CONFLICTS OF LAWS: BLOCKING STATUTES AND ANTIBOYCOTT

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This is the sixth of a seven-part series on the application of US sanctions to the shipping community.

This article will focus on conflicts of laws stemming from the EU Blocking Statute and US antiboycott law, both of which are intended to prevent parties from complying with a disfavored sanctions regime. The article will highlight some of the inherent conflicts in dealing with multiple conflicting sanctions regimes. It follows our comprehensive summary of sanctions and shipping, which covered several of the issues herein in some detail.

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ANTIBOYCOTT LAW: IN GENERAL

Antiboycott law is essentially the inverse of sanctions law. Sanctions law generally is designed to prevent parties from dealing with sanctioned persons or countries. Antiboycott law is designed to prevent parties from complying with another country's sanctions law. In theory, antiboycott law always creates a conflict in law where both the antiboycott law and sanctions law apply; a party must choose whether to comply with the sanctions law and violate the antiboycott law or comply with the antiboycott law and violate sanctions.

EU BLOCKING STATUTE

In General

The EU blocking statute (Council Regulation No 2271/96) (the "Blocking Statute") was adopted by the Council of the European Union in 1996. It was initially enacted primarily to combat US sanctions on Cuba, Iran and Libya. In conjunction with the Blocking Statute, some EU member states, notably Germany, enacted domestic laws to combat all sanctions not supported by the EU.

As described in our 2018 article, the US unilaterally pulled out of the JCPOA (Iran nuclear deal) and re-imposed all secondary sanctions and some primary sanctions against Iran that had been lifted. In response, and in an attempt to salvage the JCPOA, the EU activated and updated the Blocking Statute to prevent EU persons from complying with the re-imposed US secondary sanctions on Iran.

The Blocking Statute generally applies, *inter alia*, to EU nationals, companies organized in the EU and any entities controlled by EU persons. As amended, the Blocking Statute now applies to the US secondary sanctions that were lifted under the JCPOA, as well as certain prohibitions on reexporting US-origin goods from a third country to Iran. The Blocking Statute provides that an EU person may not "comply, whether directly or through a subsidiary or other intermediary person, actively or by deliberate omission, with any requirement or prohibition, including requests of foreign courts, based on or resulting, directly or indirectly, from the [applicable US sanctions]." An EU person that can demonstrate that its interests would be "seriously damaged" by adhering to the Blocking Statute can request authorization from the European Commission to permit such EU person to comply with the relevant sanctions, in whole or in part.

"The various EU member states have taken different approaches to enforcing the Blocking Statute. In some member states, a breach is a criminal offense; in other states, it is just an administrative offense."

The Blocking Statute also gives EU persons the right to sue to recover any damages caused by the application of the applicable US sanctions "or by actions based thereon or resulting therefrom." Finally, the Blocking Statute provides that any EU person whose economic and/or financial interests are "affected, directly or indirectly," by the specified US sanctions, or by "actions based thereon or resulting therefrom," should inform the European Commission.

The Blocking Statute is enforced by the EU member states, not by the European Commission, and the member states are tasked with assessing penalties for noncompliance. The various EU member states have taken different approaches to enforcing the Blocking Statute. In some member states, a breach is a criminal offense; in other states, it is just an administrative offense. The UK has drafted regulations that would retain the Blocking Statute (as applied to UK persons) post-Brexit.

Application of the Blocking Statute

In the Guidance Notes to the Blocking Statute, responding to the question of whether an EU person is *required* to do business with a sanctioned country, the answer given is:

> EU operators are free to conduct their business as they see fit in accordance with EU law and national applicable laws. This means that they are free to choose whether to start working, continue, or cease business operations in Iran or Cuba, and whether to engage or not in an economic sector on the basis of their assessment of the economic situation. The purpose of the Blocking Statutes is exactly to ensure that such business decisions remain free, i.e., not forced upon EU operators by the listed extraterritorial legislation, which the Union law does not recognise as applicable to them.

The Guidance Notes suggest that the Blocking Statute applies where the decision to refrain from doing business with Iran is driven by an intention to comply with the targeted US sanctions, not where it is driven by business decisions (and it is unclear whether or to what extent the Blocking Statute applies where there is a mix of motivations). In practice, it can be difficult to determine whether an EU person's decision not to engage in business with Iran is driven by the targeted US sanctions rather than other business motivations.

Difficult issues often occur when negotiating agreements such as loan agreements, charterparties, etc. EU parties often will want a carve-out from any applicable sanctions clause so as not to run the risk of violating the Blocking Statute. But non-EU parties (and in some cases, even EU parties) may not want to create a situation in which their counterparty may cause a violation of US sanctions, which may have negative consequences to any or all involved.

EUROPEAN CASELAW INVOLVING THE BLOCKING STATUTE AND US SECONDARY SANCTIONS

A handful of recent European cases have shed some light on the scope of the Blocking Statute and US secondary sanctions, although considerable uncertainty remains:

> "Parties must consider exactly how they wish US secondary sanctions, the Blocking Statute and any tensions between them to apply in the context of their arrangements, and set this out as clearly as possible in their contracts."

- In *Mamancochet Mining Limited v Aegis Managing Agency Ltd [2018] EWHC2643*, an English High Court case, an EU insurer sought to avoid payment on an insurance claim involving Iran on the grounds of the insurance sanctions clause. The court held that the sanctions clause did not permit the insurer to refuse to make payment because it was not clear that secondary sanctions on Iran would apply to the insurance payment. As an alternative argument, the claimant argued that the insurer could not invoke the sanctions clause to escape payment, since this would violate the Blocking Statute. This issue did not require determination by the court because it found that the defendants were not entitled to rely on the sanctions clause to avoid payment. However, the judge, while specifically not expressing a "concluded view" on the point, said that he saw considerable force in the argument that the Blocking Statute was not engaged where an obligation is suspended under a sanctions clause. If correct, this position would imply that complying with a contractual provision to comply with US sanctions on Iran should be viewed as distinct from and treated differently from complying with the actual sanctions themselves, with only the latter (direct compliance with the sanctions) being caught by the Blocking Statute. However, the comments were made *in obiter* and in the context of the particular facts of the case. For further WFW analysis on this decision, please see our October 2018 article.
- In *Lamesa Investments Limited v Cynergy Bank Ltd [2020] EWCA Civ 8212*, an EU borrower stopped making payments on a loan agreement to a lender that had become subject to US secondary sanctions on Russia. Both the English High Court and the Court of Appeal found that US secondary sanctions constituted mandatory provisions of law, and that withholding of payments constituted "compliance" with law for purposes of the loan agreement. This may seem surprising on the basis that the US secondary sanctions do not impose direct obligations on non-US persons (the consequence of a violation of secondary sanctions is not a criminal or civil penalty, but being frozen out of US markets in some capacity). Although the sanctions in question in this case were not covered by the Blocking Statute, the court noted that the language of the Blocking Statute refers to the relevant US secondary sanctions as imposing a "requirement or prohibition" on EU entities subject to it, and commented that this was the reality of the position; because of the consequences of breach, US secondary sanctions must be seen as an "effective prohibition." For further WFW analysis, please see our July 2020 article and our summary of sanctions and shipping.

- In *Payesh Gostaran Pishro Ltd v Pipe Survey International CV and P&L Pipe Survey* (Case No C / 10/572099 / HA ZA 19-352, decided Apr. 1, 2020), a case decided by the Court of Rotterdam, Netherlands, a Dutch company that had entered into a contract to provide pipe inspection services for an Iranian company argued that upon the imposition of US secondary sanctions, it should be excused from further performance under the contract due to *force majeure*. The court discussed the Blocking Statute as part of its determination that the US secondary sanctions should not be viewed as creating a legal impossibility to performance, since the secondary sanctions are explicitly not viewed as binding law under the Blocking Statute. The court then determined that although the business risks to the Dutch company of potentially being closed off from US markets may be substantial, they did not constitute *force majeure*.

Mamancochet seems to reach quite different conclusions from *Lamesa*, with differing implications. *Mamancochet* might be seen as intended to apply a narrow view of when US secondary sanctions apply, while *Lamesa* recognizes the significant potential economic consequences of a violation of such sanctions. The caselaw on US secondary sanctions and the Blocking Statute is still developing. What is clear is that parties need to consider exactly how they wish US secondary sanctions, the Blocking Statute and any tensions between them to apply in the context of their arrangements, and set this out as clearly as possible in their contracts.

PARTIES OFTEN NEED TO NAVIGATE THROUGH NARROW STRAITS TO AVOID VIOLATING SANCTIONS LAW AND ANTIBOYCOTT LAW

US ANTIBOYCOTT LAW

In general

In general, US antiboycott law operates similarly to the Blocking Statute, in that it prohibits US persons from participating in a boycott that is not supported by the US. However, there are multiple differences, including the primary targets of and operation of the antiboycott law.

History, policy and administration

US antiboycott law was enacted largely in its current form in 1979 as part of the Export Administration Act. The Export Administration Act was repealed in 2018, but the antiboycott law was retained pursuant to the Anti-Boycott Act of 2018. The operative provisions of antiboycott law are found in Part 760 of the Export Administration Regulations (EAR) promulgated and administered by the Bureau of Industry and Security (BIS), which is part of the Department of Commerce. This contrasts with US sanctions, which are administered by the Office of Foreign Assets Control (OFAC), part of the Department of the Treasury.

"US antiboycott law also applies only to activities undertaken in US interstate or foreign commerce."

US antiboycott law applies to any "unsanctioned foreign boycott," which is generally a boycott that is not supported by US policy. There is no precise definition of what constitutes an unsanctioned foreign boycott, but historically, the term has been applied to only one boycott: the Arab League Boycott of Israel. It is possible that US antiboycott law could apply to other boycotts, most notably in recent years, the Saudi Arabia-led boycott of Qatar that began in 2017. However, BIS has issued no guidance to suggest that the boycott of Qatar or any other boycott is subject to US antiboycott law, and the only boycott that has been explicitly targeted by BIS remains the Arab League Boycott of Israel.

Operation of antiboycott law

US antiboycott law applies to US persons, which are generally defined to include US residents and nationals, entities organized in the US, US branches or offices of non-US persons, and other entities "controlled in fact" by US persons. Whether a non-US entity is "controlled in fact" is determined based on facts and circumstances, with certain guidelines and presumptions. In particular, it is possible that a non-US entity that is owned less than 50% by a US person can still be deemed "controlled in fact" by a US person.

US antiboycott law also applies only to activities undertaken in US interstate or foreign commerce. A transaction that falls outside of US interstate or foreign commerce is not subject to US antiboycott law, even if a US person is involved.

US antiboycott law generally provides that US persons cannot:

1. refuse, or require another person to refuse, to do business with a boycotted country;
2. discriminate on the basis of race, religion, sex, or national origin;
3. furnish information on race, religion, sex, or national origin; or
4. furnish information regarding past business with a boycotted country;

in each case, with intent to comply with an unsanctioned foreign boycott.

In addition, a US person who receives a request to support an unsanctioned foreign boycott (whether by refusing to do business or by furnishing information) generally must report the request to the Department of Commerce.

"There may be times in which at least a risk of a violation of some law will occur by necessity."

Implications for shipping

US antiboycott laws are typically most relevant to the shipping sector in negotiating ship sales, charters, loans and other agreements. Especially in the context of ship sales and charters involving non-US persons, agreements will often require the seller or owner to represent that the relevant ship has never traded with Israel, and in the case of a charter, may provide that the ship will not trade with Israel. Any such language *may* constitute a violation of US antiboycott law (although the precise application of the law depends on the specific facts and circumstances). More broadly, agreements sometimes provide that the parties represent and covenant that they have not violated or will not violate the sanctions law of *any* country, without referring specifically to Israel or the Arab League Boycott. It is possible (although far from certain) that such language will also trigger a violation.

CONCLUSION

The Blocking Statute, US antiboycott law and other laws that prevent parties from complying with another sanctions regime create complex problems for the international shipping community. Parties often need to navigate through narrow straits to avoid violating sanctions law and antiboycott law. There may be times in which at least a risk of a violation of some law will occur by necessity, in which case, parties will need to balance carefully the potential consequences of violating a respective country's legal regime. Parties should consider these issues carefully in documenting their contractual relationships to ensure that their contracts reflect the agreed-upon balance of such considerations.

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