



TWENTY
ESSEX

O v C

When and how can a party be
ordered to do something that
breaches US sanctions law?

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THE CONTEXT – ENGLISH LAW OF ILLEGALITY

- Very limited circumstances where English law permits a defence based on foreign illegality
- Where performance of the contract necessarily requires an act in a friendly foreign state which would be unlawful by the law of that state - The **Ralli Brothers** principle.
- If the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country - The **Foster v. Driscoll** principle.
- But may be circumstances where English law compels a party not to rely upon foreign law – **EU/UK Blocking Regulation** (SI 2020 No 1660).

INTERIM RELIEF O v C [2024] EWHC 2838 (Comm)

FACTS

- Application for interim relief under section 44 Arbitration Act, 1996.
- Sale of naphtha cargo affected by sanctions – Charterers designated by OFAC.
- Proceeds of sale - Payment into UK Court v Payment into blocked US account?



O v C

APPROACH

American Cyanamid principles

v

More “**nuanced**” approach applicable where English Court asked to make order to ensure a fair trial (e.g. disclosure of relevant documents)

O v C – PRINCIPLES APPLIED

- An English court can order a party to act contrary to foreign law.
- Courts are cautious where compliance would cause a party to breach its own foreign law.
- Party seeking to rely upon foreign criminal law must prove a real risk of prosecution.
- When experts disagree, the court must assess the evidence, noting that significant doubt about the law may suggest prosecution is unlikely.
- If a real risk of prosecution is proven, this risk is balanced against the importance of the relief sought. Greater risk of prosecution increases the weight given to this factor. The Court can fashion an order that reduces or minimises the concerns under foreign law.
- Once an order is made, the potential breach of foreign law does not excuse non-compliance, as the court must enforce its decisions .

O v C – DECISION AND TAKE AWAYS

DECISION

Court concluded that proceeds should be paid into court

KEY TAKE AWAYS

- **Court support of arbitration** - Ordering payment into court seeking to assist arbitral process by making enforcement of Tribunal's future decision as easily as possible.
- **Evidence of foreign law as to likelihood of prosecution** - May give rise to practical difficulties – If US law, Uncertainties as to what OFAC likely to do in any particular case.

RETALIATORY MEASURES BY FOREIGN COURTS/LAWS – BEWARE OF UNFORESEEN CONSEQUENCES OF RELIEF

UniCredit Bank GmbH v RusChem Alliance LLC [2025] EWCA Civ 99

Application - to revoke or discharge final ASI granted by Court of Appeal (and upheld on appeal to the UKSC) to enforce arbitration clause providing for ICC arbitration seated in Paris.

Reason for Application - RCA secured a ruling from the Russian Arbitrazh court prohibiting UniCredit from initiating or continuing any proceedings outside Russia, requiring Unicredit to “*take all measures within its control*” to “*cancel the effect of*” the English ASI and imposing a potential €250m penalty on UniCredit for non-compliance.

Material risk - For UniCredit who had assets in Russia.

Court of Appeal – Varied injunction to discharge the injunctive relief.

RETALIATORY MEASURES BY ENGLISH COURTS/LAWS BLOCKING REGULATION (SI 2020 No 1660)

- UK law - Prohibits compliance with certain US secondary sanctions against Iran and Cuba.
- Article 11 - Applies to UK and EU nationals
- Article 5 – Widely worded prohibition - **Bank Melli Iran v Telekom Deutschland GmbH** (C124/20)
- Potential loophole if conduct based upon contractual clause and not US sanction – **Mamonochet Mining v Aegis Managing Agency** – [2018] EWHC 2643



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