

ADDENDUM TO THE ICC GUIDANCE PAPER ON THE USE OF SANCTION CLAUSES (2014)



ADDENDUM TO GUIDANCE PAPER

Key messages:

1. Addendum to the ICC Guidance Paper on the use of Sanctions Clauses (2014)
2. Sanctions clauses should not be used routinely.
3. Any clause should be drafted in clear terms according to the sample clause.

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Addendum to 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

Introduction

The ICC Guidance Paper on the use of Sanctions Clauses (2014)¹ dealt with the use of sanctions clauses in relation to trade, economic or financial sanctions, restrictive measures or counter-measures (collectively “sanctions”) in trade finance instruments (documentary and standby letters of credit, demand guarantees and counter-guarantees) that are subject to the rules drafted by the ICC Banking Commission (“ICC rules”).

That paper stated that the use of sanctions clauses had become a problematic issue in that they lead to uncertainty as to their application and may put into question the very effectiveness of the instrument in which they are drafted. They are non-documentary conditions for the purpose of the UCP and the URDG. The Guidance Paper highlighted the problems associated with the use of sanctions clauses in trade finance and 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.

The ICC has noted a resurgence in the use of sanctions clauses in documentary credits and in demand guarantees, particularly in the form of non-specific clauses that create uncertainty. In fact, many of the sanctions clauses witnessed in practice could lead to making trade finance instruments unworkable. Moreover, the use in bank undertakings of sanctions clauses not scheduled in public procurement documents may lead to the disqualification of the contractor as a result of the non-compliance with the tender regulations.

As a result, the ICC Banking Commission considers it necessary to emphasise its principled position towards sanctions clauses by way of an update of the Guidance Paper, with the addition of an addendum with a sample clause and guidance for use.

Operators must not consider that the sample clause drafted in this Paper is in any way recommended practice. The only purpose of proposing a sample clause in this Paper is to limit the legal uncertainty by linking the referenced sanctions regulations to those objectively applicable in the transaction.

Proposed Addendum

The ICC Banking Commission recommends that banks review this Guidance Paper and the principles thereunder when considering the drafting of sanctions clauses.

As generally stated in the original Guidance Paper issued in 2014, it is recommended that banks refrain from issuing or accepting trade finance instruments that include Sanctions clauses that purport to impose restrictions beyond those

¹ <https://iccwbo.org/publication/guidance-paper-on-the-use-of-sanctions-clauses-2014/>

applicable to the performance of the obligation under the trade finance instruments as a matter of law. Broader sanctions clauses defeat the independence principle in letters of credit and demand guarantees, the exclusively documentary nature of the instrument, and create uncertainty.

That said, the paper recognises that there may be instances in which a bank determines it wants to include a sanctions clause.

The ICC confirms its guidance that sanctions clauses should not be used generally. Nevertheless, if a bank, after consultation with its customer and counterparty in the trade finance transaction, considers that a sanctions clause is to be used, ICC recommends that the clause should be drafted in clear terms, restrictively, to limit the reference only to mandatory law applicable to the bank, as according to the following sample clause:

“[notwithstanding anything to the contrary in the applicable ICC Rules or in this undertaking,] We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by restrictive measures, counter-measures or sanctions laws or regulations mandatorily applicable to us or to [our correspondent banks in] the relevant transaction.”

While the sample clause may not contemplate every conceivable instance of sanctions application or, indeed, exempt the bank abstaining from the performance of its obligation from liability, it does give notice that the bank will comply with the sanctions to which it is subject and that the bank disclaims liability for doing so.

ICC recommends that the following Guidance is noted when drafting a sanctions clause:

- Sanctions clauses should not be used routinely. They ought only to be considered in specific transactions, and only after consulting with the customer and counterparties in the relevant transaction.
- Specific sanctions regulations may be referred to in the clause (e.g. *sanctions administered and enforced by the Hong Kong Monetary Authority*) provided, however, that those references are limited to those regulations directly and mandatorily apply to the bank.
- Sanctions regulations may apply as mandatory rules in several situations, including, without limitation, the following situations:
 - As the law applicable to the bank or, if relevant, the branch that issued the relevant undertaking in the trade finance instrument;
 - As the law applicable to the currency of payment of relevant undertaking in the trade finance instrument;
 - As the law governing the performance of the relevant undertaking in the trade finance instrument as a result of choice of law clause, or of the determination of the applicable law in accordance with the conflict of laws rules in the competent jurisdiction;
 - As international public policy where the arbitral tribunal or the court with jurisdiction so characterise the particular multilateral sanctions regulations.

- Clauses should refrain from including unparticularised references to laws generally (e.g. “any applicable local and foreign laws”).
- Reference to “bank policy and procedure” should be avoided at all times.
- There are jurisdictions in which the local law prevents the inclusion of a sanctions clause that references the laws of a foreign jurisdiction on the grounds of illegal discrimination or otherwise. To the extent that the law of those jurisdictions applies to the bank or to the transaction, banks ought to consider not using sanctions clauses in the trade finance instrument and to seek legal advice as to their liability if they were to contravene such laws.
- The reference to correspondent banks should be added in a sanctions clause only if a correspondent bank is in a different location from that of the instructing bank and would be unable to complete the transaction due to sanctions directly applicable to the correspondent bank that are not applicable to the issuing bank. An example is a correspondent bank in the US, therefore subject to primary US sanctions, which is clearing USD payments on behalf of a non-US bank.

Important Notice: The referenced example clause is a sample only and not to be used without seeking advice from legal and compliance advisors.

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