



Neutral Citation Number: [2018] EWHC 2643 (Comm)

Case No: CL-2018-000335

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 12/10/2018

Before :

MR. JUSTICE TEARE

Between :

MAMANCOCHET MINING LIMITED **Claimant**
- and -
AEGIS MANAGING AGENCY LIMITED AND **Defendants**
OTHERS

Jawdat Khurshid QC and Anna Gotts (instructed by **Reed Smith LLP**) for the **Claimant**
Richard Blakeley and Michael Harper (instructed by **Roose + Partners**) for the **Defendants**

Hearing dates: 2 and 3 October 2018

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Mr. Justice Teare :**

1. Notwithstanding the age of this marine insurance claim (the events which gave rise to it took place in 2012) it is being determined on an expedited basis. That is because its resolution is dependent upon, in part, the effect of President Trump's decision on 8 May 2018 to end the US's participation in the Joint Comprehensive Plan of Action by which it had been internationally agreed that multi-lateral sanctions targeting Iran would be eased. President Trump's decision was effective as of 27 June 2018, but subject to a wind down provision pursuant to which the relevant sanction will be re-imposed at 1159 pm eastern standard time on 4 November 2018. It is common ground that payment of the claim after that date will be prohibited as a matter of US law. For that reason the parties, or at any rate the Claimant, require a decision of the court before then.
2. Three main issues arise for consideration:
 - i) What is the proper interpretation of the phrase in the policy "*to the extent that ...payment of such claim ...would expose that 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 in the policy ?
 - 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 (as amended by Commission Delegation Regulation (EU) 2018/1100) ?
3. In view of the need to provide a speedy decision I shall explain the context, as shortly as I can, and then proceed to determine the matters at issue.

THE MARINE INSURANCE CLAIM

4. The Claimant is the assignee, by Deed of Assignment dated 30 April 2014, of the benefit of a marine cargo insurance policy ("**the Policy**") governed by English law. The Policy protected the assured, Metalloyd Limited, against (amongst other things) the risk of theft of two cargoes of steel billets carried on board the vessels M/V GELIUS 2 and M/V GULF TRADER, which were carried from Russia to Iran on 23 August 2012 and 25 August 2012, respectively. The two cargoes were worth some US\$3.8 million. It was common ground that, on arrival at the port of Bandar-e-Anzali in Iran, the cargoes were put in bonded storage. The purchaser, Liberal Resources FZC, did not pay for them and Metalloyd arranged for substitute bills to be issued naming an Iranian national, (Mr. Fallah) as consignee. The goods were stolen from their bonded storage (by presentation of fraudulent documents) at some time between 22 September 2012 and 7 October 2012.
5. There is no evidence as to the actual or intended use of the cargoes in Iran either prior to or after their theft. It was common ground that the consignee under the contract of

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carriage was an Iranian person, who is not a ‘Specially Designated Person’ (“SDN”) subjected to specific sanctions by the US Treasury Department.

6. Following discovery of the theft of the cargoes, the assured made a claim under the Policy in March 2013. It was assumed by the experts that this claim was submitted after 8 March 2013 (which, as I set out below, is an important date in the history of US sanctions against Iran).
7. The Defendant underwriters have never denied that, in principle, the assured (and, latterly, the Claimant as assignee) has a valid claim under the Policy. However, the Defendants have resisted payment on the basis of the ‘Sanction Limitation and Exclusion Clause’ in the Policy.
8. The sanctions clause, on standard wording developed by the Joint Hull Committee (of the London market) and adopted by the Joint Cargo Committee, provides as follows:

“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.”
9. The Claim was issued in this case against 30 Defendants (being the underwriters of the Policy) on 22 May 2018, following President Trump’s decision on 8 May 2018 to re-impose sanctions against Iran. Since that time, the claim has been settled with 19 of the Defendants, all of whom had defended the claim under the sanctions clause solely in respect of EU sanctions. Of the 11 remaining Defendants, 2 rely solely on EU sanctions as grounding their defence to payment under the sanctions clause; the other 9 rely on both US and EU sanctions.

THE UNITED STATES SANCTIONS REGIME

10. The 9 Defendants who rely on US sanctions are all established and maintained in the UK. Each is ultimately owned or controlled by a US person. For the purposes of the US sanctions regime, each is therefore classified as a ‘US owned or controlled foreign entity’ (“USCFE”).
11. The US sanctions against Iran have a long and complex history, of which only a short summary is necessary for present purposes. The sanctions relevant to the present case are ‘primary’ sanctions – that is, those directed (initially) at US persons (as they are defined in the relevant legislation).
12. The sanctions regime is to be found in the Iranian Transactions & Sanctions Regulations, 31 C.F.R. Part 560 (“ITSR”). The ITSR contain a number of relevant prohibitions, including, in section 560.204, a prohibition on the exportation, re-exportation, sale or supply of goods, technology or services to Iran. It was common ground that the provision of insurance cover, including the payment of a pre-existing claim, constitutes a ‘service’ within the meaning of section 560.204 of the ITSR.

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13. It was common ground that, at the time the Policy attached, the ITSR did not apply to USCFEs. Accordingly, the Defendants were not prevented by US law from insuring the cargoes.
14. A change in the sanctions regime was heralded by the entry into force on 10 August 2012 of the Iran Threat Reduction and Syria Human Rights Act 2012 (“ITRA”). Section 218 of that Act empowered the President to enact further legislation bringing USCFEs within the scope of the sanctions regime.
15. That power was not exercised until 22 October 2012. Accordingly, at the time the cargoes were stolen (at some time between 22 September 2012 and 7 October 2012), the ITSR would not have prevented the Defendants from paying a claim under the Policy.
16. On 22 October 2012, President Obama (acting through the Office of Foreign Assets Control (“OFAC”), a division of the US Treasury Department) exercised the power contained in section 218 of ITRA. Specifically, a new section 560.215 was added to the ITSR. Section 560.215 provides (so far as is relevant) as follows:

“560.215 Prohibitions on foreign entities owned or controlled by U.S. persons.

(a) Except as otherwise authorized pursuant to this part, an entity that is owned or controlled by a United States person and established or maintained outside the United States is prohibited from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would be prohibited pursuant to this part if engaged in by a United States person or in the United States.

(b) *Definitions:*

(1) For purposes of paragraph (a) of this section, an entity is “owned or controlled” by a United States person if the United States person:

(i) Holds a 50 percent or greater equity interest by vote or value in the entity;

(ii) Holds a majority of seats on the board of directors of the entity; or

(iii) Otherwise controls the actions, policies, or personnel decisions of the entity.

(2) For purposes of paragraph (a) of this section, the term knowingly means that the person engages in the transaction with actual knowledge or reason to know.

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(3) For purposes of paragraph (a) of this section, a person is “subject to the jurisdiction of the Government of Iran” if the person is organized under the laws of Iran or any jurisdiction within Iran, ordinarily resident in Iran, or in Iran, or owned or controlled by any of the foregoing.”

17. Alongside the new section 560.215 of the ITSR, OFAC also revised the ITSR to include a new section 560.555, allowing USCFEs to engage in transactions ‘*ordinarily incident and necessary to the winding-down of transactions prohibited by section 560.215*’. That wind-down provision effectively delayed the entry into force of the prohibition in the new section 560.215, until 8 March 2013.
18. Accordingly, from 9 March 2013, USCFEs fell within the scope of the ITSR. From that date, the 9 relevant Defendants would have been prohibited from paying a claim under the Policy. It was common ground that the claim was submitted after that prohibition came into effect.
19. The regulatory landscape changed again in 2015-16 following the agreement of the Joint Comprehensive Plan of Action (“**JCPOA**”) between Iran, the five permanent members of the UN Security Council plus Germany, and the EU. The JCPOA, effective from 18 October 2015, provided that Iran was to receive relief from various international sanctions in return for making certain commitments in relation to nuclear non-proliferation.
20. The relevant provisions of the JCPOA are contained in Annex II (‘Sanctions-related commitments’). Section 4 of that Annex (‘United States’) contains commitments by the US to lift sanctions in relation to ‘non-US persons’ (not including USCFEs), on a sector-specific basis. Section 4.2.1 of that Annex provided for sanctions to be lifted in respect of the provision of insurance and re-insurance services. Section 5 of Annex II (‘Other trade measures’) provided, in section 5.1.2, that ‘*The United States commits to ... License non-US entities that are owned or controlled by a US person to engage in activities that are consistent with this JCPOA*’.
21. The ‘Implementation Day’ of the JCPOA was 16 January 2016.
22. The commitment in section 5.1.2 of Annex II to the JCPOA was given effect to by ‘General License H’, an OFAC regulation forming part of Part 560 of the ITSR. General License H also came into force on the Implementation Day.
23. So far as is relevant, General License H provides as follows:

“(a) Except as provided in paragraph (c), an entity owned or controlled by a United States person and established or maintained outside the United States (a "U.S.-owned or -controlled foreign entity") is authorized to engage in transactions, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would otherwise be prohibited by 31 C.F.R. § 560.215.

[...]

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(c) Paragraph (a) of this general license does not authorize transactions involving:

(1) The exportation, reexportation, sale, or supply, directly or indirectly, from the United States of any goods, technology, or services prohibited by 31 C.F.R. § 560.204, without separate authorization from the Office of Foreign Assets Control (OFAC);

(2) Any transfer of funds to, from, or through a United States depository institution or a United States-registered broker or dealer in securities;

(3) Any person on OFAC's list of Specially Designated Nationals and Blocked Persons (SDN List), or any activity that would be prohibited by any part of chapter V of 31 C.F.R. other than part 560 if engaged in by a United States person or in the United States;

[...]

(6) Any military, paramilitary, intelligence, or law enforcement entity of the Government of Iran, or any official, agent, or affiliate thereof;

[...]”

24. General License H therefore provided a relaxation of sanctions subject to certain exceptions. With effect from 16 January 2016, USCFEs were entitled to engage in all activities consistent with the JCPOA, other than those specifically set out in paragraph (c) (which, for example, continued to prohibit any transactions in US Dollars).
25. On 8 May 2018 President Trump announced the withdrawal of the US from the JCPOA. OFAC accordingly revoked General License H with effect from 27 June 2018, subject to a new wind-down provision introduced into the ITSR.
26. That wind-down provision, section 560.537, provides (so far as is relevant) as follows:
- “(a) Except as provided in paragraph (c) of this section, all transactions and activities that are ordinarily incident and necessary to the wind down of the following activities are authorized through 11:59 p.m. eastern standard time on November 4, 2018: an entity owned or controlled by a United States person and established or maintained outside the United States (a “U.S.-owned or -controlled foreign entity”) engaging in transactions, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would otherwise be prohibited by §560.215.”
27. The exceptions set out in paragraph (c) of the wind-down provision in section 560.537 are in materially identical terms to the exceptions contained in paragraph (c) of General License H.
28. It follows that section 560.215 of the ITSR (which brings USCFEs within the primary sanctions against Iran contained in Part 560) became re-effective as of 27 June 2018, subject to a wind-down period ending on 4 November 2018 for transactions ‘*ordinarily*

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incident and necessary to the wind down of ... transactions ... that would otherwise be prohibited by §560.215’.

29. It was common ground that, absent a specific license from OFAC, the Defendants will be prohibited by the ITSR from paying the claim under the Policy on or after 5 November 2018.

THE EUROPEAN UNION SANCTIONS REGIME

30. Relevant sanctions were first enacted by the Council of the European Union in March 2012 by Council Regulation (EU) 267/2012 containing restrictive measures against Iran (the “**Sanctions Regulation**”). It was common ground that, as enacted, that Regulation would not have prohibited the Defendants from paying the claim under the Policy.
31. The Sanctions Regulation was amended with effect from 21 December 2012 by Council Regulation (EU) 1263/2012 (the “**Amending Regulation**”). The effect of the Amending Regulation, so far as is relevant to the present case, was to add (by article 1(10) of the Amending Regulation) new articles 15a, 15b and 15c to the Sanctions Regulation, and to add (by article 1(30) of the Amending Regulation) a new Annex VIIB to the Sanctions Regulation.
32. The new article 15a of the Sanctions Regulation prohibited the sale, supply or transfer of the materials listed in the new Annex VIIB ‘*directly or indirectly, to any Iranian person, entity or body, or for use in Iran.*’ Under the new article 15b, it was prohibited ‘*to provide, directly or indirectly, financing or financial assistance related to the goods listed Annex VIIB, to any Iranian person, entity or body, or for use in Iran*’. The goods listed in the new Annex VIIB included ‘*semi-finished products of iron and non-alloy steel with HS Code 7207*’.
33. It was common ground that the cargoes of steel billets insured under the Policy were non-alloy steel with HS Code 7207. It was further common ground that payment of an insurance claim in relation to the cargoes would constitute ‘*financial assistance*’ within the meaning of the new article 15b. Consequently, payment of the claim in the period after 21 December 2012 would have been in breach of EU sanctions.
34. Following the agreement of the JCPOA, the EU adopted a series of measures intended to lift or relax sanctions against Iran. Those measures included Council Regulation (EU) 2015/1861, entered into on 18 October 2015 (the “**Repealing Regulation**”), effective as of the Implementation Day of the JCPOA. In particular, article 1(11) of the Repealing Regulation repealed article 15b of the amended Sanctions Regulation; article 1(10) replaced article 15a with a new prior authorisation regime for the provision of ‘*financing or financial assistance related to*’ the materials in Annex VIIB; and article 1(29) amended Annex VIIB, removing the reference to iron and non-alloy steel with HS Code 7207.
35. It follows (as was common ground) that payment of the claim by the Defendants on or after 16 January 2016 would not have been prohibited by EU sanctions.

THE EU “BLOCKING” REGULATION

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36. Council Regulation (EC) 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (the “**Blocking Regulation**”) was adopted on 22 November 1996.
37. Article 5 of the Blocking Regulation provides as follows:
- “No person referred to in Article 11 shall comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the laws specified in the Annex or from actions based thereon or resulting therefrom. Persons may be authorized, in accordance with the procedures provided in Articles 7 and 8, to comply fully or partially to the extent that non-compliance would seriously damage their interests or those of the Community. The criteria for the application of this provision shall be established in accordance with the procedure set out in Article 8. When there is sufficient evidence that non-compliance would cause serious damage to a natural or legal person, the Commission shall expeditiously submit to the committee referred to in Article 8 a draft of the appropriate measures to be taken under the terms of the Regulation”
38. Article 11(2) provides that the Regulation applies to legal persons incorporated within the European Community.
39. As enacted in 1996, the Annex to the Blocking Regulation contained three pieces of US legislation (concerning sanctions against Cuba, Libya and Iran), none of which is relevant to the present case. Following President Trump’s announcement of the US withdrawal from the JCPOA (as set out above), the Commission enacted Commission Delegated Regulation (EU) 2018/1100, amending the Blocking Regulation with effect from 7 August 2018. By that amending Commission Regulation, the Annex to the Blocking Regulation was updated to include various US sanctions against Iran, including ITRA.
40. Article 9 of the Blocking Regulation leaves it to the Member States to enact ‘*effective, proportional, and dissuasive*’ sanctions for its breach. In England and Wales, the Blocking Regulation is given effect to by the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996. Section 2 of that Order makes it a criminal offence to act in breach of (inter alia) section 5 of the Blocking Regulation.

THE CONSTRUCTION OF THE POLICY (THE FIRST ISSUE)

41. The Defendants maintain that the sanctions clause in the policy of marine insurance provides them with a defence to the claim. That clause provides as follows:
- “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

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or economic sanctions, laws, or regulations of the European Union, United Kingdom or United States of America.”

42. The Defendants submit that on its true construction the clause provides that they are not liable to pay the claim if they are at risk of being sanctioned by OFAC for paying a claim under the Policy. That, they say, is what is meant by “exposure” to any sanction.
43. The Claimant submits that the clause requires the Defendants to establish, on the balance of probabilities, that payment would put them in breach of the applicable sanctions and thus would lawfully expose them to sanction.
44. The meaning of a contract is that which it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contracting. Neither party suggested any particular background or factual matrix which was reasonably available to the parties in 2012.
45. Both parties referred to the dictionary meaning of “expose” and derived support from it. The new Shorter Oxford English Dictionary gives several definitions. Those relied upon included “lay open to something undesirable”, “subject to risk” and “leave without protection”. Counsel for the Defendants relied upon “subject to risk” and counsel for the Claimant relied upon “leave without protection”. It seemed to me that counsel for the Claimant might also have relied upon “lay open to something undesirable”. However, the dictionary definition, though perhaps a useful starting point, is not determinative of the meaning which the clause as a whole, read in its context, would convey to a reasonable person; cf *The Triton Lark* [2012] 1 AER (Comm), [2011] EWHC 2862 (Comm) and [2012] EWHC 70 (Comm) at paragraphs 7-10 of the second judgment.
46. One can be “exposed” to a sanction (in the sense of being laid open to a sanction or left without protection from a sanction) or “exposed” to the risk of being sanctioned (in the sense of being subject to the risk of a sanction). The present clause does not refer in terms to being exposed to *the risk* of a sanction or prohibition. It refers to a payment which “would expose” the insurer “to any sanction, prohibition or restriction”.
47. It is necessary to understand what must happen before a sanction is imposed, since that is the context in which the sanctions clause must be construed. Before a sanction can lawfully be applied there must be conduct which is prohibited. Further, when there is prohibited conduct the agency charged with the application of sanctions may or may not decide to penalise the prohibited conduct with a sanction. That suggests that it is necessary for the insurer to show that the payment of the claim in question would be conduct which was prohibited by the applicable laws or regulations. If that is shown then the insurer can fairly be said to be laid open to a sanction, to be at risk of a sanction, or to be left unprotected from a sanction. If that is not shown, then it cannot be said that the insurer is laid open to a sanction, or at risk of a sanction, or left unprotected from a sanction. For unless the conduct is prohibited, in law there can be no sanction.
48. The argument advanced by counsel for the Defendants was that it was sufficient to show that there was a risk that the agency in question might conclude that there was prohibited conduct (when in law there was not or may not be) and so impose a sanction.

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If that had been the intention of the parties I would have expected them to have made such intention clear, perhaps by referring in terms to “exposure to the risk of being sanctioned”, or to “conduct which the relevant authority might consider to be prohibited”.

49. Another aspect of the context in which the present issue arises for decision is that it concerns an insurer’s liability to pay a claim pursuant to a contract of marine insurance. Whilst an insurer might welcome a clause which entitles him to decline to pay an otherwise valid claim when there was merely a risk that payment might be considered to be prohibited, one would expect that an assured would only be willing to agree that the insurer was not obliged to pay an otherwise valid claim where the insurer was prohibited in law from paying— rather than where there was merely a risk that the relevant authority would (perhaps wrongfully) impose a sanction on the insurer. These considerations suggest that clear words would be required to establish a common intention that the insurer need not pay an otherwise valid claim where there was merely a risk that payment would incur a sanction, without having to show that payment was prohibited as a matter of law.
50. Having considered the opposing arguments I have concluded that the language and context of the clause show that the meaning of the clause which would be conveyed to a reasonable person is as follows. The clause provides that the insurer is not liable to pay a claim where payment would be prohibited under one of the named systems of law and thus “would expose” the Defendants to a sanction.

THE US SANCTIONS (THE SECOND ISSUE)

51. There is considerable common ground between the two experts on US law, Mr. Saville for the Defendants and Mr. Poblete for the Claimant. Thus it is agreed that in 2012 when the cargo was shipped to Iran and insured the Defendants, being foreign subsidiaries of US persons, were not subject to the then current sanctions against Iran. US persons were so subject. However, from October 2012 entities owned or controlled by a US person and established or maintained outside the US were prohibited, subject to the effect of the wind down provision, from knowingly engaging in any transaction, directly or indirectly, with Iran that would be prohibited if engaged in by a US person. Thus in March 2013 when the claim was submitted (after the wind down period had expired) payment of the claim would have been prohibited and would have exposed the Defendants to a sanction. That was the effect of the ITSR, section 560.215.
52. Following the JCPOA the US agency charged with the enforcements of sanctions, OFAC, issued General License H on 16 January 2016. It provided, by paragraph (a), that entities owned or controlled by a US person and established or maintained outside the US were authorised “to engage in transactions, directly or indirectly ... that would otherwise be prohibited by” the aforesaid section 560.215. The authorisation did not authorise transactions involving the matters set out in paragraph (c), for example, a transfer of funds in US dollars or transactions involving a military entity of the Government of Iran. Thus it was agreed that payment of the claim in US dollars would be prohibited, notwithstanding General License H. However, if payment were made in sterling such payment would not be prohibited. (The Defendants did initially suggest that such payment would be prohibited because it was an attempt to evade or avoid the regulations but, after Mr. Saville gave evidence, that suggestion was not pursued.)

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53. Thus, as from 16 January 2016, payment by the Defendants of the claim under the Policy in sterling would not have been prohibited. At this time there were discussions between the parties concerning payment. The Defendants wished to make a joint approach to OFAC and HM Treasury, but in June 2016 the Claimant formally stated its view that the Defendants could make payment without reference to OFAC or HM Treasury. In November 2016 the parties agreed to prepare joint approaches to OFAC and the UK Office of Financial Sanctions Implementation (“OFSI”). The parties corresponded concerning these documents over the following months. In July 2017 the Claimant reverted to its view that no approach to OFAC was necessary; in January 2018 the parties submitted their joint approach to OFSI. OFSI responded in February 2018, suggesting that the parties make a reference to the UK Export Joint Control Unit (“EJCU”), which the parties did later that month. The EJCU had not, at the time of the hearing, provided a formal response to this reference.
54. On 8 May 2018 President Trump announced his decision to end the US’s participation in the JCPOA and on 27 June 2018 OFAC revoked General License H. However, a winding down of transactions was permitted until 1159 pm on 4 November 2018. Section 560.537 of the ITSR now provided:
- “Except as provided in paragraph (c) of this section, all transactions and activities that are ordinarily incident and necessary to the wind down of the following activities are authorized through 11.59 pm eastern standard time on November 4, 2018: an entity owned or controlled by a United States person and established or maintained outside the United States (a “US owned or controlled foreign entity”) engaging in transactions, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would otherwise be prohibited by [section] 560.215.”
55. There was no dispute that this wind down provision extended to transactions entered into during the currency of, and in reliance upon, General License H. However, whilst Mr. Poblete considered that it also extended to transactions lawfully entered into prior to that time, such as the Policy of insurance in this case, Mr. Saville expressed the view that the wind down provision did not apply to transactions or activities that arose prior to the issue of General License H. He said there was a “serious question” as to whether OFAC would consider payment of a claim arising before the effective date of General License H to be a wind down activity within the meaning of section 560.537.
56. Thus the question whether payment of the claim before 4 November 2018 would be prohibited (and so expose the Defendants to a sanction) is a question as to the true construction of section 560.537 of the US regulations. On that question the court has heard evidence from two US lawyers, Mr. Poblete and Mr. Saville. There is common ground that a US court would have regard to the “plain meaning” of the regulation and also to the guidance issued by OFAC when construing the regulation. OFAC guidance in the form of FAQs was issued both in relation to General License H (January 2016) and in relation to the wind down (May 2018). But since both experts have given different views as to the true construction of the wind down provision it is necessary for the court to decide between the conflicting testimony; see *The Conflict of Laws*, Dicey and others, paragraphs 9-017 – 9-019. Although the court’s decision as to foreign

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law is a finding of fact, it is a finding of fact of a “peculiar kind”, one in respect of which, where appropriate, the court is entitled to exercise its own judgment; see *Dexia Crediop SPA v Comune di Prato* [2017] EWCA Civ 428 at paragraphs 34-42.

57. It is appropriate to start with the language of section 560.537, the wind down provision. It authorises “all transactions and activities that are ordinarily incident and necessary to the wind down of the following activities”. Those activities are those of US owned or controlled foreign entities “engaging in transactions, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would otherwise be prohibited by [section] 560.215”.
58. Mr. Poblete’s opinion, as expressed in his supplementary report, was that the transactions authorised by General License H included insurance activities in connection with cargoes of steel and that the activities of USCFEs to be wound down between June and November 2018 were those which would otherwise have been prohibited by section 560.215 and included insurance activities in connection with cargoes of steel. He noted that the wind down provision applied to “*all* transactions and activities that are ordinarily incident and necessary to the wind down” (emphasis added) which, he said, includes payment of a claim on a policy of insurance.
59. Mr. Saville expressed the opinion, in his first report, that the question whether the payment of the claim (which was initially prohibited, then permitted under General License H, then once again prohibited) can be considered a transaction “ordinarily incident and necessary to the wind down” of an activity within the meaning of section 560.537 is “wholly unresolved and not the subject of any regulatory guidance nor any case law.” In the joint report he expressed the view that as the claim had not been submitted and paid before the expiry of the first wind down period which expired in March 2013 there was a “serious question” as to whether OFAC would consider payment of a claim arising before the effective date of General License to be a wind down activity within the meaning of section 560.537.
60. The payment of the marine insurance claim in question was prohibited by section 560.215. That is common ground. It is, I think, reasonably clear from section 560.537 that the wind down provision was intended to authorise, for a limited period, that which had been prohibited by section 560.215. Since the payment of this insurance claim had been prohibited by section 560.215 it would follow that such payment was authorised by the wind down provision.
61. It was common ground that the FAQs issued by the US Department of the Treasury available on OFAC’s website could be referred to when construing the wind down provision.
62. The January 2016 FAQs raised the question of a wind down period in the event that sanctions were re-imposed (see question M.5). The answer stated:

“The US Government has a past practice of working with US or third country companies to minimise the impact of sanctions on the legitimate activities of those parties undertaken prior to the imposition of sanctions, and we anticipate doing the same in the event of a JCPOA sanctions snapback.

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As a general matter, in the event of a JCPOA sanctions snapback, the US government would provide non-US, non-Iranian persons a 180-day period to wind down operations in or business involving Iran that was consistent with the US sanctions lifting under the JCPOA and undertaken pursuant to a written contract or written agreement entered into prior to snapback.”

63. That answer refers to transactions entered into “prior to snapback”, which phrase could cover both transactions entered into pursuant to the relaxation of sanctions brought about by the JCPOA (and hence by General License H) and transactions entered at an even earlier period. However, the latter are not expressly contemplated. Nevertheless, allowing payment of this particular claim would be “consistent with the US sanctions lifting under the JCPOA” since payment of the claim was authorised by the JCPOA.
64. The FAQs issued in May 2018 confirm that the wind down period is for activities that were consistent with the US sanctions relief provided for under the JCPOA or previously authorised pursuant to General License H; see the answers to FAQ 1.1, 1.3, 2.1, and 4.4.
65. Mr. Poblete relies upon these FAQs to support his opinion. Mr. Saville, although he accepted that the FAQs are admissible when construing the regulation, did not expressly rely upon any of them either in his first report (where he says at paragraph 59 that the matter is not the subject of any regulatory guidance) or in his supplementary report (see paragraph 5). Rather, Mr. Saville relied upon the wind down provision which applied between October 2012 and March 2013. He suggests, as I understand him, that because the claim arose in 2012 it was subject to *that* wind down provision and is not subject to the wind down provision presently in force and due to expire on 4 November 2018. He suggests that that wind down provision only applies to claims which arose after General License H came into effect.
66. The difficulty with that view, in my respectful opinion, is that, as stated by Mr. Poblete, there is nothing in the wind down provision to support the distinction between claims which arose after General License H was introduced and those which arose before. On the contrary the language of the wind down provision indicates that it extends to *all* transactions and activities that were ordinarily incident and necessary to the wind down of transactions that would otherwise have been prohibited by section 560.215. Payment of the insurance claim in question was such a transaction notwithstanding that the Policy was effected prior to the inception of General License H. It is common ground that it was prohibited by section 560.215.
67. Further, the wind down provision lists a number of activities which are excluded from the operation of the wind down provision. Transactions dating from prior to the inception of General License H are not included in those exceptions. Mr. Poblete expressed the view when being cross examined that if it had been the intention to exclude such transactions he would have expected that to have been stated expressly. I agree with that approach.
68. It was suggested to Mr. Poblete in cross-examination that the answer to FAQ number M4 in January 2016, and the answer to FAQ 1.5 in May 2018, supported the view that the wind down provision applied only to transactions entered into after Implementation Day. Mr. Poblete did not agree. I accept that both answers focus on transactions

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undertaken after Implementation Day or on activity undertaken pursuant to the sanctions relief provided by the JCPOA but they do not say in terms that that is the limit of the wind down provision. It is to be noted that Mr. Saville himself did not suggest that these answers supported his view.

69. Mr. Poblete also made reference in his first report to a press briefing on 8 May 2018 by John Bolton, the US National Security Advisor, who said “there is a wind down period to allow an orderly termination of the contract, so that people who – in good faith on the waiver of sanctions – have engaged in business are not totally surprised.” This comment, which Mr. Poblete accepted could be used by a US court to provide context when construing the wind down provision, also focuses upon a contract made in reliance upon the waiver. Such contracts are, of course, clearly within the scope of the wind down provision, but I do not regard the comment of Mr. Bolton as limiting the scope of the waiver to such contracts.
70. The scope of the waiver must be assessed, primarily, by reference to the “plain meaning” of the waiver. The language of the waiver, which is broad, extends the waiver to transactions that would otherwise be prohibited by section 560.215. Payment of the insurance claim in question is such a transaction. Reference can be made to the FAQs when construing the waiver. They support the proposition that the wind down provision applies to operations that were consistent with the lifting of sanctions under the JCPOA. Payment of the insurance claim in question is consistent with the JCPOA. For these reasons I agree with and accept the opinion of Mr. Poblete that until 1159 pm eastern standard time on 4 November 2018 payment of the insurance claim in question is not prohibited by the US and so payment by that date would not expose the Defendants to sanction.
71. Mr. Saville also said that it cannot be said for certain that the steel billets were not intended for a use which would fall within one of the stated exceptions (for example, military use) from the scope of the wind down provision. If they were for such use, then the Defendants would be exposed to sanctions. However, there is no evidence that any of the exceptions is applicable, so the Defendants are unable to discharge the burden of proof which lies upon them of showing, on the balance of probabilities, that the intended use fell within any of the exceptions.

THE EU SANCTIONS

72. This aspect of the case can be taken very shortly.
73. It is common ground, as the Defendants’ Skeleton Argument makes clear at paragraphs 57 and 67, that the provision of cover was not prohibited by EU law at the time the Policy was written and that the relevant prohibition on providing financial assistance to the export of cargoes to Iran was lifted on Implementation Day (being 16 January 2016). Thus, there is no prohibition on paying the claim in question.
74. It was submitted by the Defendants that, because the relevant authorities have failed and/or refused to confirm that payment of the claim can safely be made, the Defendants nonetheless remain exposed to sanction (or to the risk of sanction). However, such failure or refusal cannot “expose” the Defendants to sanctions on the construction of

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the sanctions clause which I have held to be correct, because it is common ground that payment of the claim in question is not prohibited by EU law.

75. That being so the Defendants are not exposed to any EU sanction.

A FURTHER CONSTRUCTION ISSUE

76. It is necessary to deal with a further argument based on the construction of the sanctions clause. It was submitted on behalf of the Defendants that once the sanctions clause was triggered, its effect was to extinguish any liability of the Defendants to pay the claim. This submission had the consequence that as soon as the claim was presented (by common ground on a date after 8 March 2013) the claim was immediately extinguished, because at the time it was presented payment was prohibited and so the Defendants were exposed to sanctions.
77. In my judgment this submission is not correct. There is nothing in the sanctions clause which purports to extinguish a claim. Rather, the clause provides that “to the extent that” payment of such claim would expose the insurer to sanction the insurer will not be liable to pay. The meaning which those words would convey to a reasonable person is that for as long as payment would expose the insurer to sanction, the insurer is not liable to pay. Thus, when, pursuant to General License H (as a matter of US law) and the Repealing Regulation (as a matter of EU law), payment of the claim ceased to be prohibited in 2016, the insurer was again liable to pay the claim under the Policy. In the meantime, that liability was suspended.
78. It was suggested that such a conclusion will lead to confusion and uncertainty in application. I do not agree. In the present case there was agreement as to whether or not the Defendants were liable to pay the claim from March 2013 until June 2018. The only dispute has been as to whether payment falls within the 2018 wind down clause; and that dispute the court has resolved. It was also suggested that this suspensory interpretation leads to potentially open-ended liability. I agree that it does, subject to the effect of limitation. However, I disagree that this consequence means that the clause should be construed so as to extinguish liability once the insurer is exposed to sanctions. The wording of the clause does not permit such a construction. If proceedings are commenced (to stop the limitation period running), I see no difficulty in staying the claim (during the period when liability to pay is suspended) and then lifting the stay (when the sanctions are relaxed) so as to permit the claim to be paid. It is said that this is both undesirable and uncommercial. I disagree. In my view, it would be a sensible way of managing the claim, where payment is, for the time being, prohibited. The Defendant insurers will be able to account for the suspended liability in their books.

THE EU BLOCKING REGULATION (THE THIRD ISSUE)

79. The Claimant sought to rely upon the EU Blocking Regulation in the event that the Defendants were otherwise entitled to rely upon the sanctions clause to resist payment. So in the light of my conclusions so far this issue does not arise for decision.
80. The Claimant sought to rely upon the Blocking Regulation in three ways. First, it says that the Defendants’ reliance on the Sanctions Clause constitutes ‘*compliance*’ with

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ITRA, in breach of article 5 of the Blocking Regulation (and therefore in breach of English criminal law). Secondly, it says that the US sanctions are “unlawful” under the Blocking Regulation, and that on a proper interpretation of the sanctions clause, that clause only allows the Defendants to resist payment where that “would *lawfully* expose” them to sanctions. Thirdly, it says that enforcement of the sanctions clause would be illegal and/or contrary to public policy, in light of the Blocking Regulation.

81. The Defendants responded to these arguments with a “short answer”, and a number of more detailed submissions concerning the applicability of the Blocking Regulation. The Defendants’ “short answer”, as expressed in their skeleton argument at paragraphs 90 and 91, is that if the sanctions clause applies, “the consequence is that the insurers have no liability to make payment... [T]here is no liability that the insurers are refusing to discharge in prohibited compliance with the Blocking Statute (assuming for present purposes that this would constitute prohibited compliance). Indeed, there is no ‘act’ (whether of compliance or otherwise) by the US Exposed Defendants at all: the contract simply operates according to its terms.”
82. Since I have concluded that the US sanctions do not prohibit payment of the claim, this point does not arise for determination. For that reason, and in order not to delay the completion of this judgment, I shall not express a concluded view on this point. I shall merely say that I see considerable force in the Defendants’ “short answer” to the point, namely that the Blocking Regulation is not engaged where the insurer’s liability to pay a claim is suspended under a sanctions clause such as the one in the Policy. In such a case, the insurer is not “complying” with a third country’s prohibition but is simply relying upon the terms of the policy to resist payment.

CONCLUSION

83. Payment of the claim under the Policy before 1159 pm eastern standard time on 4 November 2018 will not expose the Defendants to a sanction within the meaning of the sanctions clause. The Claimant is therefore entitled to payment of its claim.