International Chamber of Commerce
Policy and Business Practices

GUIDANCE PAPER ON THE USE OF SANCTIONS CLAUSES IN TRADE FINANCE-RELATED INSTRUMENTS SUBJECT TO ICC RULES

Prepared by the ICC Banking Commission

Summary and highlights

- IMPACT OF PROLIFERATION OF SANCTIONS CLAUSES IN TRADE FINANCE-RELATED INSTRUMENTS SUBJECT TO ICC RULES
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INTERNATIONAL CHAMBER OF COMMERCE
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Document No.470/1238

GUIDANCE PAPER

THE USE OF SANCTIONS CLAUSES IN TRADE FINANCE-RELATED INSTRUMENTS SUBJECT TO ICC RULES, INCLUDING DOCUMENTARY AND STANDBY LETTERS OF CREDIT, DOCUMENTARY COLLECTIONS AND DEMAND GUARANTEES

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The ICC Banking commission would like to express its appreciation of the Legal Committee members for their contribution to the revision of this paper and their crucial role in enhancing the clarity of its recommendations.

ICC BANKING COMMISSION

Founded in 1931, the ICC Banking Commission has evolved into the world's essential rule-making body for the banking industry.

ICC Banking Commission produces universally accepted rules and guidelines for international banking practice. ICC rules on documentary credits, UCP 600, are the most successful privately drafted rules for trade ever developed, serving as the basis of USD2 trillion trade transactions a year. In addition, ICC Banking Commission is helping policy makers and standard setters to translate their vision into concrete programmes and regulations to enhance business practices throughout the world. In past years, ICC Banking Commission has been active in producing guidance on issues of financial crime risk and prudential reforms.

With 80+ years of experience and more than 600 members in +100 countries, the ICC Banking Commission has rightly gained a reputation as the most authoritative voice in the field of trade finance.

The Use Of Sanctions Clauses In Trade Finance-Related Instruments Subject To ICC Rules, Including Documentary And Standby Letters Of Credit, Documentary Collections And Demand Guarantees

1. Introduction

1.1 The use of clauses in relation to trade, economic or financial sanctions or embargos (“sanctions”) in trade finance-related instruments that are subject to the rules drafted by the ICC Banking Commission (“ICC rules”), stating banks’ intention to comply with sanctions regulations, has become a problematic issue for banks involved in trade finance transactions, including, particularly, irrevocable, independent documentary and standby letters of credit, demand guarantees and counter-guarantees.

1.2 Sanctions are imposed by the United Nations, the EU Council or individual countries to achieve political and economic ends. They may prohibit dealings with specific countries, persons or property. The need for sanctions is a political matter outside the realm of the ICC. The enforceability of sanctions is a question to be decided by courts, national regulators or administrative agencies; it is not an issue that can be addressed by rules of banking practice such as ICC rules. Accordingly, ICC rules do not address how sanctions should be interpreted or their impact on the trade finance-related instrument in which they are incorporated.

1.3 Sanctions may restrict a bank’s ability to perform its role under ICC rules. International banks may be confronted with different sanctions regimes imposed in the multiple jurisdictions in which they operate. As a result, those banks may be subject to conflicting regulatory requirements, and consequently be amenable to formulating internal policies to mitigate the resulting legal risks. Some banks have chosen to control these legal risks by use of sanctions clauses.

1.4 Sanctions laws and regulations to which a bank engaged in a trade finance-related instrument is subject may include those of its country of operation, its country of incorporation or registration, the country of the currency or the place of payment, and any other jurisdiction whose laws govern the transaction. Where they are determined to be applicable to the instrument, sanctions laws and regulations are generally considered as being mandatory and thus may override the ICC rules applicable to that instrument and, more generally, the contractual terms of the instrument. If these are the only sanctions laws and regulations applicable to the parties, adding a clause in a trade finance-related instrument stating the bank’s commitment to respect such sanctions law or regulation applicable to it by law may be unnecessary and lead to confusion. In some circumstances, banks may even face legal liability in some countries if mandatory laws prohibit the use of such clauses on grounds of discrimination (see paragraph 2.3 below).

1.5 The purpose of this Guidance Paper is to highlight certain issues arising from the use of such clauses and recommend best practices in that respect.

2. Sanctions clauses

2.1 Concerned about the implications of sanctions for their own obligations under trade-related transactions, and seeking to notify their counterparties, whether correspondent banks or beneficiaries, banks sometimes include so-called “sanctions clauses” in transaction documents.

2.2 There is no standard for these clauses and they vary considerably in their scope. Where they simply state: “[The bank] is under a statutory duty to comply with sanctions laws and regulation mandatorily applicable to [it]”, they are merely informational and do not extend beyond applicable laws and regulation.

2.3 Some countries have legislation that prohibits, on grounds of discrimination, any reference to “exclusion” or “boycott” regulation or language in any transaction unless such exclusion or boycott is required under the laws of those countries. In those countries, the inclusion of sanctions clauses in a trade finance-related instrument, or in instructions to confirm, advise or offer other services in relation to such an instrument, may compel the addressee to reject and return the received instrument or instructions, failing which it may face legal liability.

2.4 If the sanctions clauses in trade finance-related instruments, including letters of credit or demand guarantees or counter-guarantees, allow the issuer a level of discretion as to whether or not to honour beyond the statutory or regulatory requirements applicable to that issuer, they bring into question the irrevocable and documentary nature of the letter of credit or guarantee. The implementation by a bank of an internal sanctions-related policy that goes beyond what is required under the laws and regulations applicable to that bank is an illustration of that discretion. It may cause a serious problem when considering the role of a confirming bank, a nominated transferring bank, a guarantor or a beneficiary. If the reference to an internal, sanctions-related policy were to allow the bank discretion to honour or refuse payment, one could even question if that bank has in fact assumed a legally binding obligation, a question that of course has to be determined under the applicable law. Of particular concern are clauses that purport to alter the reimbursement provisions of UCP 600 with respect to nominated banks that have acted pursuant to their nominations or clauses that seek to shift the risk of compliance with sanctions to those nominated banks. The same concern arises for guarantors that have acted pursuant both to the instructions and the counter-guarantees received from the counter-guarantors under URDG 758.

2.5 Where sanctions clauses that refer to banks’ internal policy requirements appear in the letter of credit or counter-guarantee, the nominated bank is in a difficult position as it is not aware of the internal sanctions policy that the issuing bank might elect to apply. If such a policy purports to have a broader scope than that of sanctions laws and regulations applicable as a matter of mandatory law to the issuing bank, the nominated bank would face uncertainty as to whether it will be reimbursed should it pay a complying presentation. As a result, a nominated bank’s risk assessment is likely not only to include the issuing bank and the country risk, but also the assessment of the likelihood of a prohibited reimbursement due to sanctions regulations or an internal, sanctions-related policy. This may result in increased costs, delays and potential disputes.

3. Examples of sanctions clauses

3.1 Below are examples of sanctions clauses sometimes seen in trade transactions.

a. The following is an example of an informative sanctions clause that does not extend beyond applicable laws and regulation:

   "Presentation of document(s) that are not in compliance with the applicable anti-boycott, anti-money laundering, anti-terrorism, anti-drug trafficking and economic sanctions laws and regulations is not acceptable. Applicable laws vary depending on the transaction and may include United Nations, United States and/or local laws."

b. The following sanctions clause is more problematic in that it refers to internal policies that are unknown to the nominated bank. By doing so it brings into question whether the bank will comply with its irrevocable obligation:

   "[Bank] complies with the international sanction laws and regulations issued by the United States of America, the European Union and the United Nations (as well as local laws and regulations applicable to the issuing branch) and in furtherance of those laws and regulations, [Bank] has adopted policies which in some cases go beyond the requirements of applicable laws and regulations. Therefore [Bank] undertakes no obligation to make any payment under, or otherwise to implement, this letter of credit (including but not limited to processing documents or advising the letter of credit), if there is involvement by any person (natural, corporate or governmental) listed in the USA, EU, UN or local sanctions lists, or any involvement by or nexus with Cuba, Sudan, Iran or Myanmar, or any of their governmental agencies."

c. Another problematic example that may permit exercise of discretion beyond the requirements of applicable law is the following:

   "Trade and economic sanctions ('sanctions') imposed by governments, government agencies or departments, regulators, central banks and/or transnational organizations (including the United Nations and European Union) impact upon transactions involving countries, or persons resident within countries currently including Balkans, Belarus, Cote d'Ivoire (Ivory Coast), Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, Syria, the Democratic Republic of Congo, Uzbekistan, Afghanistan, Iran, Iraq, Myanmar (Burma), North Korea, Cuba, Zimbabwe and Sudan. Issuing bank and all of its related bodies corporate might be subject to and affected by, sanctions, with which it will comply. Please contact issuing bank for clarification before presenting documents to issuing bank for negotiation or undertaking any dealings regarding this credit involving countries or persons affected by sanctions. Issuing bank is not and will not be liable for any loss or damage whatsoever associated directly or indirectly with the application of sanctions to a transaction or financial service involving issuing bank. Issuing bank is not required to perform any obligation under this credit which it determines in its discretion will, or would be likely to, contravene or breach any sanction. This clause applies notwithstanding any inconsistency with the current edition of the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits."

4. Recommendations

4.1 It is recommended that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements. It is also advisable for practitioners to be aware of the risks posed by such clauses if included by other banks involved in their transactions.

4.2 In trade finance transactions involving letters of credit or demand guarantees subject to ICC rules, practitioners should refrain from bringing into question the irrevocable, independent nature of the credit, demand guarantee or counter-guarantee, the certainty of payment or the intent to honour obligations. Failure to do so could eventually damage the integrity and reputation of letters of credit and demand guarantees which may have a negative effect on international trade.

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The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the 20th century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rule setting, dispute resolution, and policy advocacy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice. ICC also offers specialized training and seminars and is an industry-leading publisher of practical and educational reference tools for international business, banking and arbitration.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on relevant technical subjects. These include anti-corruption, banking, the digital economy, marketing ethics, environment and energy, competition policy and intellectual property, among others.

ICC works closely with the United Nations, the World Trade Organization and intergovernmental forums including the G20.

ICC was founded in 1919. Today its global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. National committees work with ICC members in their countries to address their concerns and convey to their governments the business views formulated by ICC.

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