

PANORAMIC NEXT

Supply Chain Management

GLOBAL OVERVIEW

LEXOLOGY



Supply Chain Management

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In *Panoramic Next: Supply Chain Management*, a panel of leading practitioners from key jurisdictions address the most challenging legal and commercial issues faced by companies when managing their global supply chains. Covering hot topics including sanctions, export controls and ESG requirements, as well as practical contractual considerations, it offers useful insights to all organisations operating across borders.

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Global Overview

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It is universally acknowledged that modern supply chain management is a constantly evolving global challenge. From sanctions that can differ from jurisdiction to jurisdiction, to increasing regulatory reform and technological advances, modern business provides both risk and opportunity to international traders.

Lexology Panoramic Next: Supply Chain Management provides insight into and comparison between five key jurisdictions at the centre of global trade: Brazil, China, The Netherlands, Türkiye and the United Kingdom. In this overview, we look at key similarities and differences that can be found in the legal and regulatory regimes. The authors consider regulatory and sanctions, title and operational issues and look at what steps parties can take in drafting their contracts to mitigate common risks.

The authors have identified influencing factors on global trade, including tariffs and increasing environmental, social and governance (ESG) requirements, and have considered strategies to mitigate associated risk. Unsurprisingly, digitisation through blockchain and AI will be increasing factors as we look at the next few years; also unsurprising are the effects of operating on an unpredictable geopolitical stage.

As one might expect, a common theme across all jurisdictions was that contracts provide sophisticated mechanisms to deal with the impact of sanctions. It is common for sanctions clauses to include representations and warranties as to parties' compliance with sanctions laws, both in the countries where they are domiciled and more widely. Interestingly, it is also common for sanctions to be dealt with in a force majeure context, as advised by both the UK and Dutch lawyers.

Looking in greater detail, the position in relation to sanctions against Russia can be the subject of significant variation, from jurisdictions where sanctions can apply extra-territorially, leading to indirect compliance obligations, to countries that do not permit unilateral trade sanctions against a particular country or that have elected not to impose sanctions on Russia. Geopolitical divides can lead to gap risks for trading entities and care should be taken to understand all applicable (and potentially inconsistent) sanctions regimes with cross-border trades.

We do, however, see agreement from all jurisdictions as to the importance of transaction-specific detailed due diligence in mitigating sanctions and regulatory exposures.

ESG reporting requirements have developed significantly in recent times, with each of the five jurisdictions confirming that mandatory reporting requirements now apply. Regular self-assessments, engagement with stakeholders and trading partners, in addition to external audits, now form part of the recommended programme to ensure ESG compliance across the globe. Further, it is now considered best practice to include ESG compliance

provisions in bilateral agreements to mitigate the risk of accidental non-ESG compliance when trading.

Due diligence again features prominently in the advice provided in relation to mitigation of financial risk: as with the preparation of effective sanctions clauses, lawyers across the globe advise that careful pre-contractual due diligence measures are taken to assess counterparties. A variety of security measures are available across the five jurisdictions, including guarantees, pledges and promissory notes. It is clear that in addition to preparation of the security documents themselves, contractual clauses also require careful consideration and drafting to ensure and facilitate enforcement should that become necessary. One key factor that should not be overlooked is the potential requirement for registration of security in order to ensure effectiveness.

The lawyers consulted have advised on the passing of title and property in each jurisdiction and have identified the retention of title as a potential mitigant of financial risk. What is also clear is that while title to goods can be governed by statute in some jurisdictions, it is presumed to have passed on delivery in other jurisdictions. In cross-border transactions it is essential to understand (1) when title will pass; (2) how title will pass; and (3) where title will pass in order to ensure that effect is given to the parties' intentions. Whereas some jurisdictions (for example, the United Kingdom) will give effect to the written contract, this may not be universally the case. The passing of title is at the heart of any supply transaction, where an incorrect assumption or understanding of the underlying legal position can be extremely costly.

Other risks have been considered by the authors, including those arising from different forms of transportation. It is in this area that we see insurance playing an important role. While various authors refer to the possibility of credit insurance as one of the financial risk mitigants, all of the jurisdictions identify insurance in the context of transportation risk. In addition, some forms of insurance are compulsory in certain jurisdictions, depending on the mode of transport used.

Some jurisdictions have identified the applicability of international conventions, again depending on the mode of transport under consideration. This contrasts with jurisdictions where no convention or standard documents are required, highlighting again the gap risk that arises in cross-border transactions. Finally, the importance of understanding what standard documents are issued, the use of freight forwarders, and whether documents convey title or are mere receipts is addressed in these articles.

Across all the topics covered, a common theme is that of risk allocation in advance between the parties – whether financial risk, regulatory risk or performance risk – all should be clearly dealt with in the contractual documents. Almost all mitigation strategies are most effective if they are built into robust contractual provisions.



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