

On 8 November 2024, the judgment of the English High Court (Sir Nigel Teare) in *O v. C* was handed down. The decision will be of interest to many in the shipping industry but also more widely to those who deal with sanctions issues, whether in shipping or in other contexts.

## The Facts

The applicants were the owners (O) of a vessel that had been chartered to the respondent charterers (C) for the carriage of a cargo of naphtha from Singapore to Japan.

Very shortly after the loading of the cargo in Singapore, C was added to the Specially Designated Nationals (SDN) List by the US Office of Foreign Assets Control (OFAC). Thereafter, O refused to deliver or discharge the cargo to C (or to a buyer of the cargo put forward by C), on the basis that the cargo was “blocked” under US law and that the relevant provisions of the charterparty permitted O to refuse to deliver or discharge the cargo in those circumstances.

C commenced arbitration in London against O, pursuant to the arbitration agreement contained in the charterparty, seeking both delivery up of the cargo and damages.

## The S.44 Application

As the arbitration between O and C continued, the cargo remained on board the vessel, preventing the vessel from trading. It was also suggested that prolonged storage of the cargo on board would ultimately damage the vessel’s tank coatings. The cargo remained on board for around 20 months.

Given the above circumstances, O applied to the court (with the permission of the arbitral tribunal) for an order permitting the sale of the cargo, with the proceeds of the sale to be held pending the outcome of the arbitration.

S.44 of the Arbitration Act 1996 deals with the court’s powers in support of arbitral proceedings. It includes a wide range of powers, including (S.44(2)(d)): the power to order the sale of goods that are the subject of arbitral proceedings.

## The Dispute

C did not oppose the sale of the cargo. The crux of the dispute was what should happen to the proceeds of sale. Ordinarily, the proceeds of sale would be paid into court, pending the outcome of the dispute. However, O sought an order that the proceeds be paid into a “blocked account” with a US financial institution. C opposed that, arguing that the ordinary procedure of payment into court should be followed.

OFAC had previously issued a licence for the sale of the cargo, which, O argued, only permitted the proceeds of sale to be paid into a blocked account. O further argued that it, its parent company and its (US-based) personnel would risk criminal prosecution in the US if any other course of action were to be followed. C objected to this (unsurprisingly) on the basis that it would place the proceeds of sale beyond its reach, even if were to be successful in the arbitration.

## Applicable Principles

Paragraph 22 of the judgment helpfully summarises C’s submissions on the principle to be applied, which were accepted by the court as being correct (see Paragraph 24 of the judgment). That summary is as follows (with citations and quotations from authorities omitted):

- “i) An English court can order a party to do something that is (or may) be contrary to a foreign law, including a foreign criminal law ... . It is a question of discretion.
- ii) An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e. foreign) criminal law, not least with considerations of comity in mind ... .
- iii) The burden is on the party relying on the foreign criminal law to prove that there is a real risk of prosecution ... . What must be shown is a ‘real’ (rather than ‘fanciful’) risk, and the risk must be of prosecution, not merely of the breaching of foreign law or of the imposition of a sanction falling short of prosecution ... .
- iv) Where the parties’ experts express a different view about the risk of prosecution, the court should exercise care when approaching the issue of foreign law, but it does not follow from the disagreement that there is a real risk ... .
- v) If a real risk of prosecution is established, the court must then conduct a balancing exercise, weighing the risk of prosecution with the importance of the relief sought by the order ... . The greater the risk of prosecution is, the more weight is to be given to that factor... .
- vi) The court can fashion an order that reduces or minimises the concerns under the foreign law... , and considerations of comity may be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the court’s order... .
- vii) Once the court has decided to make the order, the fact that compliance would or might constitute a breach of a foreign law does not excuse noncompliance, as the court must be able to enforce its decision... .”

## Evidence

The Court heard expert evidence on US sanctions law, and its attention was also drawn to the *Economic Sanctions Enforcement Guidelines* published by OFAC. This evidence was then considered by the court in assessing whether the risk of prosecution to which O claimed to be exposed was a “real risk”, as opposed to a “fanciful” one. Unsurprisingly, the experts instructed by the parties expressed differing views on this.

## The Court’s Decision

The court concluded that O did not face a real risk of prosecution, in the event the sale proceeds were paid into court. The court notes that O had done all it could to seek to comply with US sanctions, rather than breach them, that O would be acting in compliance with an English court order (and thus not “wilfully or recklessly”) and that payment into court would not detract from the objective of the sanctions – if the arbitral tribunal ultimately concluded that O was obliged to block the cargo, then C would not be able to access the sale proceeds.

In short, the court “concluded that there is no real prospect of a prosecution” and accordingly ordered the sale proceeds to be paid into court.

## Comment

The decision is of interest in a number of ways.

First, it emphasises the basic principle that the fact that an order may require a party to do something contrary to a foreign law is not, without more, determinative. The framework set out in the judgment (and quoted above) seems likely to be applied in future cases, both in the sanctions context and more widely.

Second, the decision highlights the growing complexity of international trade operations, especially in the light of increasingly intertwined sanctions regimes across multiple jurisdictions. As businesses expand globally, the challenges of sanctions compliance become more pronounced, with multinational companies navigating overlapping regulatory frameworks.

Third, the differing views of the expert witnesses whose evidence was relied on by each party meant the court had to decide which expert’s evidence it preferred on the key questions of whether a “real risk” existed. That demonstrates the fact-sensitive nature of the exercise, carrying with it a degree of uncertainty in similar cases in the future.

The case illustrates the intricate balance that companies doing business across different jurisdictions must strike between compliance with international sanctions and fulfilling contractual obligations. Here, the court’s ruling emphasises that speculative or minimal risks of breaching sanctions will not prevent it from acting in support of arbitration and commercial agreements. However, this approach also places companies in a position where they must interpret and assess the real risk of prosecution, based on evolving, and often ambiguous, standards set by sanctions authorities such as OFAC.

Fourth, the decision is a good illustration of the use of the court’s powers under S.44 of the Arbitration Act to resolve an impasse of the kind that can quite often arise in shipping and international trade contexts. The use of these powers at least resolves the immediate issue and prevents further losses from accruing, pending the outcome of the dispute as a whole. While sanctions are one reason why such an impasse can arise, there are plenty of others.

## Authors



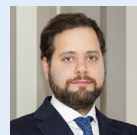
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