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SANCTIONS CLAUSES – HOW TO PROTECT SUPPLIERS

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1. Proliferation of Sanctions Regimes

In the past decade, and in particular since the start Russia's invasion of Ukraine, sanctions regimes have proliferated around the world. Sanctions regimes work by imposing fines, and even possible criminal liability, on an individual or company if it violates the sanctions. Sanctions can be narrow, such as a prohibition on doing business with a specific sanctioned individual, or very broad, such as a prohibition on doing business in a certain country like Iran, or supporting a country's military, like some of the sanctions against Russia. The United States has imposed the most sanctions with the EU, and other democratic countries, including Japan, and the UN also imposing numerous sanctions. Not only have states been imposing more sanctions, prosecutions for violating sanctions have increased significantly since 2022, particularly in the US where the Office of Foreign Assets Control ("OFAC") and the Department of Justice have been reorganized and undertaken a number of high profile prosecutions. In addition to the increased risk of prosecution, companies have also identified violating sanctions as a reputational risk.

This increased risk and awareness of violating a sanctions regime has lead to companies, particularly large companies with extensive worldwide supply chains, to include sanctions clauses in their contracts with their suppliers. These clauses take various forms, many of which can be quite complicated and onerous, but nonetheless understanding them to ensure the company does not breach these clauses is important for suppliers of all sizes.

2. Sanctions Clauses

A sanctions clause is a clause in a contract where a company tries to ensure that its counterparty is not violating any sanctions. A typical sanctions clause in a sale of goods or services contract is effectively a representation by the supplier that it is not violating any sanctions and an undertaking that it will not violate sanctions regimes. Suppliers can also include sanctions clause in their contracts to insure that the goods or services they provide will not be used in violation of a sanctions regime.

Sanctions clauses have a number of common elements:

- Sanctions clause need to identify the sanctions regimes that apply. This can be limited to specific sanctions regimes; given the importance of the US in the world economy sanctions imposed by OFAC are almost always included, as are regimes imposed by relevant countries. Sanction clauses can also be more open-ended clauses that apply, "any applicable sanctions." In addition certain industries (e.g.. shipping, banking) face specific sanctions, and these can be identified in a sanctions clause.
- The clause will also identify who it applies to. This is not just the contracting party but also any affiliates or companies under its control. Since sanction regimes specifically prohibit benefitting sanctioned individuals a sanctions clause will usually include a representation that the supplier is not controlled by a sanctioned individual.

- A sanction clause will also set out what happens if there is a violation of sanctions. This usually includes a right not to undertake any action that might violate a sanctions regime and a right to terminate the contract.
- Finally, companies will often try and include and indemnity provision in a sanctions clause that makes the other party responsible for any costs or damages that arise from violating the sanctions.

These clauses might seem like boilerplate that a supplier has to just accept without being too concerned about; however, a recent Singapore case[1], following on cases from the UK, ruled that a company could rely on the sanctions clause in its contract to not pay the contract because doing so might violate US sanctions. This shows the importance for suppliers of understanding and limiting a sanctions clause.

3. Negotiating Sanctions Clauses

It may seem difficult for a supplier to negotiate a buyer's sanctions clause, especially if the buyer is an important customer and claims that their sanctions clause cannot be negotiated. However, as shown above, sanctions clause vary in their scope and reasonableness and, in fact, it usually is possible to push back on more extreme aspects of a sanctions clause that can cause significant unnecessary risk for supplier.

While a negotiation will, of course, always depend of the specific parties and issues there are a few general points that will often be applicable:

- Sanctions clause should be reciprocal. If a buyer wants to impose a sanctions clause on a supplier it is reasonable to insist the clause should apply equally to the buyer. This is relevant as some sanctions regimes impose liability for where products end up, for instance, if a component provided by a Japanese supplier end up in a sanctioned country, e.g. North Korea, the Japanese supplier could face liability. Moreover, on a basic level, making both parties subject to the same provisions is a rough way to ensure they are reasonable.
- Some sanctions clauses are overly broad. Buyers may want to say that the clause applies to any applicable sanctions but this exposes the supplier to an unknown risk if new sanctions are imposed in the future. It is reasonable to limit the scope of a sanctions clause so it only applies to listed sanctions regimes and clearly identified parties.
- Some sanctions clause try and impose unlimited liability, arguing the supplier should not have violated the clause so should bear responsibility for all the consequences. However, like with most other indemnity provisions, it is reasonable to limit liability, such as limiting it to direct damages.

Another issue to be considered in a sanctions regime is conflicting regimes. This is the case where some countries have passed legislation designed to stop companies complying with sanctions regimes imposed by other countries. This is a growing risk in East Asia as tensions between China and Taiwan increase and the parties look to impose sanctions on each other.

A final consideration for a supplier is that once a sanctions clause is agreed to a company needs to be sure it complies. This can mean establishing internal compliance mechanisms; it can also mean adding sanctions clauses to contracts with the company's own suppliers.

[1] *Kuvera Resources Pte Ltd v. JPMorgan Chase Bank, NA*

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4. Conclusion.

The proliferation of sanctions clauses in recent years may feel like something a supplier has to accept but that is unlikely to clause a problem; however, the risk from an overly broad sanctions clause is real and suppliers do not need to accept such clauses. By getting expert guidance to understand how sanctions regimes work and what is acceptable practice a company can push back on overly broad or unreasonable clauses that buyers try to impose and ensure a sanctions clause has only a limited, manageable risk for the company.

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Matthew is a Canadian qualified lawyer with extensive mining experience across four continents. He has worked as a general counsel for two multi-billion-dollar mining projects, as well as in-house counsel for mining investors, outside counsel supporting investments in mining projects. He has been deeply involved in every aspect of mining projects, from start-up projects, investment decisions, project financing permitting and environmental compliance, construction contracts and issues and sales contracts.
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