UK DEFENCE CLUB

Soundings

The High Court provides guidance on US and EU sanctions and the obligations of insurers in respect of sanctioned payments.

In a recent expedited judgment in Mamancochet Mining Ltd v Aegis Managing Agency Ltd & Others [2018] EWHC 2643 (Comm) Mr Justice Teare provided guidance on the correct interpretation of a standard sanctions clause contained in a marine cargo insurance policy following a loss of cargo shipped to Iran in 2012.

The insurers sought to resist payment of the claim under the terms of the sanctions clause within the policy on the basis that payment would potentially expose them to sanctions. However, after reviewing the US sanctions regime, Teare J concluded that the assured was entitled to payment of its claim.

Background

The claimant was the assignee of the benefit of a marine cargo insurance policy which protected the assured against, inter alia, the theft of two cargoes of steel billets which were carried from Russia to Iran in August, 2012. On arrival in Iran the cargoes were placed in bonded storage, but at some time between 22nd September, 2012 and 7th October, 2012 the cargo was stolen. Following discovery of the theft, the assured made a claim under the policy.

The defendant insurers never denied that the assured had a valid claim under the policy. However, they resisted payment on the basis of the sanctions clause, which provided as follows:

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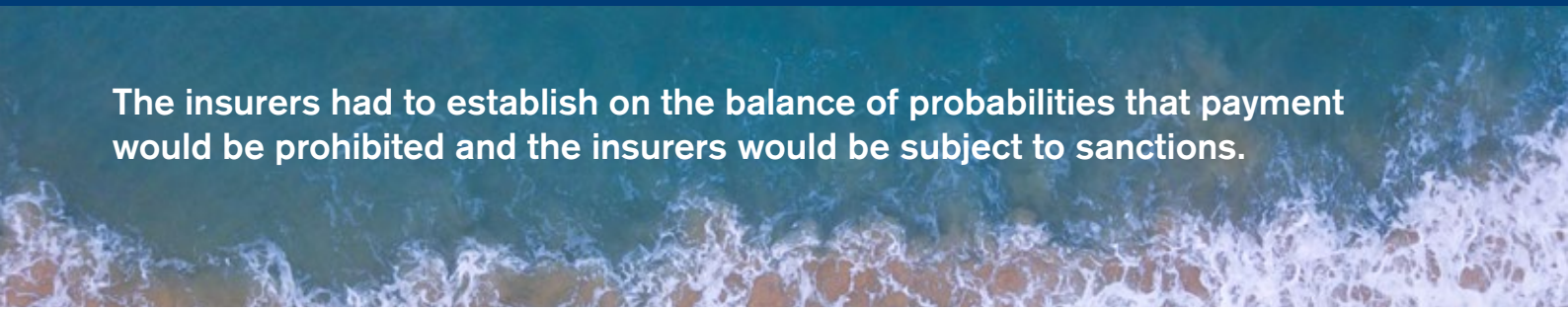

The insurers had to establish on the balance of probabilities that payment would be prohibited and the insurers would be subject to sanctions.

"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 the United States of America."

At the time the policy was taken out, there were no applicable sanctions in place. However, the claim was made after 9th March, 2013, when US owned or foreign controlled entities ("USFCEs"), such as the insurers in this case, were subject to the US sanctions regime, and prohibited from paying a claim under an insurance policy.

Following the coming into force of the Joint Comprehensive Plan of Action ("JCPOA") between Iran, the five permanent members of the UN, Germany and the EU, the Iranian sanctions regime was relaxed from 16th January, 2016 (the "Implementation Day"). As from the Implementation Day, USFCEs were entitled to engage in all activities consistent with JCPOA. At this time, the claimants argued that payment under the policy would not be prohibited and then sought to revive its claim.

However, on 8th May, 2018 President Trump announced the withdrawal of the US from the JCPOA. The US re-imposed Iranian sanctions with effect from 27th June, 2018, subject to a wind-down provision ending on 4th November, 2018 for transactions "ordinarily incident and necessary to the wind down of … transactions … that would otherwise be prohibited." More information on this can be found in our online article.

It was common ground that, absent a specific licence, the defendant insurers would be prohibited from paying the claim under the policy on or after 5th November, 2018. However, it was necessary to determine whether such payment would fall within the wind-down exemption or if the claim was already prohibited as of 27th June, 2018. The case was determined on an expedited basis so that a decision could be given prior to the US sanctions being re-imposed.

The issues

Three main issues arose for consideration:

i) What is the proper interpretation of the phrase in the sanctions clause "to the extent that …payment of such claim …would expose that (re)insurer to any sanction, prohibition or restriction under …the trade or economic sanctions, laws, or regulations…"?

ii) As a matter of fact, would payment of the claim "expose" the defendants to US and/or EU sanctions, within the meaning of the sanctions clause?

iii) If the question above is answered affirmatively are the defendants prevented from relying on the sanctions clause by virtue of Article 5 of Council Regulation (EC) No. 2271/96 (the "EU Blocking Regulation")? Under Article 5 of this Regulation, parties are not permitted to comply with any requirement or prohibition contained in certain specified laws, one of which is the relevant US sanctions regime.

The decision

The defendant insurers argued that the effect of the sanctions clause was that they would not be liable to pay a claim under the policy if there was a risk that doing so would expose them to sanctions. Teare J rejected this argument and instead concluded that the insurers had to establish on the balance of probabilities that payment would be prohibited and the insurers would be subject to sanctions. This decision turned on the interpretation of the words "would expose", which the Judge found to mean that the insurers must be exposed to sanctions and not merely exposed to the risk of sanctions.

After reviewing the relevant US sanctions regime he concluded that the wind-down period applied to payment under the policy. Therefore, he held that until 11:59 pm on 4th November, 2018 payment of the insurance claim in sterling was not prohibited by the US sanctions regime and that payment before that date would not expose the insurers to sanctions.

The insurers had also sought to rely on the fact that payment was prohibited at the time the claim was presented, arguing that once the sanctions clause was triggered its effect was to extinguish any liability of the defendants to pay the claim. However, Teare J rejected this argument and clarified that the clause did not completely extinguish the insurers' liability to pay but merely suspended it. Accordingly, when payment ceased to be prohibited in 2016, following the implementation of the JCPOA, the insurers were again liable to pay, even if liability had been suspended prior to this.

Because of his decision on these first two points, it was unnecessary for Teare J to decide on the effect of the EU Blocking Regulation. However, Teare J commented that he saw considerable force in the argument that the EU Blocking Regulation was not engaged where the insurers' liability to pay was suspended under a sanctions clause like that in issue. This is because the insurers' resistance to payment is not pursuant to a third country's prohibition to resist payment, but is instead based on the terms of the insurance policy.

Accordingly, the claim succeeded and the insurers were required to make payment under the policy before the re-imposition of US sanctions on 5th November, 2018.

Please contact the Managers for further information in relation to this case and any other sanctions queries.

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