

NEWSLETTER 02_22

Title: Sanctions - An up-date as at February 20 22

Introduction

Economic sanctions imposed by governments against self-governing states, legal entities and individual persons are intended to be punitive methods which seek to promote foreign policy objectives. They have been proven to be a popular and effective framework adopted by intra- and supra-national governing authorities given the potential for fast and wide application.

There are numerous sanctions frameworks currently in effect, but those key to the maritime industry are those imposed by the USA, the European Union ('EU') and the United Nations ('UN') against the following states:

- Belarus
- Cuba
- Crimea
- Democratic Republic of Korea
- Iran
- Syria

The enforcement agencies of those sanctions and regulatory frameworks are increasing focus on the maritime community to abide by, and thus give practical effect to, those sanctions. Given that 90% of world trade involves the carriage of goods by sea, one could argue that this is unsurprising.

Navigating the various sanctions frameworks in force at the time of fixing a vessel and / or performing a trade to ensure a lawful operation has become a routine requirement for vessel operators. However, that is not to say that it has been simple.

The changing geopolitical landscape has caused numerous amendments, creations and – in some cases – dissolutions of the applicable sanctions frameworks.

Key events include the establishment of the Joint Comprehensive Plan of Action in July 2015 which provided for the lifting of some sanctions against Iran, and the subsequent withdrawal from the same by the United States of American ('USA') in May 2018. This resulted in the consequent passing of the EU Council Regulation EC No. 2271/96 (known as the 'EU Blocking Regulation') which sought to counter the effect of the reinstatement of sanctions by the USA against Iran.

The fluidity of the regulations and the potential for immediate effect is not just what causes vessel operators difficulties. The inherent nature of international trade involves multiple parties in multiple jurisdictions with multiple financial and proprietary interests – many of which either change during a voyage or are not known until during or after the voyage has been completed. These factors inevitably require detailed and strenuous due diligence procedures to maintain compliance.

The consequences of failing to comply with the applicable sanctions can be severe. The punishment for breaching sanctions – intentionally or unintentionally – can be served against individuals by way of criminal fines and / or custodial sentences. But punishment can also be served against the legal entity that performed the trade; this includes being sanctioned itself which would prevent many third parties from being able to trade with that entity lawfully.

It is therefore of utmost importance not just to implement rigorous due diligence protocols, but also to review those protocols regularly to ensure that they are up to date with any and all applicable changes.

It seems that the uncertainty in the regulatory framework is also likely to continue and the complexity of regulations compounded given recent political events.

Potential upcoming changes: Russian Federation

Whilst not yet in force, the increase in deployment of army and naval troops by Russia to perform military exercises surrounding Ukraine has caused governments worldwide to prepare for the application of additional financial sanctions against Russia to deter any further, similar deployments or potential invasion.

The Senate for Foreign Relations Committee of the USA has authored the ‘Defending Ukraine Sovereignty Act 2022’ which seeks to authorise financial sanctions being imposed by the USA against Russia in the event that hostilities against Ukraine are escalated.

If the bill is passed, the financial sanctions intend to target Russian government officials, financial institutions, entities involved in constructing or operating the Nord Stream 2 project and / or entities involved in the Russian resource extractive industries.

As has been the case in the past, the implication and expectation is that these sanctions would also extend to those assisting such operations, including vessel operators and those entities providing, inter-alia, financial and insurance services for the same.

If this comes to pass, this will once again raise concerns regarding pre-existing contractual obligations in light of any new sanctions as well as those in the future.

Enforcement and technology

The increased focus on the maritime community has also extended to the technology on which maritime industry relies, even if it was not for the purpose of enforcing sanctions; the primary example is the Automatic Identification System (AIS).

Under the international convention for the Safety of Lives at Sea (SOLAS), all ships irrespective of size are obliged to have a global navigation satellite system or a terrestrial radionavigation system for use at all times throughout any voyage to establish and update the vessel’s position automatically. The original purpose of this obligation was to ensure that the position of vessels is known to other vessels, shore-side entities and maritime authorities for safety purposes, such as avoiding collisions.

Whilst AIS should always be in operation, there are exceptions such as when the Master believes that the operation of the AIS may compromise the safety of the vessel and / or its crew. For example, when transiting waters where there are known pirate operations or armed robbers, the vessel is lawfully entitled to disable the AIS whilst sailing through such an area to avoid detection and attempted hijacking. Thereafter, the Master is obliged to enable AIS again.

However, maritime authorities and governments alike are looking to AIS signals given by ships to indicate the trade which the vessel may be performing. Disabling the AIS can and has been interpreted by authorities to be a method of intentionally avoiding detection and, therefore, an intention to perform a sanctioned trade.

Whilst the entitlement to disable AIS pursuant to the exceptions under SOLAS has not been revoked or amended, increased attention is being paid to when, where and why detection is being avoided.

Therefore, not only are there likely to be changes on the scope of incumbent sanctions, but also a potential expansion on the obligations of vessel operators and the use of tools available to the same. P.L. Ferrari urges all of its client to review and, where necessary, update its due diligence protocols with regards to sanctions and be aware of the changes which may come into effect in the coming months.

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