

# Sanctions update



“They are proactive, never fail to update you with the latest development on a matter, or in relation to the law.”

Chambers Guide

Continuing unrest in the Middle East and North Africa, the on-going crisis in Syria and increasing tensions between Iran and the West over Iran's nuclear programme are resulting in a number of far-reaching trade sanctions, the implementation of which is patchy and the impact often unpredictable.

While the direct and immediate effects of sanctions may be in line with governments' intentions, the flow of international trade is increasingly affected by:

- Concerns around compliance
- Reduced ability to rely on letters of credit
- Issues regarding goods in transit
- The ability to buy insurance.

To facilitate debate around the issues raised by international sanctions and to shed some light on current experience, Clyde & Co's commodities team held a seminar in London on 17 April 2012 attended by around 50 commodity producers, intermediaries and bankers.

Panellists at the debate, which was conducted under Chatham House rules, included Jonathan Marsh, Head of Legal at Vitol, Jason Mantovan, Senior Legal Counsel at Stemcor, Andy Wragg, Senior Manager, International Regulatory Affairs at Lloyd's, Nick Williams, Head of Corporate Sales, Trade and Supply Chain Europe at ANZ Bank and Simon Rainey Q.C, Joint Head of Quadrant Chambers.

This newsletter provides a brief summary of the discussion and the issues raised. We are delighted to provide further advice and insight on request.

## International sanctions regimes are increasingly complex

Panellists and audience members discussed how growing antipathy towards military intervention means the use of international sanctions is likely to be more frequent going forward. Whereas in the past, sanctions were introduced over time, often in a co-ordinated manner between the EU, the UN and US, now individual states are imposing their own sanctions, often at short notice, on the same jurisdictions, each adopting a different approach.

Attendees at the seminar agreed that the resulting plethora of regimes and their different, sometimes conflicting, requirements are slowing the speed and reducing the volume of international business being transacted.

## Compliance is a challenge

Due to the speed at which sanctions are usually imposed, there is often a dearth of official advice around implementation resulting in companies, bankers and lawyers having to devote more time and effort to compliance than ever before in order to navigate through the increased contractual and commercial exposures.

Practical compliance issues were cited as a key challenge for all attendees, who expressed particular concerns over the difficulty of managing risks along a value chain that extends from producer, to trader, shipper, banker, insurer and end purchaser – all of whom may be resident in different sanctions territories, with differing legal requirements.

Lack of resource within the entities that police sanctions once they have been implemented, including the US Office of Foreign Assets Control (OFAC) and the UK's HM Treasury, combined with a lack of familiarity with the practicalities of international trade, has seen the financial services sector bear the brunt of sanctions oversight, in effect becoming the de facto enforcement arm of the sanction setters.

A banker commented: "If I look back over the past decade, with respect to ten years ago I don't think I really understood what the role of my compliance officer was. I think they generally tended to deal with derivatives in the trading room. But when it came to general banking like trade finance or loans to clients, I don't think I ever had a compliance discussion. It is fair to say today that the compliance and risk management function in a financial institution is probably as important as the credit risk analysis. It is all around reputation and the protection of reputation."

As sanctions are imposed in different jurisdictions, a bank will often be guided not only by its local country sanction requirements, but also those of its region as well as wider implications linked to UN sanctions. Juggling these legal requirements is not a straightforward task, resulting in a heavy compliance burden.

## Education is essential

Attendees stressed the need for strong discipline around the education of employees. Companies must now be able to provide documentary evidence to regulators and auditors that policies in respect of sanctions are clear, and that implementation is supported by appropriate due diligence, including careful analysis of potential transactions.

One attendee commented: "Education is critical to ensure employees ask the right questions and understand the point of procedures. It is the failure to engage with the spirit of sanctions by adopting a mechanistic approach that can lead to a breach. Fear of someone doing something stupid is what keeps me awake at night".

## Reducing reliance on letters of credit

There was broad agreement amongst the panellists that the value of the documentary letter of credit (DOC) as an instrument of trade is being reduced by the increasingly common requirement to include a sanctions clause as a part of standard procedure.

While larger clients often insist that such a clause is removed, imposing a greater burden of due diligence on the bank to ensure sanctions exposure is minimised, many smaller entities do not have the relevant experience nor expertise to insist on these measures, and are therefore left in the difficult position of trying to negotiate a transaction with a less attractive DOC.

Attendees agreed that the extreme caution often exercised by banks in regard to sanctions can frequently lead to a very restrictive interpretation of the law. One attendee commented: "Banks are wary. That's the reality of doing international business. Often you could trade legally but are constrained operationally because the bank won't take the risk."

## Issues regarding goods in transit

Legacy issues were also cited as a real concern and attendees discussed the practical problems this creates for goods in transit. Because sanctions are often introduced with immediate effect without any transitional provisions, goods are frequently at sea or in port when sanctions are imposed.

This gives rise to a complex web of responsibilities involving not just the counterparties but also the shippers, insurers and warehouses that are part of the supply chain. Complexity is increased when supply chain companies are in different jurisdictions.

One delegate noted that insurers providing cover on an open cargo basis or as part of a treaty will often not know which parties are involved in a trade and it will be unclear until after an event has occurred that there has been a sanctions infringement.

Another attendee commented: "Regulators often do not understand how business works." Whilst another noted: "The problem is that sanctions are a very blunt instrument, that do not account for existing relationships, nor do they offer transitional provisions to allow companies to extract themselves from existing transactions."

## Targeting of insurance sector may have unintended consequences

Attendees at the seminar noted that sanctions were now having a serious impact on insurers, reinsurers and brokers because of the significance of their role in facilitating international trade. The trade of Iranian oil will be one of the first sectors affected by this new focus.

Under a new set of sanctions imposed on 24th March this year by EU council regulation 267/2012, the insurance and reinsurance of oil shipments from Iran with EU or US cover will be prohibited.

As one delegate commented: "From 1st July, the only way for non EU members to lift crude oil from Iran would be to find insurance cover via an independent and viable insurance sector which is totally unconnected to the US and EU. As that cover doesn't exist outside those markets, tankers operating out of Iran will have no protection unless they can obtain sovereign guarantees."

One of the attendees observed: "The reason for this is that there realistically will not be sufficient reinsurance capacity outside the London market for the required billion or so environmental liability cover that a shipment of oil would require. So the reality is that after 1st July it is likely there will be tankers with Iranian oil cargoes that are partially uninsured."

The International Group of P&I Clubs has been putting pressure on the government to address this situation, but at the moment there is no evidence such pressure is working. How the authorities and ship owners will deal with pollution and third party liability risks is yet to be seen.

## Conclusion

The law of unintended consequences, often cited but rarely defined, is that actions of people - and especially of governments - always have effects that are unanticipated or "unintended."

In the case of international sanctions, the combination of increasing contractual and commercial exposures, stringent regulation, very hefty fines and the potential reputational damage, is resulting not just in a number of organisations reconsidering their appetite to be involved in high risk jurisdictions, but substantially reducing the volume and pace of international trade.

Rather than manage the onerous compliance burden, entities are increasingly choosing to refocus their activities away from troubled parts of the world, instead focusing on areas which are profitable and where they can minimise their exposure to international sanction risks.

In this constantly evolving environment, organisations that have the appetite to do business in these high risk (and potentially high reward) territories need to make sure that they are aware of the latest developments in order to remain compliant.

Clyde & Co has developed a particularly strong record for advising a wide range of clients on trade sanctions. This expertise is supported by in depth understanding of our key sectors – trade and commodities, transportation, insurance, infrastructure and energy – and by our extensive experience of working in new and emerging markets.

We have recently advised on the implications of the imposition of trade sanctions against Iran, Syria and Libya by the US and the EU, and the recent implementation of sanctions by the Arab League and Turkey.

Should you require any further information or advice regarding sanctions please contact any of the partners listed below or your usual Clyde & Co contact.

For further information please visit our microsite <http://sanctions.clydeco.com> or contact:

## **London:**

### **Aviation**

#### **Catherine West**

T: +44 (0)20 7876 5000

E: [catherine.west@clydeco.com](mailto:catherine.west@clydeco.com)

### **EU Law**

#### **Philippe Ruttley**

T: +44 (0)20 7876 5000

E: [philippe.ruttley@clydeco.com](mailto:philippe.ruttley@clydeco.com)

### **Solange Leandro**

T: +44 (0)20 7876 5000

E: [solange.leandro@clydeco.com](mailto:solange.leandro@clydeco.com)

### **Insurance**

#### **Nigel Brook**

T: +44 (0)20 7876 5000

E: [nigel.brook@clydeco.com](mailto:nigel.brook@clydeco.com)

### **Mike Roderick**

T: +44 (0)20 7876 5000

E: [mike.roderick@clydeco.com](mailto:mike.roderick@clydeco.com)

## **Marine**

### **Ben Knowles**

T: +44 (0)20 7876 5000

E: [ben.knowles@clydeco.com](mailto:ben.knowles@clydeco.com)

## **Trade & Energy**

### **Clare Hatcher**

T: +44 (0)20 7876 5000

E: [clare.hatcher@clydeco.com](mailto:clare.hatcher@clydeco.com)

### **Michael Swangard**

T: +44 (0)20 7876 5000

E: [michael.swangard@clydeco.com](mailto:michael.swangard@clydeco.com)

### **Stephen Tricks**

T: +44 (0)20 7876 5000

E: [stephen.tricks@clydeco.com](mailto:stephen.tricks@clydeco.com)

## **Middle East:**

### **Patrick Murphy**

T: +971 4 384 4563

E: [patrick.murphy@clydeco.com](mailto:patrick.murphy@clydeco.com)

## **Shanghai**

### **Ik Wei Chong**

T: +86 21 6035 6100

E: [ikwei.chong@clydeco.com](mailto:ikwei.chong@clydeco.com)

## **Singapore**

### **Brian Nash**

T: +65 6544 6552

E: [brian.nash@clydeco.com](mailto:brian.nash@clydeco.com)

## **US**

### **Christopher Carlsen**

T: +1 212 710 3930

E: [christopher.carlsen@clydeco.us](mailto:christopher.carlsen@clydeco.us)

### **Douglas Maag**

T: +1 212 710 3946

E: [douglas.maag@clydeco.us](mailto:douglas.maag@clydeco.us)

Clyde & Co LLP  
The St Botolph Building  
138 Houndsditch  
London EC3A 7AR

T: +44 (0)20 7876 5000

F: +44 (0)20 7876 5111

Further advice should be taken  
before relying on the contents  
of this newsletter.

Clyde & Co LLP accepts no responsibility for loss  
occasioned to any person acting or refraining  
from acting as a result of material contained in  
this summary.

No part of this summary may be used,  
reproduced, stored in a retrieval system or  
transmitted in any form or by any means,  
electronic, mechanical, photocopying, reading  
or otherwise without the prior permission of  
Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership  
registered in England and Wales. Authorised and  
regulated by the Solicitors Regulation Authority.  
© Clyde & Co LLP 2012