses suffered by contractual outsiders such as cargo interests and that claims by a Charterer were therefore beyond its scope. The Judge held that there was nothing in the wording of the Convention that restricted its application in this way.

The Judge did, however, accept Owners' alternative case that a claim in respect of loss of or damage to the ship, including consequential loss resulting from the ship being lost or damaged, did not fall within Article 2.1(a).

The fact that the damage to the ship was caused by cargo on board did not assist MSC in bringing the damage within Article 2.1(a). That Article's application was not a question of causation but of classification of the claim. Although the damage for which Owners now claimed was caused by the cargo, what they were claiming for was damage to the ship. Accordingly, MSC was not entitled to limit its liability under the Convention.

SUBJECTS

In DHL Project & Chartering v Gemini Ocean Shipping Charterers DHL and Owners Gemini were negotiating a fixture for a proposed voyage of "Newcastle Express" from Newcastle, Australia to Zhoushan. On 25 August 2020 a fixture recap was circulated by email which stated.

"SUBJECT SHIPPERS/RECEIVERS APPROVAL WITHIN ONE WORKING DAY AFTER FIXING MAIN TERMS & RECEIPT OF ALL REQUIRED CORRECTED CERTIFICATES/ DOCUMENTS
RIGHTSHIP INSPECTION WILL BE CONDUCTED ON 3RD/ SEPT. OWNERS WILL PROVIDE REQUIRED CERTIFICATES LATEST BEFORE VESSEL SAILING (INTENTION 5/SEP). OWNERS WILL ENDEAVOR TO PROVIDE ALL REQUIRED CERTIFICATES/DOCUMENTS EARLIEST POSSIBLE"

The recap set out 20 further clauses including a London arbitration clause and provided -

"OTHERWISE AS PER ATTACHED CHARTERER'S PROFORMA C/P WITH LOGICAL ALTERATION"

On 3 September 2020 Charterers informed Owners that the shippers were not accepting "Newcastle Express" due to Rightship issues, that Charterers would not wait for these to be rectified and would charter a substitute vessel and "Newcastle Express" was therefore free. Owners held Charterers in repudiatory breach of the charterparty and claimed damages.

Arbitration proceedings were commenced by Owners who argued that the subject in question was qualified by a term of the proforma charterparty by which the shippers/receivers' approval was not to be unreasonably withheld. Charterers did not participate in the arbitration proceedings because of a failure of communication within their organisation.

The arbitrator found the vessel's rejection by Charterers was unreasonable as the vessel had not yet sailed from Zhoushan and therefore Owners had no obligation to address the status of Rightship inspection at that stage. Owners were awarded damages.

Charterers applied to the High Court:

(1) challenging the arbitrator's jurisdiction under s67 of the Arbitration Act 1996 arguing that no binding contact had been concluded as the subjects had not been lifted;

(2) in the alternative applying for leave to appeal on a question of law under s69 of the Act asserting the arbitrator made an error of law in finding that as a result of the proforma charterparty's provisions the shippers/receivers' approval for the purposes of the subject provision could not be unreasonably withheld.

Owners relied on the severability doctrine under s7 of the Act asserting the intention of the parties was to arbitrate and the issue of whether the charterparty was binding was properly a matter for the arbitrator's consideration.

The Court of Appeal upheld the Charterers' s67 application finding that the subject was not qualified and its effect was that the parties had not yet entered into a contractual relationship. The subject provision worked as a condition precedent applying to both the proposed charterparty and any agreement to arbitrate. Owners' arguments on severability were rejected. The application under s69 was not determined, but the Court observed permission to appeal would have been granted on the basis the arbitrator's decision was open to serious doubt.

STENA UKC; FREE PRATIQUE

The Master of "Stena Primorsk" chose to leave the discharge berth 12 minutes after berthing at Paulsboro, Delaware and later refused to return to the berth after having been advised that the discharge rate would be significantly lower than expected and having calculated that the Vessel's Under Keel Clearance (UKC) at low water would be less than the minimum required by the Vessel's managers.

Charterers relied on Charterparty clause 7 which provided that demurrage did not accrue if delay was caused by Owners' fault. Owners relied on Clause 3(2) of the Charterparty which required Owners to follow Charterers' orders only in so far as the Master considered them safe.

Judge Bird found that the Owners' UKC policy which required a waiver from the Vessel's managers to berth with UKC of less than 10% of the Vessel's draft was incorporated into the Charterparty by being included in the Q88 and was therefore binding on Charterers.

Despite Charterers arguing that there would have been sufficient water for the Vessel to remain afloat at the berth, the Judge deferred to the Master's judgment, placing importance on the assessment of risk and consideration of all of the circumstances. The Vessel's managers similarly were considered to have acted reasonably in not granting a waiver.

The Charterparty provided that Notice of Readiness would not be valid if Owners "fail to obtain free pratique unless this is not customary prior to berthing ... within the 6 hours after notice of readiness originally tendered ..." Charterers argued that since there was no documentary evidence of free pratique having been granted, the original NOR was invalid.

The Judge preferred a practical approach noting that all the parties were acting as if free pratique had been granted. The port ordinarily operated a system of free pratique by default and there was nothing to suggest it had not been granted. Demurrage was not suspended.

COMMERCIAL COURT GUIDANCE ON ARBITRATION ISSUES

In the recent case of RQP v ZYX Mr Justice Butcher gave guidance on

(i) what constitutes an award;
(ii) whether a crossclaim under a different contract can fall within an arbitrator's jurisdiction, and
(iii) the circumstances in which the Court will order compliance with a Peremptory Order.

ZYX commenced London LCIA arbitration against RQP in relation to various issues under a License Agreement. In response to the request for arbitration RQP raised jurisdictional issues, as to whether some of the claims fell within the scope of the arbitration clause. ZYX raised objection to a crossclaim brought by RQP whereby it sought to set off sums owing to RQP under a different agreement.

The arbitration involved a complicated procedural matrix and in March 2021, during what he called a "Mid-Stream Case Management Conference" ("MSCMC") the sole arbitrator made some oral comments on RQP's jurisdictional objections. This was subsequently followed by an email to both parties stating "because of the many intertwined issues, I made a point not to decide on the jurisdictional objections at this stage and restricted myself to comment, and to a statement about the issues of jurisdiction will be dealt with as the arbitration continues". In the same email he also confirmed his oral comments in writing "for the sake of good order".

In late March 2021 RQP applied pursuant to Section 67 of the Arbitration Act to set aside what it referred to as the arbitrator's

award on jurisdiction. Separately, also in March 2021, ZYX made an application for security on the basis RQP had been dissipating assets.

The arbitrator ordered RQP to issue a bank guarantee in favour of ZYX or make a deposit in the sum of USD 10,000,000 as security for any future award issued in favour of ZYX. RQP was also ordered to provide security for a future costs award in the additional sum of USD 250,000. ZYX sought a Peremptory Order pursuant to Section 41(5) of the Arbitration Act that RQP should issue a bank guarantee or provide a deposit as ordered by the arbitrator. The arbitrator granted the Order. RQP contended it had learned of conduct on the part of ZYX which it said constituted a breach of the Arbitration Agreement.

On the basis of this RQP terminated the Arbitration Agreement and failed to provide the security. In spite of this RQP still pursued its Section 67 application but stated it was doing so "solely for the purpose of seeking a determination as to the scope of the arbitrator's jurisdiction at the commencement of the claim". The arbitrator gave permission to ZYX to seek enforcement of the Peremptory Order under Section 42(2)(b) of the Arbitration Act.

(i) What constitutes an Award

The Judge held it was established authority that the Court does not have power to review interlocutory decisions which are not Awards. Consequently the first question for the Court was whether the arbitrator's comments at the MSCMC and his written follow-up constituted an Award.

Referring to guidance from ZCCM Investments Holdings v Kanshanshi Holdings Plc [2019] the Judge made the following comments on an award versus interlocutory decisions:

(a) The Court will look at substance over form and although the Tribunal's own description of the decision is relevant it is not conclusive.

(b) It is relevant to look at how a reasonable recipient would have reviewed the decision considering the objective attributes of that decision. The Judge formed the view that a reasonable recipient would consider whether the decision complies with the formal requirements for an Award under any applicable rules and that it must be assumed the reasonable recipient had all the information available to the parties and the Tribunal when the decision was made.

(c) Factors in favour of a decision being an Award are if the decision is final in the sense that it disposes of the matter submitted so as to render the Tribunal functus officio and deals with substantive rights and liabilities of the parties rather than purely procedural issues.

Applying these considerations to the facts the Judge concluded that there was no Award given by the Arbitrator since he had expressly stated he was making only preliminary comments and in any event his finding did not comply with the formal requirements for an Award under the LCIA Rules. It was also significant to note the Arbitrator did not call his decision an Award.

(ii) Did the crossclaim under a difficult contract fall within the jurisdiction of the arbitrator?

The primary question is whether the crossclaim is a transaction set-off or an independent set-off since a transaction set-off is a form of equitable set-off which usually means it is not necessary to show it would be manifestly unjust to enforce a payment without taking the crossclaim into account.

The Judge held the crossclaim was not sufficiently closely connected with the claim and arose out of a separate agreement between different parties. Further, it was not manifestly unjust to consider ZYX's claim in the arbitration without taking into account the crossclaim. On this basis even if the arbitrator had made an Award to the effect that he had no jurisdiction over the crossclaim he was correct to do so.

(iii) Enforcement of a Peremptory Order

As a preliminary point the Judge considered whether the word "Tribunal" in Section 42 of the Arbitration Act could include a Tribunal whose jurisdiction is subject to challenge. The Judge concluded that it could do so on the basis that it is open to a Tribunal to defer a decision on its jurisdiction to an Award on the merits, but it may still need to ask the Court to make an Order requiring compliance with a Peremptory Award.

The Judge continued that it was appropriate to make an Order under Section 42 in this case because:-

(a) The Peremptory Order was made in response to noncompliance with an Order which had persisted for a considerable length of time.

(b) RPQ's contention that it did not have any money to pay was expressly considered by the arbitrator and indeed was the reason given for ordering security in the first place.

(c) There had been no material change of circumstances since the arbitrator made his Order despite RQP's impecuniosity.

All of these decisions demonstrate the Courts will only interfere with the arbitration process to the extent necessary to support it.

The above are only intended to be short summaries.
If you require any further information please feel free to contact us.

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