Clyde & Co

In-Short:
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Introduction

With the recent imposition of tariffs on steel imports, the announcement of aggressive new sanctions against Rusal (and others said to have close ties to President Putin) and US withdrawal from JCPOA, there can be little doubt that White House policy is having a direct and significant impact on commodity markets.

In this, latest edition of In-Short, we look at some of the issues that could arise from the US withdrawal from the JCPOA as well as the European Commission's recent notice concerning imports of steel products, which some have interpreted as a reaction to US tariffs on steel imports. We also review FOSFA's newly published revised Arbitration Rules and discuss the possible impact of blockchain in international trade execution.

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Nixed

By Patrick Murphy (Partner, Dubai)

It was already clear by the time President Trump addressed the assembled White House press corps on Tuesday 8th May that the US was going to put some sort of dent in the Joint Comprehensive Plan of Action (JCPOA), the clunkily named nuclear deal reached between the P5+1 (the permanent 5 UN Security Council members plus Germany) and Iran. But any doubt as to the extent of the damage he was prepared to do to the deal was emphatically blown away as the President announced the re-introduction of what he termed the "highest level of economic sanctions".

The Iran deal was always a creature of compromise. Aside from its utilitarian moniker, it was dependent for its survival on continued waivers of US secondary sanctions by the US President (a function of the congressional approval of the deal in the first place). It was also limited – quite deliberately – in the scope of its ambition: it did not seek to settle disputes concerning Iranian intervention in regional conflicts, Iran's human rights record or its ballistic missile program. And, much to the chagrin of Iran hawks in the US and elsewhere, the sunset clauses place no restriction on Iran's uranium enrichment after the first 15 years of the deal. From the Iranian side, whilst it provided relief against EU sanctions and US extraterritorial secondary sanctions, it offered Iran no access to the US economy or, crucially, the US dollar denominated financial system.

But, imperfect as it was, it did result in the destruction of Iran's stockpile of enriched uranium and afforded the International Atomic Energy Association (IAEA) access to Iran's nuclear sites to verify continued Iranian compliance. And it has allowed Iran access to major European investment in Iran; including high profile deals struck with Airbus and French oil major Total.

In any event, some of the lingering congenital defects would not have mattered as much, or at all, were it not for other extraneous events. For example, it was always intended by the Obama administration that the JCPOA would be a starting point for further discussions and deals on other areas of difference once the nuclear boil was lanced; negotiating the nuclear settlement was lengthy enough without complicating the negotiations further by involving issues such as Syria and ballistic missiles. And continued sanctions waivers were never thought to be seriously in doubt, even as the Trump campaign gained momentum throughout 2016. The State and Treasury Department reach out sessions following Implementation Day emphasised that the political consequences of a US lead snapback would be so serious that the next President would balk at tearing it up, even if that President was a candidate who described the deal as the "worst ever".

> "The Iran deal was always a creature of compromise. "

Fix it or nix it

Even after further criticism of the deal from the newly inaugurated President Trump, that conclusion seemed to hold good. Early forays into extending sanctions against Iran with SDN designations in February 2017 were limited in scope. They did not designate Iranian financial institutions or state owned enterprises. Indeed, they were no different in character to some of the late Obama administration's post Implementation Day Iran designations. Many concluded that moderate voices within the administration had managed to constrain the President's more hawkish impulses.

But the President has continued to be a vocal critic of the deal and has been ramping up his rhetoric in recent months, and the lack of much perceived benefit from the deal in

Iran has meant that the defects began to matter much more. The appointment of two key Iran sceptics, John Bolton (National Security Advisor) and Mike Pompeo (Secretary of State) effectively sealed the fate of the Iran deal, providing President Trump with a core of foreign policy advisors who shared his dim view of Iran deal and wanted it "nixed".

The initial fear was that President Trump would refuse to renew the next set of waivers that were due to expire. The complex manner in which the US sanctions were imposed - piecemeal through a number of Congressional acts and Executive Orders - and in which the waivers were put in place meant that different sets of sanctions expired at different times. The waiver of the secondary sanctions providing for penalties against foreign financial institutions that engage in significant financial transactions with Iran's central bank were due to expire on 12th May. Other secondary sanctions targeting broader economic activities were due to expire in July 2018.

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However, President Trump chose to announce the reintroduction of the whole gamut of US secondary sanctions, and withdraw various general licences issued pursuant to the JCPOA, without waiting for the waivers to expire. When "wind down" periods of 90 and 180 days (dependent on the types of sanctions concerned) are taken into account, this means that US secondary sanctions will effectively come back into effect on 6th August 2018 and 4th November 2018.

In particular, after 6th August 2018, the US will re-impose sanctions on:

– the purchase or acquisition of U.S. dollar banknotes by the Government of Iran;
– Iran's trade in gold or precious metals;
– the direct or indirect sale, supply, or transfer to or from Iran of graphite, raw, or semi-finished metals such as aluminium and steel, coal, and software for integrating industrial processes;
– significant transactions related to the purchase or sale of Iranian rials, or the maintenance of significant funds or accounts outside the territory of Iran denominated in the Iranian rial;
– the purchase, subscription to, or facilitation of the issuance of Iranian sovereign debt; and
– Iran's automotive sector.

Moreover, after 4th November, the US will re-impose sanctions on:

– Iran's port operators, and shipping and shipbuilding sectors, including on the Islamic Republic of Iran Shipping Lines (IRISL), South Shipping Line Iran, or their affiliates;
– - petroleum-related transactions with, among others, the National Iranian Oil Company (NIOC), Naftiran Intertrade Company (NICO), and National Iranian Tanker Company (NITC), including the purchase of petroleum, petroleum products, or petrochemical products from Iran;
– transactions by foreign financial institutions with the Central Bank of Iran and designated Iranian financial institutions;
– the provision of specialized financial messaging services to the Central Bank of Iran and Iranian financial institutions;
– the provision of underwriting services, insurance, or reinsurance; and
– Iran's energy sector.

General licences allowing foreign subsidiaries of US companies to engage in transactions with Iran in specified circumstances are also being withdrawn and Iranian financial institutions and government of Iran entities will be added to the SDN list, with secondary sanctions consequences for non-US persons who deal with them. The President's announcement is of nothing less than a wholesale reintroduction of the pre-implementation day US secondary sanctions regime.

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Caught in the middle

All of this concerns the EU greatly. The EU sees the JCPOA as the most effective way to stop Iran obtaining a nuclear weapon, and precipitating a nuclear arms race in the Middle East that will potentially involve Gulf Arab states, Turkey, Egypt as well as Israel. As the EU points out, the IAEA has repeatedly confirmed substantial Iranian compliance with the terms of the deal.

The immediate reaction to President Trump's announcement from the UK, France and Germany was "regret and concern" at the US action and an expression of a continuing commitment to the deal. The UK's Office of Financial Sanctions Implementation has emphasised that the UK Government continues to fully support expanding Britain's trade relationship with Iran and encourages UK businesses to take advantage of the commercial opportunities that arise. However, it went on to highlight that the re-imposition of US sanctions may have implications for UK businesses and individuals dealing with Iran.

And there is the rub. The President's announcement will see European companies that have chosen to engage with Iran since Implementation Day exposed to US secondary sanctions after 6th August and 4th November; the first time there has been a significant divergence on Iran policy between the US and EU on what EU companies can do.

"The immediate reaction to President Trump's announcement from the UK, France and Germany was "regret and concern" at the US action and an expression of a continuing commitment to the deal."

The US did not relax its own self-denying sanctions preventing US persons dealing with Iran after Implementation Day; only the secondary sanctions affecting non-US persons. By contrast the EU lifted most of its general restrictions on trade with Iran except for those on controlled good or remaining designated persons. As a result, European companies that have been able to find means of getting paid (not an easy task when US dollar transactions are still proscribed) have engaged with Iran more enthusiastically – a fact that is no doubt not lost on a President currently jostling with the EU over aluminium tariffs. The unilateral re-imposition of US secondary sanctions will impact these European companies. The recent application of US secondary sanctions against certain Russian companies and oligarchs illustrates some of the problems that this can cause.

Historically the threat of a divergence between the US and EU over Iran has never been a problem. The two have managed to proceed in concert with each other so that US sanctions which unilaterally sought to regulate or restrict trade and investment activities carried out by persons outside the US were mirrored by the EU's own regulations and restrictions on what EU persons are able to do. But there are earlier precedents for transatlantic fallings out over the extraterritoriality of US sanctions.

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In the 1980s the US imposed sanctions on companies doing business on a Russian pipeline in Eastern Europe, provoking a diplomatic falling out. And in 1996 the Helms-Burton Act, which, amongst other things, imposed penalties upon non-US persons "trafficking" in Cuban property formerly owned by US persons, provoked a furious response from the EC which launched blocking legislation and a WTO panel investigation alleging that the extraterritorial restriction of trade between the EC and Cuba breached various provisions of the GATT and GATS. The US countered that it was prepared to rely on the rarely used national security exemption in the GATT. The dispute was only withdrawn after high level political compromise.

But the prospect of a large scale transatlantic trade dispute over Iran developing at the same time as a US / EU dispute over US aluminium tariffs and extraterritorial Russia sanctions is deeply concerning for the EU.

The tough decision for many EU companies – and one that they never had to consider before Implementation Day because the activities were directly sanctioned by the EU in any event – is whether they can risk continuing engagement with Iran without infringing the renewed US secondary sanctions, which are sometimes couched in much less specific terms than the old EU prohibitions. The penalties for breaching US secondary sanctions are not fines or custodial sentences but they can be severe; they include the denial of access to the US financial system and potentially being designated as a SDN. It may be a decision that is taken out their hands, however, if banks and other financial institutions that they rely on insist that all forms of trade with Iran are ceased in light of the reintroduction of US secondary sanctions.

What happens to the JCPOA?

What, then, is the status of the JCPOA now that one (but so far only one) of the parties to it has abrogated its terms?

The JCPOA obliges the US not only to cease the application of its secondary sanctions program but to "continue to do so". The triggering of the re-introduction of sanctions on 6th August is, therefore, a breach by the US of the terms of the agreement. But the agreement, for what it is worth, remains in force between the other parties. President Rouhani of Iran has expressed a hope that the agreement can continue to remain in force if the EU maintains its own sanctions relief (Russia and China did not impose unilateral sanctions against Iran prior to Implementation Day and so the question of their continued relief is irrelevant). And a senior Trump administration official was quoted immediately after the President's announcement indicating that the US will not seek to trigger the snapback of UN sanctions under the mechanism provided for in JCPOA and UN resolution 2231.

> "Iran could, in theory, refer the issue of the US breach to the JCPOA dispute settlement mechanism where the question of US compliance could be considered by the Joint Commission established under Annex IV of the JCPOA. But that process cannot prevent the reintroduction of US sanctions."

Iran could, in theory, refer the issue of the US breach to the JCPOA dispute settlement mechanism where the question of US compliance could be considered by the Joint Commission established under Annex IV of the JCPOA. But that process cannot prevent the reintroduction of US sanctions. Even if the US does not participate in the Joint Commission (and presumably it will not in circumstances where the President has positively ended participation in the JCPOA) the only possible outcome from the almost month long process is the automatic snap back of UN sanctions, which Iran has no interest in fomenting.

The deal could, in theory, limp on for some time with the EU and Iranians keeping to their respective sides of the agreement, and with tentative Iranian business being pursued by businesses in the EU, Asia and elsewhere outside the US. However, it is likely that such business will be more limited now, particularly given the already risk averse approach of financial institutions generally. The question is how long Iran's own hard liners, already opposed to the deal in principle, are willing to continue with such a compromise. They may see the US move as just the opportunity Iran needs to commence uranium enrichment again, free from any guilt for abrogating the deal itself. The EU will find it difficult or impossible to continue their own support for the deal and provide continued sanctions relief in those circumstances.

US imposes new sanctions on Russia

By Clare Hatcher (Partner, London) and Owen Williams (Associate, London)

On 6 April 2018 the US Office of Foreign Assets Control (OFAC) added 24 Russian individuals and 14 companies to its list of specially designated nationals (SDNs). The US-based assets and property of these SDNs are now frozen and US-persons are prohibited from having any dealings with them. Non-US persons could also face enforcement action if they engage in "significant" transactions with any sanctioned Russian entity, under enhanced secondary sanctions.

Who has been designated?

The new designations cover 17 Russian government officials, two state-owned companies, seven oligarchs and 12 of the companies they own. The list is not exhaustive. Under OFAC's "50% rule", any company owned 50% or more (whether directly or indirectly) by an SDN or combination of SDNs, is itself designated. Therefore firms engaged in Russian business should conduct sufficient due diligence to determine the ultimate ownership of their counterparties in order to be certain that they are not dealing with a counterparty which is indirectly covered by US sanctions.

Of particular note amongst the new SDNs is the inclusion of the heads of three of Russia's largest state-owned companies, Gazprom, Gazprombank and VTB Bank. However the companies themselves have not been added to the SDN list.

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How do the sanctions apply to non-US persons?

The Countering America's Adversaries Through Sanctions Act (CAATSA) contains secondary sanctions aimed at discouraging non-US persons from dealing with certain Russian entities. Non-US persons who knowingly facilitate "significant" transactions for or on behalf of such entities risk having their US-property and assets frozen.

When determining whether someone has "facilitated" a transaction, OFAC will take a wide view, with official FAQs stating that:

facilitating a significant transaction for or on behalf of a person will be interpreted to mean providing assistance for a transaction from which the person in question derives a particular benefit of any kind (as opposed to a generalized benefit conferred upon undifferentiated persons in aggregate). Assistance may include the provision or transmission of currency, financial instruments, securities, or any other value; purchasing, selling, transporting, swapping, brokering, financing, approving, or guaranteeing; the provision of other services of any kind; the provision of personnel; or the provision of software, technology, or goods of any kind.

The legislation itself does not spell out what is meant by a "significant" transaction. However OFAC has provided a list of seven factors it will take into account in determining whether a transaction is "significant":

1. the size, number, and frequency of the transaction(s);
2. the nature of the transaction(s);
3. the level of awareness of management and whether the transaction(s) are part of a pattern of conduct;

4. the nexus between the transaction(s) and a blocked person;
5. the impact of the transaction(s) on statutory objectives;
6. whether the transaction(s) involve deceptive practices; and
7. such other factors that the Secretary of the Treasury deems relevant on a case-by-case basis.

OFAC has confirmed that these new measures apply to significant transactions with entities subject to Russian sectoral sanctions (SSIs), as well as with full-blown SDNs. Under the Russian sanctions regime there are two classes of sanctioned entities: SDNs and SSIs. SDNs face the most restrictive measures and are subject to asset freezes, whereas SSIs face less restrictive measure aimed at preventing them from raising money on western capital markets and undertaking certain types of business. The SSI list includes some of Russia's largest and most strategically significant companies.

It is important to note that, according to OFAC FAQs, a transaction with an SSI will only be considered "significant" if it involves deceptive practices. "Deceptive practices" are described as "attempts to obscure or conceal the actual parties or true nature of a transaction, or to evade sanctions". Nevertheless the prohibition on facilitating "significant" transactions for or on behalf of these businesses represents an important extension of the restrictions targeting SSIs.

Activities with either an SDN or an SSI will not be considered significant if US persons would not require specific licenses from OFAC to participate in them. This includes where a US person could participate under the authority of one of the general licences which OFAC has published in relation to the new sanctions. At the time of writing, OFAC has published three general licenses: General License 12B, General License 13A and General License 14.

As relations between the US and Russia continue to deteriorate, we are likely to see further additions to the SDN list, particularly in areas such as energy, defence and finance. With the introduction of enhanced secondary sanctions, both US and non-US firms that deal with Russian counterparties will need to keep abreast of the latest developments.

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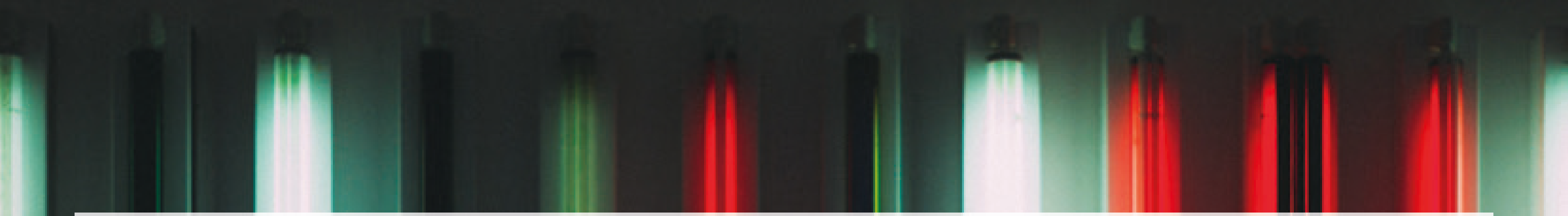

From supply chain to blockchain: where can digitization make a difference in international trade and what is holding up progress?

By Robert Parson (Partner, London)

Modernisation and automation of global trade is a journey that has an inevitable destination. However, in a market sector which needs to continually introduce logistic and administrative improvements to maintain profit margin and increase competitiveness there still remain too many practices that date back to the age of sail and steam.

The reasons for this slow pace of change are complex - partly it is due to the need to change old legal rules and conventions that took centuries to achieve international consensus - but the impact of digital disruption on working practices in some countries and the ability of some economies to adapt is also having a braking effect.

International trade and its financing relies on a series of inter-dependant contractual events and third party confirmations of performance coming together to prove that goods have been produced, shipped and delivered and that payment has been effected. It is a system that evolved by parties becoming comfortable with exchanging pieces of highly valuable paper: bills of lading that acted as title documents to cargos of shipped goods; typed letters of credit and bills of exchange which permitted sight and deferred payment; various certifications of performance from trusted third party service providers; and policies of insurance. It was an imperfect system relying on trust between parties, experience of trade and money flows and appetite for risk. In some countries the administration of this 19th Century process is highly labour intensive - sometimes to provide checks and balances, but often because the community has become used to the system providing employment to a wide group of people even in an age where most people own a smart phone.

The international trade business has been looking at how to introduce technology both to speed up and to improve accuracy in certain aspects of trade execution and settlement for around 25 years, and to provide a digitized solution to the paper chain of trust that traders and bankers have long relied upon to act with confidence in buying, selling, transporting and financing goods internationally. Blockchain has become something of a buzzword in trade finance circles over the past 24 months as solution providers jostle to be first with a workable blockchain solution to the trade's multiple inefficiencies.

"The international trade business has been looking at how to introduce technology both to speed up and to improve accuracy in certain aspects of trade execution and settlement for around 25 years, and to provide a digitized solution to the paper chain of trust that traders and bankers have long relied upon to act with confidence in buying, selling, transporting and financing goods internationally."

Blockchain, in layman's terms is a technical solution to the gathering of multiple third party confirmations of events and facts surrounding a particular transaction that can provide the key transaction parties with assurance that their counterpart's performance of the contract has occurred and that the transaction has completed. What might have been achieved in former days by making a dozen phone calls or participating in a dozen meetings and exchanging multiple pieces of paper could be achieved by a dozen secure and authenticated electronic record "blocks" being "chained" together to provide incontrovertible proof of contractual performance.

The low hanging fruit in international trade that blockchain developers have identified as suitable for modernisation is the documentary credit. However, even this highly inefficient area of international trade has not proved easy to change.

Although the first proof of concept blockchain LC transaction took place in September 2016 and internationally agreed rules for electronic documentary presentation have existed for over 15 years, the reality is that in 2018 the vast majority of all LC transactions are still executed using paper.

However, despite every effort, establishing a globally accepted digital alternative to the paper bill of lading has proved a very difficult proposition. The governing UK statute dates back to 1885 and a range of different uncoordinated electronic solutions have been tested – some on a commercial scale. The problem has been caused by a mix of (a) a lack of political will globally to introduce legislation into a constantly evolving and highly technical sector and (b) the difficulty in persuading a majority of the world's traders, banks and governmental agencies to agree a common legal approach. Investors, including trade stakeholders have committed money in various directions, unsure which, if any, system might succeed. Solutions providers have often been reluctant to share with competitors' their standards and technology which they feel embodies their USP.

An additional peril facing participants in international trade is that despite contractual agreement that certain processes will be followed through during the performance of a contract, which might include the service of notices or the formal transfer of title, parties either choose not to or simply fail for operational reasons to do what was agreed. Disputes often arise and are an additional unwanted cost - ultimately passed on to the consumer. If some, at least, of those processes could be automated that would likely save significant time and money.

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The potential gains from the introduction of effective technologies are therefore many. Cost efficiencies, compliance, accounting, speed of settlement, reduction of operational risk and default of performance, increased security and avoidance of fraud and standardisation of contract terms are all benefits achievable by digitization. In letters of credit, just one discrepancy in a paper document can cause a letter of credit not to pay. That still occurs in well over 50 % of LC transactions. The appearance of blockchain or distributed ledger technology has therefore raised hopes that a more lasting and global breakthrough might be achieved, and there have been numerous projects taken through to proof of concept stage. Document checking and the "5 day" rule for inspecting documents could become a thing of the past if the market embraces automation fully.

An automated process that could address some or all of those issues should have significant value and support. In a current paper LC transaction, the paper trail fulfils that function, but often imperfectly and not without the potential risk of fraud. The blockchain verified information could, in addition, automatically trigger the performance of a "smart contract" – a pre-loaded and coded application which can then electronically deliver either a physical contractual step – such as the issuance or activation of a contract - or the issuance or satisfaction by payment of a payment instrument, such as a letter of credit.

In the performance of contracts generally, parts of the process ought to follow automatically once conditions precedents have been met. Introducing automation of such steps need not be controversial. Blockchain driven solutions can in fact do as much or as little as the parties want them to, depending on the goal to be achieved and is more likely to take hold if the goals set for it are realistic ones.

With such evident advantages, why hasn't this solution for trade and trade finance met with success before now? The reasons are multiple but not all that surprising:

1. The introduction of a technology which has the effect of further "commoditizing" a business under some pressure can frighten some participants. Will the introduction of a disruptive technology such as blockchain expose the parties to greater risk of loss and/or lack of control. Some parties enjoy the ability/flexibility to stray off the contractual path when the opportunity presents itself – particularly where the path of contractual performance can be affected by events outside the parties' immediate control such as weather, strikes etc.

2. The regulatory piece in international trade requires individual responsibility for certain compliance risks. Delegating some of these functions to a machine won't entirely shift that risk. With or without Brexit, compliance is here to stay and blockchain solutions

providers will have to work with the authorities to find out what can and cannot be achieved.

3. The lack of global standards for this sort of scheme makes like for like comparison between solution providers difficult – this has in turn created the appearance of a solution overload with a sometimes baffling choice to market participants. Technology providers naturally want to protect their share of the blockchain cake when it takes hold. However, first the market has to get to like the taste of cake.

4. There are some tricky legal questions inherent in blockchain and other automation solutions – ensuring that the potential risk of systems failure is covered clearly and that there is an express seat of jurisdiction so that remedies can be pursued against someone if it all goes horribly wrong. As firms across Britain face up to the introduction of GDPR, the issue of data (and financial) security within blockchain systems and the question of who owns the resultant IP and data on any system will be scrutinized.

However, the potential savings are great and banks, traders and other participants are rushing to buy a part of their local offering. The opportunity to use blockchain to de-risk certain aspects of trade execution is very attractive.

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There is more work to be done. Care has to be taken in ensuring that all parties are able to digitally contract (there should not be a digital gap between rich and poor countries if a real breakthrough in global trade is to be made). There may also be local jurisdictional rules in play. Slicing and dicing the areas suitable for blockchain/smart contract delivery will also require some legal analysis to avoid gap risk. One benefit may be the standardisation of some trade rules to avoid unnecessary cost and breaches. Commentators estimate that the first arms' length "on risk" (rather than proof of concept) commercial LC transaction fulfilled through blockchain (and without any paper) may take place within 18 months.

Electronic settlement of payments and standardising of contracts is of course the low-hanging fruit in terms of efficiencies to be made. The oil trade, with its high value cargos and increasingly standardised contact terms and vessel charters, is another target under consideration. Traders may have to concede some loss of control to the "system" and flexibility to achieve real savings, but that is still achievable without changing the general role of the trader. Dematerialized transport documents or at least alternative ways of fulfilling/evidencing the shipment obligation will still require some careful global due diligence – but that project is already underway with the ICC Banking Commission, so real breakthrough may not be far off.

Changes to the FOSFA Arbitration Rules from 1 April 2018

By Andrew Rourke (Partner, Guildford) and Rebecca Armstrong (Legal Director, Guildford)

Following on from their review of the standard form Oilseed and Soyabean contracts at the end of last year, the Federation of Oils, Seeds and Fats Association ("FOSFA") has published revised Arbitration Rules (the "2018 Rules"). The 2018 Rules will apply to disputes arising out of contracts incorporating FOSFA arbitration entered into from 1 April 2018 onwards. The current Arbitration Rules published in 2012 (the "2012 Rules"), will continue to apply to contracts entered into prior to 1 April 2018. Some of the key changes to be aware of are as follows:

Time Limits

In the 2018 Rules, the time limits within which a party must commence arbitration have been updated as follows:

Quality and/or condition

For disputes arising out of the quality and/or condition of goods, the time limit within which to commence arbitration in the 2018 Rules has been extended to not later than 90 consecutive days from:

- completion of discharge of the goods in CIF, CIFFO, C&F and similar contracts.
- completion of delivery in FOB, Ex-tank, Ex-mill and Ex-store contracts.

These time limits are significantly longer than those contained in the 2012 Rules and there is no longer any distinction in the 2018 Rules between those claims supported or not supported by certificates of contractual analysis. In the 2012 Rules, the time limit within which to commence arbitration was just 21 consecutive days from completion of delivery (in CIF or similar contracts) or discharge (in FOB or similar contracts) of the goods where the claim was not to be supported by certificates of contractual analysis and 14 consecutive days from the date of the final analysis certificate where the claim was to be supported by certificates of contractual analysis.

Monies due claims and claims other than quality and/or condition

Under the 2012 Rules, arbitration in respect of monies due had to be commenced not later than 60 consecutive days after the dispute had arisen. Under the 2018 Rules, however FOSFA no longer treats monies due claims as a separate category of dispute, and the same time limits apply to monies due claims as to all other non-quality and/or condition claims (which are unchanged from the 2012 Rules).

"Under the 2012 Rules, arbitration in respect of monies due had to be commenced not later than 60 consecutive days after the dispute had arisen. Under the 2018 Rules, however FOSFA no longer treats monies due claims as a separate category of dispute…"

Under the 2018 Rules, for all disputes other than quality and/or condition of goods, the time limit within which to commence arbitration is not later than 120 consecutive days from:

- the expiry of the contract period of shipment or of the date of completion of final discharge of the goods (whichever later) in CIF, CIFFO, C&F and similar contracts.
- the expiry of the contract period of delivery or delivery of the goods (whichever later) in FOB, Ex-tank, Ex-mill, and Ex-store contracts.
- the last day of the contractual delivery period on any other contract terms.

FOSFA hopes that by standardising the time bars for monies due claims and non-quality and/or condition disputes, this will overcome continuing arguments in the trade distinguishing between these types of claims.

Procedural Deadlines

The deadlines for parties to file their submissions i.e. their written arguments in quality and condition disputes have also been extended:

- When bringing a claim under the 2018 Rules, the deadline to file submissions has been increased from within 10 consecutive days under the 2012 Rules (from the date of the notice of arbitration, the document which formally commences proceedings) to within 30 consecutive days under the 2018 Rules (from the date that the responding party appoints their arbitrator).
- When responding to a claim under the 2018 Rules, the deadline to file submissions has also been increased to within 30 consecutive days (from the date when the party bringing the claim's submissions are received), which is an increase from being within 14 consecutive days under the 2012 Rules.

"When bringing a claim under the 2018 Rules, the deadline to file submissions has been increased from within 10 consecutive days under the 2012 Rules (from the date of the notice of arbitration, the document which formally commences proceedings) to within 30 consecutive days under the 2018 Rules (from the date that the responding party appoints their arbitrator)."

Submissions from both parties in all other types of disputes continue to be required to be served "without delay".

Arbitrators and the "two tier" system

FOSFA will continue to operate a "two tier" arbitration system. The first decision is made by the "first tier" tribunal, and this decision can be appealed to a "board of appeal".

Under the 2018 Rules, a three arbitrator tribunal will be standard in the first tier. Whereas, under the 2012 Rules (and unless otherwise agreed), tribunals consisted of two arbitrators with an umpire only being appointed in circumstances that the two arbitrators disagreed.

Under the 2018 Rules, the parties will appoint one arbitrator each, with FOSFA selecting the third arbitrator. This arbitrator will have the responsibility to progress the case diligently and in a timely manner. The parties will remain able to agree to appoint a single arbitrator (instead of a panel of three) under the 2018 Rules.

Deposit

FOSFA have also introduced a £5,000 deposit (£2,500 for small claims) as standard, to be paid within 30 days of the appointment of the third arbitrator or the sole arbitrator as applicable, by the party bringing the claim. If, once the arbitration is complete, any sum remains once costs have been paid, the remainder of the deposit will be returned to the party that paid it.

If you would like more information on the changes in the 2018 Rules and how they affect your business, please do not hesitate to get in touch with us.

Heavy Metal? A review of the European Commission Safeguard Investigation into Steel Imports

By Michael Swangard (Partner, London) and Caitriona McCarthy (Associate, London)

On 26 March 2018, the European Commission issued a "Notice of initiation of a safeguard investigation concerning imports of steel products". The Commission explained that the rationale for its notice was that imports of certain steel products had recently increased sharply showing that there was sufficient evidence that these trends in imports appeared to call for safeguards measures.

To the casual observer the notice might look like a knee jerk reaction to recent measures taken by the Trump administration coming, as it did, a week after the US announced tariffs on foreign steel and aluminium. This is not the full story, however, and the reasoning is more nuanced than might appear from a glance at the latest news headlines.

Over the course of this article, I will address the content of the notice and its timing, the procedure regarding a safeguard investigation by the Commission, its possible implications for the industry and what steps industry players should be considering.

About the Notice

The products subject to the notice are steel products. The products concerned, together with the CN codes within which they are currently classified, are listed in an annex to the notice and amount to 26 steel product categories. The information currently available to the Commission indicates that the total imports of the products concerned increased from 17.8 million tonnes to 29.3 million tonnes in the period 2013 – 2017. Imports of the products concerned increased by around 65 per cent. between 2013 and 2016. The main increases took place in 2015 and especially in 2016 when they reached 28.6 million tonnes and imports of the products concerned have remained at a significant level thereafter. The increase in imports appears to be the result of (i) global overcapacity in steel making and (ii) trade measures adopted by a series of third countries in the context of that global overcapacity including the recent Section 232 measures in the US.

The Commission believes there is sufficient evidence showing that the volume and price of these imports have caused or are threatening to cause significant overall impairment of the position of the EU industry and have had a negative impact on the market share of EU producers.

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What will the investigation consider?

- Import trends
- The conditions in which they take place
- Whether the imports cause (or threaten to cause) serious harm to EU producers

The main conclusions of the finished investigation will then be published as a regulation.

Investigation procedure and timeline

A safeguard investigation must normally be completed within 9 months although, in exceptional circumstances, it may be extended to 11 months. If the investigation shows that imports have increased so much that they cause (or threaten) serious harm to EU producers, safeguard measures can be imposed. These can take various forms such as increased customs duties or quotas which are set at least as high as the average level of imports over the last 3 representative years:

- provisional measures (these cannot exceed 200 days) may be imposed in critical circumstances and if a preliminary determination provides clear evidence of harm or impending harm; or
- definitive measures must not exceed 4 years (including the duration of the above provisional measures) unless extended to a total maximum of 8 years.

The Commission will send questionnaires to the known producers of like or directly competing products and to any known associations of producers, within the EU. The completed questionnaires must reach the Commission within 21 days from the date on which they are sent to the party and it is not yet clear how quickly a preliminary determination will be made such that provisional measures could be deemed necessary.

Politics and consequences

The EU could decide that no measures are necessary. In advance of the issue of the Commission's Notice, in an interview with the Financial Times discussing the Trump administration's decision to levy national security tariffs on imports of metals, Cecilia Malmstrom, the EU trade commissioner, had noted that "imposing sweeping measures [like this] generally is not the way forward … we risk seeing a dangerous domino effect from this". However, EU officials are worried that US tariffs could lead to the diversion of steel intended for the US to the EU and this concern added to an increase in imports has finally led to the launch of a safeguard investigation.

If the Commission does conclude that measures are required, those measures will apply to all non-EU countries without discrimination (save for developing countries with low import shares). This means that leading exporter countries such as China, India, Russia, South Korea and Turkey will be hit with the added possibility of retaliatory measures from those countries most effected (e.g. at present around 40% of Indian steel exports go to EU). Unsurprisingly, China's Ministry of Commerce has said that it does not consider adopting global safeguards to be the right choice.

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What should the industry do?

For the moment, it is a case of wait and see as to what measures (if any) are deemed necessary following the Commission's investigation. The Commission has a delicate balancing act and must be seen to balance the various competing interests in this investigation (i.e. the EU steel industry vs those EU industries which rely on steel imports from outside the EU). Clearly this uncertainty has created significant industry concerns given there is no indication from the announcement of the safeguard investigation how quickly the Commission might take action and what form that action could take. Such uncertainty can paralyse a market very quickly.

In addition to closely following the investigation, those dealing in the trade of the relevant steel product would do well to adopt a pessimistic viewpoint and review their standard terms and conditions of sale to ensure these are drafted to take account of any possible additional tariffs (if the Commission does chose to impose them) while optimistically hoping such forward planning is not ultimately necessary.

50+

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