

**UNITED KINGDOM SANCTIONS**

**Lockdown Lunchtime**

**22 January 2021 at 12pm**

**SPEAKER PROFILES**

**Main switchboard: +44 20 7379 3550**

**Qudsi Rasheed OBE**

Qudsiis a diplomat at the Foreign, Commonwealth and Development Office. Most recently, he was Deputy Director Multilateral Policy and Head of the Sanctions Unit. His recent diplomatic postings include Head of the UK’s Syria Office in Beirut, and External Relations Counsellor at the UK Representation to the EU in Brussels, where, amongst other things, he was the UK’s sanctions negotiator to the EU. Prior to joining the FCDO, he was a barrister at Brick Court Chambers, and was also a visiting tutor at King’s College London.

**Lord Anderson of Ipswich KBE QC** [**david.anderson@brickcourt.co.uk**](mailto:david.anderson@brickcourt.co.uk)

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David Anderson practises in the fields of public, regulatory, international and EU-related law. His sanctions cases have included *Kadi* (2008-2010) and *Mubarak* (2020) in the Court of Justice of the EU, and *MODSAF v IMS* (2020) in the Court of Appeal. From 2011-2017 he reviewed the operation of terrorist asset-freezing law as Independent Reviewer of Terrorism Legislation. In 2018 David was knighted for services to national security and human rights, and appointed to the House of Lords as a cross-bench “people’s peer” where he sits on the EU Justice and Security Committee.

**Fergus Randolph QC** [**fergus.randolph@brickcourt.co.uk**](mailto:fergus.randolph@brickcourt.co.uk)

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Fergus is at the forefront of EU and competition law litigation at the English bar and is also a full member of the Brussels bar. He has acted on behalf of several Iranian companies that have been the subject of sanctions imposed by the EU. He succeeded in persuading the EU General Court to annul those sanctions.

**Maya Lester QC** [**maya.lester@brickcourt.co.uk**](mailto:maya.lester@brickcourt.co.uk)

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Maya specialises in sanctions law (in a broad public, EU and international law practice) and is the “star individual” for sanctions in the legal directories. She founded and co-authors [www.europeansanctions.com](http://www.europeansanctions.com) (the main international sanctions legal resource, with over 8,000 followers worldwide) and has given evidence to five parliamentary inquiries on sanctions and spoken at numerous conferences. She has represented and advised hundreds of companies and individuals before the European and English courts and has acted in most of the leading cases, including *Lamesa, Kadi II, Tay Za, Central Bank of Iran, Sberbank, Rotenberg, NITC* and *IRISL*.

**Jonathan Dawid** [**jonathan.dawid@brickcourt.co.uk**](mailto:jonathan.dawid@brickcourt.co.uk)

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Jonathan is regularly instructed in matters concerning UK and international sanctions and export controls especially in areas involving the interaction between sanctions and commercial law, with a particular focus on their application to financial services. He recently acted for VTB Bank in its CJEU appeal against listing under Regulation (EC) 833/2014, C-729-18P. He regularly advises on sanctions under UK and EU law, including UN sanctions and export controls in relation to dual-use technology.

**Richard Blakeley** [**richard.blakeley@brickcourt.co.uk**](mailto:richard.blakeley@brickcourt.co.uk)

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Richard has appeared in dozens of sanctions cases led and unled before the English and EU courts. These include cases concerning de-listing, licensing and the interpretation of sanctions clauses (including the *Mamancochet* *Mining* case referred to below). In his younger days, Richard was named Global Young Practitioner of the Year by *World Export Control Review*.

**Malcolm Birdling** [**malcolm.birdling@brickcourt.co.uk**](mailto:malcolm.birdling@brickcourt.co.uk)

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Malcolm is an experienced public lawyer with a diverse practice acting for individuals, organisations and Government bodies. His recent experience includes advising as to the consequences of the new domestic sanctions regime, and acting as junior counsel for the successful appellants in only the second successful de-proscription appeal before the POAC.

**David Heaton** [**david.heaton@brickcourt.co.uk**](mailto:david.heaton@brickcourt.co.uk)

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David has appeared in several sanctions cases before the English, Cayman Islands and EU courts and arbitrators, including the *Palladyne* litigation in the Cayman Islands, the *MODSAF* litigation in England and Wales and several ongoing arbitrations. He regularly advises on sanctions-related issues. His work has touched on the scope and interpretation of sanctions prohibitions, including the interaction of UN, EU and UK sanctions instruments, the effect of “no claims” clauses, licensing grounds and import/export prohibitions. He has been recognised for sanctions expertise by Chambers & Partners.

**BRICK COURT CHAMBERS SANCTIONS PRACTICE**

Brick Court Chambers at at the forefront of sanctions litigation and advice. Members of chambers have wide expertise in advisory and compliance work, investigations for breach of sanctions, challenges to sanctions listings, and have acted in more sanctions cases in the UK and EU courts than any other barristers’ chambers. They advise private and public bodies and individuals on the whole range of sanctions regimes, including counter terrorism and nuclear proliferation sanctions, regime / country sanctions, the Blocking Regulation, listings, sanctions clauses, licences and contractual issues.

Significant sanctions cases in which members of chambers have acted include:

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| * *Palladyne International Asset Management BV v Upper Brook A Ltd & Ors* | * *Zubedi v Council* |
| * *Lamesa Investments Ltd v Cynergy Bank Ltd* | * *Chyzch v Council* |
| * *Crescent Petroleum Company International Ltd v National Iranian Oil Company* | * *Dinamo Minsk v Council* |
| * *Mamancochet Mining Limited v Aegis and 29 Ors* | * *Tay Za v Council* |
| * *Jahanshahi & Ors v Metrobank Plc* | * *Ocean Administration v Council* |
| * *Kanthappu Arumugam & Ors v SoS for Home Department* | * *Elegant Target v Council* |
| * *Ministry of Defence and Support for Armed Forces of Islamic Republic of Iran v International Military Services Ltd* | * *Good Luck Shipping v Council* |
| * *Breish v Mahmoud and Ors* | * *Nabipour v Council* |
| * *Arash v Groupama* | * *Azizi & Sedghi v Council* |
| * *Kadi v Council & Commission (Nos 1 & 2)* | * *Ministry of Energy of Iran v Council* |
| * *VTB Bank v Council* | * *Central Bank of Iran v Council* |
| * *Mubarak v Council* | * *R (Azizi v Sedghi) v FCO* |
| * *Bank Saderat Plc v Council* | * *R (Sarkandi) v FCO* |
| * *Bank Tejarat v Council / Bank Mellat v Council* | * *Iran Aluminium Company v Council* |
| * *Yanukovych v Council* | * *El Materi v Council* |
| * *IRISL v Council* | * *Kaddour v Council* |
| * *Kim & Ors v Council* | * *Zubedi v Council* |
| * *DenizBank v Council* | * *Al Tabbaa v Council* |
| * *Sabra v Council* | * *El Maghraby & Gazaerly v Council* |
| * *Sberbank v Council* | * *Rautenbach v Council* |
| * *Rotenberg v Council* | * *Tomana v Council* |

**KEY SANCTIONS DOCUMENTS & RESOURCES**

[www.europeansanctions.com](http://www.europeansanctions.com) has in its **UK SECTION** all UK sanctions legal documents, guidance, judgments, and new stories (updated several times a day).

**UK STATUTORY FRAMEWORK**

[Sanctions and Anti-Money Laundering Act 2018](https://www.legislation.gov.uk/ukpga/2018/13/pdfs/ukpga_20180013_en.pdf) and [Explanatory Notes](https://www.legislation.gov.uk/ukpga/2018/13/pdfs/ukpgaen_20180013_en.pdf)

[Sanctions Review Procedure (EU Exit) Regulations 2018](https://www.legislation.gov.uk/uksi/2018/1213/pdfs/uksi_20181213_en.pdf)

**REGULATIONS AND GUIDANCE**

[UK Financial Sanctions](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952150/General_Guidance_-_UK_Financial_Sanctions.pdf) Guidance

[Guidance on UK sanctions framework after 31 December 2020](https://www.gov.uk/government/publications/sanctions-policy-after-31-december-2020/sanctions-policy-after-31-december-2020)

[Regulations and guidance for each UK regime](https://www.gov.uk/government/collections/financial-sanctions-regime-specific-consolidated-lists-and-releases)

[The Global Human Rights Sanctions Regulations 2020](https://www.legislation.gov.uk/uksi/2018/1269/pdfs/uksi_20181269_en.pdf)

**REVIEW / DE-LISTINGS**

[Guidance on how to request a variation / revocation of a sanctions designation](https://www.gov.uk/government/publications/making-a-sanctions-challenge-how-to-seek-variation-or-revocation-of-a-sanctions-designation/making-a-sanctions-challenge-how-to-seek-a-variation-or-revocation-of-a-sanctions-designation)

[UK sanctions review request form](https://www.gov.uk/government/publications/sanction-challenge-form-designated-persons)

**KEY DIFFERENCES BETWEEN UK AND EU SANCTIONS REGIMES**

**Changes to / extension of asset freezing provisions**

1. **Knowledge/reasonable cause to suspect:** Asset freeze provisions now often require knowledge or reasonable cause to suspect that someone is dealing with frozen funds: see, eg, Libya (Sanctions) (EU Exit) Regulations 2020 reg 12(1). By contrast, EU regimes generally prohibited any unfreezing, sometimes with protection from liability where there was an absence of knowledge and no reasonable grounds to suspect a breach: see, eg, Council Regulation (EU) 2016/44 Articles 5(1) and 16(2).
2. **Ownership and control:** Asset freezes generally prohibit dealings in assets “owned or controlled” by designated persons. The new UK sanctions regimes lay down an extended and detailed definition of the circumstances in which direct or indirect ownership or control via a corporate vehicle exists. A person will own or control a company where one of two conditions is satisfied (see, eg, Libya (Sanctions) (EU Exit) Regulations 2020 reg 7):
   1. A person (a) holds directly or indirectly more than 50% of the shares in a company, (b) holds directly or indirectly more than 50% of the voting rights in a company, or (c) holds the right, directly or indirectly, to appoint or remove a majority of the board of directors of a company.
   2. “*it is reasonable, having regard to all the circumstances, to expect that P* [the person] *would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes*.”

**Differences in designations and prohibitions**

1. **Some UK designations are different:** Not all EU designations (ie listings) have been continued under the new UK regimes (eg none of the Ukraine / Egypt / Tunisia misappropriation listings have been carried into UK law).
2. **Differences in prohibitions:** There are various differences in the scope of various prohibitions exist. For example:
   1. where EU sanctions on Russia had provided exceptions for EU-based subsidiaries, the UK regimes provide only exceptions for UK-based subsidiaries;
   2. the UK “Global Human Rights” regime in the Global Human Rights Sanctions Regulations 2020 is more limited in scope than the EU equivalent.

**UK nexus**

1. **Geographical / nationality nexus required:** Power to impose sanctions prohibitions under Sanctions and Anti-Money Laundering Act 2018 s 21(1) extends only to “*(a) conduct in the United Kingdom or in the territorial sea by any person; (b) conduct elsewhere, but only if the conduct is by a United Kingdom person.*” Accordingly, the geographical scope of the UK regimes is now clear. Although the EU regimes had clear application provisions, it was not clear whether the UK statutory instruments implementing them, which imposed criminal penalties, were coextensive or narrower in their geographical scope.

**Absence of “no claims” clauses**

1. **No “no claims” provisions:** UK regimes do not contain “no claims” provisions that were contained in EU law regimes, and which generally had the effect of preventing a claim being satisfied where that claim was caused by the imposition of sanctions: see, eg, *Ministry of Defence & Support for Armed Forces of the Islamic Republic of Iran v International Military Services Ltd* [2020] EWCA Civ 145, considering Article 38 of Council Regulation (EU) No 267/2012.[[1]](#footnote-1) Query whether to some extent English principles relating to contractual non-performance may fill this gap, at least where English law applies.

**Other bespoke provisions**

1. Other bespoke provisions exist that provide the UK with greater scope itself to take actions that would have been prohibited, such as:
   1. **National security/crime prevention overrides:** see, eg, Iran (Sanctions) (Nuclear) (EU Exit) Regulations 2019 reg 38(1):

*“Where an act would, in the absence of this paragraph, be prohibited by the prohibition in regulation 9(2) or any prohibition in Part 3 (Finance) or Part 5 (Trade), that prohibition does not apply to the act if the act is one which a responsible officer has determined would be in the interests of — (a) national security, or (b) the prevention or detection of serious crime in the United Kingdom or elsewhere.”*

A “responsible officer” is defined in reg 38(3) as in effect a civil servant, acting in the course of their duty. Note that this is not limited to acts of the UK itself.

* 1. **Licences for an “extraordinary situation”:** see, eg, Iran (Sanctions) (Nuclear) (EU Exit) Regulations 2019 reg 40(1) and Schedule 2 para 10.

**REVIEW OF UK SANCTIONS DESIGNATIONS / DE-LISTINGS**

**Legal Framework**

1. Chapter 2 (ss. 22-33) of the Sanctions and Anti-Money Laundering Act 2018 (**SAMLA**) provides for the revocation, variation and ministerial review of designations made under Regulations pursuant to SAMLA. Chapter 4 of SAMLA (ss. 38-40) provides for court review of the minister’s decisions.
2. Sections 29-32 set out temporary powers that apply for two years after the UK’s exit from the EU. These allow changes to be made to the EU sanctions regime as retained in domestic law after exit, allowing ministers to add or remove names from the lists of designated persons designated at the EU level.
3. The Sanction Review Procedure (EU Exit) Regulations 2018, which came into force in January 2019, make provision for the procedure applicable to requests for review of a designation under SAMLA.

**Review of designation by a minister**

1. **Section 23(1)** provides that a designated person may request that the appropriate Minister revoke or vary their designation. This is characterised as an administrative review.[[2]](#footnote-2) For example, a person may seek a review if they have been misidentified or considers the designation does not meet the required evidentiary threshold.[[3]](#footnote-3)
2. **Section 25** gives UN designated individuals the right to request that the appropriate minister ‘use their best endeavours’ to persuade the UN to remove them from the relevant UN instrument.
3. **Section 36** gives individuals included in a retained EU sanctions list the right to request a direction under s. 34(3)(b) that their name be treated as removed from the list.
4. Once a request has been made under s. 23, s. 25 or s. 36, the appropriate minister must decide whether or not to accede to the request. The decision on any such request must be made as soon as ‘”reasonably practicable”[[4]](#footnote-4) and the person who makes the request must be informed of the decision and the reasons ‘”as soon as reasonably practicable after the decision was made.”’[[5]](#footnote-5)
5. The minister who made the designation has the *discretion* to revoke or vary that designation.[[6]](#footnote-6)
6. The minister also has a *duty* to revoke a designation when the required conditions of the relevant designation power are not met. This might be as a result of actions taken by persons to seek reassessment of their designation, or the government’s own review of designations under s. 24.[[7]](#footnote-7) The minister must revoke a designation of a named person where the s. 11(2) conditions are no longer satisfied – i.e. if the minister:
7. no longer has reasonable grounds to suspect that the person is an involved person as defined by s. 11(3);
8. no longer considers it appropriate to maintain that designation for the purposes set out under s. 1(3) of SAMLA; or
9. considers that it is no longer appropriate to maintain that designation having regard to the likely significant effects of that designation on that person.
10. Once a person has made a request for review and that request has been refused, the same person cannot make a further request in relation to that designation unless they can show there is a significant matter of which the government was not aware (e.g. new significant evidence).[[8]](#footnote-8)
11. Although SAMLA provides a mechanism for those listed under UK and UN Sanctions regimes to challenge their listing, many persons would also be designated under corresponding EU sanctions. There is no mechanism to challenge EU designations from the UK (they must be challenged at EU level).

**Periodic Review / Delisting**

1. **Section 24** requires the government to conduct a periodic review of sanctions regulations made under section 1 of SAMLA and any ‘qualifying designations’ made by an appropriate minister. “Qualifying designations” are set out in s. 24(3).
2. The appropriate minister must review each qualifying designation and decide whether to revoke, vary or take no action with it.[[9]](#footnote-9) A review must occur within three years of a qualifying designation being made. After this initial review, a further review must be conducted within three years of the preceding review, for as long as the designation remains in place.[[10]](#footnote-10)

**Court review of government / minister’s decisions**

1. **Section 38** provides designated persons a route to challenge government decisions in the High Court, or in Scotland, the Court of Session.[[11]](#footnote-11) Before doing so, a designated person must first exhaust the administrative process in Chapter 2 of SAMLA.
2. Section 38(1) sets out which decisions can be challenged in court. These include: i) an administrative reassessment of a UK designation under s. 23; ii) a UK government review of a UK designation, under s. 24; iii) an administrative reassessment of a UN designation, under s. 25; iv) an administrative reassessment of a retained EU designation, under ss. 36 or 37; v) an administrative reassessment of a UK-specified ship, under s. 27; vi) a UK government review of a UK-specified ship, under s. 28; vii) an administrative reassessment of a UN-specified ship, under s. 29.[[12]](#footnote-12) Designations to implement UN sanctions are not within the scope of this procedure.
3. When considering an application brought under s. 38 of SAMLA, the courts will apply the principles applicable on an application for judicial review (s 38(4)). However, the power to award damages is limited to cases of negligence or bad faith.[[13]](#footnote-13)
4. Also provision for Closed Material Proceedings (“CMPs”), closely modelled on those applicable in financial restrictions proceedings pursuant to Counter-Terrorism Act 2008.[[14]](#footnote-14)

**UK GLOBAL HUMAN RIGHTS SANCTIONS**

1. The regime is set out in Global Human Rights Sanctions Regulations 2020. The Regulations can be used to impose sanctions for serious violations and abuses of: i) an individual’s right to life; ii) the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; or iii) the right to be free from slavery, not to be held in servitude or required to perform forced or compulsory labour.[[15]](#footnote-15)
2. A person may be designated by the Secretary of State under the Regulation if he has “reasonable grounds to suspect that that person is an involved person” and “considers that the designation of that person is appropriate”.[[16]](#footnote-16) An “involved person” is someone who i) is or has been involved with one of the above abuses; ii) is owned or controlled directly or indirectly by a person who is or has been so involved; iii) is acting on behalf of or at the direction of a person who has been so involved; iv) is a member of, or associated with, a person who has been so involved.[[17]](#footnote-17)
3. The UK Regulations prevent anyone from dealing with funds or economic resources owned, held or controlled by a designated person if that person knows, or has reasonable cause to suspect, that they are dealing with such funds.[[18]](#footnote-18)
4. Exceptions and licenses to the asset freeze requirements are set out in Part 5 of the Regulations.
5. First set of listings published on 6 July 2020, with additional designations made on 29 September 2020 (in response to serious human rights violations in Belarus) and 10 December 2020 (re: Venezuela, Russia, the Gambia and Pakistan).

**UK SANCTIONS: CONSIDERATIONS FOR COMMERCIAL PARTIES**

**Extended asset freezing provisions**

1. The UK asset freeze provisions / prohibitions on dealing apply to funds and economic resources that are indirectly owned or controlled by a designated person.
2. UK SIs provide that funds or economic resources are to be "treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly … by the designated person".
3. This will require extended KYC / due diligence to ensure that counterparties are not indirectly controlled by a designated person.
4. Particular care needed when dealing with group companies where the UBO is designated.
5. Effectively does away with the position under EU guidance that there was a rebuttable presumption that making funds available to a person owned or controlled by a designated person was to make them available indirectly to a designated person.

**Licensing**

1. Licensing power in SAMLA, s.15: <https://www.legislation.gov.uk/ukpga/2018/13/section/15>
2. May grant general or specific licences.
3. Licences can only be issued when appropriate for defined statutory purposes. These vary from regime to regime. There are some that apply only to UN designated persons and some that apply to non-UN designated persons.
4. See <https://www.legislation.gov.uk/uksi/2019/461/schedule/2> in respect of licences for transactions with persons designated for reasons connected with Iranian nuclear sanctions.
5. In respect of UN designated persons/entities they tend to include: (a) basic needs (as defined, including food, medical supplies, rent, and needs of dependents); (b) legal services; (c) maintenance of frozen funds and resources; (d) extraordinary expenses; (e) pre-existing judicial decision; and (f) diplomatic missions.
6. In respect of non-UN designated persons/entities, the Treasury may additionally licence payments for (a) humanitarian assistance; (b) diplomatic missions; (c) prior obligations; (d) to *“enable anything to be done to deal with an extraordinary situation”*. It remains to be seen how broadly (d) will be interpreted. (In each case check the specific SI).
7. In respect of counter-terrorism sanctions, the licencing regime is different to that created by the post-Brexit statutory instruments for other regimes in that it does not limit the ability of the Treasury to issue a licence authorising acts by a particular person to instances where the Treasury considers a licence appropriate for a purpose set out in the schedule of the relevant SI.

**Impossibility of performance because of UK sanctions**

1. Where lawful performance of contract is not possible because of UK sanctions, the Court will first look to any contractual provision dealing with financial sanctions or allocation of risk in those circumstances. If there is none, parties may have recourse to the law of frustration, arguing that the contract is frustrated by supervening illegality.
2. Note: generally it is not prohibited under UK sanctions to transfer funds to a designated person’s bank for credit to their account, where those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a designated person. This is an important carve out for pre-existing obligations.
3. Frustration occurs: “*whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”* (*Davis Contractors Limited v Fareham Urban District Council* [1956] AC 696, at p.729 per Lord Radcliffe).
4. The doctrine is “*to give effect to the demands of justice but not to be lightly invoked”*: *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1, at 8 per Lord Bingham; and in the sanctions context see *Melli Bank v Holbud* [2013] EWHC 1506 (Comm) at [15] per Robin Knowles QC.
5. New UK sanctions ought not to change the position as regards frustration compared to the position under EU sanctions, save (a) where UK sanctions extend asset freezes to new areas / parties not touched by EU sanctions; and (b) UK licensing regimes are more generous.
6. Need to assess whether there is any illegality because of UK sanctions. Place of performance is important: is a payment within the UK, or is payment to be made by a UK person (i.e. UK national or company)?
7. Can a licence be obtained? That will prevent frustration, at least until the licence process has been exhausted. So if a licence can be sought and is expected to be granted there will be no frustration: see, for example, *DVB Bank SE and others v Shere Shipping Co Limited and others* [2013] EWHC 2321 (Comm); *Melli Bank v Holbud* [2013] EWHC 1506 (Comm).

**Sanctions clauses**

1. In new contracts, ensure (where desirable) sanctions clauses are drafted to cover UK sanctions and the degree of risk that the parties wish to exclude.
2. In *Mamancochet Mining Limited v Aegis Managing Agency Limited* [2018] EWHC 2643 (Comm)Teare J took the view thata clause referring to payments that *“would expose”* underwriters to sanctions did not exclude a *risk* of breach of sanctions, but instead required that sanctions would in fact be breached by the payment.
3. Ensure that the clause deals with the consequences also: does it extinguish an obligation or merely suspend it? Will require clear words to extinguish and will probably be suspensory: see *Mamancochet*, [76]-[78].

**The United States aspect**

1. Beware Untied States secondary sanctions. US legislation allows the imposition of secondary sanctions affecting property subject to US jurisdiction belonging to non-US persons, even if they are not themselves operating in the US.
2. In *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 the Court of Appeal considered a clause that excused a borrower from non-payment of interest payments where *“such sums were not paid in order to comply with any mandatory provision of law”*. It was held (by a majority) that US secondary sanctions were capable of constituting (and did constitute in the circumstances) a mandatory provision of law such that not payment by reasons of such sanctions fell within the clause.
3. This was so even though US legislation could not prohibit, and did not purport to prohibit, a payment by the borrower to the lender. If this case is followed it could have a far-reaching impact in cases concerning parties with US business. But query what effect the UK Blocking Statute could have (see below).
4. And note that the position remains that in general, illegality under foreign law does not frustrate or otherwise relieve a party from performance of an English law contract. There is a narrow exception, where the performance of the contract must necessarily involve the performance of an act illegal at the place of performance. This was recently applied in the case of US secondary sanctions by Mrs Justice Cockerill DBE in *Banco San Juan Internacional Inc v Petróleos De Venezuela SA* [2020] EWHC 2937 (Comm). The judge held that the party relying on the doctrine will in general not be excused if he could have done something to bring about valid performance and failed to do so. In that case, *PDVSA* should have applied to OFAC for a licence.

**THE POST-BREXIT FRAMEWORK FOR EXPORT CONTROLS IN THE UK**

* **Reminder:** 
  + Export controls apply both to exports of goods from UK *and* to UK persons involved in movement of controlled goods between third countries.
  + Application of controls depends on both *nature* and *destination* of goods
  + UK law: Export Control Act 2002 & Export Control Order 2008
  + EU law: Dual Use Regulation (Regulation (EU) 428/2009), Torture Regulation (Regulation (EU) 2019/125), plus others.
* **Position up to end of Transition Period:**
  + Minimal controls for exports to (and from) EU
  + Dual system of licensing:
    - UK law: Export Control Joint Unit
    - EU law: authority of state where exporter based
  + Open (ECJU) & general (EU) licenses permitting exports of lower risk goods to safe destinations on simple registration or notification.
* **Post-Transition Period**
  + No immediate change to *type* of goods/technology subject to controls
  + Significant changes to *destinations* for which licenses required
  + Divergence between *Great Britain* and *Northern Ireland*
* **Great Britain (England, Wales, Scotland)**
  + EU export controls continue as retained EU legislation but with EU destinations treated as third countries & EU-issued licenses no longer valid.
  + No longer exemptions for exports to EU under UK legislation.
  + **Result:** ECJU licence required for all exports of controlled items.
    - *But* EU GEAs carried over as Retained GEAs. So if exporting from UK to non-EU destination under EU GEA, can continue to do so.
  + Similarly, GB treated as third country from perspective of EU.
    - UK added as permitted destination under EU GEA001
* **Northern Ireland**
  + NI Protocol: Dual Use and Torture Regulation continue to have direct effect.
  + **Result:** previous regime still applies to exports from NI to EU and non-EU
  + No controls on exports between GB and NI
* **Teething / future problems?**
  + Status of EU licenses in NI
  + Divergence between controls in NI and GB: implications for Irish sea
  + Competence of CJEU over UK export control law

**THE UK AND EU BLOCKING REGULATIONS**

**The EU Blocking Regulations**

* Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effect of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom:

<https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=CELEX:01996R2271-20180807&qid=1611080056319>

* Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96:

[https://eur-lex.europa.eu/legal content/AUTO/?uri=CELEX:32018R1101&qid=1611080244420&rid=1](https://eur-lex.europa.eu/legal%20content/AUTO/?uri=CELEX:32018R1101&qid=1611080244420&rid=1)

**The UK Blocking Regulation**

* SI 2020 No. 1660: The Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2020:

<https://www.legislation.gov.uk/uksi/2020/1660/contents/made>

* Explanatory Memorandum:

<https://www.legislation.gov.uk/uksi/2020/1660/memorandum/contents>

* Guidance:

<https://www.gov.uk/guidance/protection-of-trading-interests-retained-blocking-regulation>

**CJEU preliminary references on the EU Blocking Regulation**

* March 2020:Bank Melli Iran v Telekom Deutschland GmbH:

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=225701&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=11648>

* July 2020: *Bank Sepah v Overseas Financial Limited and Oaktree Finance Limited:*

<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=230944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2035352>

1. “*No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by …* [designated persons, Iranian persons or other persons acting on their behalves]”. [↑](#footnote-ref-1)
2. Explanatory Notes to SAMLA, Para. 89. [↑](#footnote-ref-2)
3. Explanatory Notes to SAMLA, Para. 89. The evidentiary threshold for designation by name and description is set out in Sections 11(2) and 12(5) of SAMLA. [↑](#footnote-ref-3)
4. SAMLA, s. 33(2)(a). [↑](#footnote-ref-4)
5. SAMLA, s. 33(2)(b). [↑](#footnote-ref-5)
6. SAMLA, s. 22(2). [↑](#footnote-ref-6)
7. SAMLA, s. 22(3) and (4). [↑](#footnote-ref-7)
8. Explanatory Notes to SAMLA, para. 91. [↑](#footnote-ref-8)
9. SAMLA, s. 24(2). [↑](#footnote-ref-9)
10. SAMLA, s. 24(4). [↑](#footnote-ref-10)
11. SAMLA, s. 38(2). [↑](#footnote-ref-11)
12. Explanatory Notes to SAMLA, para. 110. [↑](#footnote-ref-12)
13. SAMLA, s. 39(2) and Explanatory Notes to SAMLA, para. 113. [↑](#footnote-ref-13)
14. SAMLA, s. 40(1). [↑](#footnote-ref-14)
15. Global Human Rights Sanctions Regulations 2020, s. 4(2). [↑](#footnote-ref-15)
16. Global Human Rights Sanctions Regulations 2020, s. 6(1). [↑](#footnote-ref-16)
17. Global Human Rights Sanctions Regulations 2020, s. 6(2). [↑](#footnote-ref-17)
18. Global Human Rights Sanctions Regulations 2020, s. 11(1). [↑](#footnote-ref-18)