COMMODITIES BULLETIN
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Welcome to the October 2024 HFW Commodities bulletin.

In this edition, our partners and senior lawyers reflect on trends and developments in some of the key areas affecting the commodities sector.

- London Partner Brian Perrott considers what recent decisions tell us about the English Courts' current approach to the interpretation of contracts.
- Perth Partner Jo Garland and Senior Associate Jessica Marshall discuss the challenges and opportunities presented by energy transition.
- London Partner David Savage and Geneva Partner Sarah Hunt, together with Associates Sara Abhari and Hermance Schaerlig, look at developments in the effects of sanctions on commodities trading.
- Geneva Senior Associate Jason Marett and Associate Tiffany Monteiro Ferreira report on a proposal to align Swiss regulations with the EU's CSRD.
- London Partner Barry Vitou finishes with an assessment of enforcement authorities' continued focus on commodities companies and provides practical tips on how to minimise risks.

We hope you find these articles useful. Please contact us if we can help further.

You can find team news and where to meet us next on the back page.

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FREEDOM OF CONTRACT - FREE OF ACTIVISM: TRENDS IN CONTRACTUAL INTERPRETATION EMERGING FROM RECENT UK SUPREME COURT JUDGMENTS

During 2024, the UK's highest court, the Supreme Court, has demonstrated continued judicial fidelity to the parties' agreement and a determination to protect certainty and predictability as key pillars of English commercial law.

Its decisions in *RTI Ltd v MUR Shipping BV [2024] UKSC 18* and *Herculito Maritime Ltd and others v Gunvor International BV and others [2024] UKSC 2* (***The Polar***) have exemplified this respect for the doctrine of freedom of contract. Both decisions evidence the Supreme Court's reticence to adopt an activist approach and renegotiate commercial bargains.

The doctrine of freedom of contract is a fundamental building block of the English common law. It establishes that parties have a general freedom to enter into legally binding agreements and formulate individual terms within such an agreement. The court must respect the terms of a contract entered into by freely consenting parties of full capacity and refrain from illegitimately rewriting the agreement they have reached.

RTI Limited (RTI) v MUR Shipping BV (MUR)

In 2016, MUR and RTI entered into a contract of affreightment (**COA**) under which MUR was to make monthly shipments of bauxite and RTI was to make corresponding monthly payments in US dollars. The COA contained a force majeure (**FM**) clause which stated that an event would only be considered a FM event if it could not *"be overcome by reasonable endeavours from the party affected"*.

In 2018, the US Department of the Treasury's Office of Foreign Assets Control (**OFAC**) applied sanctions to RTI's parent company, making RTI subject to the same restrictions as its parent. As a result, MUR sent an FM notice, suspending performance under the COA and noting that payment in US dollars (as required by the COA) would be delayed by the sanctions. RTI rejected the FM notice and offered to pay in Euros instead and to bear any additional costs or exchange rate losses suffered by MUR as a consequence. MUR maintained its right to payment in US dollars.

RTI commenced arbitration, claiming damages for the costs of chartering seven replacement vessels for the period during which MUR had suspended performance. The tribunal found for RTI and held that, although the imposition of sanctions causing delay in payments in US dollars would otherwise constitute a FM event, MUR could not rely on the FM clause because that event could have been overcome by MUR's reasonable endeavours (accepting payment in Euros instead of US dollars).

MUR appealed to the High Court. The Court held that the exercise of reasonable endeavours could not require MUR to accept non-contractual performance. RTI appealed. In a majority decision, the Court of Appeal reinstated the decision of the tribunal. MUR appealed.

The Supreme Court was tasked with deciding "*whether the requirement of overcoming [force majeure] by reasonable endeavours extends to the party affected having to accept some form of non-contractual performance by the other party*".[1] MUR submitted that in the interests of contractual certainty, reasonable endeavours provisos should not be extended to offers of non-contractual performance unless the parties expressly agree otherwise.

The Supreme Court agreed, holding that "*the principle of freedom of contract includes freedom not to*

1 Professor Edwin Peel, "Overcoming force majeure by reasonable endeavours" [2023] LMCLQ 177.

contract; and freedom not to contract includes freedom not to accept the offer of a non-contractual performance of the contract".[2] It confirmed that in order to forego valuable contractual rights, clear words are needed and that certainty and predictability are of particular importance in the context of English commercial law.

This decision has the obvious benefits of commerciality and certainty: if the Supreme Court had found that reasonable endeavours provisos *did* extend to non-contractual performance, it would have required potentially complex inquiries as to whether the acceptance of non-contractual performance would, in fact, be of no detriment to the innocent party and whether it would achieve the same result as the contractual performance in question.

The Polar

The MT POLAR was seized by Somali Pirates in 2010 whilst transiting the Gulf of Aden. It was released in 2011 after a substantial ransom payment. The shipowner declared general average and a large proportion of the general average adjustment related to the ransom. Cargo interests claimed they had no liability in general average in respect of the ransom payment. They argued that on the true construction of the bills of lading, the shipowner's only remedy was to recover under the terms of additional insurance cover, taken out in relation to such risks pursuant to the terms of the voyage charterparty, the premium for which was payable by the charterer. They described this as an "exclusive insurance code."

The dispute was referred to arbitration and the tribunal held that the cargo interests did not have to contribute to general average. The shipowner's appeal was upheld by the Commercial Court. Cargo interests appealed to the Court of Appeal which dismissed the appeal, finding that the cargo interests did have to contribute to general average. The case went to the Supreme Court.

The Supreme Court had to consider (1) whether the charterparty contained an implied insurance code; (2) whether clauses in the charterparty had been incorporated into bills of lading; (3) whether on the proper interpretation of those clauses in the bills of lading and/or by implication, the shipowner was similarly precluded from claiming for such losses against the bill of lading holders; and (4) whether wording of clauses should be manipulated to substitute the words "*the Charterers*" with "*the holders of the bill of lading.*"

The Supreme Court found that an implied insurance code did not exist, that charterparty clauses had been incorporated into the bills of lading and that the wording of the relevant clauses should not be manipulated in order to substitute the words "*the Charterers*" with "*the holders of the bill of lading*".

In its decision, the Supreme Court held that to find that an insurance code had been agreed between the parties, it would have to be shown that an insurance code was a necessary consequence of what had been agreed. This was not the case. To search for an implied insurance code would necessarily introduce uncertainty and, if parties had intended to provide that there be no right of recovery in respect of insured losses, that could have been easily stated in the charterparty.

When determining whether clauses in the charterparty had been incorporated into the bills of lading, the Supreme Court emphasised the importance of certainty and predictability again and cited Bingham LJ in *The Federal Bulker*: "*it is preferable that the law should be clear, certain and well understood than that it should be perfect*".[3]

Finally, the Supreme Court ruled that there should be no manipulation of charter clauses in order to make the wording fit the bill of lading unless this was "necessary". It was not necessary in this case and to manipulate the wording would introduce uncertainty for holders of bills of lading.

HFW Comment

In both of these cases, the Supreme Court has affirmed that it is not the courts' role to interfere in the drafting of a contract agreed between commercial parties. Terms will not be implied into commercial contracts unless it is necessary to do so. The parties will be free to formulate individual terms governing their relationship and the courts will refrain from adopting an activist approach and re-negotiating commercial bargains. Certainty and predictability remain key pillars in English commercial law.

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2 RTI Ltd v MUR Shipping BV [2024] UKSC 18 [42]

3 Federal Bulk Carriers Inc v C Itoh & Co Ltd (The Federal Bulker) [1989] 1 Lloyd's Rep. 103

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NAVIGATING THE CHALLENGES AND OPPORTUNITIES OF THE ENERGY TRANSITION

We are in the middle of a significant energy transition, unprecedented in both scale and speed. There are many interdependencies that must align and crossroads that economies and businesses must navigate on their energy transition journey. Understanding the challenges presented, but also the opportunities afforded, will allow them to establish a strong pathway so as to navigate that journey successfully.

Challenge/opportunity one: scale

The current transition to clean, sustainable energy sources is one of the most significant undertakings in recent history. The Paris Agreement set a goal to limit global warming to below 2 degrees Celsius above pre-industrial levels (with an ambition of 1.5 degrees) by 2050. To achieve this requires a huge, immediate push in the scale and pace of technology deployment. The time between now and 2030 is critical to meeting the ambition. According to the International Energy Agency (**IEA**), annual progress in global energy intensity improvement must rise from a 2022 baseline of 2% per year to a little over 4% per year between now and 2030.[1]

Recent research by McKinsey has found that to overcome the physical challenges presented by the energy transition, "*billions of low-emissions assets – for instance, about one billion EVs, over 1.5 billion heat pumps, and about 35 terawatts of low-emissions power generation capacity – would need to be deployed by 2050 alongside scaling supporting infrastructure such as the grid, EV, charging stations, and supply chains*".[2]

As the energy transition advances, McKinsey identified 11 high potential sectors that could be worth USD 12 trillion in annual revenues by 2030: industrials (including steel and cement); hydrogen; agriculture and land use; water; buildings; carbon management; waste; oil, gas and fuels; consumer; power; and transport.[3]

The transition is in its early stages. It is ever evolving and the markets and technologies for emissions reduction are still maturing. While it is not quite a case of "one step forward, two steps back," the nature of the physical power system means that developments are often faced with interdependent challenges.

Challenge/opportunity two: practical and physical realities

The energy transition requires physical and structural transformation. Achieving this presents both challenges and opportunities.

In 2023, the world's capacity to generate electricity from renewables increased faster than at any time in the past three decades.[4] Developments in certain areas like EV sales (with global sales set to reach 17 million in 2024) and the addition of new renewable capacity have been significant and record-breaking year on year[5].

However, overall, progress has slowed. There are various reasons for this, but many stem from the physical reality of the energy system. It is hard to change that system quickly – yet that must happen in order to meet the Paris Agreement ambition.

Globally, there have been significant investment announcements but many have not reached FID[6] (and likely won't until after the critical

1 International Energy Agency, Energy Efficiency 2023, page 96.

2 McKinsey Global Institute, "The hard stuff: Navigating the physical realities of the energy transition", August 2024, page 9.

3 McKinsey Global Institute, "Accelerating toward net zero: The green business building opportunity", June 2022.

4 See, International Energy Agency, Renewables 2023: Analysis and forecasts to 2028.

5 International Energy Agency, "The world's electric car fleet continues to grow strongly, with 2024 sales set to reach 17 million", 23 April 2024.

6 Final Investment Decision.

2030 period). We have seen this trend particularly in nascent industries like hydrogen and carbon, capture, utilisation and storage (**CCUS**). The IEA recently reined in forecast growth in Spain, Australia, Oman and multiple ASEAN countries. Reasons for this include undersubscribed renewable energy auctions, slow progress in large-scale renewable capacity for hydrogen and production, long project development lead times, sustained policy uncertainty and power supply gluts limiting additional renewable deployment in the short-term.[7]

According to McKinsey's analysis of project commitments in the EU and USA, the major issues threatening deployment of technologies are certainty of economic returns, many technologies not yet being cost competitive for consumers, and key technologies having not yet been tested at scale.[8]

The scale and complexity of the physical transformation is illustrated by McKinsey's analysis which suggests that globally, there are seven, interrelated physical domains that must change in order to achieve it. The first is the power domain (by reducing emissions and providing clean energy). This feeds into the mobility, industry and buildings domains. Then there are the enabling domains of raw materials (including critical minerals), new fuels and carriers, and carbon and energy reduction.[9] We consider some of these domains and what this analysis means for businesses and advisers below.

Challenge/opportunity three: the domains

The power domain

A major issue in the move to ready power systems to operate on 100% renewable energy is how to manage the associated high degrees of intermittency and variability. During the transition, the firming baseloads of gas and coal power must be reduced and replaced. While energy storage technologies are advancing, we need a flexible power system, with interconnections and transmission upgrades so as to unlock planned renewable energy projects. Private investment must also be stimulated. The Australian Government is trying to achieve this with underwriting agreements for large-scale renewable energy and clean dispatchable storage projects, and a AUD 20 billion concessional fund for transmission infrastructure developments and upgrades.

Land access and approvals for renewables projects is another factor which can stall investment and progress. Availability of land, with both the right characteristics for solar and wind projects and in the right location for grid connection, is often a challenge, even in Australia where there are seemingly endless vast open spaces.

Industry and the big 4 pillars

Industrials are lagging behind in the energy transition, with processes still reliant on fossil fuels and carbon-heavy raw materials. For example, the cement and steel sectors account for nearly 40% of European

7 Ibid, no. 5, page 18.

8 McKinsey Global Institute, "The energy transition: Where are we, really?", 27 August 2024.

9 Ibid, no. 2, pages 11, and 63 – 173.

"Overcoming one challenge often unlocks a raft of opportunities in another area. Above all, understanding the challenges presented and the opportunities afforded by the global energy transition can assist business and advisers in navigating it successfully."

industrial emissions.[10] With CCUS hubs anticipated to store an average of 10 million tonnes of carbon dioxide per year by 2030,[11] the introduction of shared CCUS hubs to decarbonise the big four industrial pillars of steel, cement, plastics and ammonia requires scaling up.

As energy intensive industries, these four pillars are ideal candidates to use hydrogen as a feedstock, with facilities often co-located in regions favourable to hydrogen production. The need for green steel, processed using renewable energy (including hydrogen), is particularly acute, especially with a reported downturn in China's steel sector. To achieve this, project lead times need to reduce and policy must focus on creating demand for low-emission products. The Australian Government has just released its 2024 National Hydrogen Strategy,[12] with one of its objectives being to identify and support the most likely sectors for hydrogen use (including steel and ammonia). It has also signed a bilateral agreement with Germany to deepen cooperation on green hydrogen supply chains, ensuring European buyers for Australia's renewable hydrogen producers.

Enabling sufficient supply raw materials

Enabling sufficient supply of the raw materials required for producing solar panels, batteries and wind turbines – including the critical minerals of lithium, nickel, cobalt and copper – is key to the successful deployment of decarbonisation technologies. How will the supply for these materials keep pace with demand, if the transition is to stay on target? Will policy development allow countries to benefit from a green premium on the materials? These questions are facing countries around the world. The Minerals Council of Australia[13] recently outlined the need for a strong mining sector and good policies that unlock private sector mining investment and improve the chance of projects reaching FID, improve links with strategic overseas partners and allow integration into the fast growing, high demand global clean technology supply chains. It is hoped that this will foster Australia's ambition of becoming a renewable energy superpower.

HFW Comment

The energy transition journey may be a bumpy one, but it cannot be avoided. To date, "*deployment of low-emissions technologies is only at about 10 percent of the levels required by 2050 in most areas, and that has been in comparatively easy use cases.*"[14] Innovative decarbonisation technologies like CCUS are required at scale, and quickly. What complicates the roll-out is that the entire value chain is involved, and there are kinks in some of those chains (as noted above). Despite the challenges, the energy transition is full of opportunity, now and going forward, both from an economic, social and value creation perspective. Overcoming one challenge often unlocks a raft of opportunities in another area. Above all, understanding the challenges presented and the opportunities afforded by the global energy transition can assist business and advisers in navigating it successfully.

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10 Equinor, Energy Perspectives 2024, page 34

11 The CCUS Hub, "CCUS Basics: Understanding CCUS".

12 Department of Climate Change, Energy, the Environment and Water, National Hydrogen Strategy 2024.

13 Minerals Council of Australia, An investment strategy for a resource-intensive future: Minerals+, September 2024.

14 Ibid, no. 2, page 9.

DEVELOPMENTS IN SANCTIONS AND THE LAW OF UNINTENDED CONSEQUENCES

Sanctions are a powerful tool in international relations which have been increasingly used by governments and supra-national bodies to influence the behaviour of other nations. While the primary goal of sanctions is to compel a change in policy or behaviour, they can also lead to a range of unintended consequences that may create new challenges for those seeking to comply in a complex and fast changing regulatory environment.

In this article, we consider developments in the use of sanctions, the impact they have had on commodities traders – sometimes unexpected – and how traders can respond.

Why has the sanctions landscape changed so rapidly?

Sanctions are typically imposed to achieve specific objectives, such as:

- deterring military aggression or other hostile activities.
- pressuring governments to improve their human rights records.
- preventing nuclear proliferation.

Until a few years ago, the impact of international sanctions on countries with a global footprint was relatively limited. Simply put, Iran, Syria and the DPRK did not, in reality, enjoy significant bilateral trading arrangements with the West in the first place, so the imposition of sanctions had little practical effect. All that changed on 22 February 2022, when Russia invaded Ukraine. The international response to that decision has now seen multiple rounds of new sanctions imposed against Russian-related activities. These sanctions, while broadly aligned, are nuanced and reflective of each imposing government's risk appetite, intelligence and exposure to, in particular, Russian-generated fuel sources. Given Russia's extensive global trading relationships, the sanctions have had a significant impact.

What has been the impact?

The effect of the expedited passage of a range of sanctions onto the statute books has resulted in a number of unintended consequences. Some examples include:

Approvals and licences

While there is generally a level of coordination between governments and blocs in relation to sanctions targets, the same cannot be said for exceptions and permissions. Layers of prohibitions from different jurisdictions have resulted in the need for multiple rounds of approvals. This creates significant administrative and financial burdens for those who need to procure multiple approvals.

Disruption to correspondent banking

Certain correspondent banks have adopted a conservative approach to sanctions compliance, refusing to make what would otherwise be lawful payments on the grounds that to do so might constitute a breach of sanctions. Originally, the UK's Office of Financial Sanctions Implementation (**OFSI**) had stated that this conservative approach was incorrect and issued a clarificatory general licence. However, OFSI later amended the law to align with the conservative approach adopted by the banks, creating rather than resolving uncertainty.

The meaning of "control"

The Court of Appeal's obiter comments in *Mints v PJSC National Bank Trust [2023] EWCA Civ 1132* suggested that every company in Russia might be subject to sanctions on the grounds that it could be controlled by Vladimir Putin. This created short-lived panic for those with any exposure to Russian counterparties which was, to a degree, remedied by a statement by OFSI that "*for the purposes of regulation 7(4) of the Russia (Sanctions) (EU Exit) Regulations 2019, the UK government does not consider that President Putin exercises indirect or de facto*

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control over all entities in the Russian economy merely by virtue of his occupation of the Russian Presidency. A person should only be considered to exercise control over certain private entities where this can be supported by sufficient evidence on a case-by-case basis."[1] However, the delta between judicial commentary and non-binding guidance issued by OFSI continues to create uncertainty.

Freezing of a non-designated person's funds as a result of their transfer from a sanctioned bank

This can occur whenever a bank has a UK nexus and considers it prohibited to process transactions involving sanctioned financial institutions unless there is a relevant exception or licence from OFSI. There is currently no clear exemption or licensing ground to rely on for a non-designated client's funds to be unfrozen.

Interruption of supply chains

The UK has not sanctioned third country trading or transport of, for example, Russian coal to third countries. It has however designated Russian Railways and all coal and, indeed, the majority of Russian commodities, are transported in Russia via Russian Railways. Effectively, this could mean that UK persons are cut off from all Russian trade.

For commodities businesses, the impact has been potential regulatory exposure, exposure to legal challenges and litigation, and commercial and administrative headaches.

Globally, the result of these discrepancies and unintended consequences is a bifurcation of world trade and the creation of secondary markets. For example, Russian crude oil is now routinely exported to and refined in India and there has been a movement of vessel insurance to non-Western providers.

How can commodities companies respond?

There is no simple, or single, answer to how to address these issues. Sanctions risk should always be considered on a case-by-case basis. It is important to remain nimble as a business and ensure that compliance functions are well-versed in the application of sanctions to global business. Some sensible steps to consider include:

- Identify applicable regulatory regimes. This will involve having a checklist including the governing law of contracts, nationality of employees, location of the goods being traded, currencies involved, and locations where business is conducted.
- Conduct regular reviews of customers and their locations to ensure that newly sanctioned individuals or blocked industries are promptly identified.
- Identify any goods planned to be exported to counterparties in jurisdictions in which there are sanctions.
- Identify third party risks, for example, actual and potentially impacted suppliers and consider alternatives.
- Identify any transactions with sanctioned entities that involve ongoing or continuing obligations.

1 Ownership and Control: Public Officials and Control guidance - GOV.UK (www.gov.uk)

> “Traders are well advised to ensure that knowledge of and compliance with sanctions is firmly embedded in their business to minimise the potential for breaches and the costs of having to address queries from the regulators, or worse, having to defend an enforcement action.”

- Identify all contracts with exposure to sanctioned jurisdictions. Assess:
  - contractual rights, including force majeure, illegality, suspended performance termination or wind-down, rights to request amendment to payment terms, including changes to currency of the contract and pre-payment.
  - payment provisions.
  - sanctions-related warranties and indemnities.
  - notice provisions.
- Engage with banks and insurers to ensure that finance facilities and cover are not impacted.
- Prepare a sanctions compliance guideline policy which should include operational procedures and communications strategies sufficient to respond if new sanctions are imposed on short notice.
- Consider the need to apply for EU, UK and/or US licences for any activity that may otherwise be a breach of sanctions.

Conclusion

The effect of sanctions on a targeted nation is significant and ranges from damage to its economy to a reduced capacity to produce weapons. For commodities traders, the consequences of sanctions are also significant and the scope for further sanctions going forwards is readily apparent. Increased multilateral coordination on sanctions between the US, EU and UK has generally also broadened the scope of applicable sanctions. Considering this coordination, there is a heightened risk of both inadvertently breaching sanctions and running into practical difficulties. For instance, although a particular transaction may not have a US or UK nexus, many banks refuse to process payments which they view as presenting a US or UK sanctions risk to ensure their own compliance. Similar concerns can arise with insurers and other service providers.

Of potentially more immediate concern, however, is the enforcement landscape. Notwithstanding the various unintended consequences identified in this article and the speed and scale with which sanctions against Russia, for example, have developed, regulators are now turning their minds to ensuring compliance is a key part of doing business globally and this is achieved through enforcement activity. Therefore, traders are well advised to ensure that knowledge of and compliance with sanctions is firmly embedded in their business to minimise the potential for breaches and the costs of having to address queries from the regulators, or worse, having to defend an enforcement action.

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THE GROWTH OF SUSTAINABILITY REGULATION: NEW SWISS SUSTAINABILITY RULES - WHAT COMMODITY TRADERS NEED TO KNOW

As the commodity sector grapples with increasing demands for sustainability information from regulators, banks and consumers, Swiss companies are facing new sustainability reporting challenges.

The Swiss Federal Council has proposed amendments to the Swiss Code of Obligations to align Swiss regulations with the EU's Corporate Sustainability Reporting Directive (**CSRD**). These changes would significantly expand the number of companies required to report and would introduce stricter standards, including mandatory external audits. Traders and banks should prepare for these new reporting obligations, which may affect compliance costs, sustainability targets, and have implications for sustainability linked financings.

Why now?

The EU has introduced tougher sustainability reporting requirements for certain companies incorporated, or with a significant presence, in the EU. The new EU rules are set out in the CSRD, which entered into force on 18th December 2022 and will be phased in for entities which are 'in scope' from the 1st January 2024 until 2029.

The CSRD amended existing EU reporting rules that applied under the Non-Financial Reporting Directive. The EU reporting rules now impose reporting requirements on approximately 50,000 entities (as opposed to 11,000 entities under the previous rules).

The CSRD forms part of the EU's efforts to position itself as a leader on sustainable finance. The changes to the EU rules will, directly or indirectly, affect many Swiss companies because of the close economic ties between Switzerland and the EU. Swiss companies with significant activity in the EU, or which have EU-listed securities, will be required to report under the CSRD.

As the existing Swiss rules are closely aligned with the pre-CSRD rules, the Swiss Federal Council has proposed that Swiss law should evolve to keep pace with the changes to the EU rules. The amendments to the Swiss rules would expand the number of companies subject to reporting requirements from around 300 under current rules, to approximately 3,500 companies.

How closely would the new Swiss rules be aligned with the CSRD?

The new Swiss rules are broadly aligned with the CSRD. They would apply to companies that meet a financial threshold test and have more than 250 employees (as opposed to 500 employees under current Swiss rules). The financial threshold test would be met either by having total assets of more than CHF 25 million or sales revenue of more than CHF 50 million, over two consecutive years[1]. There are exemptions for certain small companies.

They adopt the 'double materiality' concept, a key concept under the CSRD. This means companies would have to report not only on how ESG issues impact the company, but also on the external impact of the company's activities on sustainability issues.

Like the CSRD, they would also require sustainability information to be audited by an independent third party. This is in contrast to the current Swiss reporting rules, under which companies are not required to verify sustainability reports.

One significant difference between the proposed Swiss rules and the

1 Companies with fewer than 250 employees are also within scope of the reporting requirements if they meet both limbs of the financial threshold test, subject to exemptions.

CSRD is that Swiss companies would be free to choose whether to adopt the European Sustainability Reporting Standards (**ESRS**) or another equivalent standard for sustainability reporting.

What must be reported?

In-scope companies would need to report on "sustainability aspects" ("*Nachhaltigkeitsaspekte*") relating to environmental risks, social issues, human rights and governance. Whilst the current reporting rules refer to these kind of issues as "non-financial matters", the Swiss Federal Council has recognised that such information can indeed be financially relevant. The proposed rules therefore adopt the terminology of "sustainability" information. This follows the EU approach under the CSRD.

Environmental factors include progress towards the achievement of net-zero greenhouse gas emissions (**GHG**) by 2050. The notes to the draft legislation explain that climate reporting would include scope 1, scope 2 and scope 3 GHG emissions, in accordance with the current GHG Protocol Corporate Accounting and Reporting Standard.

As mentioned, Swiss companies would be free to choose whether to adopt the ESRS or an equivalent standard.

How would the new rules affect the commodity sector?

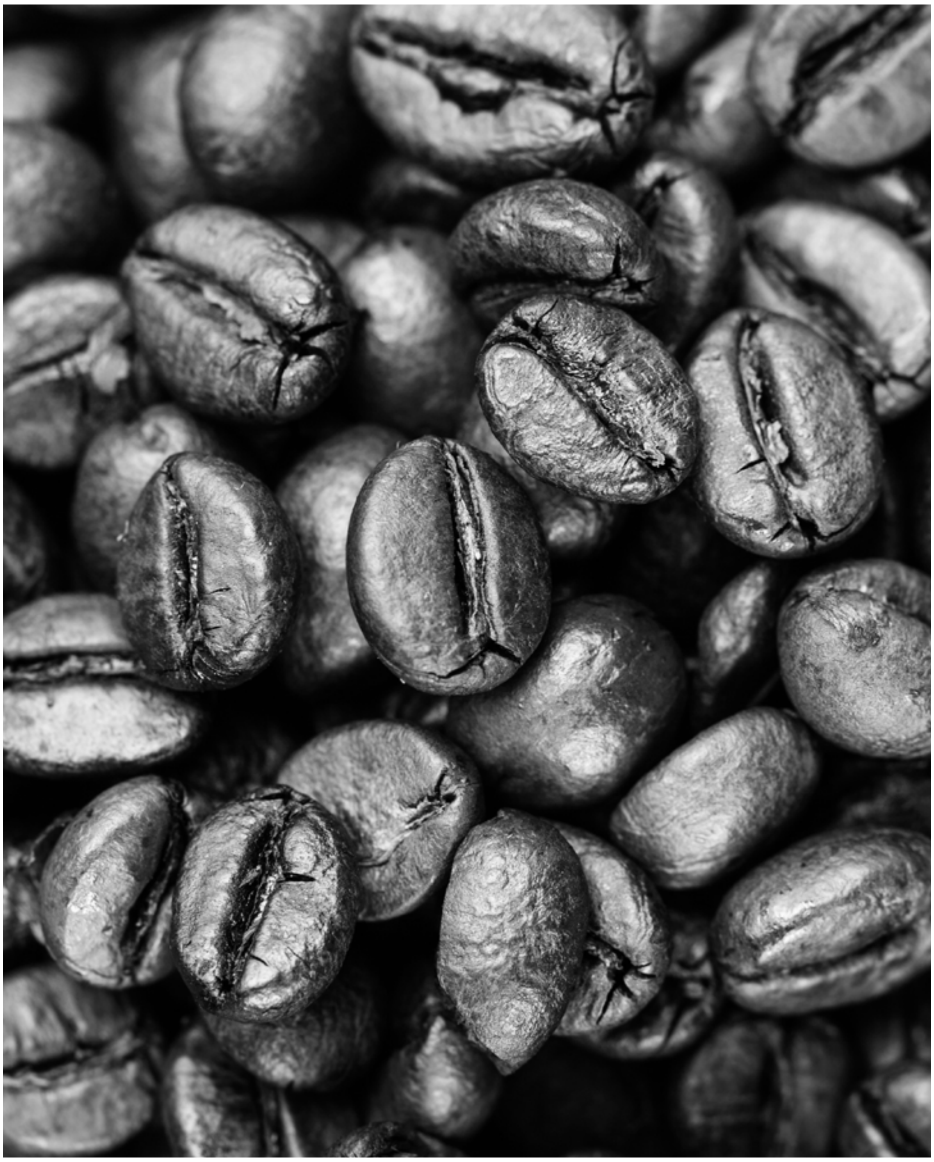
If the new rules become law, more companies will be required to report and the sustainability reporting requirements will be stricter. There would also be a mandatory external assurance requirement and non-compliance could lead to penalties under Swiss criminal law.

Swissnégoce, the Swiss Commodity Trading Association, has published an open letter to the Swiss government supporting the harmonisation of the Swiss rules with the CSRD, but highlighting the potential costs to Swiss companies in the commodities sector. It has called for the Swiss government to consider providing financial support for reporting and auditing costs. It has also called for the rapid development of Swiss sustainability standards equivalent to the EU standards, to avoid double reporting.

For its part, the Federal Council has stated that it is currently examining how the federal government could provide Swiss companies with tools to implement the new requirements.

What happens next?

The consultation period ends on 17th October 2024. If the new rules are adopted, there is expected to be a two year transition period. This means that, were the changes to come into force by the start of 2025, the new reporting rules could be applicable for the 2027 reporting period.



What can companies do to prepare?

Swiss companies will need to prepare for the potential rule changes and should consider the following key steps:

- **Awareness.** Ensure you are familiar with both the proposed Swiss regulations and the CSRD, as well as the relevant reporting standards.
- **Assess current reporting.** Assess your current sustainability reporting frameworks, including any voluntary sustainability standards with which you comply. Determine whether these are aligned with the new Swiss rules and other reporting rules to which you may be subject in the markets in which you operate (e.g. CSRD).
- **Sustainability linked products.** Review any existing sustainability linked financings you are using. There may be opportunities to align the sustainability targets under these products with the information to be disclosed under your reporting obligations. This might help streamline sustainability compliance efforts, and strengthen any broader sustainability commitments.
- **Stay informed.** Engage with the Swiss Federal Council consultation process on the new rules and stay updated on any new developments. Speak to your advisors about how the rules will apply and the impact on your business and existing sustainable financings.

CURRENT SWISS SUSTAINABILITY REPORTING RULES

The current reporting rules were introduced by the Counter-Proposal to the Responsible Business Initiative and came into force on 1st January 2022 by an amendment to the Swiss Code of Obligations[2]. In summary:

- **Applies to a limited number of companies.** Only about 300 Swiss companies are currently within scope. These are, broadly, "public interest" entities (i.e. listed companies, financial institutions) that have more than 500 employees and **either** revenues of more than CH 40m or a balance sheet of more than 20 m.
- **Limited reporting requirements.** In-scope companies must report on ESG issues, including CO2 goals and respect for human rights. This includes reporting on relevant policies and risks to the business.
- **Internal approvals.** As a general rule, sustainability reporting must be approved by shareholders.
- **Audit/assurances.** Not required under the current rules.
- **Additional sustainability due diligence.** The current rules require certain entities in the minerals and metals sector, or whose supply chain might reasonably be at risk of using child labour, to carry out due diligence and provide reporting. These rules are not affected by the proposed changes to sustainability reporting.

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FRAUD, BRIBERY AND CORRUPTION CHARGES CAN CAUSE MORE THAN REPUTATIONAL DAMAGE. HOW CAN YOU MAKE SURE YOUR BUSINESS STAYS OUT OF THE HEADLINES?

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Recent bribery charges brought by the UK's Serious Fraud Office against six individuals who have worked for commodity traders are a further reminder, if one were needed, of the authorities' focus (and corresponding headlines) on commodity trading and alleged misconduct.

We do not expect this focus to change, in the UK or globally. In separate enforcement actions in the US, other commodity traders have been convicted and some of the largest commodity trading houses have been subject to fines and penalties running into billions of US dollars following lengthy multijurisdictional criminal and civil investigations. Enforcement actions elsewhere, including in Switzerland, remain ongoing.

The levying of fines, penalties and worse mask other huge costs to affected traders, including the time and money spent dealing with the investigations and their aftermath, which can include ongoing reporting obligations to law enforcement, up to and including the appointment of a 'monitor' (essentially an auditor), for a period of years following the resolution.

Outside of regulatory investigations, allegations of fraud have made headlines and spawned disputes worth hundreds of millions of dollars within the commodity trading community.

Given the high stakes, prevention really is better than cure. Here are three tips for keeping out of trouble.

TIP 1: Make sure your compliance programme is fit for purpose.

Have you checked your compliance programme recently? Are you confident that it works in practice? We recommend that compliance policies are dusted down and reviewed on a regular basis. A good programme will evolve and update to take into account feedback from the business and developments in the regulatory environment (for example, the new UK legislation on failure to prevent fraud and other changes which now make it easier successfully to prosecute corporates for fraud in the UK and abroad).

A really good programme will knit together with other processes and procedures so that it is integrated with them and not siloed.

It is important to ensure that your business does all the things that the compliance programme says it will do. While the law is not prescriptive about what your compliance programme should include, it is important that your business complies with the standards it has set itself. A programme which, for example, references annual training, or requires that a specific process is followed in certain circumstances, will be viewed as having failed if that training is not undertaken or that process is not followed.

TIP 2: Ensure your record keeping has kept pace with developments in communications

The use of BYO/other mobile devices and third party messaging apps within businesses has given rise to a very basic problem. Employers often no longer have control over the communication platforms used by employees.

Put another way, it is commonplace for those working for companies to download whatsapp and other messaging services to their mobile phones and for clients and others to message them using these services. While some businesses have outlawed the practice, in most cases this equates to burying your head in the sand. Businesses should factor in these new communication practices and consider how best to ensure that important business communications will be saved and available if and when they are needed.

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We have come across instances on more than one occasion where a business does not have records of key transactions because they were conducted using whatsapp on a former employee’s mobile phone, making it difficult or impossible to explain it to a regulator and/or to bring and/or to defend a civil claim.

TIP 3: Make sure your whistleblower hot line is working and that you are receiving complaints!

It may seem counterintuitive, but it is good news to receive complaints on your corporate whistleblower helpline.

On the one hand, whistleblowers are the catalyst for many regulatory investigations and adverse media stories and globally, there is a move to pay whistleblowers for tips, such is their value in bringing cases to the attention of regulators and law enforcement. However, on the other hand, whistleblowers offer an opportunity for a company to learn what might be going wrong and have the opportunity to address, remediate and fix a problem internally before it is escalated.

We strongly encourage businesses to ensure that whistleblower hotlines are well-publicised and that people use them.

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EVENTS & TEAM NEWS

Where you can meet the team next

Our **London Commodities Autumn Series** continues this October:

- **Wednesday 16 October** (online): exploring the impact/potential of Fuel EU Maritime with William Gidman, latest developments in sanctions with David Savage and EU Methane Regulation with Joshua Prest.

Our next **Trade Finance Series webinar** is on **6 November**, entitled *'The Celestial judgment – how do sanctions impact on obligations under letters of credit, guarantees and insurance?'*. It will be hosted by Matthew Cox and Olivier Bazin with David Savage.

For more information on upcoming HFW events, click here. If you are interested in registering to any of the above, please email events@hfw.com.

Other Team News

- The 17th edition of our Commodities Case Update, is now available. You can find it here, or see our post on LinkedIn here.
- Peter Zaman, Jefferson Tan, Christopher Ong and Farah Majid examine the challenges and opportunities presented by insetting, how it differs from offsetting and how it interacts with other voluntary decarbonisation initiatives. Read the full briefing here, or see our post on LinkedIn here.
- Olivier Bazin and Matthew Cox explore *Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd*, a key for the trade finance community. Read the full briefing here, or see our post on LinkedIn here.
- Sarah Hunt, Daniel Martin, David Savage, Sara Abhari and Amanda Rathbone provide a brief overview on newly announced sanctions against Russia. Read the briefing here, or see the LinkedIn post here.
- The latest article in our Bioenergy series, reflecting on the evolution of the Brazilian ethanol industry is available here, or on LinkedIn here.
- Adam Topping, Daniel Martin, Sarah Hunt, Sara Abhari and Violet O'Gorman consider the impact and scope of the Corporate Sustainability Due Diligence Directive, and the preparatory steps companies should take. You can read the full briefing here, or interact with the LinkedIn post here.
- Daniel Martin, David Savage, James Neale and Stephen Green consider *Celestial Aviation Services Limited v Unicredit Bank GmbH, London Branch*, in which the Court of Appeal handed down a judgment of significance to all those involved in the movement, financing and insurance of goods. Read the full briefing here, or see the LinkedIn post here.

Events and speaking opportunities

- On 11 September, Peter Zaman attended the S&P Global APPEC Carbon Conference and participated in the panel discussion on 'Navigating CORSIA in Asia: Challenges and opportunities' with distinguished panellists from Trafigura and the International Airlines Group (IAG).
- CAR, our cooperation firm, hosted Peter Zaman to meet clients and discuss topics including international carbon markets, voluntary carbon markets, CORSIA, and decarbonisation to clients across CAR's core sectors.
- Adam Richardson, alongside other industry professionals, hosted the monthly networking drinks for CommodityThursdays Singapore.
- On 18 September and 2 October, we hosted two breakfast seminars at our London office as part of our Commodities Autumn Series, sharing insights on the energy transition, new corporate sustainability due diligence obligations, current issues in global investigation and enforcement and recent commodities and insurance cases. Presenters included Jo Garland, Adam Topping, Roxanne Johnson, Barry Vitou and Nigel Wick.

HFW has over 700 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our commodities capabilities, please visit hfw.com/Commodities.

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