PANORAMIC NEXT

Supply Chain Management

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Contributing Editor

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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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What key environmental, social and governance (ESG) reporting requirements apply in your jurisdiction and what is their impact on supply chain management?

How can companies in the commodities and logistics sectors best prepare for upcoming and current ESG reporting requirements in your jurisdiction?

What key environmental and human rights due diligence requirements apply in your jurisdiction, and what steps and best practices should parties undertake to comply with these standards?

What contractual and practical measures can companies take to protect themselves from financial counterparty risk, including non-performance and insolvency?

How does title in goods pass? Are there any legal or documentary steps required before title in goods passes? Are there any mandatory statutory provisions relating to the passing of title?

What specific risks arise in relation to transport via vessel, road and rail? Are any standard contracts in use for each of these methods of transport?

What proactive risk management strategies can companies consider implementing to mitigate supply chain disruptions?

THE INSIDE TRACK

What are the three main concerns most regularly raised with you by clients in relation to supply chain management?

In the next ten years, what factors do you think will have the most impact on supply chain management?

In your view, what qualities should a lawyer advising in this area possess?

Profiles

ABOUT THE LAWYERS

Sarah Taylor specialises in international commodity trade and shipping, advising on trade structures, contract drafting, financing, litigation and arbitration, with expertise in both physical and derivative commodity contracts. Sarah deals with long-term supply projects and day-to-day trading and operational issues. She advises across the spectrum of energy commodities and natural resources, with particular expertise in base and precious metals.

Adam Topping specialises in regulatory and transactional matters, with a particular focus on the commodities sector, including the crossover with derivatives, digital trade, sustainability regulation and carbon markets. He advises on UK and EU financial services rules, commodity market rules, licensing and related compliance issues. He has been seconded to two investment banks and has worked in-house on oil, gas and LNG projects, negotiating energy documentation across the supply chain.

David Savage specialises in regulatory and white-collar criminal matters, with a particular emphasis on international sanctions and export controls. He advises individuals, banks and corporates on their obligations in doing business around the world, including the legal, regulatory, commercial and practical aspects of sanctions, fraud, corruption, money laundering, market manipulation and insider trading. He was previously group senior sanctions officer for a private bank.

Q&A

WHAT CONTRACTUAL MECHANISMS ARE AVAILABLE TO PROTECT PARTIES FROM THE IMPACT OF CHANGES TO THE SANCTIONS AND EXPORT CONTROLS LANDSCAPE?

The evolving sanctions and export controls landscape presents significant challenges for parties engaged in international trade and commercial relationships. From a UK perspective, the implementation of robust contractual mechanisms has become essential for protecting parties from the impact of sanctions changes, and various contractual mechanisms may be available.

The sanctions and export control clause is generally the most important contractual mechanism for protecting a party. The clause should contemplate a broad range of sanctions and sanctions authorities (eg, the European Union, United Kingdom and United States, etc), set out the parties to which it applies and allow the suspension and termination of the contract. At exactly what point termination should be permitted is a fine balance. On the one hand, parties should not be required to perform when this would breach applicable sanctions and export controls. On the other hand, parties should not improperly use the clause where there is no real risk of performance breaching sanctions or export controls. Finally, for security, the clause might include an indemnity for damages resulting directly and indirectly from another party's breach of sanctions. The transformation of sanctions clauses from 'nice to have' to 'must have' contractual provisions reflects the reality that sanctions regimes can change rapidly and with significant commercial consequences.

Sanctions are often dealt with via the force majeure clause. This will usually permit the suspension and potential termination of a contract upon the occurance of a specified

event stated in the contract. The force majeure clause should consider the extent of the obligations on parties to perform where potential sanctions issues may arise.

A material adverse change clause can provide additional protection where sanctions significantly impact business operations or the commercial viability of contractual arrangements. Such a clause must be carefully drafted to capture sanctions-related changes while avoiding overly broad language that could be subject to challenge. It should specifically reference sanctions designations, changes in sanctions regimes and regulatory compliance costs as potential triggers. The clause should define materiality thresholds and provide clear procedures for invoking its protections.

Representations and warranties clauses can be useful for parties, especially where the ownership (and therefore sanctions status) of a counterparty cannot be fully ascertained or for ensuring ongoing compliance with sanctions. In particular, depending on the contract, the breach of a representation may allow a party to terminate. Alternatively, a party may seek damages. However, representations and warranties are limited in that they will not prevent a party from the regulatory consequences of breaching sanctions, including civil penalties and criminal penalties.

WITH RUSSIAN SANCTIONS LIKELY TO BE IN PLACE FOR SOME TIME, WHAT ARE THE KEY CONCERNS FOR THOSE ENGAGING IN INTERNATIONAL TRADE WHERE THERE IS A RUSSIAN NEXUS?

The comprehensive sanctions regime imposed on Russia following its invasion of Ukraine in February 2022 represents one of the most extensive and complex sanctions programmes in modern history. The EU has issued multiple sanctions packages and over £20 billion of UK trade with Russia is now sanctioned. Therefore, a general key concern for those engaging in international trade has been and is likely to continue to be keeping up to date with the restrictions. This is crucial to ensure parties minimise the risk of sanctions breaches and the penalties and reputational damage that can follow.

Turning to specific issues, in the past year, the focus of regulators has moved to circumvention. As a result, there has been a noticeable increase in the number of persons in third countries being sanctioned for assisting circumvention. As the West seeks to further combat circumvention via third countries, parties must be aware of the sanctions risks posed by not only the activities and transactions directly involving a Russian nexus but also those with indirect connections, such as the involvement of jurisdictions known for circumvention. The UK government has identified several key evasion tactics that create significant risks for legitimate businesses. These are:

- indirect shipping routes designed to obscure the true origin or destination of goods;
- deliberate falsification of end-uses for traded goods to circumvent restrictions;
- professional evasion networks operating across multiple jurisdictions without the awareness of local governments;
- use of front companies and shell entities to obscure true ownership and control, which is particularly challenging given the different approaches to ownership and control adopted by the UK, the US and the EU; and
- complex corporate structures involving offshore companies and layered ownership arrangements.

Finally, a continued key concern, which is not likely to cease any time soon, is the extra-territoriality of US sanctions. US sanctions have a broad jurisdiction. In particular, US sanctions apply where a transaction involves US dollars or US financial institutions, even if there are no other US connections. Given this extra-territoriality, activities involving a Russian nexus that are otherwise permitted may still be caught by US sanctions, which can lead to potentially serious restrictions on access to the US financial market and severe penalties.

WHAT DUE DILIGENCE PROCESSES SHOULD PARTIES UNDERTAKE TO MITIGATE THEIR EXPOSURE TO POTENTIAL SANCTIONS?

The due diligence processes that should be undertaken to mitigate sanctions exposure will ultimately depend on the specific circumstances and a range of factors including the nature of the particular transaction, activity and parties.

However, generally most parties will need to consider undertaking the following.

Counterparty checks

This requires a party to know exactly who it is undertaking business with. This includes conducting sanctions checks on direct counterparties under a contract as well as any third parties who will be involved, for example, ports, producers of goods or the end-user of goods or services.

Goods checks

Parties should know the nature and origin of the goods and cargo they are dealing with. A key part of this is obtaining information to prove their origin and compliance with sanctions, such as harmonised system codes and the certificate of origin. Enquiries should be made in relation to where the goods have been exported from or are being imported to, especially when those places are known to be sanctioned or involved in circumvention.

Check existing arrangements with key stakeholders

Undertaking certain business whether sanctioned (or not) may impact a party's existing contractual arrangements with its key stakeholders. A party should review its insurance policies and lending arrangements, which may require compliance with sanctions (even where the insured are not subject to their sanctions jurisdiction).

Ongoing due diligence

While due diligence is important at the onset of a business relationship, it should continue throughout. Therefore, parties should have in place systems that allow for checks as well as at commercial key points, for example, prior to making payment to counterparties.

WHAT KEY ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) REPORTING REQUIREMENTS APPLY IN YOUR JURISDICTION AND WHAT IS THEIR IMPACT ON SUPPLY CHAIN MANAGEMENT?

In the UK, key ESG reporting requirements are driven by several regulations and frameworks aimed at enhancing transparency and accountability. One of the primary regulations is the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, which mandates certain large companies to include non-financial information in their annual reports. This includes disclosures on environmental matters, social and employee-related aspects, and human rights. Some large companies are also required to comply with streamlined carbon and energy reporting requirements (SECR).

Additionally, the UK government has officially endorsed the Task Force on Climate-related Financial Disclosures (TCFD) framework, requiring certain companies to disclose climate-related financial information. This includes governance around climate-related risks and opportunities, strategy, risk management, and metrics and targets used to assess and manage these risks.

The Modern Slavery Act 2015 is another critical piece of legislation, requiring businesses with a worldwide annual turnover of £36 million or more to publish an annual statement on the steps they have taken to ensure that slavery and human trafficking are not taking place in their supply chains.

The UK government has also published a framework to create UK sustainability reporting standards (UK SRS). If endorsed, it would entail the FCA potentially introducing requirements for UK-listed companies to report sustainability-related information to their investors. If a UK company has trading counterparts in the EU, it will likely also need to be aware of the obligations under new EU laws, such as CSRD, CSDDD, CBAM, the EU Deforestation Regulation and the EU Methane Regulation.

HOW CAN COMPANIES IN THE COMMODITIES AND LOGISTICS SECTORS BEST PREPARE FOR UPCOMING AND CURRENT ESG REPORTING REQUIREMENTS IN YOUR JURISDICTION?

Companies in the commodities and logistics sectors can best prepare for ESG reporting requirements by adopting a proactive and comprehensive approach. They should familiarise themselves with the relevant regulations and frameworks, such as the TCFD recommendations, the Modern Slavery Act 2015, the upcoming UK Sustainability Reporting Standards (UK SRS) and any other relevant and upcoming legislation globally.

To ensure compliance, companies should integrate ESG considerations into their core business strategies. This involves conducting thorough assessments of their current practices and identifying areas for improvement. Implementing robust data collection and reporting systems is crucial for tracking ESG performance and for ensuring accurate and timely disclosures.

Engaging with stakeholders (including suppliers, customers and investors) is also essential. Companies should communicate their ESG commitments and expectations clearly and work collaboratively with their supply chain partners to ensure compliance. This may involve providing training and support to suppliers to help them meet the required standards or developing an ESG policy and requiring suppliers to adhere to it.

Finally, companies should consider obtaining third-party certifications or joining industry initiatives that promote ESG best practices. This can enhance their credibility and demonstrate their commitment to sustainability and responsible business practices.

WHAT KEY ENVIRONMENTAL AND HUMAN RIGHTS DUE DILIGENCE REQUIREMENTS APPLY IN YOUR JURISDICTION, AND WHAT STEPS AND BEST PRACTICES SHOULD PARTIES UNDERTAKE TO COMPLY WITH THESE STANDARDS?

In the UK, environmental and human rights due diligence requirements are outlined in legislation. The Modern Slavery Act 2015 mandates certain businesses to report on the steps they have taken to prevent slavery and human trafficking in their operations and supply chains. Additionally, the proposed Commercial Organisations and Public Authorities Duty (Human Rights and Environment) Bill aims to impose a duty on companies to prevent human rights and environmental harms throughout their value chains.

To comply with these standards, companies should undertake comprehensive due diligence processes. This involves identifying, assessing and mitigating potential adverse impacts on human rights and the environment. Companies should conduct regular risk assessments to identify areas of concern and implement appropriate measures to address these risks.

Engaging with stakeholders (including affected communities, employees, and suppliers) is crucial for effective due diligence. Companies should establish grievance mechanisms to allow stakeholders to raise concerns and ensure that these are addressed promptly and transparently.

Implementing robust monitoring and reporting systems is also essential. Companies should track their performance against established benchmarks and report on their progress regularly. This includes disclosing information on their due diligence processes, identified risks and the measures taken to mitigate these risks. Robust monitoring is also required to counter the risk of greenwashing litigation against the company.

WHAT CONTRACTUAL AND PRACTICAL MEASURES CAN COMPANIES TAKE TO PROTECT THEMSELVES FROM FINANCIAL COUNTERPARTY RISK, INCLUDING NON-PERFORMANCE AND INSOLVENCY?

Depending on the type of transaction, several strategies can be employed to effectively manage counterparty risk prior to concluding contracts. Initial know your client (KYC) and due diligence on potential counterparties, including credit checks and market reputation analysis. Credit ratings from agencies can provide valuable insight into the likelihood of a counterparty default.

If there are concerns about a counterparty's ability to perform, or potential insolvency, there are a number of ways to secure performance or debts through collateral agreements as follows.

- Take out asset pledges (noting that, although pledges over movable goods do not require registration, some kinds of pledge require registration with the Land Registry or Companies House, depending on the nature of the asset pledged, in order to ensure enforceability).
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Obtain guarantees, including parent company and performance guarantees. It is important to ensure that the obligation undertaken by the guarantor is clear (performance by the counterparty or replacement performance by the guarantor) and that the limits of the guarantee (in terms of duration and amount) are clearly stated. Depending on the type of guarantee, the form may also be important for enforcement.

- Where selling goods, retention of title clauses can be used to ensure that title does not pass to a buyer until payment is received. If goods are in the control or possession of third-party storage providers, it is important to ensure that storage and insurance documentation is consistent with seller's ownership. Sellers may also wish to employ independent surveyors to monitor goods in storage.
- Where buying goods, risks arise as to obtaining good title in the event of an insolvent counterparty. Where available, the use of central counterparties such as exchanges can guarantee contract performance and remove the risk of individual counterparty default.

HOW DOES TITLE IN GOODS PASS? ARE THERE ANY LEGAL OR DOCUMENTARY STEPS REQUIRED BEFORE TITLE IN GOODS PASSES? ARE THERE ANY MANDATORY STATUTORY PROVISIONS RELATING TO THE PASSING OF TITLE?

Transfer of title to goods is primarily governed by the Sale of Goods Act 1979 (SGA). Section 12 provides for an implied condition of the contract that the seller has (or will have) the right to sell the goods at the time when property is to pass. Further terms are to be implied that the goods are free of encumbrances and the buyer will enjoy quiet possession. These terms are mandatory and cannot be contracted out of.

Subject to this, the general rule is that title passes when the parties intend it to pass. This should always be written into the contract, but if it is not specified for any reason, the passing of title can be implied by the conduct of the parties. In addition, there are rules as to when property will pass in certain circumstances, but it would be unwise to rely on these statutory rules and best practice is to clearly state in the contract what is required for title to pass, including when title is to pass.

Separate statutory requirements deal with goods in bulk. Under the SGA, goods must be ascertained before title can pass. Appropriation of part of goods in bulk to a contract is something that can give rise to disputes, for example, when there is insufficient bulk for a seller to perform all of its sale obligations to different buyers. Contractual provisions dealing with this situation are therefore recommended to buyers, to ensure that property in goods will pass as intended.

It is common practice for retention of title clauses to be included in contracts for the sale of goods, providing for title to pass when payment is received. There are different types of clauses, some providing for payment in part, others for payment in full before property in the goods passes to the buyer. It is essential that such clauses are carefully drafted so that they work as intended and do not create a security over the goods, rather than prevent the passing of title. Retention of title clauses can be particularly useful where a buyer's creditworthiness is in question because, in the event of the buyer's insolvency, if the seller has retained title to the goods they can reclaim possession and the goods will not be included in the buyer's insolvency.

WHAT SPECIFIC RISKS ARISE IN RELATION TO TRANSPORT VIA VESSEL, ROAD AND RAIL? ARE ANY STANDARD CONTRACTS IN USE FOR EACH OF THESE METHODS OF TRANSPORT?

Risks arise notwithstanding different methods of transport:

- risk of theft or damage to goods;
- risk from transporting dangerous goods;
- delay in contract performance due to strikes or congestion;
- loss of goods due to force majeure type events;
- security threats, including terrorism and piracy;
- errors in documentation; and
- trade restrictions where goods are travelling across different jurisdictions.

Each of these risks can be mitigated by the party who contracts for the transportation of goods; in cost, insurance and freight and cost and freight contracts, the seller will contract for the transportation of goods; in free on board contracts, the buyer undertakes this role.

Effective risk mitigants for each of the above-identified risks are as follows:

- ensure goods are insured, by the party with an insurable interest, to their full value;
- allocate risk under the sale and purchase contract, including responsibility for the nature of the goods with robust quality inspection and testing provisions; and
- provide clear and allocated consequences in the contract for delay in delivery, including the right to reject delayed goods where applicable.

As force majeure is a creature of contract, consider what events are likely to apply (depending on the chosen mode of transport) and ensure that a clear force majeure clause is drafted, including definition of what is a force majeure event, event notification provisions and consequences if the force majeure event extends beyond prescribed time limits, including the ability to terminate the contract if desired.

- consider whether additional security is required for particular routes;
- have robust back office document procedures, including for the review and approval of draft documentation before it is issued by the transport provider; and
- consider regulatory and other legal issues and take advice in advance of concluding contracts where necessary.

Standard documents are issued by transport providers, and it is essential to understand how different types of documents operate. Bills of lading are usually a negotiable instrument, capable of endorsement and transferring title in goods to the lawful holder. Note that 'straight' bills of lading are not negotiable. Bills of lading are governed by the Carriage of Goods by Sea Act 1992. Unlike bills of lading, airway bills are non-negotiable contracts of carriage that do not transfer title. Similarly, lorry receipts and courier receipts are generally non-negotiable proofs of transport and do not transfer title.

WHAT PROACTIVE RISK MANAGEMENT STRATEGIES CAN COMPANIES CONSIDER IMPLEMENTING TO MITIGATE SUPPLY CHAIN DISRUPTIONS?

Several methods can be used to mitigate potential supply chain disruptions, including the following examples:

- have robust sale and purchase contracts appropriate to the type of goods and transport method involved; do not rely on standard form or counterparty documentation. Ensure that, to the extent possible, the consequences of disruption and allocation of risk are clearly spelled out in the contract documentation;
- include optionality in sale and purchase and transportation documentation to allow for multiple potential points of delivery to mitigate the effects of unexpected tariffs or trade restrictions;
- consider the pros and cons of establishing a presence in the jurisdictions of shipping and delivery; and
- have a diversified portfolio of supply to minimise the consequences of delay.

The Inside Track

WHAT ARE THE THREE MAIN CONCERNS MOST REGULARLY RAISED WITH YOU BY CLIENTS IN RELATION TO SUPPLY CHAIN MANAGEMENT?

We have seen a noticeable increase in queries in relation to tariffs. This is unsurprising given the new US administration's fast-moving tariff policies. Whether this continues will depend on the wider geopolitical landscape and ongoing trade deal negotiations.

Compliance with both sanctions and ESG regulations and reporting is another major concern, in particular relating to the Russian oil and gas sector, which has seen heavy sanctions.

Last, managing costs effectively while maintaining quality and efficiency is a constant challenge, especially with fluctuating raw material prices and transportation costs.

IN THE NEXT TEN YEARS, WHAT FACTORS DO YOU THINK WILL HAVE THE MOST IMPACT ON SUPPLY CHAIN MANAGEMENT?

The drive for energy security and the fluctuating geopolitical landscape will continue to impact supply chains, with changes in sanctions, tariffs and export controls as governments seek to achieve both security of supply and political aims.

Additionally, the increasing importance of data security and cyber threats, coinciding with the rise in the digitalisation of trade, will have a major impact.

Finally, the growth in number and complexity of rules and laws regulating the supply chain will require companies to ensure they understand and keep abreast of which regulations apply to them. AI will have a significant role to play here.

IN YOUR VIEW, WHAT QUALITIES SHOULD A LAWYER ADVISING IN THIS AREA POSSESS?

A proactive approach and the ability to stay on top of the latest legal, political, industry and technological developments will be required to provide clients with up-to-date advice. A genuine interest in geopolitics and geolaw will be an advantage.

Commercial awareness is a must. Each client has a different risk appetite to be considered when advising. A key part of this is understanding the client's business and the factors that impact its risk appetite, such as regulatory requirements and key stakeholder relationships.

Clients often need quick advice in relation to their supply chain. Therefore, advising efficiently yet accurately is key.

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