

THE IMPACT OF SANCTIONS ON THE BUSINESS OF OBTAINING SECURITY FOR CLAIMS. A HINDERANCE OR AN OPPORTUNITY?

INTRODUCTION

World Trade, by which we mean the International Sale of Goods Carried by Sea, is essential, no one can argue with that.

Given the present state of the world it is clear that we are living through turbulent times. In October 2022, the WTO reported that “world trade volumes” were worth US\$ 25 trillion and but they also foresaw a slowdown with just a 1% increase for 2023. We are where we are, and all of us here are aware that World Trade relies on all the many and varied parties that are involved in such trades, not just the Trading Companies involved but Shipowners, their crews, Banks and Underwriters along with the various collateral companies that service this business.

This includes Members of ShipArrested.com present today and all who are attending this the 18th Annual Conference - which, it must be admitted, is taking place during a difficult period for World Trade.

This forum is not a place or time for a debate on Sanctions themselves - we are none of us politicians.

Sanctions are, nowadays, a commercial fact. World Trade, especially in agricultural commodities, relies heavily on contracts governed by English law and jurisdiction. The following comments are based on this fact.

The UK has the largest share of the global maritime market (about 33%) which is more than the USA, Japan, Germany, and France.

P&I Clubs (and we have some representatives present today) provide essential cover to around 90% of the world’s commercial vessels.

Security, for the release of arrested vessels, is frequently provided by Club Letters of Undertaking (LOUs) on standard terms prepared/ approved by Clubs who are part of the International Group of P&I Clubs, the trade association for the industry; based in London.

My comments therefore rely heavily on guidance from the Office of Financial Sanctions Implementation (OFSI), part of HM Treasury, the authority for the implementation of financial sanctions in the UK. A pdf copy can be found on the Ship.Arrested.com website.

It aims to offer guidance “for entities and individuals which operate in, or with, the maritime shipping sector, especially those involved in areas that may be subject to UK financial sanctions restrictions, including the handling of goods”.

To say that sanctions (and I include Embargoes here) interfere with World Trade is an understatement. Vessels have been detained/ delayed and sometimes damaged because of them.

I can only suggest that the area of “sanctions,” no matter where in the world they are aimed or against whom, is a field where Members should see that disputes over the impact/interference that sanctions may have on commercial contracts is one that Members should be aware of.

1. So, the question is “What are financial sanctions”?

- a. From the point of view of the UK it is said that they (i) help the UK meet its foreign policy & national security aims, and (ii) help protect the integrity of the UK’s financial system.
- b. Like other states the UK Government uses sanctions to respond to a range of threats, from terrorism and nuclear proliferation to internal repression and human rights.
- c. These essential tools require effective implementation and enforcement.

2. Why are sanctions imposed?

- a. Generally imposed to:-

Quote

- *Coerce a regime, or individuals within a regime, into changing their behaviour (or aspects of it) by increasing the cost on them to such an extent that they decide to cease the offending behaviour.*
- *Constrain a target by denying them access to key resources needed to continue their offending behaviour, including the financing of terrorism or nuclear proliferation!*
- *Signal disapproval, stigmatising and potentially isolating a regime or individual, or as a way of sending broader political messages nationally or internationally.*
- *Protect the value of assets that have been misappropriated from a country until these assets can be repatriated.*

Unquote

3. The general effects of sanctions on matters of International Trade (i.e. The International Sale of Goods Carried by Sea).

- a. Sanctions are a fact of present-day commercial life and are imposed by the UN, USA, EU, UK, Canada, Japan as well as other jurisdictions¹.
- b. Sanctions worldwide cover such countries as Cuba, Iran, North Korea, Russia, Syria & Venezuela.
- c. The UK implements UN sanctions [and the UK’s own autonomous sanctions] under the Sanctions and Anti Money Laundering Act.²

¹ See DOW JONES website <https://visit.dowjones.com/risk/lp/dg/sanctions-compliance> A subscription only service -or University of Pittsburgh “Office of Trade Compliance” at <https://www.tradecompliance.pitt.edu/embargoed-and-sanctioned-countries>

² See the website “legislation.gov.uk. Part 1 Chapter 1 “1” gives “Power to make sanction regulations” “2” Additional requirements for regulation for a purpose within section 1(2)”.

commonly include arms embargoes, trade sanctions, travel bans and financial sanctions.

- d. The Foreign, Commonwealth and Development Office (FCDO) has overall responsibility for the UK's policy on sanctions.
- e. The Office of Financial Sanctions Implementation (OFSI) – part of HM Treasury – works to “*improve understanding, implementation and [most importantly] enforcement*” of financial sanctions applicable in the UK.
- f. Do note that currently HM Treasury can also make counter-terrorism sanctions designations and issue directions under the Counter-Terrorism Act (2008).
- g. These sanctions specifically relate to restrictions on funds and economic resources² that are owned, held, controlled or made available to, or for the benefit of, designated persons or entities.
- h. This can be either directly or indirectly. A number of vessels and companies appear on the consolidated list of financial sanctions targets. However, a vessel, firm or individual that is owned or controlled directly or indirectly by a designated entity is also captured under financial sanctions regulations. More information on this can be found in Chapter 4 of OFSI's general guidance document. You may wish to consider other non-financial sanctions prohibitions which may apply to sanctioned vessels.

4. Suspicious shipping practices. What to look out for.

- a. By suspicious or deceptive practices I mean used to evade sanctions by camouflaging illicit trades and or sanctionable behaviour.
- b. Such practices can be used to ‘facilitate terrorism’ , smuggling along with other criminal activities.
- c. 14.05.20 the US Department of the Treasury's office of Foreign Assets Control [OFAC] issued guidance on sanctions evasion³.
- d. Rather than take time up now I recommend the Stephenson Harwood newsletter dated 12.05.2⁴ concerning the case *MUR Shipping v RTI* where the Commercial Court affirmed a contracting party's right to invoke, and rely on, *force majeure* [FM] where the parent company of its counterparty is subject to sanctions.
- e. A variety of tactics can be deployed to confuse or conceal the identities of vessels, cargo, routes and ports. Apart from your own offices your clients, as individuals or entities involved in shipping, should be aware of a non-exhaustive list of potentially illicit practices [see below].
 - i. **Ship-to-ship transfers. [STS]** Used in some cases to conceal the origin and nature of a cargo. STS is used to facilitate the illicit transfer of coal, crude oil and petroleum products to evade sanctions.
 - ii. **Automatic Identification Systems (AIS),**

³ See [Ofac.treasury.gov](https://ofac.treasury.gov) This includes an interesting list of companies that have paid substantial fines. Worth reading.

⁴ See – <https://www.shlegal.com/news/sanctions-deceptive-practises-and-high-risk-areas-part-2>

We all know what AIS is. There are some reasonable reasons for turning off the AIS and for the vessel “going dark, passing through areas of high risk of piracy.

There are however cases where the AIS being disabled allowing vessels to “disappear” and be used on illicit trades.

Where STS is used to hide illicit trades the AIS has been turned off. There are recorded attempts to manipulate the data transmitted via AIS.

- iii. **Cyber activity.** Outside my areas of competency but I understand that cyberattacks have been used to illegally force the transfer of funds from financial institutions and cryptocurrency exchanges to circumvent financial sanctions. I can say no more on cyber-attacks or on “crypto assets.” If you have experience of this please speak up.

- f. **Financial system abuse.** An area where you need advice from a suitable qualified accountant rather than me, but some bank accounts are opened with the sole intention of being used for illicit activities in violation of sanctions to facilitate illegal shipping practices.
- g. **False documentation.** Here I am on stronger ground as it is not unknown for arbitrators to have to deal with false or fraudulent documentation. Most usually associated with the dates and descriptions on Bills of Lading which are of course the central documents imparting property and title from Buyer to Seller. Wrongly dated bills of lading are not uncommon, but switch bills of lading are those where the aim is to hide the description of the cargo, its destination and, most probably, the name of the receivers.
- h. **Concealment.** Where the sanctions buster attempts to physically hide or conceal an illicit cargo on the vessel.

The above practices may well not be exhaustive but give some indication that something is going on.

- 5. **Due diligence.** It goes without saying that due diligence is needed no matter where you sit in the shipping and trading community. As lawyers you should understand the requirements of good diligence.

When you have a client seeking an arrest, or seeking to defend/lift an arrest, then an understanding of the “tricks” being played on the underlying commercial contract should assist.

In certain areas where what are described as “non-compliant actors are known to operate “enhanced” due diligence should be followed.

Consider that under the UN ISIL (Da’esh) and Al-Qaida regime [and other thematic regimes that are not country specific] individuals and groups across the world are designated.

As the guidance notes I have referred to put it: “High-profile sanctions regimes include those in place for the DPRK, Iran, Libya and Syria which are described below. Please refer to OFSI’s website

<https://www.gov.uk/government/collections/financial-sanctions-regime-specific-consolidated-lists-and-releases> for a list of all current sanctions regimes

Conclusion

From a purely commercial point of view the fact that there are sanctions will lead to disputes where the services of Members will be required.

In this present world climate it would be prudent to look carefully at any underlying contract.

Force Majeure may well be used as a defence but do also consider that FM is not recognised in English law. Frustration needs to be carefully considered, where the underlying contract as proved to be impossible or performance [for whatever reason] it may be that the contract will be considered as null and void, with the loss lying where it falls. Even so attempts have been made to obtain security when the contract in question has been declared void.

I hope this proves of assistance.

Dick Faint ©

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