Managing geopolitical risk
Sanctions

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For entities involved in international trade, managing sanctions exposure has become increasingly complex since the outbreak of war in Ukraine in February 2022. Since that time, numerous jurisdictions, including Australia, have expanded the breadth and depth of their sanctions regimes against vessels, companies and individuals. As a result, we are increasingly seeing sanctions disrupt international trade with often significant cost implications for the affected parties.

Australia's sanctions regime is administered by the Department of Foreign Affairs and Trade (DFAT) and imposes sanctions through the enforcement of 'autonomous' and 'United Nations' sanctions regimes against certain countries, groups, individuals and entities established under key legislative instruments. Australia implements:

- Australian Autonomous Sanctions imposed and implemented by the Australian Government as a matter of foreign policy; and
- United Nations Security Council (UNSC) Sanctions imposed by the UNSC, and Australia is obligated to implement as matter of international law.

Regulation 14 of the Autonomous Sanctions Regulations 2011 prohibits any making an asset available, directly or indirectly, to or for the benefit of a designated person or entity, unless authorised by a permit granted by the Minister. However, it is the question of what exactly will constitute "indirect" supply that is causing many Australian entities and individuals consternation. Recently, the Federal Court of Australia in Alumina and Bauxite Co Ltd v Queensland Alumina Ltd concluded that, for the purposes of Regulation 14: "indirectly" includes "doing so through interposed corporate entities, and where the benefit is either the object, effect or likely effect of making the asset available", and where the sanctioned party is only a minority shareholder of the receiving entity.

Other than this recent decision, participants in the international trade sector have little practical guidance as to the outer limits of the phrase "indirectly".

Moreover, the "indirect" test is very different from that applicable under various other sanctions regimes, which typically look at whether a counterparty is subject to "ownership" and/or "control" by a sanctioned entity.

The consequences of this for Australian companies can be far-reaching. For example, Australian entities may unwittingly find themselves involved in a sanctions breach, despite purchasing goods from a non-sanctioned buyer in a non-sanctioned country, if it subsequently emerges that a sanctioned entity has been involved (even as a minority shareholder) in the supply chain of the goods, or where the goods are transported via a sanctioned entity.

Moreover, with an expanding sanctions regime, Australian expatriates employed by a foreign company must be aware of becoming personally involved in a breach of Australian sanctions where their employer is involved in trade that would – if the company had an Australian nexus – infringe Australian sanctions. Again, there is currently little publicly available guidance available for individuals who find themselves in such a position.

In the meantime, what is clear is that Australian entities involved in international trade should consider: (i) establishing a risk-based sanctions protocol; and (ii) future-proofing their contracts to allow them to require detailed supply-chain disclosure from their counterparts and – where necessary – suspend or cancel performance where to proceed would involve exposure to regulatory risk.

Managing cross border enforcement risk: Jurisdiction

When contracting with a foreign counterparty or one whose assets are based outside of Australia, assessing enforcement risk at the time of contractual negotiations is critical. Decisions made at the outset have the potential to affect the chances of successful recovery in the event of a later dispute. This is often overlooked.

The key legal considerations will be different depending on where the counterparty is based. Here, we take China as an example as it is a common trading partner for many of our clients.

As part of the contractual negotiations, a decision needs to be made about jurisdiction – the forum or place where the parties wish any future disputes between them to be resolved. For an Australian company trading to or from China, generally speaking the parties will be free to elect where they prefer their disputes to be resolved. This could be the Australian Courts, the Chinese Courts, through international arbitration, or the Courts or tribunals of some other place.

With counterparty enforcement risk ultimately in mind, international arbitration may offer the best choice when balancing the competing considerations. The Australian Courts offer a familiar system and strong procedural protections, however, in a scenario where the counterparty is based overseas, recovery becomes a two stage process. The dispute would first be litigated in Australia, and then the

Australian Court judgment would need to be enforced through the local Courts in the place where the counterparty's assets are located. This adds time, complexity, cost, and uncertainty into the legal process. The alternative is to proceed directly to the local Courts overseas. This may seem a more direct route, however, it can be unfamiliar for foreign parties.

In our experience, international arbitration is more commonly chosen for cross-border and international trade contracts. The key advantage of international arbitration is that arbitration awards are widely enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention provides a framework for enforcement through local Court procedures of contracting States. There is a pro-enforcement presumption, unless one of a few narrow exceptions can be established. With 172 States adhering to the Convention, it provides a robust and well tested path to maximise recovery prospects in international trade disputes.

Across the Asia Pacific region, we frequently see the Hong Kong Special Administrative Region (SAR) and Singapore being chosen as the venue for international arbitration in maritime and trade disputes. As common law jurisdictions, they provide a familiar procedural framework. For China related contracts, Hong Kong SAR institutional arbitration offers particular advantages as compared with other venues. The Hong Kong SAR common law system operates within China under a "one country, two systems" constitutional framework.

As part of that framework, various mechanisms exist to aid enforcement of Hong Kong SAR arbitral awards in the Chinese Mainland. For example, in a Hong Kong SAR seated institutional arbitration it is possible to obtain interim relief at the outset of the arbitration from Courts in the Chinese Mainland. Court assistance can be obtained to freeze assets, regulate or restrain the conduct of persons, and to collect or preserve evidence – thereby preserving the status quo for later enforcement.

Once a Hong Kong SAR arbitration award is obtained, there is also a separate arrangement for enforcement in the Chinese Mainland. Adopting Hong Kong SAR arbitration therefore allows the parties the choice of common law procedure, whilst also obtaining enforcement advantages in the Chinese Mainland.

Container misdeclaration: an Australian perspective on Stournaras Stylianos Monoprosopi EPE v Maersk A/S ([2024] EWHC 2494 (Comm)).

In this recent English High Court case, the claimant purchased copper scrap under three contracts. The goods were shipped in 22 containers aboard Maersk's vessel, but the containers instead contained concrete blocks. Relying on clean bills of lading issued by Maersk, the claimant paid USD 459,031. Verified Gross Mass (VGM) data provided by stevedores showed the containers weighed far less than the shipper's declared weight. However, the VGM was not cross-checked against the declared weight before issuing the bills.

The claimant alleged Maersk breached contractual duties under the Hague Rules regarding the weight, made negligent misstatements, and owed a duty of care to prevent its bills being used as instruments of fraud.

The High Court dismissed all claims and held Maersk had no duty to compare shipper-declared weights with VGM data, which was used solely for stowage planning. The Court noted that the bills expressly disclaimed responsibility for the shipper's declared weight, and no negligent misstatement or novel duty of care was established.

Notwithstanding the High Court's findings, an ocean carrier's documentary obligations in these circumstances may treated differently between jurisdictions, especially as container fraud is a recurring risk in international trade, exacerbated by containerisation and reliance on documentary compliance. While carriers are beginning to implement more robust procedures, fraudsters continue to exploit gaps between operational and commercial processes. In a different situation with under declared weight there may be OH&S implications,

Would the outcome differ in Australia? Possibly. Under the Australian Consumer Law (ACL), s 18 prohibits misleading or deceptive conduct in trade or commerce. If a bill of lading were construed as a representation to the consignee, and the carrier knew or ought reasonably to know of discrepancies, liability could arise despite contractual disclaimers as the ACL cannot be excluded by contract. Courts have interpreted s 18 broadly, and a claimant might argue that issuing a clean, unclaused bill in the face of contrary VGM data constitutes misleading conduct, potentially creating greater exposure for carriers in Australia than under English law.

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