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Singapore Court of Appeal decision in Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA

It is increasingly common for parties to include as an additional term of the contract a clause that gives a party the right to either suspend or terminate a payment obligation in the event of a breach of sanctions. In the case of Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA¹, the Singapore Court of Appeal decided that under Singapore law, a sanctions clause must be construed objectively and strictly in order for a party to rely on it.

Facts

Kuvera Resources Pte Ltd ("**Kuvera**") advanced funds to a company ("**Seller**") who had contracted to sell coal to a United Arab Emirates company ("**Buyer**"). The funds enabled the Seller to purchase the coal to on-sell to the Buyer. Under the sale contract, the Buyer paid for the coal by way of two irrevocable Letters of Credit ("**LCs**"). Kuvera was named as beneficiary under the LCs. The LCs were issued by a bank in Dubai, which appointed JPMorgan Chase Bank, NA ("**JPMorgan**") as the advising bank for both LCs. JPMorgan's confirmation of the LCs included a sanctions clause, which provided as follows:

[JPMorgan] must comply with all sanctions, embargo and other laws and regulations of the U.S. and of other applicable jurisdictions to the extent they do not conflict with such U.S. laws and regulations ('applicable restrictions'). Should documents be presented involving any country, entity, vessel or individual listed in or otherwise subject to any applicable restriction, we shall not be liable for any delay or failure to pay, process or return such documents or for any related disclosure of information.

the ("**Sanctions Clause**")

When Kuvera presented the documents via its presenting bank to JPMorgan, JPMorgan performed an internal screening. Through this screening process, JPMorgan discovered that the vessel involved in the sale contract, the *Omnia* ("Vessel"), was included in an internal list which contained the names of various entities and vessels determined by JPMorgan to have a sanctions nexus and/or concern by JPMorgan ("**JPM List**") and, accordingly, JPMorgan refused to make payment to Kuvera. The Master List was not accessible to the public, unlike the list found on OFAC's website known as "OFAC Specialty Designated Nationals and Blocked Persons list (the "OFAC List"). Accordingly, JPMorgan refused to make payment to Kuvera. Kuvera commenced proceedings against JPMorgan for its refusal to pay against a compliant presentation of documents.

High Court's Decision

The Singapore High Court ("**HC**") agreed with JPMorgan's assessment that the Sanctions Clause entitled JPMorgan to refuse payment to Kuvera². In particular, in construing the phrase "or otherwise subject to any applicable restriction", the HC judge agreed with JPMorgan that the bank could rely on their internal assessment of the circumstantial evidence regarding the beneficial ownership of the Vessel. JPMorgan relied on its communication with OFAC which confirmed that based on JPMorgan's findings on the believed beneficial ownership of Vessel, OFAC would have deemed JPMorgan to be in violation of the Syrian sanctions regulations. The HC judge was satisfied that if OFAC had reviewed and considered the circumstantial evidence being relied by JPMorgan, OFAC would have found that the bank to be in breach of the regulations concerning Syrian sanctions. Essentially, the HC judge adopted a subjective approach in interpreting the Sanctions Clause because

¹ Court of Appeal Decision can be accessed at this link : https://www.elitigation.sg/qd/s/2023_SGCA_28

² High Court Decision can be accessed at this link: https://www.elitigation.sg/qd/s/2022_SGHC_213

this was based on JPMorgan's assessment of the circumstantial evidence.

Court of Appeal's Decision

On appeal, the Singapore Court of Appeal ("CA") reversed the HC's judgment and found that JPMorgan could not rely on the Sanctions Clause to refuse payment.

The CA held that the Sanctions Clause only permitted JPMorgan to refuse payment if the Vessel was "*listed in or otherwise subject to any applicable restriction*". Since the Vessel was not listed in the OFAC List, but merely in the JPM List, the CA considered that the Vessel was not "*otherwise subject to any applicable restriction*". The CA rejected the subjective approach adopted by the HC judge and held that the Sanctions Clause must be construed strictly, and an objective approach must be taken. JPMorgan could only rely on the Sanctions Clause if JPMorgan could provide objective evidence that the Vessel had Syrian beneficial ownership at the material time of the sale contract, i.e. in 2019.

The CA explained that: (i) it was speculative and arbitrary to rely on the subsequent correspondence with OFAC because the beneficiary under the LC would not have any certainty as to payment and JPMorgan was essentially asking the Court to consider a hypothetical review by OFAC; (ii) according to the bank's own risk-assessment matrix, an entity could be placed on the JPM List even if there was less than 50% risk of violating US sanctions; and (iii) the bank's reliance on its correspondence with OFAC and OFAC's opinion that JPMorgan would have violated sanctions was a retrospective assessment used to justify the bank's decision.

After reviewing the evidence put forward by JPMorgan, the CA found that the facts were insufficient to show that the Vessel continued to have beneficial ownership linked to Syria / Syrian interests. In particular, the CA noted that the Vessel was originally placed on the JPM List in 2015 as the beneficial owner of the Vessel at that point in time was known to be a Syrian company. However, in 2019, the Vessel was sold and re-named to her current name of *Omnia*. There was no conclusive evidence that with the change of ownership, the Vessel continued to have a nexus to Syria. The CA noted that the new registered owner was a Barbados entity, and her technical and ISM managers were a UAE entity, which suggests that there was no longer any existing nexus to Syria.

Comment

The CA decision illustrates the strict approach that the Singapore courts take with sanctions. Any clause will be construed strictly and objectively before it can be

relied upon to excuse performance of a contractual obligation.

This case is particularly relevant for parties dealing with counterparties in South East Asia that have requested Singapore law as the governing law of the contract instead of English law. Sanctions clauses are common globally, and the OFAC List has in the past included Singaporean nationals. Within the region, the Russian-Ukraine war has prompted a surge in "dark vessels" transporting and supplying Russian crude oil and petroleum products above the Russian price cap.

Parties should be careful when drafting any sanctions-related clauses to ensure that the criteria to invoke the clause are clear. Any party seeking to rely on such a clause should ensure that their decision is based on sufficient objective evidence from publicly available sources.

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

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