2022 Compliance and Regulatory Update

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SULLIVAN & WORCESTER

UK sanctions regime

UK sanctions regime imposes extensive restrictions on dealing with people who are listed as “designated persons”

Restrictions include:

- prohibitions on making or receiving payments from “designated persons”
- prohibitions on dealing with the “economic resources” of “designated persons”
- prohibition on participating in activities that would directly or indirectly circumvent the sanctions regime

Crypto assets are categorized as an economic resource and as such are caught by financial sanctions regulations

Attempting to circumvent sanctions using crypto assets is prohibited

The Economic Crime (Transparency and Enforcement) Act 2022

Fast-tracked through Parliament

The Act has three elements

- Part 1 Introduces a register of the beneficial owners of overseas entities that own land in the UK (comes into force on such day as HM Treasury may by regulation appoint)
- Part 2 Makes changes to strengthen unexplained wealth orders (as above)
- Part 3 Makes changes to sanctions legislation to help deter and prevent breaches of financial sanctions
  - Chapter 1, of Part 3: Comes into force on such day as HM Treasury may by regulation appoint)
  - Chapter 2, of Part 3: Comes into force on the day on which the Act is passed)

Part 3 of The Economic Crime (Transparency and Enforcement) Act 2022

Removes the requirement that individuals must have known or suspected they breached sanctions law to receive a monetary penalty for such breaches

Removes the requirement that a Minister must review penalties for breaches of sanctions law personally

Allows the Treasury (the Office of Financial Sanctions Implementation) to publish notices on cases where it thinks a person has breached sanctions law but it has not (for whatever reason) imposed monetary penalties

Expands information-sharing powers relating to sanctions

Policing and Crime Act 2017- Section 146 - Old

Power to impose monetary penalties

1. *The Treasury may impose a monetary penalty on a person if it is satisfied, on the balance of probabilities, that—*
    a. *the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation, and*
    b. *the person knew, or had reasonable cause to suspect, that the person was in breach of the prohibition or (as the case may be) had failed to comply with the obligation*

Policing and Crime Act 2017 Section 146 (1) - New

(1) *The Treasury may impose a monetary penalty on a person if it is satisfied, on the balance of probabilities, that the person has breached a prohibition, or failed to comply with an obligation, that is imposed by or under financial sanctions legislation.*

(1a) *In determining for the purposes of subsection (1) whether a person has breached a prohibition, or failed to comply with an obligation, imposed by or under financial sanctions legislation, any requirement imposed by or under that legislation for the person to have known, suspected or believed any matter is to be ignored.*

Policing and Crime Act 2017 - Points to note

The test will be “on the balance of probabilities”

The test will be a strict liability test

No “personal” Ministerial review – what will this mean in practice?

Penalties can be significant

Policing and Crime Act 2017 Section 146

(3) In a case where the breach or failure relates to particular funds or economic resources and it is possible to estimate the value of the funds or economic resources, the permitted maximum is the greater of—

(a) £1,000,000, and

(b) 50% of the estimated value of the funds or resources

Force Majeure – Your starting point (if there is one!)

Commercial contracts often include a force majeure clause

“Force majeure” is not a principle of English law

It needs to be introduced into a commercial relationship by means of contract

Designed to allow one or both parties to be excused from performance either temporarily or permanently on the happening of specified event(s) beyond a party’s control

The burden of proof falls on the party seeking to relying on it

Whether “sanctions” will fall within a “force majeure” will depend on the drafting – are “sanctions” expressly included or expressly excluded?

There is precedent to support the argument that economic sanctions fall within the expression “force majeure”

Force Majeure

The party relying on it must show that there were no reasonable steps that it could have taken to avoid or mitigate the event or its consequences

"a party must not only bring himself within the clause but must show that he has taken all reasonable steps to avoid its operation, or mitigate its results"

Channel Island Ferries Limited v Sealink UK Limited [1988] 1 Lloyd's Rep 323

Accordingly, thought should be given to the impact of any licensing regime when drafting or seeking to rely on such a clause

Force majeure clauses tend to be strictly construed by the courts

It is prudent to expressly include reference to sanctions if it is intended that they should be covered by such a clause

Force Majeure – Check the formalities

Notice may need to be given in a particular way or by a particular time following the event

In the MUR Shipping v RTI Ltd case the underlying agreement provided that:

"… A Party wishing to claim force majeure in respect of a Force Majeure Event must give the other Party a Force Majeure Notice within 48 hours (Saturdays, Sundays and holidays excepted) of becoming aware of the Force Majeure Event. Such Force Majeure Notice shall be a notice in writing which:

- *a) sets out or attaches details of the Force Majeure Event, and*
- *b) states that the Party giving the Force Majeure Notice wishes to claim force majeure in respect of such Force Majeure Event.*
- *c) give reasonable estimated duration of the Force Majeure Event to the extend [sic] it is reasonably possible to do so at the time of giving the Force Majeure Notice. …"*

Here the Force Majeure Notice was, in effect, "framed as a condition precedent" so that even if the underlying force majeure event had been triggered it will have been necessary to ensure that the notice was given in accordance with the Force Majeure clause itself

The importance of understanding the place of performance - Mur Shipping BV and RTI Ltd [2022]

The appeal raises a short question of law, namely whether “reasonable endeavours” extended to accepting payment in (non-contractual) € instead of (contractual) US$

The payment obligations in the COA were to pay US$

The place of performance in respect of the payment of US$ was The Netherlands

The Owners' case was that under their force majeure clause (and force majeure clauses in general) the exercise of "reasonable endeavours" does not require the affected party to agree to vary the terms of the contract or agree to a non-contractual performance – i.e. € instead of (contractual) US$

The importance of understanding the place of performance - Mur Shipping BV and RTI Ltd [2022]

Where a contract is governed by English law, and there is an obligation to pay in a foreign currency in England, the debtor can tender either the foreign currency or sterling

“The present case is not concerned with an obligation under an English law contract to pay foreign currency in England. I am considering an English law contract to pay foreign currency in The Netherlands”

"If a debt, expressed in whatever currency, pounds, dollars or francs, is governed by English law and payable in Switzerland, Swiss law should determine whether it can be discharged by tendering Swiss francs"

Frustration

A Principle of English law

What happens if post-execution of a contract something happens which either renders its performance either

- Impossible or
- Only possible in a very different way from that originally contemplated

English law originally took the strict view that a promisor was bound by his express promise

English law then took the position that performance was excused under the doctrine of frustration

Frustration

As a principle of English law the doctrine of frustration is narrow

The effect of frustration is to discharge the parties from further liability under the contract

The effect of frustration is to bring the contract to an end forthwith, without more and automatically

The essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it but due to some outside event or extraneous change of situation

Cannot simply be invoked simply because a contract has become more onerous

Do the sanctions make performance of the contract illegal - if so, then it may be possible to claim that the contract has been frustrated

English law defences to non-payment

The Law of England will not require an act to be done in performance of an English contract if such act would be unlawful under English law or if it would be unlawful by the law of the country in which the act has to be done. But I know of no authority for the proposition that that an English court will not enforce performance in England by a foreigner of an act which is lawful in England merely because the law of the foreigner's country prohibits him from doing that act in England.

A foreigner can only get protection in such a case if there is a term in the contract which gives it to him.

Kahler v Midland Bank [1950]

English law defences to non-payment

English law will not allow the application of foreign law as a defence to a breach of contract claim, unless the law is:

- the law of the contract or
- the law of the place of performance

As a matter of contract the parties can agree to reverse the general common law principle

See for example Lamesa Investments Limited vs Cynergy Bank Limited 2020

Lamesa Investments Limited v Cynergy Bank Limited [2020] EWCA 821

Cynergy Capital borrowed £30 million of Tier 2 Capital from Lamesa Investments

Lamesa's parent company was owned by Viktor Vekselberg - VV was put on the US's Russia sanctions list as a "specially designated national" (SDN) shortly after the Facility Agreement was signed

Cynergy refused to pay interest because it was concerned that it would then be subject to US secondary sanctions for "facilitating a significant transaction" with a US SDN

The Facility Agreement provided that Cynergy would not be in default if it did not make payment in order to comply with a "mandatory provision of law"

Cynergy argued that US secondary sanctions were a "mandatory provision of law"

Lamesa argued that US secondary sanctions did not prohibit payment and could not be a "mandatory provision of law" applicable to an English contract with no US nexus

The Court of Appeal held that Cynergy was "complying" with US secondary sanctions by not paying interest - that secondary sanctions were a "mandatory provision of law" under the facility agreement - that US secondary sanctions were an "effective prohibition" - that Cynergy's reason for non-payment was to comply with them was in accordance with the terms of the Facility Agreement

Governing law – EU vs England & Wales

No claims provisions

EU's Russian sanctions contain "no claims" provisions

"No claims" provisions protect a party that refuses to perform a contract on the grounds that they may breach EU sanctions from claims that they might otherwise face

"No claims" provisions prohibits designated parties and (as regards some of the sanctions) any Russian person (whether designated or otherwise) from bringing claims in connection with the performance of a contract or transaction which is the subject of EU sanctions

The UK's Russian sanctions regime does not contain these provisions. This is an area of divergence that may be significant depending on the construction of the contract

One way to pro-actively protect from such a sanctions issue is to incorporate an appropriate sanctions clause into contracts

Crypto Currency

The FCA published a statement issued jointly with the Bank of England and OFSI on 11 March 2022 that outlines the legal and regulatory requirements on all firms, including those in the crypto asset sector

The use of crypto assets to circumvent financial sanctions is a criminal offence under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692) ("**MLRs 2017**") and regulations made under SAMLA

Primary and Secondary Sanctions

Primary - Sanctions which are aimed at preventing/disrupting the business activities of the directly or "primary" sanctioned person

Secondary sanctions applied against "secondary" persons engaged in dealings with the "primary" sanctioned person

US "secondary" sanctions specifically target non-US persons

Penalties for breaching secondary sanctions can be severe – for example prohibitions on accessing the imposing country's financial system

The primary risk for non-US persons is being added to the SDN list

Mark Norris
Partner

Mark's practice covers cross border syndicated lending, structured export credit finance, structured trade and commodity finance, debt restructurings and asset finance. Mark is recognized in *The Legal 500 UK* as "excelling" in structured export credit transactions and is praised for his "commercial and user-friendly approach". Mark also advises on financial crime, modern slavery, bribery and corruption issues in connection with trade and export finance. Mark led Sullivan's response to the UK Government's consultation on UK Export Finance (UKEF)'s anti-bribery and corruption policy. Many of Mark's recommendations were specifically accepted by the UK Government.

He has advised financial institutions, funds, corporate borrowers, agents and trustees, and national and supranational sovereign/quasi-sovereign organisations on award-winning finance transactions throughout Africa, Western, Central and Eastern Europe, Russia and the CIS and the Middle East.

Mark has lived and practised in the Czech Republic (Prague), England (London), Germany (Düsseldorf and Frankfurt) and Russia (Moscow).

Mark holds graduate and post-graduate degrees with honors from the London School of Economics.

Sullivan & Worcester UK LLP

Awards & Recognition

Chambers UK, 2022
Chambers UK, 2022 ranked Sullivan in Commodities: Trade Finance (UK-wide)
Geoffrey Wynne and Simon Cook are Ranked Lawyers in Tier 1 and Tier 2 respectively
Sam Fowler-Holmes is recognised as an "Up and Coming" lawyer

The Legal 500 UK, 2022
Sullivan is ranked in Tier 1 for Trade Finance by *The Legal 500 UK, 2022* for the eighth year running
Partner Geoffrey Wynne is included as a Leading Individual for Trade Finance in the "Hall of Fame"
Simon Cook and Mark Norris are recognised as Leading Individuals
Sam Fowler-Holmes is recognised as a Next Generation Partner and Hannah Fearn as a Rising Star

IFLR1000 Banking and Finance Guide, 2022
Sullivan recognised for Banking Lending - Lender Side, United Kingdom, in *IFLR1000's Banking and Finance Guide, 2*
Partner Geoffrey Wynne is ranked as a Leading Lawyer in the United Kingdom

***Global Trade Review* "Law Firm of the Year" in the category "Leaders in Trade for Innovation", 2021**
Global Trade Review (GTR) named Sullivan the "Best Trade Finance Law Firm" in the category "Leaders in Trade for Innovation" at the
2021 GTR Leaders in Trade Awards

2021 Lexology "Client Choice" award for Banking, United Kingdom
Geoffrey Wynne named a recipient of the Lexology "Client Choice" Award 2021 for Banking, United Kingdom

***Global Trade Review* "Best Trade Finance Law Firm" 2020 and 2019**
Global Trade Review (GTR) named Sullivan "Best Trade Finance Law Firm" at their GTR Leaders in Trade Awards in 2020 and 2019

***Trade Finance Global* "Best Trade Finance Law Firm" 2019**
Sullivan named "Best Trade Finance Law Firm" 2019 by *Trade Finance Global* at its International Trade Finance Awards, 2019

***Trade Finance Magazine* "Best Law Firm of the Year" 2019**
Trade Finance Magazine named Sullivan "Best Law Firm of the Year" at its Awards for Excellence, 2019

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