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US Sanctions vs. EU Blocking Regulation – Aired in Court

1. Following the US decision to withdraw from the JCPOA[1], the re-imposition of sanctions against Iran was scheduled to enter into force after expiry of two wind-down periods. While the first such wind-down period expired on 6 August, with expiry of the second wind-down period on 5 November 2018 all (and more) of the sanctions in force before the conclusion of the JCPOA apply.

2. In response to US extra-territorial sanctions legislation, on 7 August the EU brought into immediate effect an update of its "Blocking Regulation" of 1996 (Regulation (EC) 96/2271). This regulation aims at mitigating the impact of the effects of US sanctions on EU economic operators engaging in otherwise valid trade with Iran.

3. In an effort to mitigate the legal effects of the US sanctions regime within the EU, the blocking stature states that "*no [specified] person … shall comply … with any requirement or prohibition … based on [various US sanctions, including these]*". Hence, but for express approval of the European Commission in case their interests, or those of the EU, would seriously be threatened or damaged, EU businesses are prohibited from complying with the listed US sanctions against Iran (article 5).

4. To further safeguard the interests, particularly, of EU companies investing in and trading with Iran, the regulation further provides

    a. for a EU-wide non-enforcement and non-recognition of any court decision, arbitral award or other formal action giving effect to the US sanctions (article 4);

    b. that European firms having suffered loss caused by post 8 May measures may sue for damages (including legal costs) in front of the courts of the European member states. (article 6); in line with the protective aim of the regulation, the scope of damages that can be claimed is very broad; in these proceedings the courts' jurisdiction is to be determined on the basis of the Brussels I (recast) regulation;

    c. for the implementation of "effective, proportionate and dissuasive" penalties by the EU member states against European companies that comply with US sanctions without the European Commission's approval (Article 9). Since the Blocking Regulation came into force in 1996, EU member states have implemented

[1] For an outline of the US withdrawal from the JCPOA (the "Iran deal") and summary of the two wind-down periods applicable to various trades, after which relevant sanctions would be reinstated, you may want to refer to the client update of Floyd Zadkovich LLP of 8 May 2018.

respective laws (e.g. an Austrian law implementing such penalties of up to EUR 70,000).

5. In addition, the Blocking Regulation obliges EU companies to inform the European Commission if they are affected by US sanctions (article 2).

6. The unique intersection of US and European laws and regulations is likely to insert a factor of uncertainty into every contractual relationship for companies engaging in cross-border business involving Iran. Further, it will likely give rise to questions of contractual law, European law, international law, and civil procedural law among others.

7. In this context, the UK commercial courts decision in *Mamancochet Mining v Aegis ([2018] EWHC 2643 (Comm))* may prove of great interest, though perhaps for what it considered in *obiter dicta* – rather than what it decided.

8. The court examined a standard insurance market clause allowing underwriters to decline a claim if to pay it "would expose" them to UK, EU or US sanctions.

9. It ruled that: (a) underwriters had to show that payment would mean breach of the prohibition relied on, such that sanctions could lawfully follow; (b) just being at *risk* of sanction was not enough; and (c) on analysis of the various regimes and expert evidence, payment *under the concerned policy by 11.59 pm Eastern Standard Time on 4 November* would not expose underwriters to sanctions.

10. Plainly, on and following 5 November (i.e., reinstatement of certain US sanctions) things could be very different.

11. It is also notable that, in *Mamancochet Mining*, the Claimants cited the Blocking Regulation. Though he did not rule on this argument, the judge said he saw considerable force in underwriters' contention that they would not breach Article 5 of the Blocking Regulation if they validly declined payment under a contractual sanctions clause – because the basis for non-payment would be a policy clause rather than compliance with a US prohibition.

12. Again, the judge did not render a decision on that issue. However, the underlying argument seems to be one which could well be the subject of future adjudication.

13. Following 5 November 2018, the UK, Germany and France, among others, have continued to state their support for European companies doing "legitimate business" with Iran. China appears intent on continuing its trade with Iran as well. This issue is uniquely a US and European intersection of laws and regulations, and one in which our law firms' joint team is well equipped to advise on.

Mitigating sanctions risk

14. Our key suggestions for mitigating risk in this changing and highly contentious sanctions environment with Iran is to:

- check regularly for any connections with Iran or Iranian businesses in contractual or ownership chains;
- review contracts for activity in trades and sectors that may now be prohibited by US sanctions;
- consider whether the business may be legitimate under EU Regulations;
- consider the considerable risks or implications of running afoul of US sanctions, even if in compliance with EU law;
- seek legal advice to confirm whether concerned contracts or business may or may not be prohibited;
- seek legal advice to establish whether the regulatory framework allows for exemptions or waivers from the sanctions regimes;
- consider whether any contractual levers may exist to deal with these sanctions (such as force majeure, illegality, frustration of performance, price re-negotiation clauses or others) and consider adding such contractual levers to contracts to be concluded in the future;
- consider the insurance and financial context around potentially implicated contracts; and
- maintain ongoing assessment on new and existing contracts and projects that may be affected - as changes continue in this dynamic arena.

This article is not legal advice and is generic in nature, if you would like to discuss anything arising from this commentary please contact:

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