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SANCTIONS: BETWEEN A ROCK AND A HARD PLACE

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ABSTRACT

Sanctions have been tied to the world of shipping and international trade since at least the time of Ancient Greece. In recent years, however, sanctions have been brought back to the forefront of the shipping industry with the imposition of new sanctions regimes by the US, UK and EU, among others, which are complicated, overlapping, possibly conflicting, and especially punishing if one is found to be in breach. This has led to an explosion in litigation relating to these sanctions regimes, creating significant sanctions risks for operators in the industry. In this context, this paper discusses the fundamental concepts of sanctions, addresses the difficulties and risks created by them, and focuses on the contractual mechanisms that parties have relied on to address sanctions risks, namely force majeure and sanctions clauses. This paper also examines three recent cases where the use of these contractual mechanisms has been tested in the context of contracts of sale, financing and transport and highlights the lessons to be learned from these decisions.

Keywords: Sanctions, risk, sanctions clauses, force majeure, letters of credit, sale, contract of affreightment

[*] Justice of the Court of Appeal, Supreme Court of Singapore. I wish to acknowledge the invaluable assistance of my law clerk, Wong Weitao, in the research and preparation of this Address.

1 Preliminary remarks

I would like to thank Professor Stephen Girvin, Director of the NUS Centre for Maritime Law ('CML'), for the invitation to deliver this evening's Address. Nine years ago, I delivered the address at the opening of the CML in September 2015.[1] I had then spoken of my hope and belief that the CML would grow to be a centre for thought leadership in the maritime world and a crucial pillar of support for the shipping Bar in Singapore. I expressed every confidence in the development of the CML, with Professor Girvin on board as its able master to guide it through inclement weather and the occasional breakdown. I am pleased to note that the voyage has been smooth sailing with no breakdown, to my knowledge. I am glad to be back here again, nearly a decade later, and to see Professor Girvin still at its helm. I am pleased to note that the Centre has very much lived up to its ambitions and has published more than 50 working papers, on top of journal articles and books, making contributions in core areas of shipping such as admiralty law, marine insurance, trade finance and the carriage of goods by sea, and going further to the forefront of cutting-edge technologies such as autonomous ships, and fast-developing areas such as green and carbon-free shipping. The Centre has also made its mark in education, offering leading masters and graduate diploma programmes in maritime law under the auspices of the NUS Faculty of Law. It is my sincere hope that the Centre will continue to inspire young and bright lawyers to join the shipping Bar.

The Singapore Shipping Law Forum is itself a hallmark of the Centre's success. Since its inception in 2017, the forum has featured addresses by esteemed lawyers, academics and judges, including my colleagues on the bench, Justice Belinda Ang and Sir Bernard Rix, who sits as an International Judge on the Singapore International Commercial Court.

For this Address, I have chosen to speak on a topic which might not be regarded as a core area of shipping law. One would sooner expect to read about sanctions in the world section of a newspaper rather than in a treatise on charterparties. Yet, in recent times, sanctions have come to the forefront in the world of shipping and international trade. It is thus necessary for the modern shipping lawyer to be well versed on the major sanctions regimes and the pressing issues arising therefrom, and it is for that reason that I have chosen to speak on this

[1] Justice Steven Chong, 'Maritime Law in Singapore and Beyond – Its Origins, Influence and Importance', NUS Centre for Maritime Law Working Paper 17/01.

topic. The title of my Address is 'Sanctions: Between a Rock and a Hard Place', a title which may reflect the sentiments of some in the industry who must bear the brunt of this complicated, messy and perhaps even punishing issue.

I caveat that my purpose this evening is not to speak on the geopolitical aspects of international sanctions. That is not a topic appropriate for this forum or, indeed, for this speaker. Instead, I would like to focus on the practical impact of sanctions regimes on operators in the shipping industry – to you in the audience or, in the case of lawyers, to those you advise.

I propose to structure this Address in two parts. First, I will endeavour to cover the basics of sanctions, and to answer some of the most fundamental questions one may have – what are sanctions, what do they do, who imposes them, and who can be affected by them? I will then speak about how the industry has responded to sanctions, primarily by way of various contractual mechanisms, which I will explore.

2 An introduction to sanctions

2.1 What are sanctions?

Let me begin with the most basic question – what is a sanction? The UN Security Council's website contains the following description of a sanction:[2]

> Sanctions measures…encompass a broad range of enforcement options that do not involve the use of armed force. … Security Council sanctions have taken a number of different forms, in pursuit of a variety of goals. The measures have ranged from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions. The Security

[2] United Nations Security Council, 'Sanctions' <main.un.org/securitycouncil/en/sanctions/information> accessed 27 September 2024.

Council has applied sanctions to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights and promote non-proliferation.

These definitions are useful insofar as they aid us in understanding the broader context behind the imposition of sanctions regimes. Undoubtedly, they are a tool of geopolitics intended to pressure a State to desist in some course of action or yield to a demand without resorting to armed conflict. They are neither unique nor limited to shipping – they can target virtually any sector of the economy. The world of shipping and international trade, however, is one of the prime areas where sanctions operate, and those in the industry will feel the pinch more acutely than most, except perhaps the banks, whom I will speak briefly about later in this Address. It is easy to see why sanctions affect this industry, given the ubiquity of international trade.

In fact, the history of sanctions on shipping traces back more than two thousand years to the time of ancient Greece. In 433–432 BC, on the eve of the Peloponnesian war between Athens and Sparta, Athens issued two decrees imposing sanctions against Megara, a smaller city-state dependent on trade. The reason for these Megarian Decrees, as they have come to be known, appears to be a matter of debate – ostensibly, they were punishment for the Megarians' cultivation of sacred land or sheltering of runaway slaves from Athens, but some theorise a broader political strategy behind its imposition. I will leave that debate to the historians, but what is of greater interest for present purposes is the content of these sanctions. There were two prohibitions: first, all Megarian goods and wares were excluded from the Athenian market on pain of confiscation; second, all Megarian citizens were excluded from all ports in the Athenian empire. These sanctions effectively shut Megara out of key trade routes and cut off its food supply, leaving the city to starve.[3] We see that this early example of a sanctions regime consisted of a port embargo and a ban on the trade of goods originating from a particular State – prohibitions which are not unfamiliar to the shipping industry even today.

[3] See Francis Macdonald Cornfold, *Thucydides Mythistoricus* (Routledge 1965) 27–28.

This may be contrasted with the following modern example of a sanctions measure imposed by the UK:[4]

> **Target:** KOSTIN Andrei Leonidovich
>
> **Date Designated:** 10 March 2022
>
> **Sanctions Imposed:** Transport sanctions: ships owned, controlled, chartered or operated by the individual are prohibited from entering a port in the UK; may be given a movement or port entry direction, can be detained, and will be refused permission to register on the UK Ship Register or have its existing registration terminated.
>
> **UK Statement of Reasons:** Andrei Leonidovich KOSTIN is an involved person under the Russia (EU Exit) (Sanctions) Regulations 2019 on the following grounds: KOSTIN is or has been involved in obtaining a benefit from or supporting the Government of Russia by working as a director (whether executive or non-executive), trustee, or equivalent of a Government of Russia-affiliated entity and an entity that is carrying on business in the Russian financial services sector, a sector of strategic significance to the Government of Russia.

Comparing the two examples, we see that the key elements of a sanctions regime have remained essentially the same – there is a target, a prohibition, and a reason. We can see that, in many ways, the prohibitions remain the same. The modern example features a port embargo, very much the same prohibition imposed by the ancient Athenians. The targets and the reasons, of course, have changed with the times. One point of note is that, with some notable exceptions,[5] modern sanctions do not typically take the form of a comprehensive economic embargo against the entirety of a State and its citizens but instead target individual persons or entities.[6] This evolution is perhaps borne out of humanitarian concerns for the devastating effect that comprehensive economic sanctions can have on the population of a

[4] UK Sanctions List <search-uk-sanctions-list.service.gov.uk/designations/RUS0267/Individual> accessed 27 September 2024.

[5] The UN sanctions regime against North Korea is one such exception.

[6] Richard L Kilpatrick Jr, 'Maritime Sanctions Clauses' [2020] LMCLQ 565, 566.

State. As for the reasons, sanctions in the modern day have been imposed for a variety of reasons, including:

(a) to deter States from engaging in military aggression, as can be seen from the sanctions regimes imposed against Russia following the invasion of Ukraine;

(b) to pressure regimes into abandoning their attempts to develop nuclear weapons, as can be seen from UN sanctions imposed against North Korea and US sanctions imposed against Iran; and

(c) to punish certain regimes for human rights abuses, as can be seen from UN sanctions imposed against the Taliban in Afghanistan.

I return to the modern example above to make a few observations from the perspective of an operator on the ground:

(a) First, a sanctioning authority may state its reasons for imposing a sanction against an entity or individual, but what we do not (and will not) know is what evidence or information that authority is relying on to justify the imposition. A commercial party can only operate off the statement at its face value.

(b) Second, the scope of a sanction is often broadly worded and, in some cases, unclear or ambiguous. The sanctions measure in this example applies to any ship 'owned, controlled, chartered or operated' by the sanctioned individual. It is troubling enough to determine the question of ownership, which requires one to wade through the opaque corporate structures that are so common in this industry. What more if one has to establish the broader concept of 'control'? Issues such as these make sanctions ripe for dispute. That is where the lawyers play their role.

2.2 Who imposes sanctions?

Now that we have a broad idea of what sanctions are and why they are imposed, I turn to the next question – who imposes them? It is technically within the power of any country to impose sanctions under its own laws, subject to WTO obligations. The Singapore government has itself implemented unilateral sanctions against four Russian banks in response to Russia's invasion of Ukraine.[7]

However, the most prominent sources of sanctions which would concern the industry are (a) the UN Security Council, (b) the European Union ('EU'), (c) the UK and (d) the US. I make some brief remarks on each.

I start with the UN Security Council. The Security Council has the power to pass multilateral sanctions which bind all UN member states.[8] The responsibility falls on individual member states to implement these sanctions under their domestic laws and to enforce them. One example is the current regime imposed on North Korea in response to its nuclear programme.[9]

Next, the EU also implements a form of multilateral sanctions under the directions of the EU Council. This is done through the Common Foreign and Security Policy, which sets down a common sanctions policy for all EU Member States.[10] Through this framework, the EU has imposed sanctions against Russia in response to the invasion of Ukraine, targeting Russia's financial, trade, energy, transport, technology and defence sectors. One aspect which would be of particular interest to the industry is the price cap on the maritime transport of Russian oil and petroleum products and bans on the import of Russian crude oil and LPG.[11]

I turn next to the UK, where sanctions are primarily issued pursuant to the Sanctions and Anti-Money Laundering Act 2018.[12] While the UK had historically mirrored the EU's sanctions policy, that has changed with Brexit, perhaps most notably with the publication of a strategy paper on sanctions earlier this year (albeit under the previous Sunak administration).[13] It is

7 Monetary Authority of Singapore, Notice SNR-N01 Financial Measures in Relation to Russia.
8 Charter of the United Nations art 41.
9 United Nations Security Council, 'Security Council Committee established pursuant to resolution 1718 (2006)' <main.un.org/securitycouncil/en/sanctions/1718> accessed 28 August 2024. This is implemented in Singapore by way of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2010.
10 Richard Gordon QC, Michael Smyth and Tom Cornell, *Sanctions Law* (Hart Publishing 2019) para 2.4.
11 European Council, 'EU Sanctions against Russia' <www.consilium.europa.eu/en/policies/sanctions-against-russia/#military-aggression> accessed 27 September 2024.
12 C 13.
13 HM Government, 'Deter, Disrupt and Demonstrate – UK sanctions in a contested world' (22 February 2024).

convenient to note here that the UK sanctions regime has been a source of litigation in the English courts, providing some of the cases I will discuss in the next section of this Address.

Lastly, I turn to US sanctions, which undoubtedly draw the most attention. This is so for three simple reasons – US sanctions are greater in number, wider in reach, and, if one should fall on the wrong side of them, severely more punitive. US sanctions measures are usually imposed by Executive Order of the President and are organised into various sanctions 'programs' implemented and enforced by the Office of Foreign Assets Control ('OFAC'). The OFAC maintains a 'Specially Designated Nationals' List or 'Blocked Persons List', which consolidates all individuals and entities subject to financial sanctions measures. I shall refer to this as the OFAC List.[14]

The wide reach of US sanctions merits further elaboration. There are two factors which contribute to this – the first is design, and the second is economic reality. I start with the point on design. US sanctions apply, in the first instance, to 'US persons'. This is a term defined in the applicable regulations to include US citizens, permanent residents, entities organised under the laws of the US or any jurisdiction within the US, or any person in the US.[15] More controversially, non-US persons can also find themselves on the wrong side of US sanctions in several ways. Such persons can be liable if they re-export US goods to a sanctioned country or conspire to violate a US sanction. More controversial still is the use of secondary sanctions, which are designed to deter non-US persons from dealing with sanctioned entities by cutting them off from the US banking and financial system.[16] This links up with the second point on economic reality: the global shipping industry transacts in US dollars. Imagine being unable to pay or be paid in US dollars because you had unwittingly dealt with a sanctioned entity – that could very well sound the death knell for any company in the industry.

I would add that the use of secondary sanctions has been so controversial as to attract countermeasures from the EU in the form of the 'Blocking Statute', which prevents EU

[14] Gordon (n 10) paras 4.7–4.9.
[15] Ibid, para 4.18.
[16] Ibid, para 4.21; Joshua Andresen, 'US Secondary Sanctions: Lawful After All?' in Ksenia Kirkham (ed), *The Routledge Handbook of the Political Economy of Sanctions* (Routledge 2023) 306–307.

operators from complying with US secondary sanctions against Iran.[17] The prospect of conflicting regulations adds yet another layer to this already complex patchwork of sanctions.

Allow me to illustrate this complexity with the example of an oil trader buying a cargo of crude oil. How might he be affected by sanctions? The short and unfortunate answer is: possibly in every conceivable way. He may be caught by a sanction because his seller is a sanctioned entity or the subsidiary of one. The oil itself may be the subject of a sanction because it comes from a sanctioned country. He may also be in trouble because the vessel he has chartered to carry that oil is sanctioned or because it is captained by a Master who has been sanctioned.

2.3 The penalties for breaching a sanction

What happens to our unfortunate trader if he is found to have breached a sanction? The possibility of criminal prosecution and financial penalties cannot be ruled out. One need only look to the example of the banks to understand the severity of these penalties. In 2014, BNP Paribas was ordered to pay a fine of US$8.9 billion after it was found to have illegally processed financial transactions through the US financial system on behalf of sanctioned entities.[18] In 2019, Standard Chartered Bank was similarly prosecuted and made to pay a fine of more than US$1 billion.[19] These heavy penalties may have motivated some banks to adopt a very cautious approach to sanctions risks, and as I will discuss later, this approach is not without its pitfalls.

Over and above the prospect of criminal liability, anyone who transacts with a designated entity or individual in breach of US secondary sanctions may sooner find his own name added to that list.

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[17] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom C/2018/3572, [2018] OJ L1991/1.

[18] US Department of Justice, 'BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to US Economic Sanctions' (30 June 2014) <www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial> accessed 27 September 2024.

[19] US Department of Justice, 'Standard Chartered Bank Admits to Illegally Processing Transactions in Violation of Iranian Sanctions and Agrees to Pay More Than $1 Billion' (9 April 2019) <www.justice.gov/opa/pr/standard-chartered-bank-admits-illegally-processing-transactions-violation-iranian-sanctions> accessed 27 September 2024.

All things considered, I think it would not be unfair to say that the international sanctions environment is complex, ever-changing, wide-reaching and even potentially conflicting. Anyone in the industry may thus find himself between a rock and a hard place, and struggling to decide how best to navigate the attendant risks.

3 The industry's response: contractual mechanisms

The narrative I have outlined thus far is hardly a happy one, but the reality is that business and commerce do not halt in the face of adversity, and the flow of international trade will not be stemmed. Sanctions, painful as they may be, have to be managed like the many other risks which are inherent in the business of shipping and trade. It is in that spirit that I turn to the second part of my Address: how does the industry respond to sanctions risk?

Industry players must, first and foremost, be careful who they do business with. In that regard, there is a wealth of published guidance by P&I clubs and other institutions as to how proper due diligence should be conducted.[20]

What is of interest, however, is the question that comes after: what should you do if a sanctions risk is detected, and how can you prepare for that situation?

Not unexpectedly, the response by the industry is expressed through the contractual allocation of risk. Various contractual mechanisms have been designed to deal with this risk. I will draw attention to two – force majeure clauses and sanctions clauses. At the risk of stating the obvious, these contractual clauses are to be analysed within the general framework of contract law and the general principles of contractual interpretation.

I start with force majeure clauses. They typically set out the parties' agreement on the consequences where performance of the contract is impeded by a situation which the parties have little or no control over – in other words, a force majeure event.[21] A common consequence is that a party is permitted to suspend its performance of its obligations while

[20] See, eg, *Sanctions: A Guide for Owners and Charterers* v 2.3 (NorthStandard, June 2024).
[21] *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* 1996] SGHC 122, [1996] 2 SLR(R) 316, [60].

the force majeure event subsists. Force majeure clauses do not target sanctions risk specifically, but are instead generally framed to cover as many situations as conceivable.

Sanctions clauses, on the other hand, present a more bespoke solution targeted at sanctions specifically.[22] These clauses have appeared in many contracts which are commonly used in the industry, including bills of lading, charterparties and P&I club rules. While there are some commonalities to be found, I must emphasise that these are nevertheless highly bespoke clauses. They may differ, for example, in terms of the agreed consequences – those consequences must necessarily be adapted to fit the specific context of the transaction.

One example can be found in CMA CGM's Bill of Lading Terms and Conditions, which place sanctions obligations only on the holder of the bill of lading. These obligations essentially amount to a representation that the holder has complied with sanctions and include an undertaking of indemnification:

> **26. SHIPPER'S / MERCHANT'S RESPONSIBILITY**
>
> …
>
> (4) <u>The Merchant shall comply</u> with all regulations or requirements of customs, port and other authorities, with the provisions of applicable anticorruption laws, including but not limited to the United Nations Convention against Corruption (2005), the US Foreign Corrupt Practices Act of 1977, the UK Bribery Act of 2010, <u>with the applicable economic sanctions regulations, including but not limited to the ones published by the United States, European Union, United Nations and United Kingdom</u>. The Merchant further <u>represents and warrants that it is not listed or detained/controlled by an entity listed by the United States, European Union, United Nations or United Kingdom as a 'Blocked Person', 'Denied Person', 'Specially Designated National'</u>. The Merchant shall bear and pay all duties, taxes, fines, imposts, expenses or losses (including, without prejudice to the generality of the foregoing, Freight for any additional Carriage undertaken) incurred or suffered by reason of any failure to so comply, or by reason of any illegal, incorrect or insufficient marking, numbering or addressing of the Goods, or the discovery of any drugs, narcotics or other illegal substances within Containers

[22] See generally Kilpatrick (n 6).

> packed by the Merchant or inside Goods supplied by the Merchant or any stowaways discovered inside the Container and shall indemnify the Carrier in respect thereof.

Another example can be found in the BIMCO Sanctions Clause for Time Charter Parties 2020, which is more balanced as between owner and charterer and contains a different set of consequences designed for the charterparty context:

> …
>
> (b) Owners warrant that at the date of this Charter Party and throughout its duration they, the registered owners, bareboat charterers, intermediate disponent owners, managers, the Vessel and any substitute are not a Sanctioned Party.
>
> (c) Charterers warrant that at the date of this Charter Party and throughout its duration they and any subcharterers, shippers, receivers and cargo interests are not a Sanctioned Party.
>
> (d) If at any time either party is in breach of subclause (b) or (c) above then the party not in breach may terminate and/or claim damages resulting from the breach.
>
> (e) Charterers shall not give any orders for the employment of the Vessel which involves a Sanctioned Party or a Sanctioned Activity.
>
> (f) If the Vessel is already performing an employment which involves a Sanctioned Party or is a Sanctioned Activity, without prejudice to any other rights that may be available in subclause (d) above, Owners shall have the right to refuse to proceed with the employment and Charterers shall be obliged to issue alternative voyage orders within forty-eight (48) hours of receipt of Owners' notification of their refusal to proceed. If Charterers do not issue such alternative voyage orders Owners may discharge any cargo already loaded at any safe port or place (including the port or place of loading). The Vessel shall remain on hire throughout and Charterers shall be responsible for all additional costs and expenses. …

Another key aspect in which sanctions clauses may differ is whether they are phrased objectively, so as to require proof of a certain state of events before a party can invoke the sanctions clause, or subjectively, so as to confer a discretion upon one party to take protective measures based on its own subjective risk assessment. An example of such a subjective clause can be found in the Gard P&I Rules 2024:

> **Rule 24 Termination by the Association**
>
> **3.** Notwithstanding and without prejudice to Rules 24.1 and 24.2 and Rule 25.4, the Association may, on such notice in writing as the Association may decide, terminate the entry in respect of any and all Ship(s) in circumstances where the Member has exposed or may, in the opinion of the Association, expose the Member or the Association and/or its Agent to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever by the State of the Ship(s) flag, by any State where the Association and/or its Agent has its registered office or permanent place of business or by the United Nations, the European Union, the United Kingdom or the United States of America.

4 A survey of the cases

I turn to examine some of the cases involving the operation (or alleged operation) of sanctions regimes. While there have been many cases in just the past few years given the recent explosion in sanctions litigation, I have selected just three cases to illustrate the operation of sanctions on three different aspects of international trade – sale, financing and transport. A common denominator of these cases is that in each of them, it is the payment of money which is alleged to be prevented or hindered by sanctions. That is indicative of the typical areas of dispute in sanctions litigation. More significantly for present purposes, the contractual mechanisms I have discussed thus far were put to the test in each of these cases, and I think there is much that can be learned from their outcomes.

4.1 *Litasco SA v Der Mond Oil and Gas Africa SA*

The first case is *Litasco SA v Der Mond Oil and Gas Africa SA* (‘*Litasco*’),[23] a decision by Mr Justice Foxton in the English Commercial Court. The case involved a contract for the sale of Nigerian crude oil, CFR Dakar, Senegal. The seller was the Swiss subsidiary of a Russian oil company. The buyer was a Senegalese company. Importantly, the price was to be paid in

[23] [2023] EWHC 2866 (Comm), [2024] 1 All ER (Comm) 1044.

euros. The oil was delivered as promised, but the buyer only made partial payments and failed to pay the balance, even after the parties agreed to an extended schedule for repayment following negotiations. The seller brought proceedings for the balance of the purchase price, and the buyer raised several defences for its non-payment. Two of these defences are of interest for present purposes – namely, the buyer's reliance on both the force majeure and trade sanctions clauses in the contract of sale. We, therefore, have, in this case, a reliance on both contractual mechanisms which I have highlighted.

The buyer first argued that the force majeure clause was engaged because payment had to be made through the international banking system and no European clearing bank would make payments to the seller, presumably because of its Russian parent company.[24] In analysing this defence, the court took special notice of the fact that the buyer was seeking to suspend its performance of an *accrued* payment obligation; the goods, in this case, had already been delivered. Given the asymmetry of the situation, an argument to suspend the accrued obligation would have to be approached with particular circumspection.[25] The court concluded that the buyer had no realistic prospect of succeeding in this defence, finding on the evidence that the buyer's ability to pay had not been hindered by difficulties in the international banking system. Rather, it was that the buyer did not have sufficient foreign currency to make the payments.[26] In other words, there was, in fact, no force majeure event which had delayed, hindered, or prevented the buyer's performance of its payment obligation. More strikingly, the court pointed out, though it was not argued, that the clause itself had expressly excluded the suspension of an accrued payment obligation.[27] The force majeure defence, therefore, failed.

Moving on to the sanctions defence, the buyer cited the UK's sanctions regime against Russia and argued that it was thereby excused from performance, whether by way of the sanctions clause in the contract or as a matter of general law. The court found that on either limb, the defence would fail. The court examined the sanctions clause, which was structured in two parts – first, a mutual acknowledgement that each party's performance of the contract would

[24] Ibid, [34].
[25] Ibid, [37].
[26] Ibid, [38]–[39].
[27] Ibid, [41]–[43].

be in compliance with various sanctions regimes, and second, that if (and only if) there was a change to the applicable sanctions regimes, a party would be permitted to suspend its performance. The allocation of risk, in this case, was clear – the parties were taken to have assessed and assumed the risk of sanctions operable at the date of the contract, and the clause would only excuse them insofar as their performance was prevented by a *subsequent* change to the existing sanctions. Since the buyer could not point to any sanctions change, it could not rely on the sanctions clause.[28] The court went further to find that the buyer could not establish an arguable case that the relevant sanctions were even applicable. The evidence did not suggest that the seller was controlled by a sanctioned individual, and the transaction did not fall within the scope of sanctioned activities under the relevant sanctioned regime.[29]

Two observations can be made from the analysis in this case. First, the precise wording of the contract is everything. The legal battle can be won or lost on the footing of proper drafting to expressly provide for a carve-out for accrued obligations or the affixing of the point in time at which parties assume their respective risks. Secondly, the court will scrutinise any assertion that a particular sanctions regime applies to the transaction and to the parties before it. It is not enough to raise generic allegations by reference to the general provenance of your contractual counterparty.

4.2 *RTI Ltd v MUR Shipping BV*

I come now to the case of *RTI Ltd v MUR Shipping BV* (‘*MUR Shipping*’),[30] a decision handed down by the UK Supreme Court earlier this year. The case involved a contract of affreightment between MUR Shipping BV (‘MUR’) as shipowner and RTI Ltd (‘RTI’) as charterer. As with *Litasco*, the material fact to be highlighted is that freight was to be paid in US dollars. The contract contained a force majeure clause, which provided that neither party would be liable to the other for loss, damage, delay or failure in performance caused by a force majeure event. In order for an event or state of affairs to constitute a force majeure event, it had to

[28] Ibid, [45]–[50].
[29] Ibid, [51]–[77].
[30] [2024] UKSC 18, [2024] 2 WLR 1350.

be something which could not be overcome with reasonable endeavours by the party affected.[31]

This arrangement went on without occasion for almost two years until the OFAC imposed sanctions on RTI's parent company. Under US regulations, RTI, as a majority-owned subsidiary of its sanctioned parent, was subject to the same restrictions. MUR gave notice of force majeure on the ground that the contract required payment in US dollars, and this was now prevented by the sanctions. RTI rejected this notice and offered to pay in euros and to bear any additional costs or exchange rate losses MUR would suffer in converting euros to US dollars. MUR maintained its position and refused to nominate any vessels until OFAC gave permission for parties to carry out sanctioned activities for winding down purposes.[32] It was common ground that while the sanctions did not prohibit the payment of US dollars under the contract, they would probably have caused delays in payment because any US intermediary bank processing the payment would have to stop the transfer to investigate it for sanctions compliance.[33]

RTI commenced arbitration against MUR, claiming damages for the cost of chartering replacement vessels in the period during which MUR suspended performance. The arbitrators awarded damages to RTI on the ground that the force majeure event could have been overcome if MUR had accepted RTI's offer to pay in euros.[34] This position was reversed on appeal to the High Court and reversed again by a majority of the Court of Appeal. Thus, it came to the Supreme Court to finally resolve the dispute.

The Supreme Court approached the case not simply as a question of interpretation. Instead, the court accepted MUR's submission that a force majeure clause will generally be interpreted (or a term will be implied to the same effect) as applicable only if the party invoking it can show that the event or state of affairs was beyond its reasonable control and could not be avoided by the taking of reasonable steps. I shall refer to this as the 'reasonable endeavours requirement'. The issue was, therefore, one of principle, and the answer would be of general application. The question then was whether the reasonable endeavours

[31] Ibid, [4].
[32] Ibid, [7]–[8].
[33] Ibid, [9].
[34] Ibid, [10]–[12].

requirement extends to the party affected having to accept non-contractual performance by the other party.[35]

The Supreme Court's answer, in short, was no. This was decided primarily on the basis of the following principles:[36]

(a) First, the reasonable steps requirement was grounded in causation. If a party could reasonably have avoided the failure to perform by the exercise of reasonable endeavours, then the failure to perform would be caused not by the event but by that party's inadequate response. A failure to perform, in turn, means a failure to perform in accordance with the terms of the contract. The causation question should, therefore, be concerned only with contractual performance.

(b) Second, the freedom to contract meant equally that there was freedom not to contract and freedom not to accept an offer of non-contractual performance.

(c) Third, clear words would be required to forego a contractual right, such as the right to refuse payment in any currency other than US dollars.

(d) Fourth, parties needed to know with reasonable confidence whether or not a force majeure clause could be relied upon at the relevant time and not after a retrospective inquiry. A departure from the standard provided by the terms of the contract would create needless uncertainty.

Therefore, at least as a matter of English law, it is clear that the reasonable endeavours requirement will not extend to requiring a party to accept non-contractual performance.

A point of curiosity, however, is the Supreme Court's framing of this as a matter of general proposition, to the effect that the reasonable endeavours requirement is to be read into every force majeure clause, whether by interpretation or by implication. This would appear to elevate the reasonable endeavours requirement to one which is to be implied into all force majeure clauses by law. I would point out that there is a difference between English and Singapore law on this issue. Our Court of Appeal has expressly rejected the reasonable endeavours requirement for one simple reason – whether or not this requirement exists must

35 Ibid, [26]; [32].
36 Ibid, [35]–[57].

turn, in the final analysis, on the precise language of the clause concerned.[37] Speaking for myself, it is not entirely clear why this analysis should be on any other basis. To uphold the contractual language, after all, is to uphold freedom of contract.

4.3 *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA*

I now address the last case, *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA*,[38] a decision of the Court of Appeal which I authored last year. The dispute arose from a sale of coal in two parcels from an Indonesian seller to a buyer in the United Arab Emirates. To facilitate this transaction, Kuvera advanced funds to the seller to enable it to purchase the coal for on selling to the buyer. The buyer was to pay for each parcel by an irrevocable letter of credit ('LC') naming Kuvera as the beneficiary. The LCs were issued by Bank Alfalah Limited in Dubai, and advised and confirmed by JPMorgan. JPMorgan's advices and confirmations contained a sanctions clause stating the bank's obligation to 'comply with all sanctions, embargo and other laws and regulations of the US and other applicable jurisdictions to the extent that they do not conflict with such US laws and regulations', and excluded JPMorgan's liability for delay or failure to pay should documents be presented involving any country, entity, vessel or individual listed in or subject to any applicable restriction.

Kuvera made a complying presentation, but JPMorgan refused to honour the LCs. JPMorgan claimed that its *internal* sanctions screening procedure had revealed that one of the vessels used to ship the coal was included in an internal Master List of entities and vessels determined by the bank to have a sanctions nexus and/or concern. JPMorgan claimed that it had detected 'red flags' in its due diligence pointing towards Syrian beneficial ownership of the vessel in question. This, if true, would have placed JPMorgan in breach of US sanctions against Syria if it paid Kuvera. Significantly, the vessel, however, had not been placed on the OFAC List.

Kuvera sued for payment under the LCs and further damages incurred. At first instance, a Judge of the High Court (the judge) held that the sanctions clause could be validly incorporated into the confirmation without being separately offered or accepted, and that it would entitle JPMorgan to refuse payment if JPMorgan could prove that OFAC would have

[37] *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] SGCA 1, [2011] 2 SLR 106, [66].
[38] [2023] SGCA 28, [2023] 2 SLR 389, [2024] Lloyd's Rep Plus 59.

found it to be in breach of US sanctions had it paid Kuvera against a complying presentation. The Judge was satisfied that OFAC would have considered JPMorgan to be in breach of those sanctions and that in any event, the red flags constituted sufficient circumstantial evidence of the vessel's Syrian ownership.

The Court of Appeal agreed with the judge's analysis insofar as the incorporation of the sanctions clause was concerned.[39] However, in the court's judgment, the question of whether the vessel was 'subject to any applicable restriction' under the sanctions clause was to be determined on an objective basis, without third-party input from entities such as OFAC because, in our judgment, the inquiry as to the ownership of a vessel is quintessentially an issue capable of objective determination.[40] The court, therefore, disagreed with the Judge's approach of inquiring into whether OFAC would have found JPMorgan to be in breach of sanctions. Such an approach, while rational from a risk management perspective, was not contractually justified.[41] I will return to this distinction later.

Continuing on the objective inquiry, the court found that JPMorgan had not displaced the *prima facie* inference of ownership arising from the relevant vessel's non-Syrian registered ownership and that the red flags JPMorgan had relied on were inconclusive as to its claims on the vessel's continued Syrian beneficial ownership. JPMorgan's decision based on its own risk-taking calculus was not sufficient to establish that the vessel was, in fact, subject to any applicable restriction under the sanctions clause.[42] As such, JPMorgan could not rely on the sanctions clause. We, therefore, allowed Kuvera's appeal on that basis.

What *Kuvera* bears out, in my view, is the distinction between what is rational in terms of commercial risk management and what is justifiable as a matter of legal obligation. They are not always aligned. On the one hand, JPMorgan's cautious approach towards sanctions was perfectly understandable from a commercial standpoint – as I highlighted earlier in this address, other banks have suffered severe penalties for US sanctions breaches. On the other hand, the court must uphold the parties' contractual agreement, and the agreement, in this case, required an objective approach to the question of whether sanctions would have

[39] Ibid, [27]–[37].
[40] Ibid, [43].
[41] Ibid, [42].
[42] Ibid, [68].

applied. It is easy to see the dilemma that arises from this. One law firm commenting on the case has even painted the bleak picture that a bank may have to choose between breaching sanctions or breaching the contract.[43]

Returning to our earlier example of the sanction-weary oil trader, he may be at a loss as to what he should do if he, too, detects red flags indicating that a ship he has chartered is owned or controlled by a sanctioned individual. In that situation, it would certainly be commercially prudent to take decisive action to avoid the heavy penalties that come with a sanctions breach. However, if he has agreed to an objectively phrased sanctions clause similar to that in *Kuvera*, he knows that cogent evidence will be required to back up any invocation of the clause. Our trader could, of course, decide that it is better to pay damages rather than suffer the consequences of a sanctions breach. The other option is to use a subjective sanctions clause – one which could confer upon him the discretion to take protective measures based on a subjective assessment of the sanctions risk.

The benefits of a subjective clause are clear – sanctions regulations can be unclear, notwithstanding their heavy penalties. Sometimes, one must make a judgment call on less than the complete facts. In this regard, a subjective clause could lead to an alignment of commercial sensibilities and legal obligations.

Of course, such a clause is not suitable in every context. In *Kuvera* itself, the court took the provisional view that a sanctions clause which confers a discretion on a bank to withhold payment if it suspects that it may be subject to sanctions could be incompatible with the irrevocable nature of an LC.[44] However, there is nothing stopping parties from agreeing to such clauses beyond the LC context.

What, then, is the downside to a subjective sanctions clause? The most immediate concern is that a party could abuse this discretion to escape a bad bargain. As we have seen in *Litasco*, it is easy to make general assertions about how one has been hampered by the alleged operation of a sanctions restriction. How can we mitigate against such abuse? One possible

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[43] A&O Shearman, 'Bank's inability to establish identity of vessel owner results in inability to rely on sanctions clause' (*Insights*, 23 November 2023) <www.aoshearman.com/en/insights/banks-inability-to-establish-identity-of-vessel-owner-result-in-inability-to-rely-on-sanctions> accessed 27 September 2024.

[44] *Kuvera* (n 38) [71].

solution lies in common law that any discretion is not to be exercised arbitrarily, capriciously or unreasonably.[45] In the civil law world, the regulation of such a discretion could well fall within the scope of the obligation of good faith. These are weighty issues which I will leave for another day.

5 Conclusion

I have spent much of this evening's Address unpacking the complexities of sanctions and exploring the options available to those who wish to protect themselves against them. I encourage you to stay up to date with further developments, as sanctions will continue to feature heavily in the world of shipping and trade. For as long as there is politics, there will be sanctions measures. The restrictions are manifold, the wording potentially ambiguous, and the consequences of breach steep nonetheless. At the end of the day, the only thing that commercial parties can do is to prepare for the risk with precise drafting and good lawyering.

Thank you.

[45] See, eg, *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685 (CA).