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SANCTIONS: A VICTORY FOR COMMON SENSE

A team of HFW lawyers, led by William Gidman, secured a victory in the English High Court in a summary judgment application confirming that an "innocent" EU bareboat charterer could discharge their obligations to obtain title to vessels by paying in a non-contractual currency and into a frozen account when its counterparts are subject to international sanctions. The case endorses the Court of Appeal's view in *Mur Shipping v RTI* [2022] EWCA Civ 1406.

Gravelor was the charterer of two bulk carriers, WL KIRILLOV and WL TOTMA, under bareboat charterparties from special purpose vehicles (SPVs) in the GTLK group of companies (Russian State Leasing House) (**the Charters**). Following the outbreak of the Russia / Ukraine war, the GTLK group was subject to US, EU and UK sanctions.

The Charters were essentially "hell or high water" financing agreements, which allowed Gravelor to purchase the vessels at any time either (i) under an express purchase option; or (ii) on termination. Whilst there was a dispute as to the basis upon which Gravelor was entitled to purchase the vessels, for the purposes of this summary judgment application Gravelor confirmed that it was willing to purchase the vessels under the termination regime.

The Charters required payment in US$ to a specified bank account. Clause 8.10 stated:

"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**." [emphasis added]

The two most important issues for the court to determine were:

1. Whether Gravelor could discharge its burden of paying the termination sums, by paying into an account frozen for the purposes of applicable sanctions?
2. Whether the wording in clause 8.10 permitted Gravelor to pay, and required GTLK to receive, payment of the termination sums in a currency other than the contractual US$?

Frozen account

GTLK argued that payment into an account frozen for the purposes of sanctions would not constitute payment because it would not have unconditional, unfettered access to the funds.

The court dismissed this argument. **Firstly**, the court noted that payment into a bank account which could not be accessed by the payee (GTLK) due to a freezing injunction would still constitute payment by the payor (discharging the payor's obligation) (citing *The P* [1992] 1 Lloyd's Rep). **Secondly**, the court accepted the view of Mr Houseman KC sitting as a Deputy Judge in the High Court in *Havila Kystruten AS v STLC Europe Twenty-Three Leasing Limited* [2022] EWHC 3166 (Comm):

"Whether or not the payee, here the lessor, has access to or gets the benefit immediate or otherwise, of funds in such bank account is immaterial to this contractual analysis. This account was frozen when it was nominated. No other entity has access to or the benefit of such funds, and certainly not the payor, i.e. the lessee, which is what matters most"

The court in fact went further in this case and said it was immaterial whether or not the account had become frozen before or after it had been nominated.

It follows that payment into an account frozen by applicable sanctions still discharged the obligation to pay the termination sums under the Charters.

Non-contractual currency

Whilst different facts, the court agreed with the views of the Court of Appeal in *Mur Shipping v RTI* with Foxton J noting:

"While the facts are different MUR Shipping does, however, demonstrate that ***clauses in contracts which are intended to address extraneous circumstances which render performance in the manner originally anticipated impossible****, while keeping the relevant obligations alive as a matter of substance, or in "a … practical sense",* ***may well involve one party accepting performance otherwise than "in strict accordance with its terms"****." (emphasis added)*

On the facts of this case the court found that the words *"all necessary steps"* in clause 8.10 of the Charters required GTLK to nominate an alternative bank account into which the required termination sums could be made even if the owners' access to those funds would be restricted. Further, GTLK was required to accept payment in a non-contractual currency to allow payments to be made.

HFW Comment

The last decade or so has seen multiple events that might constitute force majeure (e.g. Covid-19) and the increased use of economic sanctions – not just concerning Russia but also Iran, Cuba and Venezuela, to name a few. It is difficult to foresee the effect force majeure events or sanctions may have on a contract; the "innocent" party may want to get out of the contract completely or may just require the cooperation of the other party to complete a transaction (as in this case).

The case law flowing from Covid-19 and the Russia / Ukraine war suggests it is prudent to include clear force majeure and sanctions clauses in all future shipping contracts. BIMCO released a new force majeure clause in 2022. BIMCO also released time and voyage charters sanctions clauses in 2020, although they arguably already needs to be updated (in part to deal with the ultimate beneficial owner being a sanctioned entity, not just your counterparty).

However, this case and *Mur Shipping* suggest it may be prudent to go even further and to include bespoke express provisions (i) allowing payment in a non-contractual currency; and (ii) confirming that payment into an account frozen for the purposes of any applicable sanctions does constitute valid discharge of the payor's obligations.

Finally, although a matter for politicians it is this author's view that sanctions could be better drafted to protect the "innocent" non-sanctioned party. This is a case in point; considerable time and cost has been incurred, and significant loss of profit suffered, by an EU entity trying to extract assets (the vessels) *away* from a sanctioned entity in consideration for paying into a frozen account (i.e. no benefit to the sanctioned entity). Put another way, in this case if Gravelor was unable to make payment in compliance with applicable sanctions then it may well be that the sanctioned entity (GTLK) would *benefit* from the imposition of sanctions on them by the return of the vessels to GTLK and the loss of Gravelor's valuable purchase rights under the Charters. That is surely not the intention of sanctions.

Gravelor Shipping Limited v (1) GTK Asia M5 Limited and (2) GTLK Asia M6 Limited **[2023] EWHC 131 (Comm).**

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