No Escape from a Bad Bargain

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PRACTICES Shipping Dispute Resolution, Energy Litigation, Europe, Middle East and Africa, Offshore Oil and Gas Dispute Resolution, Oil and Gas Litigation, International, Litigation

The case of *Optimares S.p.A -v- Qatar Airways Group Q.C.S.C* [2022] EWHC 2461 (Comm), recently determined by the English Commercial Court, acts as a stark reminder to commercial parties of the need to take great care in the formation of their contractual bargains. The judgment demonstrates clearly that the English courts will not hesitate to hold parties to the terms of their contract even if to do so may impact very negatively upon one party to the contract. As such, the courts will, when the terms of a contract are clear, uphold those terms and not "bend" the meaning, or read into the contract terms that may mitigate an extremely unfortunate commercial outcome for one of the parties.

As world economies enter into recession, and opportunities for new business become more scarce, parties are advised to heed the reminders presented by this case. Parties should be very careful not to enter into bad contractual bargains for the sake of securing new business, anticipating that the courts will mitigate the impact of the terms of that contract for a party.

A. Background

The case concerned a contract pursuant to which the claimant, Optimares, agreed to design, manufacture, sell and deliver sets of business class seats for certain passenger aircraft operated by the defendant, Qatar Airways. It was noted in the judgment that the terms of the parties' agreement were clearly favourable to Qatar Airways who no doubt had the "whip hand" in the negotiations, but it was nevertheless the case that there had been some negotiation between the parties of the terms. It was, however, clear though that Optimares had wanted the business. On this issue, Optimares' evidence (albeit an issue on which the judge made no finding) extended to it stating that as a condition of obtaining the contract in the first place, Qatar Airways had apparently made clear to Optimares that it should not take on new business for existing clients and/or decline to take on new client so Qatar Airways would have priority access to its production lines, and also that Optimares should secure a bigger plant and make substantial capital investment in its facilities, all of which apparently it had done.

In essence, the dispute arose after Qatar Airways served termination notices on Optimares (of not only the purchase orders for sets of seats but of the parties' contract itself) at a time when Optimares was on the cusp of delivering seats in respect of which Optimares had spent millions of Euros progressing the works for their development and manufacture.

Qatar Airways' letters of termination relied upon a right to *terminate for convenience* at clause 12.2.3 of the standard conditions which had been incorporated into the contract. These notices were sent one day after Optimares had served notices on Qatar Airways of allegedly Excusable Delay under the contract and in respect of the purchase orders placed thereunder, that is to say notices purporting to extend the time for Optimares' performance due to conditions beyond its control, namely circumstances in respect of the Covid-19 outbreak.

One of the key issues for the court to determine was whether Qatar Airways was entitled to exercise the right to terminate for convenience provided by the contract.

B. The issues

i) Was the right to terminate for convenience excluded by the right to terminate related to the occurrence of excusable delay?

Optimares' contentions

Optimares contended that Qatar Airways was not entitled to invoke the termination for convenience clause. It contended in particular that such right was not available where Excusable Delay had been invoked under the contract because this provision itself gave rise to a right to terminate upon a certain amount of Excusable Delay (Optimates contending that in these circumstances Qatar Airways could only terminate in relation to Excusable Delay), and by contending that the right was not exercisable in order to reward the same works to another contractor at a lower price. Optimares contended that Qatar Airways had wrongfully terminated the contract and claimed for its lost profits and costs thrown away. Even if termination was valid, Optimares contended that it should be entitled to its costs thrown away.

Qatar Airways' contentions

Qatar Airways, on the other hand, contended that it had an absolute right to terminate the contract and purchase orders for convenience under clause 12.2.3 at any time prior to delivery of the seats with effectively zero financial consequence. It did not matter that Qatar Airways may also have been entitled to terminate for Excusable Delay.

Qatar Airways relied upon contractual wording which provided that the right to terminate for convenience applied "*[n]otwithstanding anything to the contrary*". It also emphasized that the right could be exercised "*without incurring any liability*".

Court's determination

When determining the dispute, the court applied the well-established approach to the construction of contractual provisions and the judge held that Qatar Airways was correct in its contentions and upheld their termination for convenience. In so doing, the judge had regard to the language within clause 12.2.3, which provided that "*not withstanding anything to the contrary in the Standard Conditions or the applicable Purchase Agreement*", Qatar Airways "*shall be entitled to terminate……for its convenience*". He found these words were clear and unambiguous. Moreover, the two cancellation rights in issue (for convenience and in the event of Excusable Delay) operated differently, so the right to cancel upon a certain amount of excusable delay gave rise to a right to terminate immediately, whereas to cancel for convenience required Qatar Airways to give 3 months' notice (during which period it was open to Optimares to deliver under the contract and to be entitled to the price in so far as it did so). This persuaded the judge that the clauses had been drafted with different factual circumstances in mind and that they therefore were intended to co-exist.

ii) Was Optimares entitled to any compensation upon Qatar Airways' termination for convenience?

Thereafter, in considering the meaning of the provision that the termination for convenience right could be exercised "*without incurring any liability*", the judge applied the rule that the exercise of a contractual right to terminate does not, unless the contract provides otherwise (which it did not in

this case), give rise to any right to damages on the part of the other party. The consequence for Optimares – given that the contract did not provide it with any right to compensation upon a termination for convenience – was very severe. This is because Optimares had not only spent millions of Euros designing and manufacturing the relevant sets of aircraft seat; but also because as stated above a condition of obtaining the contract in the first place had, according to Optimates' evidence at least, been that it should not take on new business for existing clients and/or decline to take on new clients so Qatar Airways would have priority access to its production lines, and also that Optimares should secure a bigger plant and make substantial capital investment in its facilities, all of which it had done. This left Optimares having wasted very substantial sums.

iii) Did Qatar Airways' express duty of "*good faith in the performance of their respective responsibilities and obligations*" fetter its right otherwise to terminate for convenience?

Optimares also contended that a duty of good faith imposed on Qatar Airways by clause 16.13 of the standard conditions operated as a limit on the exercise by Qatar Airways of the right to terminate for convenience in clause 12.2.3.

Clause 16.13 provided that the parties were to act in "*good faith in the performance of their respective responsibilities and obligations under these Standard Conditions and the Purchase Agreement*".

Optimares submitted that clause 12.2.3 did not provide an unfettered discretion to terminate but was rather qualified by the good faith provision. Optimares relied upon a 2003 case in which the court had found that "*a contract for the execution of works confers on the contractor not only a duty to carry out that work but the corresponding right to be able to complete the work which it is contracted to carry out*" to contend that Qatar Airways was obliged not to take steps to frustrate Optimares' performance by terminating the contract.

Qatar Airways, on the other hand, focused on the wording of clause 16.13 emphasizing that its duty of good faith imposed by that clause applied only to the "*performance of its respective responsibilities and obligations*". Qatar Airways emphasized that its exercising of the termination for convenience right did not constitute the performance of any responsibility or obligation and so, it contended, the good faith obligation did not apply to this. Qatar Airways also emphasized that clause 12.2.3 was to apply "*[n]ot withstanding anything to the contrary*" and so, it contended, provided an unfettered right to terminate for convenience.

The judge again found for Qatar Airways, holding that the requirement to act in good faith clearly applied to performance of the subject matter of the contract. He found that the exercisable right to terminate for convenience does not constitute either a responsibility or obligation within the meaning of the clause.

Conclusion

It is of course the case in some commercial negotiations that one party will hold the balance of power in the bargaining process. The other may accordingly, so as to secure new business, have to accept terms that it may not have accepted had the balance of power been more equal. What is key in any contractual negotiation is to be alive to manner in which the courts may construe certain contractual provisions and to consider the likelihood of those provisions being at issue. Where consequences may be severe, whether or not likely, it may be possible to insure against those. Where insurance is not available, it may be possible to avoid negative outcomes by entering into early discussions with the other party. One should not assume, however, that the English courts will

be quick to soften what are otherwise clear contractual rights and obligations so as to save a party from a painful outcome.