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## CIF Weekly – issue 6

### Optimares S.p.A v Qatar Airways Group Q.C.S.C – Clear drafting means right to terminate for convenience unfettered by existence of other contractual termination rights or duty of good faith.

In *Optimares S.p.A. v Qatar Airways Group Q.C.S.C. [2022] EWHC 2461 (Comm)*,<sup>1</sup> the Court revisited and clearly elucidated the key principles of contractual construction where the parties are both sophisticated commercial entities, but one "*had the whip hand in the negotiations*". Even if the contractual arrangements are weighted in one party's favour, clear and unambiguous language will not be rewritten by the Court.

#### Facts

Optimares entered into agreements to design, manufacture, sell and deliver economy and business class seats to Qatar Airways (the "**Agreements**").

The first delivery dates had already been missed when, in March 2020, Optimares served notices of "*excusable delay*" stating that Covid-19 and the Italian government's response had removed its ability to perform in a "*meaningful fashion*" and that it was unable to give a "*meaningful estimate*" as to when operations might resume. The next day, Qatar Airways served notices exercising its right to terminate the Agreements for convenience under the following clause:

*"Notwithstanding anything to the contrary contained in these Standard Condition[s] or the applicable Purchase Agreement, Qatar Airways shall be entitled to terminate these Standard Conditions, the Purchase Agreement and/or any Purchase Order for its convenience and without incurring any liability by providing three (3) months prior written notice to the Supplier for termination of these Standard Conditions and/or Purchase Agreement and fourteen (14) days prior written notice for termination of the Purchase Order."*

#### Decision

##### **Contractual Interpretation**

The Court agreed with Qatar Airways that the dispute centred on straightforward contractual construction.

The Court preferred a textual analysis to a contextual analysis. While commercial common sense is an important factor to consider when interpreting contracts, the Court should look to the natural meaning of the wording especially when, as here, the contracts had been negotiated and prepared with the assistance of skilled professionals. Moreover, it is not the Court's role to rewrite the contract to assist an unwise party or to identify what it thinks the parties should have agreed (rather than what they have agreed).

Against those principles, the Court considered three issues of construction:

**Issue 1:** *Did the existence of a right to terminate for excusable delay prevent Qatar Airways from terminating the agreement for convenience?*

Both termination clauses (for excusable delay and for convenience) co-existed. The language of the contract was clear and unambiguous in giving Qatar Airways an unfettered right to terminate for convenience: "*Notwithstanding anything to the contrary [in the Agreements]*".

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<sup>1</sup> Handed down on 7 October 2022.

It was Qatar Airways' choice which clause it relied on. The notice provisions and financial consequences of termination were different under each clause such that there were scenarios in which each may be preferable. For example, Qatar Airways may prefer to terminate immediately if the qualifying conditions of an excusable delay were met instead of waiting the required three-month notice period under the termination for convenience clause, or it may wish to avoid a protracted dispute as to whether or not an excusable delay had occurred and instead wait out the notice period.

**Issue 2:** *What are the financial consequences of terminating in accordance with the termination for convenience clause?*

As opposed to termination following a repudiation, termination for convenience is a contractual right. There was therefore no entitlement to common law damages (such as, the reliance losses claimed by Optimares) because the sole source of the remedy for such termination was to be found in the term itself. The relevant terms of the Agreements made no provision for reliance (or any other) damages to be awarded to Optimares.

The phrase "*without incurring any liability*" meant that Qatar Airways was not liable on termination for the consequences that would normally arise from termination, except for any contractual liability to pay the purchase price for completed shipments (of which there were none). Instead, Optimares had to repay "*all sums previously paid by Qatar Airways*".

**Issue 3:** *Was there an unfettered right to terminate for convenience or was the clause qualified by other contractual provisions, notably the duty of good faith?*

Again, the language "*notwithstanding anything to the contrary*" showed that the parties did not intend the right to terminate for convenience to be disapplied or fettered by other clauses in the Agreements. The good faith clause was also clear. It applied to the parties' "*performance of their respective responsibilities and obligations*", and it could not be said that the exercise of a right to terminate was either a responsibility or an obligation.

The Court's review of the authorities showed that the Court is generally reluctant to qualify an express right to terminate with a duty to act in good faith.

### Conclusion

The Judge therefore dismissed Optimares' claims of more than USD 20 million and ordered it to pay substantial sums on Qatar Airways' counterclaim.

### Comment

This case offers a reminder of the difference between contractual termination rights (of which there may be multiple co-existing rights) and termination for breach. While sale contracts may not regularly contain a right to terminate for convenience, they will often have other termination provisions (e.g., termination for insolvency or other specified events of default). With price volatility and sanctions likely to continue to impact most commodity markets, traders and their in-house counsel should carefully consider their options and the interaction between potential termination rights before taking action.

Please click [here](#) for a copy of the full judgment.

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