ICC INTERNATIONAL CHAMBER OF COMMERCE
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CONSOLIDATED ICC GUIDANCE ON THE USE OF SANCTIONS CLAUSES IN TRADE FINANCE-RELATED INSTRUMENTS SUBJECT TO ICC RULES

> Guidance Paper on the Use of Sanctions Clauses in Trade Finance-related Instruments Subject to ICC Rules (2014)

> Addendum to Guidance Paper (2020)

Guidance Paper: The Use of Sanctions Clauses in Trade Finance-related Instruments Subject to ICC Rules, including Documentary and Standby Letters of Credit, Documentary Collections and Demand Guarantees

Issued by the ICC Global Banking Commission—2014

1. Introduction

1.1 The use of clauses in relation to trade, economic or financial sanctions or embargos ("sanctions") in trade finance-related instruments that are subject to the rules drafted by the ICC Banking Commission ("ICC rules"), stating banks' intention to comply with sanctions regulations, has become a problematic issue for banks involved in trade finance transactions, including, particularly, irrevocable, independent documentary and standby letters of credit, demand guarantees and counter-guarantees.

1.2 Sanctions are imposed by the United Nations, the EU Council or individual countries to achieve political and economic ends. They may prohibit dealings with specific countries, persons or property. The need for sanctions is a political matter outside the realm of the ICC. The enforceability of sanctions is a question to be decided by courts, national regulators or administrative agencies; it is not an issue that can be addressed by rules of banking practice such as ICC rules. Accordingly, ICC rules do not address how sanctions should be interpreted or their impact on the trade finance-related instrument in which they are incorporated.

1.3 Sanctions may restrict a bank's ability to perform its role under ICC rules. International banks may be confronted with different sanctions regimes imposed in the multiple jurisdictions in which they operate. As a result, those banks may be subject to conflicting regulatory requirements, and consequently be amenable to formulating internal policies to mitigate the resulting legal risks. Some banks have chosen to control these legal risks by use of sanctions clauses.

1.4 Sanctions laws and regulations to which a bank engaged in a trade finance-related instrument is subject may include those of its country of operation, its country of incorporation or registration, the country of the currency or the place of payment, and any other jurisdiction whose laws govern the transaction. Where they are determined to be applicable to the instrument, sanctions laws and regulations are generally considered as being mandatory and thus may override the ICC rules applicable to that instrument and, more generally, the contractual terms of the instrument. If these are the only sanctions laws and regulations applicable to the parties, adding a clause in a trade finance-related instrument stating the bank's commitment to respect such sanctions law or regulation applicable to it by law may be unnecessary and lead to confusion. In some circumstances, banks may even face legal liability in some countries if mandatory laws prohibit the use of such clauses on grounds of discrimination (see paragraph 2.3 below).

1.5 The purpose of this Guidance Paper is to highlight certain issues arising from the use of such clauses and recommend best practices in that respect.

2. Sanctions clauses

2.1 Concerned about the implications of sanctions for their own obligations under trade-related transactions, and seeking to notify their counterparties, whether correspondent banks or beneficiaries, banks sometimes include so-called "sanctions clauses" in transaction documents. There is no standard for these clauses and they vary considerably in their scope. Where they simply state: "[The bank] is under a statutory duty to comply with sanctions laws and regulation mandatorily applicable to [it]", they are merely informational and do not extend beyond applicable laws and regulation.

2.2 Some countries have legislation that prohibits, on grounds of discrimination, any reference to "exclusion" or "boycott" regulation or language in any transaction unless such exclusion or boycott is required under the laws of those countries. In those countries, the inclusion of sanctions clauses in a trade finance-related instrument, or in instructions to confirm, advise or offer other services in relation to such an instrument, may compel the addressee to reject and return the received instrument or instructions, failing which it may face legal liability.

2.3 If the sanctions clauses in trade finance-related instruments, including letters of credit or demand guarantees or counter-guarantees, allow the issuer a level of discretion as to whether or not to honour beyond the statutory or regulatory requirements applicable to that issuer, they bring into question the irrevocable and documentary nature of the letter of credit or guarantee. The implementation by a bank of an internal sanctions-related policy that goes beyond what is required under the laws and regulations applicable to that bank is an illustration of that discretion. It may cause a serious problem when considering the role of a confirming bank, a nominated transferring bank, a guarantor or a beneficiary. If the reference to an internal, sanctions-related policy were to allow the bank discretion to honour or refuse payment, one could even question if that bank has in fact assumed a legally binding obligation, a question that of course has to be determined under the applicable law. Of particular concern are clauses that purport to alter the reimbursement provisions of UCP 600 with respect to nominated banks that have acted pursuant to their nominations or clauses that seek to shift the risk of compliance with sanctions to those nominated banks. The same concern arises for guarantors that have acted pursuant both to the instructions and the counter-guarantees received from the counter-guarantors under URDG 758.

2.4 Where sanctions clauses that refer to banks' internal policy requirements appear in the letter of credit or counter-guarantee, the nominated bank is in a difficult position as it is not aware of the internal sanctions policy that the issuing bank might elect to apply. If such a policy purports to have a broader scope than that of sanctions laws and regulations applicable as a matter of mandatory law to the issuing bank, the nominated bank would face uncertainty as to whether it will be reimbursed should it pay a complying presentation. As a result, a nominated bank's risk assessment is likely not only to include the issuing bank and the country risk, but also the assessment of the likelihood of a prohibited reimbursement due to sanctions regulations or an internal, sanctions-related policy. This may result in increased costs, delays and potential disputes.

3. Examples of sanctions clauses

3.1 Below are examples of sanctions clauses sometimes seen in trade transactions.

a. The following is an example of an informative sanctions clause that does not extend beyond applicable laws and regulation:

"Presentation of document(s) that are not in compliance with the applicable anti-boycott, anti-money laundering, anti-terrorism, anti-drug trafficking and economic sanctions laws and regulations is not acceptable. Applicable laws vary depending on the

transaction and may include United Nations, United States and/or local laws."

b. The following sanctions clause is more problematic in that it refers to internal policies that are unknown to the nominated bank. By doing so it brings into question whether the bank will comply with its irrevocable obligation:

"[Bank] complies with the international sanction laws and regulations issued by the United States of America, the European Union and the United Nations (as well as local laws and regulations applicable to the issuing branch) and in furtherance of those laws and regulations, [Bank] has adopted policies which in some cases go beyond the requirements of applicable laws and regulations. Therefore [Bank] undertakes no obligation to make any payment under, or otherwise to implement, this letter of credit (including but not limited to processing documents or advising the letter of credit), if there is involvement by any person (natural, corporate or governmental) listed in the USA, EU, UN or local sanctions lists, or any involvement by or nexus with Cuba, Sudan, Iran or Myanmar, or any of their governmental agencies."

c. Another problematic example that may permit exercise of discretion beyond the requirements of applicable law is the following:

"Trade and economic sanctions ('sanctions') imposed by governments, government agencies or departments, regulators, central banks and/or transnational organizations (including the United Nations and European Union) impact upon transactions involving countries, or persons resident within countries currently including Balkans, Belarus, Cote d'Ivoire (Ivory Coast), Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, Syria, the Democratic Republic of Congo, Uzbekistan, Afghanistan, Iran, Iraq, Myanmar (Burma), North Korea, Cuba, Zimbabwe and Sudan. Issuing bank and all of its related bodies corporate might be subject to and affected by, sanctions, with which it will comply. Please contact issuing bank for clarification before presenting documents to issuing bank for negotiation or undertaking any dealings regarding this credit involving countries or persons affected by sanctions. Issuing bank is not and will not be liable for any loss or damage whatsoever associated directly or indirectly with the application of sanctions to a transaction or financial service involving issuing bank. Issuing bank is not required to perform any obligation under this credit which it determines in its discretion will, or would be likely to, contravene or breach any sanction. This clause applies notwithstanding any inconsistency with the current edition of the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits."

4. Recommendations

4.1 It is recommended that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements. It is also advisable for practitioners to be aware of the risks posed by such clauses if included by other banks involved in their transactions.

4.2 In trade finance transactions involving letters of credit or demand guarantees subject to ICC rules, practitioners should refrain from bringing into question the irrevocable, independent nature of the credit, demand guarantee or counter-guarantee, the certainty of payment or the intent to honour obligations. Failure to do so could eventually damage the integrity and reputation of letters of credit and demand guarantees which may have a negative effect on international trade.

Addendum to the Use of Sanctions Clauses in Trade Finance-related Instruments Subject to ICC Rules, including Documentary and Standby Letters of Credit, Documentary Collections and Demand Guarantees

Issued by the ICC Global Banking Commission—2020

Revised in November 2024

1. Introduction

The ICC Guidance Paper on the use of Sanctions Clauses (2014) dealt with the use of sanctions clauses in relation to trade, economic or financial sanctions, restrictive measures or counter-measures (collectively "sanctions") in trade finance instruments (documentary and standby letters of credit, demand guarantees and counter-guarantees) that are subject to the rules drafted by the ICC Banking Commission ("ICC rules").

That paper stated that the use of sanctions clauses had become a problematic issue in that they lead to uncertainty as to their application and may put into question the very effectiveness of the instrument in which they are drafted.[1] The Guidance Paper highlighted the problems associated with the use of sanctions clauses in trade finance and recommended that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements.

ICC has noted a resurgence in the use of sanctions clauses in documentary credits and in demand guarantees, particularly in the form of non-specific clauses that create uncertainty. In fact, many of the sanctions clauses witnessed in practice could lead to making trade finance instruments unworkable. Moreover, the use in bank undertakings of sanctions clauses not scheduled in public procurement documents may lead to the disqualification of the contractor as a result of the non-compliance with the tender regulations.

As a result, the ICC Banking Commission considers it necessary to emphasise its principled position towards sanctions clauses by way of an update of the Guidance Paper, with the addition of an addendum with a sample clause and guidance for use.

Operators must not consider that the sample clause drafted in this Paper is in any way recommended practice. The only purpose of proposing a sample clause in this Paper is to limit the legal uncertainty by linking the referenced sanctions regulations to those objectively applicable in the transaction.

2. Proposed addendum

[1] A previous edition of this Addendum contained a statement that sanctions clauses are non-documentary conditions for the purposes of the UCP and the URDG. This statement has been deleted, to avoid any implication that sanctions clauses are to be analysed differently from other clauses in trade finance instruments. Whether or not a sanctions clause is a non-documentary condition for the purpose of the UCP and the URDG will depend on the drafting of the clause: if it is drafted as a condition for a complying presentation under the letter of credit, the confirmation, the guarantee or the counter-guarantee without stipulating the document to indicate compliance with the clause, it could be considered as a non-documentary condition for the purpose of article 14(h) of the UCP and of article 7 of the URDG. Conversely, if the sanctions clause is drafted as a term of payment, thus operating in certain circumstances to override the payment obligation and permit the obligor in the letter of credit, guarantee or counter-guarantee not to pay the beneficiary against a complying presentation, it could be permissible under the UCP/URDG. Validity and enforceability are to be determined under the applicable law.

The ICC Banking Commission recommends that banks review this Guidance Paper and the principles thereunder when considering the drafting of sanctions clauses.

As generally stated in the original Guidance Paper issued in 2014, it is recommended that banks refrain from issuing or accepting trade finance instruments that include Sanctions clauses that purport to impose restrictions beyond those applicable to the performance of the obligation under the trade finance instruments as a matter of law. Broader sanctions clauses defeat the independence principle in letters of credit and demand guarantees, the exclusively documentary nature of the instrument, and create uncertainty.

That said, the paper recognises that there may be instances in which a bank determines it wants to include a sanctions clause.

ICC confirms its guidance that sanctions clauses should not be used generally. Nevertheless, if a bank, after consultation with its customer and counterparty in the trade finance transaction, considers that a sanctions clause is to be used, ICC recommends that the clause should be drafted in clear terms, restrictively, to limit the reference only to mandatory law applicable to the bank, as according to the following sample clause:

"[notwithstanding anything to the contrary in the applicable ICC Rules or in this undertaking,] *We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by restrictive measures, counter-measures or sanctions laws or regulations mandatorily applicable to us or to [our correspondent banks in] the relevant transaction*."

While the sample clause may not contemplate every conceivable instance of sanctions application or, indeed, exempt the bank abstaining from the performance of its obligation from liability, it does give notice that the bank will comply with the sanctions to which it is subject and that the bank disclaims liability for doing so.

ICC recommends that the following Guidance is noted when drafting a sanctions clause:

- Sanctions clauses should not be used routinely. They ought only to be considered in specific transactions, and only after consulting with the customer and counterparties in the relevant transaction.
- Specific sanctions regulations may be referred to in the clause (e.g. *sanctions administered and enforced by the Hong Kong Monetary Authority*) provided, however, that those references are limited to those regulations directly and mandatorily apply to the bank.
- Sanctions regulations may apply as mandatory rules in several situations, including, without limitation, the following situations:
  - As the law applicable to the bank or, if relevant, the branch that issued the relevant undertaking in the trade finance instrument;
  - As the law applicable to the currency of payment of relevant undertaking in the trade finance instrument;
  - As the law governing the performance of the relevant undertaking in the trade finance instrument as a result of choice of law clause, or of the determination of the applicable law in accordance with the conflict of laws rules in the competent jurisdiction;
  - As international public policy where the arbitral tribunal or the court with jurisdiction so characterise the particular multilateral sanctions regulations.
- Clauses should refrain from including unparticularised references to laws generally (e.g. "any applicable local and foreign laws").
- Reference to "bank policy and procedure" should be avoided at all times.

- There are jurisdictions in which the local law prevents the inclusion of a sanctions clause that references the laws of a foreign jurisdiction on the grounds of illegal discrimination or otherwise. To the extent that the law of those jurisdictions applies to the bank or to the transaction, banks ought to consider not using sanctions clauses in the trade finance instrument and to seek legal advice as to their liability if they were to contravene such laws.
- The reference to correspondent banks should be added in a sanctions clause only if a correspondent bank is in a different location from that of the instructing bank and would be unable to complete the transaction due to sanctions directly applicable to the correspondent bank that are not applicable to the issuing bank. An example is a correspondent bank in the US, therefore subject to primary US sanctions, which is clearing USD payments on behalf of a non-US bank.

IMPORTANT NOTICE: The referenced example clause is a sample only and not to be used without seeking advice from legal and compliance advisors.

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