Neutral Citation Number: [2019] EWHC 1877 (Comm)

Case No: CL-2018-000826

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building, Fetter Lane,
London, EC4A 1NL
Date: 12/09/2019

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

LAMESA INVESTMENTS LIMITED	**Claimant**
- and -	
CYNERGY BANK LIMITED	**Defendant**

- -
- -

Ms Maya Lester QC and Mr Richard Blakeley (instructed by **Elborne Mitchell LLP**) for the **Claimant**
Mr Brian Kennelly QC and Ms Harriet Ter-Berg (instructed by **Sidley Austin LLP**) for the **Defendant**

Hearing dates: 15 July 2019

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Approved Judgment

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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HIS HONOUR JUDGE PELLING QC

His Honour Judge Pelling (sitting as a judge of the High Court):

Introduction

1. This is the hearing of a Part 8 Claim by which the claimant ("LIL") seeks a determination as to whether the defendant ("CBL") continues to be obliged to make repayments under a Facility Agreement dated 19 December 2017 ("FA") in the events that have happened and on the true construction of the FA.

Factual Background

2. There is no dispute concerning the material factual background. LIL is a company registered in accordance with the laws of the Republic of Cyprus. It is wholly owned by Lamesa Group Incorporated ("LGI"), a company registered in accordance with the laws of the British Virgin Islands. LGI is wholly owned by Mr. Viktor Vekselberg ("VV").

3. CBL is a UK registered company carrying on business in England as a retail bank. CBL's only connection with the United States of America ("US") is that in common with most banks it is only able to carry on its US-Dollar denominated business by maintaining a US Dollar correspondent account with a US bank.

4. Under the FA, LIL lent £30m to CBL. CBL was contractually obliged to make interest payments on 21 June and 21 December of each year throughout the term of the loan. To date, interest totalling £3.6m has become due but has not been paid, although it has been "*ring-fenced*" by CBL and is available for payment subject to resolution of the issues to which I turn below – see paragraph 1.6 of Mr Jordan's first witness statement. What Mr Jordan means when he says the interest payable under the FA has been ring-fenced is unclear – see paragraph 13 of Mr Brentnall's second witness statement – but this is immaterial to the issue I have to decide.

5. In so far as is material to the issue I have to decide, the FA provides as follows:

> "1.2 **Construction**
>
> (a) Unless a contrary indication appears, any reference in this Agreement to:
>
> …
>
> (iv) a "**regulation**" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental, or supranational body, agency, department or of any regulatory, self-regulatory, or other authority or organisation
>
> …
>
> 9. **ENFORCEMENT**
>
> 9.1 **Non-payment**
>
> In the event that any principal or interest in respect of the … loan has not been paid within 14 days from the due date for payment and such sum has not been duly paid within a further 14 days following written notice from

> [LIL] to [CBL] requiring the non-payment to be made good, [LIL] may institute proceedings in a court of competent jurisdiction in England for the winding up of [CBL] … provided that [CBL] shall not be in default if during the 14 days after [LIL's] notice is satisfies [CBL] that such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction. Where there is doubt as to the validity or applicability of any such law, regulation or order, [CBL] will not be in default if it acts on the advice given to it during such 14 day period by its independent legal advisers.
>
> …
>
> 16 **ENTIRE AGREEMENT**
>
> This Agreement constitutes the entire agreement between the Parties in relation to the Facility and supersedes any previous agreement, whether express or implied, regarding the Facility.
>
> …
>
> 18 **GOVERNING LAW**
>
> This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.
>
> 19 **ENFORCEMENT**
>
> 19.1 **Jurisdiction**
>
> (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement …".

6. On 6 April 2018, VV was placed on a list of "*Specially Designated Nationals"* ("SDN") by the US Department of The Treasury Office for Foreign Assets Control ("OFAC") by Executive Order No. 13662 made under the International Emergency Economic Powers Act – a US Federal statute. In consequence LIL became a "*blocked person*" by reason of its indirect ownership by VV.

7. Although some time was taken up at the hearing in exploring the various US statutes and regulations, it is not necessary that I do so in this judgment since their effect is largely common ground. All US persons anywhere in the world, anyone dealing with property subject to US jurisdiction and anyone operating in the US are prohibited from dealing with VV by reason of him being a SDN or LIL by reason of it being a Blocked Person. Anyone dealing with either VV or LIL in breach of these prohibitions is liable to have various economic sanctions of unquestionably potential severity imposed upon it. These sanctions are known in US sanctions law as "*primary sanctions"*. It is not suggested by either party that the payment of interest by CBL to LIL is prohibited by the requirements of US primary sanctions law.

8. In addition to the imposition of primary sanctions, the US legislation entitles the US Federal Government to impose "*secondary sanctions"* on non-US persons not dealing with property subject to US jurisdiction and not operating in the US. Although there are various US Federal

Acts that are relevant, the primary Act relevant for present purposes is section 5(b) of the Ukraine Freedom Support Act 2014 (as amended) ("UFSA"). It provides that:

> "(b) FACILITATION OF FINANCIAL TRANSACTIONS ON BEHALF OF SPECIALLY DESIGNATED NATIONALS – The President shall impose, unless the President determines that it is not in the national interest of the United States to do so, the sanction prescribed in (c) with respect to a foreign financial institution if the President determines that the foreign financial institution has, on or after the date that is 30 days after the date of the enactment of the Countering Russian Influence in Europe and Eurasia Act of 2017, knowingly facilitated a significant financial transaction on behalf of any … person included on the lost of specially designated nationals and blocked persons maintained by [OFAC] pursuant to …(2) Executive Order ….13662 …
>
> (c) SANCTIONS DESCRIBED – The sanction described in this subsection is, with respect to a foreign financial institution, a prohibition on the opening, and a prohibition or the imposition of strict conditions on the maintaining, in the United States of a correspondent account or a payable through account by the foreign financial institution …
>
> (d) NATIONAL SECURITY WAIVER – The President may waive the application of sanctions under this section with respect to a foreign financial institution if the President –
>
> (1) determines that the waiver is in the national security interest of the United States; and
>
> (2) submits to the appropriate congressional committees a report on the determination and the reasons for the determination "

9. It is common ground that the US Government could impose the sanction described in section 5(c) UFSA on CBL if it determined that the payment of interest to LIL pursuant to the FA was " … *a significant financial transaction* …", subject to the president's express power to waive the imposition of that sanction conferred by sections 5(b) and/or 5(d)(1) of the Act.

10. The potential effect of the imposition of the section 5(c) UFSA sanction on CBL is described in its skeleton argument as "*… obviously ruinous …"*. The reasons why that is so are set out in paragraphs 2.3 to 2.8 of the second witness statement of Mr. Jordan filed on behalf of CBL. In summary, a significant part of CBL's business is denominated in US Dollars; Dollars deposited with CBL by its retail customers are deposited by CBL in a correspondent account (known as a "Nostro" account) maintained by CBL with JP Morgan in the US. Its Nostro account currently has a balance in favour of CBL of about US$15m. In addition to this critical issue, Mr. Jordan draws attention to the fact that CBL has entered into foreign exchange swap contracts with another bank in order to protect against exchange rate risk, which of necessity is denominated in Dollars and has long term service contracts with a number of US based companies that would or might be prevented from dealing with CBL if it was sanctioned. I accept this evidence at face value since it is not challenged.

English Law Principles

11. There is no real dispute that apart from any contractual provision that modifies the position, English law will not excuse contractual performance by reference to foreign law unless that law is the law of the contract or the law of the place of performance – see Ralli Brothers v. Campania Naviera Sota Y Aznar [1920] 2 KB 287, Kleinwort Sons & Co v. UBIA [1939] 2 KB 678 at 694-5 and Libyan Arab Foreign Bank v. Bankers Trust Co [1989] 1 QB 728 at 743 F-G. The outcome in National Bank of Kazakhstan and another v. Bank of New York Mellon [2018] EWCA Civ 1390 was as it was because the contract in issue was subject to an express provision that in effect reversed the common law position – see the judgment of Hamblen LJ at paragraphs 27, 28 and 68 to 70. CBL submits that clause 9.1 of the FA is similar in effect. Thus the sole issue that arises is whether, on its true construction, clause 9.1 of the FA in effect reverses the common law principles that would otherwise apply. If it does not then LIL is entitled to payment notwithstanding the impact that may have on CBL.

Effect of Clause 9.1 of the FA

Applicable Legal principles

12. Those principles are well known and are not in dispute. In summary, they are as follows:

    i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

    ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20;

    iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

    iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

    v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 2 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent– see Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.

The Parties' Cases in Summary

13. CBL maintains that section 5(b) UFSA is a mandatory provision of law within the meaning of clause 9.1 of the FA because its effect is to impose on it an implied obligation not knowingly to facilitate a significant financial transaction on behalf of a person included on the list of SDNs and Blocked Persons maintained by OFAC pursuant to Executive Order 13662. It maintains that since LIL is a Blocked Person (something that is common ground) and that payment of interest under the FA is at least arguably a significant financial transaction and there is no realistic prospect of a presidential waiver it follows that CBL is at realistic risk of becoming subject to the sanctions set out in section 3(c) UFSA if it pays LIL the interest to which it is entitled under the FA. It maintains that in those circumstances it is entitled to avoid this risk by not paying the interest otherwise due by operation of clause 9.1 of the FA.

14. LIL contends that this is an unsustainable proposition. It maintains that clause 9.1 requires CBL to be able to demonstrate that there is a legal provision that expressly prohibits it from making the payment relied on. It submits that on proper analysis none of the provisions of US law that CBL relies on have that effect (since it does not come within any of the categories to which primary sanctions would apply) and that on proper analysis all that CBL is doing is not paying in order to avoid the possibility that the section 5(c) UFSA sanction might be imposed on it. It maintains that the word "*mandatory*' means that the provision relied on must make it compulsory for CBL to refuse payment and the provisions that it relies on do not have that effect. Above all, LIL submits that the words "… *provision of law …*" means a law that applies to a "*… UK party, acting in the UK, that has agreed to make a sterling payment pursuant to a contract governed by English law …*" – see paragraph 23(3) of LIL's written opening submissions. LIL maintains that none of these requirements are satisfied by CBL's exposure to the risk that it may become subject to secondary sanctions and therefore that the common law position should prevail.

The Construction Exercise

15. It is necessary first to set out the relevant documentary, factual and commercial context including the facts and circumstances known or assumed by the parties at the time that the document was executed and any other provisions within the contract that throw light on the issue that arises.

16. *Documentary Context*

Aside from clauses 16, 18 and 19.1(a), the only provision within the FA that either party referred to was the definition of the word "*regulation*". As is apparent from the express definition of regulation, it applies to everything other than either primary legislation or the general law. That much is apparent from the list of instruments covered, which noticeably does not include either any primary legislation or general law. Thus, in my judgment it is clear that the phrase "*… mandatory provision of law …*" is designed to bring within the scope of the clause all otherwise relevant primary legislation and general law including, in relation to English law, the common law. It is also apparent from the terms of the definition that it includes any instrument promulgated by any government or any instrument as defined that is promulgated any of the relevant organisations identified. The definition does not include any causative constraint because it does not have to. That is provided by clause 9.1, which requires CBL to establish that sums otherwise payable have not been paid "*… in order to comply …*" with either (a) a mandatory provision of law or (b) a regulation or (c) an order of a court of competent jurisdiction. It would be inconsistent with the absence of any territorial qualification from the definition of the word "*regulation*" and to the courts whose orders can be relied on by CBL to construe the reference to a mandatory provision of law as being confined to English law. This much is common ground – see paragraph 17(b) of the List of Issues.

17. *Factual and Commercial Context*

VV was placed on the SDN list on 6 April 2018, just over 3 months after the parties entered into the FA on 19 December 2017. However, Mr. Jordan states in paragraph 5.1 of his first witness statement in these proceedings that CBL was aware in December 2017 that it was possible but not likely that US sanctions would be imposed on LIL. LIL does not challenge this, nor does it suggest that its analysis was any different to that of CBL. This possibility is therefore a circumstance known or assumed by the parties at the time that the document was executed.

18. As is common ground – see paragraph 9 of the List of Issues – there is nothing within the FA that requires payment to be made in US Dollars or to a US bank account and neither of the parties to it were US persons or entities nor did the agreement involve conduct in the US. That being so, neither of the parties could have thought that any question of direct sanction could arise even if VV became a SDN and in consequence LIL became a Blocked Person. The risk that arose was exclusively that if LIL became a Blocked Person CBL would be exposed to the risk of secondary sanctions.

19. There can be no doubt that CBL was also aware of the impact that the imposition of secondary sanctions would have on it and its business. The impact on its business would be ruinous for the reasons identified by Mr. Jordan in his second statement. If CBL was subjected to secondary sanctions it would have no recourse against LIL notwithstanding that on this hypothesis it would have paid LIL the interest due under the FA and would have to continue

doing so for the duration of the FA. This risk had been well known since at least the hand down of the judgment in Libyan Arab Foreign Bank v. Bankers Trust Co [1989] 1 QB 728, although the principle giving rise to that risk is derived from the earlier authorities identified in paragraph 11 above. As Hamblen LJ observed in National Bank of Kazakhstan and another v. Bank of New York Mellon (ibid.) at paragraph 69:*"There is every reason why an international bank would wish to protect itself from the risk of being exposed to very substantial liabilities as a result of disputes between its customer and third parties"*. Subject to substituting "*lender*" for "*customer"* that applies with equal force here.

20. Further, since the only risk to which CBL was exposed was of becoming subject to secondary sanctions, it is improbable that the parties could have intended the scope of clause 9.1 to be limited to protecting CBL from the risk it was not exposed to – becoming the subject of primary sanctions – and not to extend to the risk that was apparent – that if LIL became a Blocked Person and CBL paid LIL the sums due under the FA thereafter, it would become exposed to the risk of becoming subject to the secondary sanctions regime set out in the US legislation to which I referred earlier whilst at the same time being liable to meet future interest payments as they fell due.

21. *The Effect of Clause 9.1 of the FA*

LIL's case is that the word '*mandatory*" means as LIL put it in its skeleton submissions "*... a law applying to UK parties, acting in the UK, that have agreed to make a sterling payment pursuant to a contract governed by English law*" that (in this context at least) prohibits something. If and to the extent this implies that only an English statute or a rule of common law that prohibits particular conduct will suffice then I do not agree. As I have explained already, when read in its documentary context and together with the word "… *regulation*….", the contractual definition of that word and *the phrase "... any court of competent jurisdiction…*" it is clear that no territorial qualification was made or intended. Had the parties wished to qualify those words and phrases in that way they could have done so easily enough. They chose not to do so. To the contrary, in the only definition that matters (that of the word "*regulation*") it is clear that such a qualification was not intended. If no such qualification was intended for what constituted a relevant regulation, there can be no justification for implying such a qualification to the phrase "*... mandatory provision of law ...*".

22. More generally, it is not in dispute that both parties were legally represented or that lawyers acting for the parties drew up the FA. I do not accept that the natural understanding of English lawyers at the date of the agreement would have been that a mandatory rule of law was one that requires compliance – see paragraph 23(2) of LIL's skeleton submissions. All provisions of law by definition have to be complied with unless the parties, or one of the parties, dis-apply them to the extent that is possible. It is necessary therefore to search for some other meaning for the word "*... mandatory ...*". I accept CBL's submission that it means a provision of law that the parties cannot vary or dis-apply. This makes contextual sense. Clause 9.1 is concerned with enabling CBL to avoid what would otherwise be its clear contractual obligations. It makes sense for the parties to agree to such a provision where non-payment results from the need to comply with a provision of law that neither can dis-apply but it would make no sense for the parties to agree to such a provision where the provision of law preventing payment could be disapplied by either or both of the parties.

23. It was submitted on behalf of CBL and I agree that English lawyers during the period the FA was being negotiated and down to the date when it became binding would have understood a mandatory law to be one that could not be derogated from. The context that makes this

probable includes the meaning given to the phrase "*... mandatory provision of law ...*" in the Rome Convention 1980 and the Rome 1 Regulation on Choice of Law. It was not submitted by CBL that the construction for which they contend applies by operation of either regulation. It submits however and I accept that they provide some support for the submission that lawyers at the relevant time would have understood the effect of the word "*mandatory*" to be as I have described. It goes without saying that it was not open at any stage to either party to dis-apply the US statutes that purported to apply secondary sanctions by their agreement, nor did the parties attempt to do so either in the FA itself or afterwards.

24. In my judgment the real issue that arises concerns the effect of the words "*... in order to comply ...*". LIL draws a distinction between a statute which requires or prohibits something and one that creates the risk of a penalty or sanction if something is done or not done. It maintains that clause 9.1 is engaged only if a statute or rule of law expressly prohibited CBL from paying LIL. It is common ground that this is not the effect of the US legislation on which CBL relies. It follows so it is submitted that CBL is not entitled to rely on clause 9.1.

25. There are at least three possible permutations in which the phrase could apply. The first is that compliance can arise only in relation to a statute that expressly prohibits payment on pain of the imposition of a sanction or penalty, the second is that compliance occurs whenever a party either acts or refrains from acting in a manner that would otherwise attract a sanction or penalty imposed by statute and the third is that compliance occurs whenever a party either acts or refrains from acting in a manner that would otherwise attract the possible imposition of a sanction or penalty by operation of statute.

26. Which of these three possibilities was intended to apply is likely to be dependent on the context in which the word is used. However, there is no reason why of necessity a contractual provision in the terms of clause 9.1 should be read a confined in its scope to the first of these permutations. It has long been recognised in English law in the context of whether a contract is to be held void for illegality that a contract can be prohibited either expressly or by implication and that if a statute imposes a penalty that will be treated as an implied prohibition because the imposition of a penalty implied prohibition – see Cope v. Rowlands [1836] 2 M & W 150 at 157 approved by the Court of Appeal in Phoenix General Insurance Co of Greece SA v. Halvanon Insurance Company Limited [1988] 1 QB 216 *per* Kerr LJ at 268 C-G. The qualification noted at 270 C and following is not material for present purposes because it is not being contended by CBL that the FA is void but merely that payment has been impliedly prohibited because of the probability that the relevant sanction will be imposed if it pays LIL the sums it is entitled to under the contract. A party who acts so as to avoid the imposition of a penalty is complying with the implied prohibition just as much as a party who acts so as to comply with an express prohibition.

27. Once the meaning of "*mandatory*" is understood to be as I have set out above, there is nothing in the language used by the parties that suggests it was intended that the scope of clause 9.1 would be confined to the first of the permutations mentioned above. The factual and commercial context suggests that it is highly unlikely that was what could have been intended because as I have explained there was no prospect of CBL being subjected to the primary sanctions regime if LIL became a Blocked Person but only that CBL would or might become subject to the secondary sanctions regime. Once this point has been reached, it is as unlikely that the parties could have intended to limit the scope of clause 9.1 to the first and second of the permutations I have referred to but not the third. There are a number of reasons for reaching this conclusion, all of which are contextual. All parties were or should have been aware of the effect of the US legislation. The reason why a provision such as clause 9.1 is

included in a contract such as the FA is to eliminate the "double jeopardy" risk. It is not of any effect or benefit where a payment has been made to LIL and a sanction is imposed following an attempt by CBL to persuade the US authorities not to impose a sanction. It is only prospective in effect because it only operates so as to excuse payment by CBL to LIL. It does not create any form of after the event recourse in the event that a sanction is imposed. Thus the risk to which clause 9.1 is directed is not avoided by a contractual provision intended by the parties to apply to the first and second but not the third of the permutations I have referred to.

28. It is all the more unlikely that the parties intended to exclude the third of these permutations given the position adopted by the US authorities in relation to foreign financial institutions that do not comply. OFAC's guidance made clear that the default position would be that the sanctions would generally apply – see the quotations from OFAC's FAQ Guidance quoted at paragraphs 12-13 of CBL's skeleton submissions. This follows from the statutory language used which imposes a requirement subject only to the Presidential power to waive. The terms under which a waiver could be granted are very limited – being limited to situations in which waiver was in either the *"national interest*" or the "*national security interest …*" of the US. There was no material available to the parties down to the date when the FA was made that would have enabled them to conclude that either (i) the US Government would not regard payments by CBL to LIL under the FA as "*significant*" or (ii) there was any realistic possibility of the President of the USA concluding that it would be in either in the *"national interest*" or the "*national security interest …*" of the US not to impose the section 5(c) UFSA sanctions on CBL if it paid LIL in accordance with the terms of the FA. As I have said already, clause 9.1 of the FA was a provision by which the parties chose to manage risk.

29. It was submitted by LIL that this approach creates enormous uncertainty and thus is likely not to be what the parties had intended. I do not agree. The clause is drafted in wide terms in order that it could effectively protect CBL from the risk of breaching an express or implied prohibition against payment that exposed it to potentially severe penalties or sanctions as a result of making a payment under the FA to LIL. Uncertainty is not an answer because the parties could not know for certain what was to happen in the future. All that they could be certain of is that there was a risk that they chose to manage by clause 9.1, which was drafted in wide and unqualified language in order to ensure that the risk was properly and clearly managed contractually. Such clauses have to be wide in their terms to mitigate the rigours of the common law rule noted earlier. The clause in this case is no wider than the material parts of the clause considered in National Bank of Kazakhstan and another v. Bank of New York Mellon (ibid.).

30. I reject LIL's submission that the construction that I have arrived at is contrary to "*… the UK's long standing policy of not giving extraterritorial effect to US foreign policy as enacted through its secondary sanctions programmes"* for the following reasons. The issue I am concerned with is one of construction of the contract between the parties. Unless there is a mandatory rule of English law that precludes parties to a contract from including a provision to the effect alleged I do not consider the alleged policy is material. The secondary sanctions with which I am now concerned create a risk that the parties to a contract such as the FA are entitled to manage by agreement in the absence of such a provision. There is no such mandatory rule. The only such rule that is incorporated into English law is that contained in Council Regulation (EC) No. 2271/96. That applies only to those laws specified in the Appendix. Thus there is no general policy as suggested by LIL. The laws giving rise to the issue in this case are not included within the Appendix to Regulation 2271/96.

31. The "*territoriality*" principle relied on by LIL does not assist it either. Whilst I accept the general principle identified in such cases as Société Eram Shipping Co Ltd v. Cie Internationale de Navigation [2004] 1 AC 260, it misses the point so far as the construction issues that arise in this case are concerned. There is nothing in that case (or for that matter the cases I referred to earlier in this judgment that establish that English law will not excuse contractual performance by reference to foreign law unless that law is the law of the contract or the law of the place of performance) that precludes the parties from making alternative arrangements by express agreement between them. That is what the parties did in National Bank of Kazakhstan and another v. Bank of New York Mellon (ibid.). There is no question of the court giving effect to the mandatory provisions of a law other than the law of the contract or the law of the place of performance as suggested by LIL in paragraph 48 of its opening submissions. The conclusion I have arrived at means that the parties have chosen to do so. That choice is one they were lawfully entitled to make.

Conclusions

32. Subject to hearing from counsel for the parties as to the terms of the appropriate order, I consider that CBL is entitled to a declaration that it is entitled to rely on clause 9.1 of the FA for as long as VV remains a SDN and LIL remains a Blocked Party by reason of it being controlled by VV.