W+K UPDATE

Russia sanctions – the implications for marine insurers

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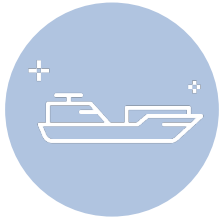
At a glance

- Coinciding with the one-year anniversary of Russia's invasion of Ukraine, the Australian Government announced further sanctions against Russia. There has been significant investment in energy storage Australia-wide, which will lead to valuable storage assets being commissioned over the next three decades.
- As there are now over 100 sanctioned persons and entities on the Australian list and a raft of sanctions in place around the world, organisations doing business across jurisdictions need to undertake careful due diligence with their transactions to avoid a sanctions breach.
- Similarly, marine cargo insurers need to ensure the payment of a claim does not breach a sanction.
- To manage their exposures, marine cargo insurers are increasingly including a version of the "Sanction Limitation and Exclusion Clause".



The current sanctions situation

On 24 February 2023, the Australian Government announced further sanctions against Russia including:

- further targeted financial sanctions
- travel bans on an additional 90 designated persons, and
- targeted financial sanctions on an additional 40 designated entities.

With the latest additions to the Russian sanctions, there are now over 100 designated persons and entities on the list. The expanding Russian sanctions in place in Australia, and around the world, need to be managed carefully by organisations doing business across jurisdictions.

Managing the risk

As the war in Ukraine continues to drag on, the Russia sanctions look set to remain in place for some time. Corporations need to be alert to the risks, including being aware of the sanctions regimes in all jurisdictions, and have systems in place to properly manage them.

The penalties for body corporates for a breach of a sanctions law include substantial fines (the greater of three times the amount of the value of the relevant transaction or 10,000 penalty units). Penalties for individuals can include custodial sentences of up to 10 years, in addition to fines.

It is possible to defend against an allegation of a sanctions breach by arguing that a corporation undertook due diligence to avoid breaches. This means that the best defence for a corporation will be to show that they have robust processes in place to ensure that they stay up-to-date with the relevant sanctions regime and monitor their activities against the requirements of the regime as it evolves.

As prevention is always better than cure, if there is a risk that a transaction will be in breach of a sanction, it is possible to seek a permit in advance. Applicants need to meet a range of criteria, including that it is in the national interest for the Minister to grant the permit.

How sanctions work in Australia

Essentially, the key thrust of sanctions in Australia is to penalise body corporates and persons who infringe restrictions on:

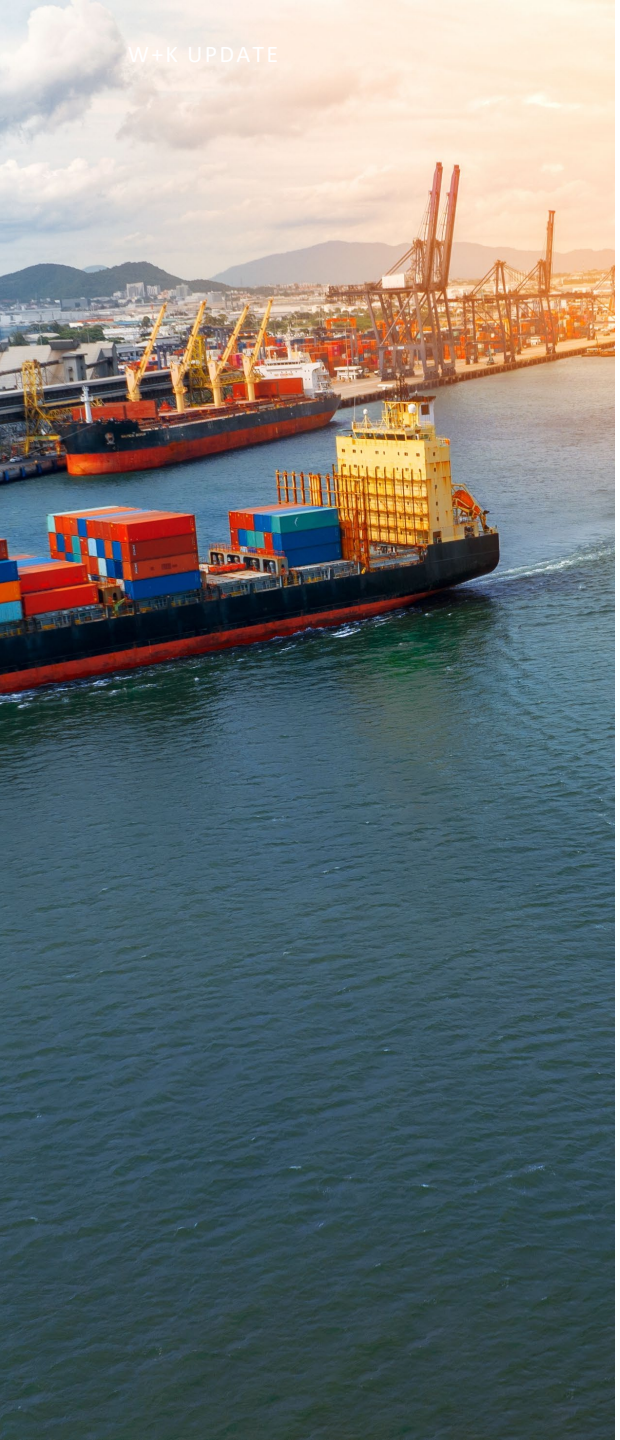
- the export or supply of certain goods
- the import, purchase or transport of sanctioned goods
- making assets available to designated persons or entities
- dealing with the assets of designated persons or entities
- providing certain services, and
- travel bans relating to designated persons.

Sanctions are designed to operate flexibly by using regulations so that the relevant governmental authorities can adapt to changing geopolitical scenarios without having to pass legislation.

In Australia, the *Autonomous Sanctions Act 2011 (Cth)* (**Sanctions Act**) makes it an offence for a body corporate to engage in conduct that contravenes a sanctions law. There is an overarching *Autonomous Sanctions Regulation 2011 (Cth)* (Sanctions Regulation) that sets out the framework for the different types of sanctions. The relevant minister is then able to pass subsidiary regulations as needed, designating specified instruments as sanctions laws.

Sanctioned goods

On 10 March 2022, the Australian Government issued a new regulation, the *Autonomous Sanctions (Import Sanctioned Goods – Russia) Designation 2022*, designating a list of items as Import Sanctioned Goods. Those goods include arms or related material, any goods that originated in (or have been exported from) specified Ukraine regions, as well as various raw materials such as coking coal, petroleum oils, and gases and bituminous mixtures.



There is also a regulation directed specifically at the export of certain goods, the *Autonomous Sanctions (Export Sanctioned Goods – Russia) Designation 2022*, which prevents the export of similar goods, as well as items suited for use for oil exploration.

Restrictions on certain commercial activities and provision of services

These restrictions include dealing with financial instruments of publicly owned banks and entities (including those involved in the sale and transport of crude oil) and services that assist in the supply, sale or transfer of sanctioned goods.

Sanctioned persons or entities

The lists of sanctioned individuals and entities (for all geographical regions) are constantly being updated and new regulations for geographical regions are regularly issued.

To facilitate access to the list of sanctioned persons and entities, the Australian Government maintains a Consolidated List on the Department of Foreign Affairs and Trade website (available here).

The latest

The targets of the latest sanctions include all current and former Russian Government ministers (and their immediate family members), and individuals and entities engaged in activities of economic or strategic significance to Russia.

What are the implications for marine cargo insurance?

The standard form institute cargo clauses all risk insurance (A) excludes cover for loss, damage or expense caused by war. This means insureds need to obtain separate war risks coverage if needed (and available).

Increasingly, marine cargo insurers have been including a version of the "Sanction Limitation and Exclusion Clause", which provides that an insurer is not deemed to pay cover or be liable to pay any claim to the extent such payment would "expose that insurer to any sanction, prohibition or restriction" under the relevant applicable sanctions law (i.e. Australian sanctions laws).

In 2018, the English law interpretation of that clause was confirmed in the case of *Mamancochet Mining Ltd v Aegis Managing Agency Ltd & Others [2018] EWHC2643 (Comm)*. In that case, the Commercial Court held that for an insurer to be relieved from making payment, it would have to demonstrate that the payment actually breached sanctions, not just that there was a risk that a payment could breach sanctions.

The Australian courts have yet to deal with this issue, but it is likely the position adopted by the English courts would be highly persuasive.

In the context of the war in Ukraine, there are a raft of sanctions in place in jurisdictions around the world. This means that for an insurer to pay out a claim under a marine cargo policy, it will be necessary to consider whether any payment will actually be in breach of any sanctions in any of the jurisdictions that are relevant to the claim. If the English law position is correct, the mere fear of exposure to relevant sanctions regimes will not be sufficient to refuse to pay a claim.

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