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International Law Meeting Summary

International Sanctions on Iran and Syria

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INTRODUCTION

This is a summary of an event which was organized to discuss the significant expansion of international sanctions against Iran and Syria. Speakers examined the recent developments in sanction regimes and the challenges facing governments, businesses and their advisers, how the courts have approached targeted sanctions, and expectations for the near future.

The participants included representatives of government, embassies, NGOs, media, academics and practising lawyers.

ALICE LACOURT

The sanctions regimes in both Iran and Syria are growing in scope and in litigation. Government legal advisers have to reconcile the need for sanctions to be used as an important policy tool with the UK government's commitment to the rule of law and a growing amount of case law in the area.

The scope of sanctions against Syria and Iran

Sanctions against Syria were adopted in 2011 and began as a standard set of measures including travel bans and asset freezes. In two years, they grew into one of the most complicated sanction regimes, amended 19 times at various stages. In the meantime, the situation in Syria continues to deteriorate. It is estimated that more than 60,000 people lost their lives and allegations of summary executions and torture are being reported. As long as the UN Security Council remains deadlocked over Syria, the EU sanction regime will play a key role in the UK foreign policy-making.

As regards Iran, UN sanctions were imposed by Security Council resolution under Chapter VII of the UN Charter and later supplemented by EU measures. Their objective has been to increase pressure on the Iranian authorities to discontinue the country's nuclear programme. The sanctions consist of a wide range of measures concerning trade and investment in the oil and gas sector, trade in precious metals or diamonds, and a separate set of measures aimed at human rights violations. Humanitarian exceptions have been provided for to allow medicines and foodstuffs to reach the Iranian population. The resulting economic pressure is having a visible impact on Iran's foreign policy, forcing its authorities to re-engage in negotiations and make concessions in its nuclear proliferation efforts.

The growing amount of litigation

One of the major developments in the area has been the expansion of sanctions-related litigation. At the end of 2012, about 120 cases were pending at the Council of the European Union, more than 60 of which were notified in 2012 alone.

Regrettably, the cases tend not to be expedited by EU courts and it often takes more than two years to obtain a first instance judgment. For example, the very recent decisions in *Bank Mellat* (T-496/10) and *Bank Saderat* (T-494/10) relate to sanctions listings that were first made in 2010. The General Court ordered the listings to be struck down on the basis that the reasons given were overly vague, following the approach taken in previous judgments in e.g. the *Bank Melli*, *OPMI* and *Kadi* cases. The use of confidential information in courts, also raised in those cases, is one of the issues to look for in 2013. It has been a subject of much debate and both Advocates General Eleanor Sharpston and Yves Bot previously commented on its significance, also referring to the European Court of Human Rights' reasoning in *A v UK* on the operation of the UK Special Immigration Appeals Commission. Another big area of litigation is likely to be access to justice following delisting, which is already being tested in courts in cases such as *Abdulrahim*, currently on appeal in the Court of Justice.

The most awaited decision of the year will be the *Kadi II* judgment concerning the implementation of UN-mandated sanctions on the EU level. In an interesting article, Advocate General Juliane Kokott argued that it is undesirable for EU courts to be creating conflicting case law and that listings originating at the UN level are properly dealt with through the ombudsperson. In addition, two judicial review cases have been started in UK courts that will examine the government's listing policy under the Iran and Zimbabwe country-specific sanction regimes.

As demonstrated by these developments, rule of law is a major issue in application of sanctions regimes and the judicial scrutiny of governmental actions will continue to define policy-making in this area.

MAYA LESTER

Targeted sanctions

Iran and Syria are both subject to the so-called targeted sanctions regimes. They differ in that, in the case of Syria, only EU measures are in place, while in the case of Iran, EU and UN sanctions are being applied simultaneously. The UN Security Council has authority under Chapter VII of the UN Charter to impose economic sanctions to address threats to international peace and security. The EU not only implements such UN-mandated sanctions, but also imposes its own 'autonomous' sanctions, as part of its common foreign and security policy. The EU's powers to impose restrictive measures are now in article 215 of the Lisbon Treaty.

Targeted sanctions aim to give effect to various different objectives. Counter-terrorism sanctions are adopted to prevent financing of terrorist activities; other sanctions regimes target the regimes of states such as Burma or Zimbabwe in order to put pressure on their governments to change aspects of their policy. Sanctions adopted in response to the Arab Spring aim to assist the repatriation of assets misappropriated by the former regime, sanctions against Iran are aimed at stopping Iran's nuclear proliferation and ballistic programme, sanctions against Syria target those responsible for violent repression of protest. Although their aims diverge, they all follow a broadly similar pattern in terms of their effect, and can include asset freezes, travel bans for named individuals and companies, and sometimes restrictions on trade in particular goods or financial transactions.

Kadi and beyond

How do these measures come to be tested in the European courts? Every person or company that has been listed in an EU restrictive measure has two months to challenge that designation in the European Courts in Luxembourg. The majority of claims are based on the violation of the individual's due process rights, largely following the leading judgment in *Kadi*, and before that the *PMOI* cases, in which the European Court of Justice (ECJ) set out the main principles that the European court applies to listing in sanction regimes. I am a barrister who acts for Mr Kadi in his EU litigation. Mr Kadi was originally given no reasons for his designation; he was listed just post-9/11 at the request of the United States in a UN Security Council counter-terrorist sanctions list of people said to be connected with Al-Qaeda and the Taliban.

He challenged his EU designation in an EU measure that implemented the UN measure. The ECJ ruled that a person placed on a sanctions list has to be given sufficiently specific reasons for his listing to be able to respond, has a right to fair hearing including having a meaningful opportunity to respond to the allegations, a right of access to effective judicial review, and must not have his or her property restricted in a disproportionate way. Following the ECJ judgment, which held that these principles had been violated in Mr Kadi's case, he was re-listed by the European institutions, which provided him with a summary of the United Nations' reasons. He challenged that re-listing, won again (the European courts finding that the institutions had only paid lip service to the first *Kadi* judgment), and the case continues its way through the European courts. In the meantime however, Mr Kadi has been delisted by the UN, after a recommendation by the UN ombudsperson for the Al Qaida committee of the Security Council. The office of the UN ombudsperson was created following the European courts' criticism of the absence of due process for listed individuals at UN level.

The same basic principles have been applied to Iranian and other sanctions, in a large number of recent cases. In many recent cases, Iranian companies, such as Bank Mellat and Bank Saderat, have succeeded in their challenges before the European courts, usually on the grounds that the reasons given for their designation are too vague, or no evidence has been given to support allegations.

Many important questions remain outstanding that may be resolved in the large number of cases currently pending in Luxembourg. For example, what happens if there is evidence in support of an individual's designation that a national government will not release on the grounds that it is classified? So far the European court has said it will not uphold a designation based solely on evidence that cannot be shown the courts. Will there be special advocates and secret evidence procedures in the European courts, and will there be a debate along the lines of the Justice and Home Affairs Bill in the United Kingdom about the dangers and unfairness of listing someone on the basis of secret evidence?

Should the same standard of judicial review apply to all the different kinds of sanctions measures, whatever their aim, since they all involve individuals and companies listed in restrictive measures? How has the European Court treated the subsidiaries of parent companies that have been placed on the list? So far they have said that wholly owned subsidiaries of Iranian companies may be listed because of the danger that they may be pressured

by their parents to circumvent sanctions. Family members are in a different position; the European court has said in another case I acted in, *Tay Za*, that family members of listed people cannot automatically be listed, but the association with members of a regime must be quite obvious and (again) supported by evidence.

More fundamentally, how far do the EU foreign policy powers go? Can the EU list individuals unconnected with a regime (this issue is arising in a pending Zimbabwe case)? Is the potential to list for political reasons open to abuse by member states?

There are interesting developments in the UK courts too. Is it possible to bring a judicial review against the government of a state that proposed a wrongful listing? So far the English courts have said that an action of that kind is not precluded, and there are some cases pending at the moment.

In the meantime, courts in Europe will continue to be busy handling the large number of pending sanctions cases. There are Iranian and Syrian cases coming up. So far the European courts have been far more protective of due process than the US courts, both in terms of not permitting the institutions to rely solely on undisclosed evidence, and also in the degree of deference afforded to the government's assessment of designations.

SARAH PARKES

Businesses around the world also face challenges as international sanctions regimes expand in scope and complexity. Companies are required to respond quickly to frequent changes in rules and often lack certainty as to the precise extent of their obligations in practice. The current landscape is particularly challenging because of (1) the potential extra-territorial reach of US sanctions, (2) the lack of clarity as to the scope of the rules in important areas and (3) the lack of enforcement action in the UK or other member states, which might be expected to clarify companies' obligations.

To give an example of the first point, at the end of 2012, the United States enacted the Iran Threat Reduction and Syria Human Rights Act, which, among other measures, imposes liability on US parent companies for actions of their foreign-incorporated subsidiaries that contravene the sanctions regime against Iran (the so-called 'parent liability rule'). Initially, the act did not specify at all what level of ownership was required to attract liability. Strictly speaking, the effect of the act is not extra-territorial since it is only the US parent company that will be liable, not the foreign subsidiary. That is likely to

be one of the reasons why this time the EU did not respond with blocking measures.

Secondly, there is a troubling lack of certainty as to the precise scope of the EU sanctions. For example, key concepts such as ‘owned or controlled’ or ‘making assets available directly or indirectly’ are used without further guidance or definitions, and it is open to EU member states to adopt differing interpretations in practice. As a result, it is often unclear who is affected by the regime and what actions are caught by the prohibitions.

HM Treasury in the UK has helpfully issued some guidance on the application of the sanctions rules but its interpretation at times seems overly expansive, perhaps influenced by UK foreign policy positions, particularly in relation to Iran. That, combined with differing interpretations across EU member states, makes it difficult for business to take practical decisions about whether to continue or cease particular business activities. For example, businesses regularly need to take binary decisions about whether to declare force majeure on long-running contractual obligations due to sanctions, taking account of both the sanctions legislation itself and its consequences, such as the practical difficulties in being paid out of countries affected by sanctions.

Lastly, the extent to which UK domestic authorities are prepared to take enforcement action remains unclear. Fines have been imposed in the regulated (financial services) sector, but to date there has been limited enforcement action to clarify the scope of companies' obligations under sanctions regimes.

The result is that businesses are generally taking a cautious approach to sanctions compliance, which has the effect of expanding the practical impact of sanctions beyond what the law envisaged. For example, many companies have decided to withdraw from Iranian business altogether because it became increasingly difficult to navigate the rules and to mitigate sanctions risks reliably across a multinational business. In this way, what were initially targeted sanctions have the potential to turn into blanket prohibitions.

DISCUSSION

It was suggested that the reliability of evidence on the basis of which individuals or corporations are listed is often questionable. It might be possible to harm commercial competitors by spreading rumours about their involvement in prohibited transactions. In a similar manner, it is often ambiguous what actions are deemed to exhibit an 'association' with a rogue government and how reliable any evidence to that effect is. It cannot be acceptable if new regimes in states such as Tunisia are able to 'designate' supporters of the toppled governments and if their suggestions are accepted by the EU or US authorities without further inquiries.

The discussion also addressed the difficulties facing an individual after being delisted pursuant to a court judgment or otherwise. In many cases, the persons were in fact re-listed following a limited disclosure by the authorities of reasons for their designation. Others that escaped repeated blacklisting are however facing further challenges; for example, financial institutions may refuse to deal with anyone who has ever been on a sanctions list. Access to justice post-delisting is likely to be one of the next big issues in sanctions-related litigation.

Much of the discussion focused on whether sanctions are achieving their objectives and what is their real impact. There seemed to have been wide agreement that the sanctions are having a significant chilling effect on trade with Iran and Syria. Although humanitarian and other exceptions exist, banks have internal vetoes on doing any business with Iranian or Syrian entities. Furthermore, even if businesses in the United Kingdom obtain a specific licence under one of the exceptions, the dollar transactions often have to be processed through US banks and further complications ensue. Ultimately, a system that was designed to be proportionate and targeted can easily turn into a blanket trade embargo. It may be that one reaction to the European court's judgments invalidating individual listings has been to broaden targeted sanctions into broader trade prohibitions.

Summary by Monika Hlavkova.