Outline

1. Overview /Problem:

- Sanctions— cannot deal with particular ships on insurance—most of P&I Clubs are in UK
- CLC 1969: compulsory insurance to particular ships—no P&I Clubs will make contracts with them.

2. Sanctions

2.1 What are sanctions?

2.2 What is the sanction system against Russia in UK?

2.3 How to interpret the regulation?

2.4 What are the contents relevant to marine insurance?

3. What is the consequence of marine insurance contracts after sanctions?

3.1 According to the sanctions clause

3.2 According to the statue law

3.2.1 Marine Insurance Act 1906

3.2.2 Marine Insurance Act 2015

3.3 According to the common law

3.3.1 Frustration?

3.3.2 Illegality?

3.3.3 Own cause of action?

4. Conclusion

CHAPTER 1

The role of insurance in sanctions regimes

George Leloudas

1 Insurance sanctions

1.1 Comprehensive sanctions

Sanctions have not always been the weapon of choice in international relations. Until the end of the Cold War, they were sparsely used because they were considered to have inferior "persuasive" value to that of the alternative option of military deployment.[1] It was only in the 1990s that they were seen as a policy tool furthering the aim of the UN to settle differences among states in a non-military manner.

The aim of sanctions is ultimately to rehabilitate non-compliant states through a process of negotiation and bargaining. The argument is that they have the potential to change the behaviour of the targeted states without incurring the devastating humanitarian effects of war. Not surprisingly, the UN made extensive use of this tool in the 1990s, with more than a dozen mandatory sanctions regimes imposed in the course of the decade.[2]

At that time, the UN regularly made use of comprehensive sanctions, namely, measures that aimed "to prevent the flow to and from a target of all commodities and products" as well as financial resources.[3] They were heavily criticised for their adverse humanitarian impact:

> [T]he civilian suffering caused by such measures often overshadow their potential political gains; moreover, comprehensive sanctions complicate the work of humanitarian agencies, cause long-term damage to the productive capacity of target nations, and unfairly penalize their neighbors (who are often their major trading partners).[4]

The Iraqi "oil for food" scandal is brought up repeatedly as an example of what can go spectacularly wrong in the enforcement of comprehensive sanctions. It was a humanitarian relief programme intended to halt the humanitarian crisis caused by

1 The first time sanctions were applied by the UN was against Southern Rhodesia by means of SCRes 232 of 16 December 1966, and the second time was against South Africa by means of SCRes 418 of 4 November 1977.

2 R. Pape, "Why economic sanctions do not work" [1997] International Security, p. 90, Watson Institute for International Studies, "Background Paper on Targeted Sanctions"(16–17 July 2004), p. 2 (TFS project) (in file with the author).

3 J Farrall, *United Nations sanctions and the rule of law* (OUP 2007), pp. 107–108 for a list of comprehensive sanctions imposed by the UN.

4 TFS project (n 2), p. 2.

the comprehensive sanctions against Iraq, but in the end, it simply contributed to the enrichment of the domestic political regime.[5]

Three major lessons were learned from the unsatisfactory experience of imposing comprehensive sanctions. First, sanctions should be targeted sanctions; they should aim at "the architects of the policies opposed by the international community",[6] be they individuals, businesses and/or entire business or administrative sectors, in order to minimise the possibility of humanitarian crises among the general population. Second, the robust enforcement of sanctions was key to changing political behaviour. Enforcing states had to be required to "stick to the script", actively policing their implementation by commercial and state entities. Third, sanctions needed to provide a carrot together with the stick: as Ban Ki-Moon put it, "[t]he target must understand what action it is expected to take. And partial or full compliance should be met by reciprocal steps from the Council, such as easing or lifting sanctions as appropriate".[7]

1.2 Targeted financial sanctions

There is consensus that targeted sanctions got off to a rocky start with those imposed against the Haitian government in 1993 and 1994, and since referred to as one of the lowest points in their history[8]:

> [T]he sanctions were applied erratically in most instances: first to the leaders only, then to their families, and still later to the elite supporters of the regime. By the time all the targets were publicly identified, they had ample time to move and protect their financial assets.[9]

Despite this experience, their use gained popularity. The blunder in Haiti was dismissed as a problem of implementation, with the failure of the Iraqi and former Yugoslavian comprehensive sanctions accelerating their use as an alternative instrument of coercion. The UN reformed its sanctions philosophy early in the present century to reflect these lessons and proceeded to make more frequent use of targeted financial sanctions. In that respect, it followed the example of the USA, which used its central role in global finance to impose targeted financial sanctions, often with extraterritorial effects, following the demise of the USSR.[10]

What, however, brought targeted financial sanctions to the attention of a broader international audience was the aftermath of 9/11. What the UN did was to use the financial world as one of the main means of pressure and to widen the scope of sanctions to cover "non-state actors that include individuals, business entities, political organizations and the third parties who provide their support".[11] Coincidentally, the first time the UN imposed financial sanctions on a stand-alone basis was against the

5 The comprehensive sanctions against Iraq were imposed by means of SCRes 661 of 6 August 1990.

6 Th Biersteker, "The emergence, evolution, effects, and challenges of targeted sanctions" (2004), p. 2 (Biersteker report).

7 Speech of Ban Ki-Moon to the Symposium on Enhancing the implementation of United Nations Security Council sanctions (New York 30 April 2007) (in file with the author).

8 Initially, targeted sanctions were imposed by means of SCRes 841 of 16 June 1993, with comprehensive ones applied by means of SCRes 917 of 6 May 1994.

9 Biersteker report (n 6), p. 3.

10 See M Rathbone, P Jeydel, & A Lentz, "Sanctions, sanctions everywhere: forging a path through complex transnational sanctions laws", 44 *Georgetown Jo. Int. Law* 1055 (2013).

11 K Alexander, *Economic sanctions. Law and public policy* (Palgrave Macmillan 2009), p. 27.

Taliban by means of Security Council Resolution 1267 of 15 October 1999. This required states to "[f]reeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban".[12] Following 9/11, their use was generalised against various terrorism-related and WMD-related targets.[13]

The common feature of post-9/11 financial sanctions regimes is an aim to cut-off the access to capital of targeted states, individuals, businesses or business sectors. In that sense, financial sanctions put the burden for changing the behaviour of the targets on the global financial system via vigorous monitoring, reporting and due diligence requirements. The enforcing states police the provider of the capital rather than the target itself. In addition, the transparency requirements imposed in the aftermath of the recent financial crisis incidentally enable the closer monitoring of financial institutions for sanction breaches.[14]

It is not a coincidence that between 2010 and 2018, the USA imposed a string of hefty fines against several international banks for sanctions violations.[15] Their prevalence was based on the belief that targeted financial sanctions remedy the drawbacks of comprehensive and trade sanctions:

> Firstly, financial sanctions target only the rogue-party's assets, or the assets of a given organization whose policies are inconsistent with international norms. Secondly, financial sanctions are, in theory, easier to enforce than traditional trade sanctions, which call for blockades, massive enforcement costs, monitoring costs, etc. In addition, sanctions aimed at delaying/denying credit, or monetary grants to targets are theoretically much easier to monitor.[16]

1.3 How successful are targeted financial sanctions?

Measuring the actual success of targeted financial sanctions is a notoriously difficult task, as they often come as part of a wider package of policies. The most sophisticated study on the effectiveness of sanctions so far suggests that they are "at least partially successful in 34 percent of the cases that we documented".[17] They are mostly successful when modest policy changes are pursued, such as the release of prisoners (51%); however, their utility decreases to 31% when they aim to achieve regime change and democratisation, and to 21% when they aim to disrupt military adventures.[18] The study suggests that targeted sanctions are not a panacea for all the ills of international relations, but provides clear evidence that they have a significant role to play.

12 para 4(b).

13 For a list of targeted financial sanctions imposed by the UN until April 2004, see TFS project (n 2), p. 6.

14 G Hakimdavar, *A strategic understanding of UN economic sanctions* (Routledge 2014), p. 146 (Hakimdavar).

15 For the list, see Refinitiv "Fines for banks that breached US OFAC sanctions" (2019) <https://www.refinitiv.com/content/dam/marketing/en_us/documents/infographics/fines-for-banks-that-breached-us-sanctions-infographic.pdf> (last accessed 2 February 2020).

16 Hakimdavar (n 14), p. 145.

17 G. Hufbauer, J Schott, K Elliot, B Oegg, *Economic sanctions reconsidered* (3rd ed, Peterson Institute Press 2007), p. 158.

18 *Ibid.*

Still, the disagreement over their usefulness is raging. In the UK, two diametrically opposing views have been expressed. In 2007, the House of Lords issued a highly critical report on the impact of targeted financial sanctions:

> economic sanctions used in isolation from other policy instruments are extremely unlikely to force a target to make major policy changes, especially where relations between the states involved are hostile more generally…Even when economic sanctions are combined effectively with other foreign policy instruments, on most occasions they play a subordinate role to those other instruments. Economic sanctions can be counter-productive in a variety of ways, including when more vigorous coercion in the form of force is needed but is forestalled by those making inflated claims for the value of sanctions as an alternative. Sanctions may also be counter-productive when what is required is a much greater emphasis on economic, diplomatic and security incentives. When the Government's goal is to symbolise disapproval, measures other than economic sanctions should be used wherever possible.[19]

The report was prepared before the sanctions in 2005–2016 against Iran, for its nuclear programme turned out to be a success story; however, it is highly doubtful that this development would have changed the critical stance of the Lords. More recently, in 2019, the Foreign Affairs Committee of the British Parliament issued a report which sang their praises, urging the British government to take an active role in their drafting and implementation in the post-Brexit era:

> Sanctions are essential to UK foreign policy, providing key levers by which the Government can exert pressure on terrorist groups, rogue regimes and individuals connected to those regimes. They also enable the UK and its partners to demonstrate solidarity with one another and to support the rules-based international system in the face of threats and unacceptable behaviour. A robust, effective and coherent sanctions policy is therefore indispensable to the UK's foreign policy and national security strategy….[20]

What explains this change of attitude and their continuous use is that targeted sanctions are appreciated for their "comparative utility", that is, the fact that their absence (or their lifting) can send the wrong signal to targets and risk making a bad situation worse in terms of coercing and constraining them.[21] In that respect, financial sanctions are not regarded as a medicine in its own right, but rather as a necessary ingredient of a wider political agenda to be evaluated by reference to their contribution to the overarching purposes of targeting a particular regime. As such, they can be "successful even when targets do not change their behaviour".[22]

1.4 Targeted financial sanctions as flexible tools

This approach does not, on its own, justify the continuous use of sanctions in international relations, but neither does it downgrade their importance as an international policy tool. Instead, it gives them a wider role, as they have become "coercive, constraining and signalling devices in foreign policy".[23]

19 House of Lords, *The impact of economic sanctions* (2007), Vol. 1, [109].
20 Foreign Affairs Committee, *Global Britain: The future of UK sanctions policy inquiry* (2019), [1] (Foreign Affairs Committee).
21 F Giumelli, *How EU sanctions work: a new narrative* (Chaillot Paper No. 129 2013), p. 25 (Giumelli Chaillot).
22 *Ibid.*, p. 37.
23 *Ibid.*, p. 37.

Thus, coerciveness indeed aims to change the behaviour of targets, but it is neither the sole reason for imposing sanctions nor the sole measure of their success. In terms of constraint, the aim is to make it "more difficult to engage into proscribed activities (though constraining access to essential resources, such as funds, arms, sensitive goods, thereby raising costs and forcing changes in strategy)".[24] And in terms of signalling, sanctions are used to identify behaviour against international norms: "[s]ignals can be directed to at targets and audiences, either domestic or international, and stigmatize or isolate targets for violating international norms".[25] Unsurprisingly, UN-targeted sanctions are found to be most effective in terms of signalling (43%) and least effective in terms of coercing targets (13%). Constraining comes a close second to signalling (42%).[26]

In that respect, the Syrian sanctions, which have been largely criticised as ineffective in terms of coercion, can be seen through a different prism:

> [s]uccess is not determined by whether Assad remains in power, but rather the effectiveness of sanctions is borne out by the degree of constraint imposed on Assad and his regime… The alternatives to sanctions do not appear to guarantee better results at lower costs. In the absence of sanctions, Assad may have had a greater incentive to limit the use of force to preserve his legitimacy in the eyes of the international community, but in fact he began to use violence when sanctions were not in place. Moreover, their lifting at this point of the crisis would serve to legitimise Assad's behaviour rather than condemn it.[27]

A significant element of signalling is influencing opinion, both as regards the targeted state itself and other members of the international community, and also vis-à-vis the general public of the targeting state. Sanctions have the potential to restore public perceptions about the standing of a country in the international arena and about its ability to protect its citizens. They do this by satisfying the public's demands for immediate corrective action, which is especially acute in the aftermath of terrorist events. Considering that military intervention is expensive and often triggers public reactions due to its destructiveness, sanctions create a protective cocoon (or the perception of it) by attenuating the fears of the public at a minimal cost. Their vigorous enforcement, inevitably, contributes to the restoration of trust to the political system.

Therefore, sanctions are devices for managing social perceptions, as much as for coercing, constraining or sending signals to the targets. The importance of such role has been amplified from the moment sanctions targeted individuals and commercial entities in addition to political and state regimes. By publicly identifying individuals and legal entities, sanctions personalise accountability and provide the means for punishing them – not so much in terms of liability, but by controlling their financial sources and activities, which is a type of punishment that is more relatable to the general public. Targeted financial sanctions create a causal link between the targets and their punishment. As such, collective responsibility is replaced by individual responsibility that is more transparent, easier to monitor and gives a clear target to the public.

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24 F Giumelli, "The Purposes of Targeted Sanctions" in Th. Biersteker, S. Eckert and M. Tourinho in *Targeted sanctions: the impacts and effectiveness of United Nations action* (CUP 2016), p. 45.

25 *Ibid.*, p. 46

26 UN Security Council Report, *UN Sanctions* (2013), p. 15 < https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/special_research_report_sanctions_2013.pdf> (last accessed 2 February 2020).

27 Giumelli Chaillot (n 21), p. 35.

2 Insurance sanctions

2.1 A slow beginning

Historically, insurance prohibitions were not popular among drafters of sanctions. Between 1990 and 2004, only four UN security council resolutions specifically targeted insurance, and all of these did so in a purely aviation context.[28] They prohibited the payment of claims under existing insurance contracts for Libyan, Serbian and Angolan aircraft, respectively, and banned the provision of new or renewed direct insurance for these aircraft.[29] These insurance prohibitions were part of broader aviation-related bans that aimed to limit the movement of the target's elites, as well as to impair their ability to move goods and money around. Evidence now suggests that aviation bans "are particularly effective" in terms of constraining the target,[30] with the prohibition of insurance viewed as one of the main supportive measures.[31]

Still, insurance prohibitions were not regarded as a measure of general application. Insurance was viewed as an ancillary activity that did not have the potential to independently further the tripartite aim of sanctions, namely, to coerce, constrain or signal. It was used as a restriction of last resort when the enforcement of flight bans had failed or had not been implemented properly.[32]

Insurance bans of this type were not of great concern to insurers, since the targets were clearly identified and consisted of a small portion of their business. Even when the prohibition was wide enough to cover the payment of claims or renewal of insurance "to any aircraft which entered the territory of Angola" other than through designated points, its implementation was not problematic as they were dealing with it via their geographical limitation warranties and their standard underwriting practices.[33] Inevitably, insurance was not in the radar of the relevant academic literature on sanctions either. Similarly, cases on frustration or illegality of insurance contracts as a result of sanctions were few and far between.

2.2 Realising the utility of insurance sanctions

The attacks of 9/11 brought a sea change to the scope of targeted sanctions, with finance taking a central role. Inevitably, "policy-makers have adapted tools initially designed to target the assets and money-laundering capabilities of terrorist organisations and organised crime to meet the needs of non-proliferation sanctions. This focus on the banking sector has forced banks and financial institutions to enhance greatly their compliance capabilities and procedures".[34]

28 In the cases of Libya by means of SCRes 748 of 31 March 1992, the Federal Republic of Yugoslavia (Serbia and Montenegro) by means of SCRes 757 of 30 May 1992 and Angola by means of SCRes 1127 of 28 August 1997.

29 Para. 4(b) of SCRes 748, Art 7(b) of SCRes 757 and Art 4(d)(iii) of SCRes 1127.

30 Targeted Sanctions Consortium, *The effectiveness of United Nations targeted sanctions* (2013), p. 26 (in file with the author) (TSC report).

31 *Ibid*., p. 74.

32 Bonn International Centre for Conversion et al, *Design and implementation of arms embargoes and travel and aviation related sanctions* (BICC 2001), p. 74.

33 Para 4(d)(iii) of SCRes 1127 of 28 August 1997.

34 M Moran & D Salisbury, *Sanctions and the insurance industry. Challenges and opportunities.* (Centre for Science and Security Studies, King's College, London, Paper 2/2013), p. 9 (Insurance report).

Insurers were not similarly prepared; as a result, they "have faced difficulties in developing similarly sophisticated compliance capabilities".[35] A factor that contributed to such unpreparedness was the pre-9/11 logic that considered insurance prohibitions as supportive measures of sectoral bans (mostly transportation-related). As such, the targets were easily identifiable, which made compliance a relatively straightforward task, while the prohibitions affected a small part of the insurance market.

The findings of the 2009 FSA review on compliance with financial sanctions are illuminating: as the review put it, "…[several] [f]irms…believed that insurance is a no or low risk area for financial sanctions and others who believed that UK financial sanctions did not apply to insurance".[36] Furthermore, monitoring compliance with insurance prohibitions was identified as an area of concern. Major insurance groups were relying on small firms to screen potential sanctions targets, yet "approximately three quarters of small firms surveyed did not screen the HMT list and, in general, small firms showed very low levels of awareness of the financial sanctions regime".[37]

What caught insurers off-guard was the transformation of the nature of insurance prohibitions. Following 9/11, their role was not limited to supporting aviation bans, but instead they became part of the regime of financial sanctions. Since 2008, several UN resolutions have called upon states to prevent or to exercise vigilance regarding the provision of insurance or reinsurance to targeted individuals and corporate entities in relation to the sanctions imposed against Eritrea, North Korea and Iran,[38] while the UN has imposed targeted asset freezes (that affect the payment of premium) on a regular basis since 2000.[39]

This change was quickly reflected in the European sanctions regime, which gradually viewed prohibitions on insurance as a tool of general application that supported the implementation of financial sanctions. To give an example, the primary legislation which comprised the pre-Brexit UK sanctions regime cast a wide net over insurers, by either containing insurance prohibitions related to terrorism or by giving authority to the Treasury to impose ad hoc insurance restrictions.

The Terrorist Asset-Freezing Act 2010, for example, imposes restrictions on the provision of financial services to persons or commercial entities designated as terrorists by HM Treasury or by Council Regulation (EC) No 2580/2001. The Act provides, among other things, that a person must not make financial services available to a designated person or to any other person for the benefit of a designated person.[40] The term "financial services" is used broadly to include the provision of "direct life assurance; direct insurance other than life assurance; reinsurance and retrocession; insurance intermediation, such as brokerage and agency; services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement

35 *Ibid*.

36 FSA, *Financial services firms' approach to UK financial sanctions* (2009), [11].

37 *Ibid*., [31].

38 In the case of Iran, by means of SCRes 1803 of 3 March 2008 and 1929 of 9 June 2010, North Korea by means of SCRes 1874 of 12 June 2009 and 2094 of 7 March 2013 and Eritrea by means of SCRes 2023 of 5 December 2011, to name a few.

39 For a recent review of the process for implementing sanctions at the UN level, see R. Gordon, M. Smyth and T. Cornell, *Sanctions law* (Hart Publishing 2019), pp. 11–34 (Gordon).

40 ss. 12 and 13.

services".[41] The Treasury has issued two general licences, namely, AFU/2011/G1 and AFU/2011/G6, under its authority deriving from s. 17 of the Act. The licences permit the provision of insurance to designated persons subject to reporting such issuance to the Office of Financial Sanctions Implementation (OFSI).[42] They also permit the provision of goods, amenities and services related to insurance claims subject to the same reporting requirements,[43] such as "courtesy cars or emergency hotel accommodation to designated persons".[44] Still, the receipt of premium from, or the payment of, claims to designated persons remains subject to the freeze and is not covered by the general licences. As such, it is prohibited unless a specific licence is issued by the OFSI.

The Anti-Terrorism, Crime and Security Act 2001 gives authority to the Treasury to make freezing orders if it reasonably believes that an action that is detrimental to the UK's economy or threatens the life or property of UK nationals or residents has been, or is likely to be, taken by a foreign government or a non-UK resident.[45] Such orders "prohibit…persons from making funds available to or for the benefit of a person or persons specified in the order".[46] Although the 2001 Act does not prohibit the provision of insurance to persons designated in the relevant order, payment of claims to and/or receipt of premium from them requires a licence from OFSI.

Schedule 7 of the Counter-Terrorism Act 2008 authorises the Treasury to give directions to manage the risk of money laundering, terrorist financing and the development or productions of WMD. The directions are to be issued to the financial sector,[47] namely, a UK or in the UK credit or financial institutions,[48] including insurance companies.[49] The Act provides that a direction may require an insurer not to enter into an insurance contract or to stop providing cover to a designated person or even to cease having any commercial relation with a designated person.[50] An example of such direction is the Financial Restrictions (Iran) Order 2009[51] which prohibited all persons operating in the financial sector, including insurers, from "enter[ing] into, or continu[ing] to participate in, any transaction or business relationship with" Bank Mellat, the Islamic Republic of Iranian Shipping Lines (IRISL) or any of their branches.[52]

41 s. 40(1)(a).
42 ss. 4 and 5 of Licence AFU/2011/G1.
43 ss. 4 and 5 of Licence AFU/2011/G6.
44 OFSI, *Financial sanctions: guidance* (2016), at [9.3].
45 s. 4(2) and (3).
46 s. 5(1).
47 s. 3, Sch 7.
48 s. 4 Sch 7.
49 s. 5(2)(b) and (g). The due diligence requirements (s. 10) and the ongoing monitoring requirements (s.11) of Sch. 7 do not apply to insurance companies, other than life insurers. The systematic reporting requirements (s. 12) and the requirement to limit or cease business with a designated person (s. 13) apply to insurers.
50 s. 13, Sch 7.
51 SI 2009/2725.
52 Paras 3 and 4. Bank Mellat successfully challenged its designation in *Bank Mellat* v *HM Treasury (No. 2)* [2013] UKSC 39; [2014] A.C. 700. The designation of IRISL led *to Islamic Republic of Iran* v *Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm); [2011] 1 Lloyd's Rep. 195.

2.3 Insurance sanctions acquiring a distinct role

The UK approach to insurance is part of the wider EU philosophy that has made insurance prohibitions a regular feature of its financial sanctions regimes. It has been rightly argued that the EU oil embargo and related insurance prohibitions against Iran were the wake-up call for insurers in terms of monitoring and compliance.[53] This is because they were quick to bite Iran itself as well as the insurers.

From the point of view of the target, "[t]he prohibition on the provision of insurance to ship owners transporting Iranian oil has indeed served to significantly reduce Iran's oil market. In June 2013, Reuters reported that Iran's crude exports had dropped to some 700,000 barrels per day".[54] From the point of view of the insurance industry, it accelerated the establishment of risk-based compliance systems, as regulators on both sides of the Atlantic started fining insurers and broker for sanctions' violations.[55]

The 2006–2015 Iranian sanctions demonstrated that insurance prohibitions were not a mere ancillary measure to be used sporadically and in a limited manner, but rather that they had a major role to play, especially against targets that used the proceeds from energy and transport to finance prohibited activities. With London being one the leading providers of energy and marine and aviation insurance, they also spread the message that compliance with sanctions shall be taken as seriously.

What made the case of Iran unique (at least in Europe) was that the insurance prohibitions in EU Regulation No. 267/2012[56] supported different types of sanctions.[57] The financial ones took the form of freezing the assets of designated persons, which had an effect on receiving premium,[58] and also of prohibiting the provision of insurance and reinsurance and payment of claims to designated persons, any Iranian person or entity, including the government, or any person acting through or on their behalf.[59] The arms embargoes prohibited the provision of export credit insurance for any sale, supply, transfer or export of designated military goods.[60] The commodity/transportation sanctions prohibited the provision of insurance and reinsurance related to the import, purchase or transport of crude oil, petroleum products, petrochemicals of Iranian origin or otherwise imported from Iran and natural gas which originated in Iran or has been exported from there.[61]

53 Insurance report (n 34), p. 9.

54 *Ibid.,* p. 25.

55 Starting in 2013, Lloyd's managing agents undertook a two-year review of their anti-sanctions controls that led to, among other things, to issuing Lloyd's-wide compliance guidelines.

56 Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010.

57 As of 16 January 2016, the EU terminated all nuclear-related economic and financial restrictive measures included in Regulation 267/2012 (as amended) by means of Council Regulation (EU) 2015/1861 of 18 October 2015, with certain restrictions remaining in place; yet the role of insurance prohibitions is minimal, limited to export credit insurance for designated goods and technology.

58 Art 23. Derogations from such prohibition were provided in Arts 24–29.

59 Art 38.

60 Art 5.

61 Arts 11, 13, and 14a

The same recipe vis-à-vis insurance prohibitions is currently used in the Syrian sanctions, albeit their scope is wider. Considering that EU Regulation 36/2012[62] was drafted around the same time as the Iranian one, this should not come as a surprise. They are part of financial sanctions in the form of freezing of funds and economic resources of designated persons; as such, they affect the receipt of premium from them[63] and also prohibit the provision of insurance or reinsurance, or payment of claims, to designated persons/entities, the Syrian state, its government and public bodies or to any natural or legal person when acting on their behalf or at their direction.[64] They are also part of commodity and transportation sanctions which prohibit the provision of insurance or reinsurance related to the importation into the EU or other transport of crude oil or petroleum products originating in, or exported from, Syria[65]; the purchase of crude oil or petroleum products which are located or originating in Syria[66]; the sale, supply, transfer or export of designated jet fuel and fuel additives to any person, entity or body in Syria, or for use in Syria[67]; and the sale, supply, transfer or export of designated goods to be used in the construction or installation in Syria of new power plants for electricity production.[68] Last but not least, they are part of the arms embargo in that they prohibit insurance, reinsurance or insurance brokering related to any purchase, import or transport of designated military goods if they originate in Syria, or are being exported from Syria to any other country.[69] It is interesting to note that insurance is expressly prohibited in the context of the Syrian arms embargo, while in the Iranian context, the Regulation only referred to export control insurance, with the term "financial assistance" not covering insurance.[70]

What we are seeing today with the Syrian sanctions is a comprehensive set of insurance prohibitions that reflect the prominence of the Syrian situation in the EU's external relations agenda. The fact that the sanctions have not worked as the EU hoped in 2011 is mostly associated with the failure to implement them multilaterally, rather than with their design. In that respect, it is not expected that the newly founded significance of insurance prohibitions in the context of sanctions will be impaired. Still, such comprehensive insurance prohibitions are to be used in situations that call urgently for either regime change or drastic constraining action.

In the case of sanctions against Russia and Ukraine, this urgency is expressed in different legal instruments. The aim of the insurance prohibitions in EU Regulation

62 Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011.

63 Art 14. Derogations such prohibition are provided in Arts 16–22.

64 Arts 26 and 27. However, the Regulation provides that it is permitted to provide compulsory or third-party liability insurance to Syrians based in the EU, and it is also permitted to provide (re)insurance to individuals acting in their private capacity – Arts 26 (2) and (3). Furthermore, the Regulation provides that it is permitted to provide (re)insurance to the owner of a vessel or aircraft that is chartered by a non-designated person or entity that is a member of the Syrian government, its public bodies, corporations or agencies – Art 26(3).

65 Art 6(d).

66 Art 6(d).

67 Art 7(a).

68 Art 12(1).

69 Art 3(a).

70 Art 5 of Regulation No. 267/2012 (as amended).

833/2014[71] is to support the arms embargo rather than contribute to extensive financing or transportation sanctions. Its provisions have now been extended to 31 January 2021; they prohibit the provision of insurance or reinsurance related to any sale, supply, transfer or export of designated military goods to any natural or legal person, entity or body in Russia or for use in Russia[72]; and the provision of export credit insurance for any sale, supply, transfer or export of dual-use goods and technology to any natural or legal person, entity or body in Russia or for use in Russia, if the items are or may be intended, in their entirety or in part, for military use or for a military end-user.[73]

EU Regulation 833/2014 contains significant restrictions affecting the oil industry. For example, the Regulation provides that authorisation is required for the sale, supply, transfer or export of designated items related to the oil industry, whether or not originating in the EU, to any natural or legal person, entity or body in Russia or in any other state, if such items are for use in Russia.[74] Such authorisation is not to be granted if there is reasonable ground to believe that the said items are destined for Russian oil exploration and production in waters deeper than 150 metres, or in the offshore area north of the Arctic Circle or in shale formations by way of hydraulic fracturing.[75] It is also prohibited to provide any services associated to the said three activities.[76] These restrictions do not, however, come with insurance prohibitions, creating as such a gap in its comprehensive nature. Furthermore, the Regulation provides in its Preamble that insurance services provided by the designated Russian financial institutions under Art 5 fall outside its scope.[77]

With respect to commodity and transportation sanctions, Regulation 692/2014[78] prohibits (a) the provision of insurance or reinsurance relating to the import into the EU of goods originating from Crimea or Sevastopol,[79] and (b) the payment of claims (i) that are related to the import of such goods,[80] (ii) to designated persons/entities according to Regulation 269/2014 and those acting through or on their behalf[81] and (iii) to any person/entity found to have breached the prohibitions of the regulation.[82] These measures have now been extended until 22 June 2020.

Last but not least, Regulation 269/2014 provides that, until 14 September 2020, (a) funds and economic resources belonging to, owned, held or controlled by any designated persons or entities shall be frozen (something that that raises implications

71 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine as amended by Council Regulation (EU) No 1290/2014 of 4 December 2014.

72 Art 4(1)(b).

73 Art 4(c).

74 Art 3(1).

75 Art 3(3) and (5).

76 Art 3(4).

77 Recital 5.

78 Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol as amended by Council Regulation (EU) No 825/2014 of 30 July 2014 and as further amended by Council Regulation (EU) No 1351/2014 of 18 December 2014.

79 Art 2(b).

80 Art 6(d).

81 Art 6(1)(a) and (b).

82 Art 6(1)(c).

regarding the payment of premium),[83] and (b) the payment of claims to designated persons/entities and anyone acting through or on their behalf is prohibited.[84]

The scope of the insurance prohibitions against Syria and Russia confirms the transition of insurance prohibitions from a tool of limited application to a regular measure, especially in political situations that call for decisive action. While the verdict on their success is still awaited, they have demonstrated that insurance prohibitions have become an integral part of the standard wording of EU sanctions. At the same time, they have demonstrated that insurance prohibitions are a versatile tool that can support different type of sanctions and its comprehensiveness may vary depending on the circumstances.

2.4 Expanding the role of insurance sanctions

The North Korean sanctions regime is a good example of the expansive role that insurance prohibitions current play in the EU. These go back to 2007, with the basic Regulation No 329/2007[85] containing a prohibition against providing credit export insurance acting in tandem with the arms embargo.[86] At the same time, it provided for a freeze on the assets and economic resources of designated persons and entities.[87] In 2013, the stance against North Korea was hardened, following its nuclear test in February 2013. As a result, more insurance prohibitions were introduced. The arms embargo was changed so as expressly to include the provision of insurance or reinsurance for any sale, supply, transfer or export of designated military goods or related technical assistance to any person or entity in, or for use in, North Korea[88]; furthermore, it was enacted that no claims were to be paid to designated persons or entities, including the North Korean government and public bodies, and any person or entity acting through or on their behalf.[89] Furthermore, in April 2016, a further overarching prohibition was implemented targeting the main source of concern at the time: it prohibited any insurance to persons or entities involved in trade which could contribute to North Korea's nuclear or ballistic missile programmes.[90] This was a wide prohibition considering that it was not linked to designated persons, but instead captured anyone whose trade could facilitate the country's targeted objectionable activities, even indirectly.

Upon further escalation of the disputes with North Korea, EU Regulation 2017/1509 was enacted, repealing and replacing Regulation No. 329/2007.[91] It contains arguably

83 Art 2.
84 Art 11.
85 Council Regulation (EC) No 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea.
86 Art 3(b).
87 Art 6.
88 Art 3(1)(b) inserted by Council Regulation (EU) No 296/2013 of 26 March 2013 amending Regulation (EC) No 329/2007 concerning restrictive measures against the Democratic People's Republic of Korea.
89 Art 9(b).
90 Art 9c inserted by Council Regulation (EU) 2016/682 of 29 April 2016 amending Regulation (EC) No 329/2007 concerning restrictive measures against the Democratic People's Republic of Korea.
91 Council regulation (EU) 2017/1509 of 30 August 2017 concerning restrictive measures against the Democratic People's Republic of Korea and repealing Regulation (EC) No 329/2007.

the most comprehensive insurance prohibitions ever enacted against a targeted country, with the overarching aim being to cut-off North Korea completely from insurance services. While replicating the prohibitions of its predecessor, two additional ones are of interest. In Art 32, the Regulation prohibits the provision of financing or financial assistance, including insurance, to natural or legal persons, entities or bodies involved in trade with North Korea. Furthermore, Art 43(f) prohibits the provision of insurance or reinsurance services to vessels owned, controlled, operated by North Korea or certain other vessels designated in the Annex of the Regulation.[92]

Blanket insurance prohibitions, such as the ones in Arts 32 and 43(f), are difficult to enforce as they are not linked to predetermined persons, entities or means of transport. Such prohibitions target trade and shipping activities because they are linked to the financial well-being of the targeted state and aim to put pressure on the political regime by cutting-off the supply of goods. As such, they exceed the ambit of targeted sanctions and have moved into the domain of comprehensive sanctions. This reflects the recent tendency of the EU to selectively "support comprehensive sanctions packages" when coercing the targeted state becomes a priority.[93]

2.5 An evaluation of the role of insurance sanctions as tool of international relations

What the analysis of the Syrian, Russian/Ukrainian and North Korea sanctions regimes also demonstrates is that insurance prohibitions follow closely the deterioration of the relations with targeted states.

At a first level, they signal disapproval by contributing to financial measures and arms embargoes against selected targets. Targeted financial prohibitions are the starting point of EU sanctions, and today their wording is pretty much standardised. In the case of embargoes, the severity of the signalling depends on the actual measures taken, namely, whether export credit insurance prohibitions or general insurance prohibitions relating to the purchase, import or transport of designated military goods are imposed. The later prohibition demonstrates a further deterioration of the relationship with the targeted state.

The next step is to prohibit the provision of insurance (and occasionally the payment of claims) related to the import, transport and purchase of designated goods originating or exported from targeted states and the sale, supply, transfer or export of designated goods to any person in designated countries. Both types of prohibitions are targeted in the sense that the relevant goods are to be designated, yet they have general application in that they aim to ban any of their movements.

The third step, and the most severe so far, is to prohibit the provision of insurance to any person or legal entity that is involved in trade with the targeted state. When this

92 Art 44(5) of the Regulation permit ad hoc derogations from the insurance prohibitions provided that "the vessel is engaged in activities exclusively for livelihood purposes which will not be used by DPRK individuals or entities to generate revenue or exclusively for humanitarian purposes".

93 T Keatinge and E Dall, "Consensus for action: towards a more effective EU sanctions policy" (Columbia University Center on Global Energy Policy 2018) < https://energypolicy.columbia.edu/sites/default/files/pictures/Sanctions-AnEUandUKperspective_CGEP_Final.pdf > (last accessed 2 February 2020).

is coupled with the prohibition of providing insurance to vessels owned or operated by nationals of the targeted state, it elevates insurance sanctions to a tool of coercing the targeted state into changing behaviour. Considering the dependence of international trade and transport on insurance, such prohibitions have the potential to severely limit the import and export of any goods from the targeted state. As such, they can indiscriminately deteriorate the living standards within the targeted state and directly contribute to the change of the regime or at least its behaviour.

Unfortunately, there are no studies measuring the specific effectiveness of insurance prohibitions as a sanctions tool. Still, their continuing deployment indicates that have become a *sine qua non* of the EU's sanctions policy. This is not surprising if one considers that four European countries are in the top ten countries by life and nonlife direct premiums,[94] and five out of ten leading reinsurers in terms of premium written in are based in Europe.[95] In that respect, insurance has a global reach that can only be compared to the banking sector in Europe. This reach is increasingly being used by European regulators as a means of putting commercial pressure on targeted states to achieve political aims.

2.6 Insurance sanctions post-Brexit

With the departure of the UK from the EU, a gap is created in terms of implementing international sanctions. This is the result of the reliance hitherto of the British government on EU sanctions regulations in order to implement both UN sanctions and unilateral European ones in the aftermath of the Supreme Court decision in *Ahmed v HM Treasury.*[96] As such, the pre-Brexit sanctions regime (which is applicable until the 31 December 2020) is made up of several different statutory instruments (one per targeted state or group/activity), which mostly contain the relevant criminal offences, and in addition a number of EU Regulations.[97] As for UK unilateral sanctions, a trio of acts, namely, the Terrorist Asset-Freezing Act 2010, the Counter-Terrorism Act 2008 and the Anti-Terrorism, Crime and Security Act 2001 (which we analysed in Part II.2), created a domestic regime of financial sanctions.

To fill the gap, the British government enacted the Sanctions and Anti-Money Laundering Act 2018 (SAMLA),[98] which aims to enable ministers to implement sanctions (s 1) and anti-money laundering (s 49) regulations by means of statutory instruments. A review of the new Act is outside the scope of this chapter, yet a few related points are worth mentioning.

94 Namely, the UK, France, Germany and Italy; for more information, see Insurance Information Institute, World Insurance Marketplace (2018) <https://www.iii.org/publications/insurance-handbook/economic-and-financial-data/world-insurance-marketplace> (last accessed 2 February 2020).

95 Namely, Swiss Re, Munich Re, Hannover Ruck, Scor and Lloyd's; for more information, see Reinsurance News, Top 50 Global Reinsurance Groups <https://www.reinsurancene.ws/top-50-reinsurance-groups/> (last accessed 2 February 2020).

96 [2010] UKSC 2; [2010] 2 A.C. 534. For a recent review of the post-Brexit sanctions regime, see Gordon (n 39), paras. 3.7 – 3.20.

97 For details, see Gordon (n 39), paras.3.21 – 3.204.

98 SAMLA received the Royal Assent on 23 May 2018 and came into effect for the most part on 22 November that year.

SAMLA gives powers to ministers to create sanctions regulations not only in order to comply with the UN sanctions regime and other international obligations of the UK[99] but also in a wide-ranging set of situations, namely, to prevent terrorism and preserve peace and security,[100] to further the foreign policy objectives of the UK,[101] to promote the resolution of armed conflicts,[102] to deter gross violations of human rights,[103] to prevent the use of WMD[104] and to promote respect for democracy.[105] More controversially, the ministers have the power to make designations by description (rather than by name).[106] The said aims of the sanctions regime would be achieved by the ministers having the power to impose financial sanctions,[107] immigration sanctions,[108] trade sanctions,[109] as well as aircraft and shipping sanctions.[110]

Insurance prohibitions are part of the financial sanctions regime of the new Actm as "financial services" are defined to include "insurance-related services".[111] In turn, insurance services are defined in a broad manner to include direct life and non-life insurance, reinsurance, brokering and services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.[112] This is an all-encompassing description that aims to cover not only insurers, P&I clubs, reinsurers, managing agents of Lloyd's and insurance brokers (both in terms of placing risks and providing risk consultancy services to insureds), but also surveyors, adjusters, as well as lawyers and other claims-handling organisations.

Regarding the actual prohibitions, SAMLA enables ministers to freeze the assets owned, held or controlled by designated individuals and entities.[113] It also permits them to prevent the provision of insurance-related services to or for the benefit of designated individuals or entities connected with a targeted state or a category of persons or entities identified by description within a targeted state.[114] Furthermore, it prevents funds from being made available to and for the benefit of or been received from the aforementioned list of individuals or legal entities.[115] In addition, it prevents the ownership, control or having a financial interest in designated insurance companies or those connected with a targeted state.[116] SAMLA also enables ministers to prevent the provision of insurance services to a wide range of trade activities, including the export, import and movement of designated goods,[117] and to designated aircraft and ships or those registered in the targeted state.[118]

99 ss. 1(1)(a) and (b).
100 ss. 1(2)(a), (b) and (c).
101 ss. 1(2) (d).
102 ss. 1(2) (e).
103 ss. 1(2) (f) and (g).
104 ss. 1(2)(h).
105 ss. 1(2)(i).
106 s. 12. The safeguards are found in ss. 12 (3) – (5).
107 s. 3.
108 s. 4.
109 s. 5.
110 ss. 6 and 7m respectively.
111 s. 61(1)(a).
112 *Ibid.* The same definition is used in the Terrorist Asset Freezing Act 2010 (see section II.2).
113 s. 3(1)(a)
114 s. 3(1)(b) and (c).
115 s. 3(1)(d) and (e).
116 s. 3(1)(g).
117 s. 5 and Schedule 1, Part 1, s. 13.
118 *Ibid.,* s. 14.

SAMLA enables the implementation of wide-reaching insurance prohibitions. It covers the provision of insurance to individuals, legal entities and modes of transport, as well as the receipt of premium from designated targets and the payment of claims money to them. It also prohibits investment in designated insurance companies and acquiring insurance and other related services from designated persons. Furthermore, it enables ministers to impose blanket trade insurance prohibitions with targeted states, as well as their ships and aircraft.

In that respect, the message for the post-Brexit era is clear that insurance prohibitions will continue playing an important role in the sanctions policy of the UK. This could not be any other way, considering that the UK is the fourth biggest insurance market in the world in terms of premium and is a host to two of the ten biggest reinsurers.[119] As such, insurance prohibitions are one of the most potent tools that the UK has in its post-Brexit aim "to become a global leader in sanctions policy [by setting] the international gold standard for strategy, design and implementation".[120]

2.7 Conclusion on insurance sanctions

Insurance prohibitions are here to stay both in the European sanctions' regime and in the post-Brexit UK. Admittedly, they are not the most impressionistic type of sanctions and their imposition does not have the ability to excite the public of the targeting state. Also, they are less effective when dealing with terrorist groups or other entities operating outside the legal norms.

Yet, they seem to be effective when dealing with states as the European insurance industry and related services have a unique extraterritorial impact in terms of trade and transport. As such, insurance prohibitions have the potential to impair the international commercial relations of the targeted states and indirectly affect their living standards, putting, as such, pressure on the targeted political regime. In that respect, we witness the evolution of insurance from a contractual risk transfer method to a tool of international relations. Having started modestly in this new role in the aftermath of 9/11, insurance prohibitions have acquired a distinct role to play in sanctions' regimes despite the absence of any detailed studies on their effectiveness.

3 Some thoughts on insurance law and sanctions

3.1 Limited insurance-related case law on sanctions

The fact that insurance sanctions are the product of the present century explains why there is little case law on the effect of sanctions on marine and non-marine insurance contracts. If one reviews English law on illegality and frustration, they will come across cases on contracts of sale, carriage of goods and charterparties, but rarely on insurance ones.

The 2006–2015 Iranian sanctions brought the issue of the interrelation between sanctions and insurance law to the forefront of the discussion. Between 2010 and 2013,

119 See n 94 and n 95.
120 Foreign Affairs Committee (n 20), [51].

three cases were heard before English courts that examined the doctrine of frustration of an English marine insurance contract as a result of an Order issued under Schedule 7 of the Counter-Terrorism Act 2008,[121] the effectiveness of sanction cancellation clauses[122]; and the effect of foreign illegality on English marine insurance contracts.[123]

With the exception of *Arash Shipping*, the other two cases did not go as planned for insurers. In both situations, they were unable to discharge their obligations under the policies by using the common law doctrines of frustration and foreign illegality. As a commentator rightly argued:

> English courts have shown a willingness to give effect to the contractual rights and obligations to the fullest extent possible despite the effect of sanctions. The tendency of the English courts to uphold contracts despite the effect of sanctions can be seen in one form or another in cases going back over nearly thirty years and beginning with *Libyan Arab Foreign Bank v Bankers Trust Co*.[124]

Understandably, these decisions caused trepidation in the insurance market, with Lloyd's and the IUA recommending the use of sanctions clause, a practice that has been religiously followed since then.[125] Not surprisingly, the only reported case since 2013 has been on the interpretation of a sanction clause.[126]

With the proliferation of insurance prohibitions in the EU and the post-Brexit British sanctions regime, we might encounter more relevant cases coming before English courts despite the relevant inactivity of the last few years. Considering that the doctrine of illegality is a "notoriously knotty territory" of English law, such a development will not come as a surprise.[127]

3.2 Insuring sanctioned activities

One might argue that illegality and sanctions are not such a tricky combination because the EU sanctions regimes (and their implementing statutory instruments) often contain express prohibitions on providing insurance to designated persons and entities.[128] In these cases, there is little doubt that any such contract of insurance will be void and unenforceable as a result of its illegality. The same conclusion is reached when the Regulation prohibits the provision of insurance over the transit of designated goods, for example, the prohibition of insuring the transportation of crude oil from

121 *Islamic Republic of Iran Shipping Lines* v *Steamship Mutual Underwriting Association (Bermuda) Ltd 2010]* EWHC 2661 (Comm); [2011] 2 All E.R. (Comm) 609; [2011] 1 Lloyd's Rep. 195.

122 *Arash Shipping Enterprises Co Ltd* v *Groupama Transport* [2011] EWCA Civ 620; [2011] 2 Lloyd's Rep. 607.

123 *Sea Glory Maritime Co* v *Al Sagr National Insurance Co (The Nancy)* [2013] EWHC 2116 (Comm); [2014] 1 Lloyd's Rep. 14.

124 D Osborne, "The impact of modern sanctions on shipping and ship finance" in B Soyer & A Tettenborn (eds) *Shipbuilding, sale and finance* (Informa Law from Routledge 2015), p. 256.

125 See Lloyd's Market Bulletin Y4832 (2014) <http://www.lloyds.com/~/media/files/the%20market/communications/market%20bulletins/2014/10/y4832.pdf > (last accessed 2 February 2020).

126 *Mamancochet Mining Ltd v Aegis Managing Agency Ltd* [2018] EWHC 2643 (Comm); [2018] 2 Lloyd's Rep. 441.

127 *Parkingeye Ltd* v *Somerfield Stores Limited* [2012] EWCA Civ 1338; [2013] Q.B. 840; [2013] 2 W.L.R. 939, [28] per Sir Robin Jacob.

128 E.g. see Reg. 15(1) of The Syria (Economic Union Financial Sanctions) Regulation 2012 that implements Art 26 of EU Regulation 36/2012 (as amended).

Syria to any other country, or the import into the EU of goods originating in Crimea as "the court has no discretion in the matter and a policy insuring such an adventure will be rendered illegal by that statute".[129]

However, issues are raised when the relevant sanctions regulations do not expressly prohibit the insurance of designated activities or goods. For example, the provision of insurance for the carriage of a drill pipe that, unbeknownst to the insurer, is to be used for deep-water oil exploration in Russia is not prohibited per se. Yet, contracts for the supply or transfer of the drill for use in oil production in waters deeper than 150 metres are prohibited, and no provision for the issuance of licences is made.[130]

If a loss occurs during transit, could the insurers use the defence of illegality of the insured's conduct? If the policy of insurance is subject to the Marine Insurance Act 1906, it has to be examined whether the insured adventure (i.e. the carriage of the goods) is lawful under the implied warranty in s. 41. To decide, one is required to look into the objective of the prohibition and question whether the performance of the prohibited act "renders… the contract illegal and void…. or [it] merely imposes criminal or other sanctions upon the offending party".[131]

Answering this question is never easy. The Regulation regards these activities as essential for putting pressure on Russia, and for that reason has imposed a blanket prohibition without the leeway of obtaining a licence. In that respect, it is likely that the contract of carriage will be considered unlawful for the purposes of s. 41. Otherwise, the scope of the prohibition in question will be eroded. The same conclusion will be reached if the said drill pipe is part of an otherwise permitted consignment of goods that is covered by the same policy.[132]

It is important to note that EU sanctions regimes usually contain the following provision:"[a]ctions by natural or legal persons, entities or bodies shall not give rise to liability of any kind on their part, if they did not know, and had no reasonable cause to suspect, that their actions would infringe the measures set out in this Regulation".[133] In essence, the activity is unlawful only if the insured suspected or was aware that the contract of carriage would breach the sanctions. As such, it might be argued that it indirectly qualifies the application of the first part of s. 41 by requiring an element of subjectivity, that is otherwise irrelevant, bringing it closer to the second part of s. 41, which requires the insured to have control over the issue of lawfulness.

Under the 1906 Act, the effect of insuring an unlawful adventure is that the insurers are discharged from liability from the moment of the breach, which, in the case of initial illegality, essentially means that no contract of insurance is ever concluded. If the Insurance Act 2015 applies, s. 10(2) of that Act provides that cover is suspended from the moment of the breach. Section 10(5) permits the breach to be remedied under certain circumstances, yet this is not a possibility in cases of initial illegality such as this one. This breach "occurs at one point before the contract is formed [and

129 B Soyer, *Warranties in Marine Insurance* (Routledge 2016), [4.23] (Soyer).

130 Art 3(3) and (5) of EU Regulation 833/2014 (as amended).

131 J Gilman et al., *Arnould: Law of Marine Insurance and Average* (19th ed., Sweet & Maxwell 2018), [21–23] (Arnould).

132 *Parkin* v *Dick* (1809) 2 Camp 221.

133 Art 10 of EU Regulation 833/2014 (as amended).

as a result] the contract will not come into existence at all and consequently it will not be possible to remedy this kind of breach".[134]

The result would be the same if the insurance contract in question was subject to common law principles. *Euro-Diam Ltd* v *Bathurst* established that the implied warranty of s. 41 is inapplicable to non-marine policies.[135] As a result, one needs to question whether (a) "the policy of the statute is aimed at prohibiting dealings in the course of which its provisions are infringed", and (b) "whether the prohibited act is merely incidental or whether it constitutes an essential part of the contract".[136] It is submitted that the objective of the said prohibition in the Russian sanctions' regime is to prohibit any dealings with drilling pipes. The prohibition was not imposed for any reason other than undermining the deep-water drilling capabilities of Russia. At the same time, there is little doubt that the carriage of the pipe goes to the core of the contract, as the parties contracted to do the very thing that the Regulation prohibits.[137] Having established that the contract of carriage is illegal, the insurance policy is unenforceable "on the ordinary common law principle that an agreement to facilitate an illegal act or to provide indemnity for the consequences of an unlawful act is itself void for illegality".[138]

3.3 Insuring an adventure that is performed in breach of sanctions

The situation becomes more complicated when an activity that is prohibited by a given sanctions regime takes place during the performance of the insured adventure. For example, imagine that an EU cruise ship calls at a designated Crimean port in breach of Art 2.d of EU Regulation 692/2014. Would such a breach impact its hull and liability cover? Recital 8 of the Regulation's Preamble provides that the prohibition on cruise services does not include insurance which would leave cover unaffected. Yet it is possible that such clarification will not be included in future sanctions' regime, either intentionally or by omission. This situation will be the topic of our analysis.

In this case, the second part of s. 41 of the 1906 Act is relevant. This provides that "so far as the assured can control the matter, the adventure shall be carried out in a lawful manner". In contrast to the first part of s. 41, it is the manner of performance that matters in that situation, rather than the adventure itself. If the illegality forms part of the adventure, in the sense that it is not incidental to it, the issue at stake is whether the assured could control the performance of the unlawful act.

The first issue is whether the act prohibited by the sanctions regulation "would be viewed as an essential part of a marine insurance contract".[139] Considering that the only aim of such a provision is to prohibit voyages to Crimea, it is likely that its breach would *prima facie* lead to illegality in the performance of the contract. It is not a breach collateral to the contract and shall not be equated to breaches of safety

134 Soyer (n 129), para. 4.21.
135 [1987] 2 W.L.R. 1368.
136 Arnould (n 131), at para. 21–03.
137 Soyer (n 129) at para. 4.26.
138 R Merkin, *Colinvaux's Law of Insurance* (12th ed., Sweet & Maxwell 2019), [5–101].
139 Soyer (n 129), at para. 4.33.

regulations that English law treats as incidental to the illegality.[140] This situation is not so different from the one with the Russian drill pipe analysed earlier.

The second issue is whether the insured could control the breach of the sanctions. It is interesting to note that the section uses the term "control" rather than "privity". Such a distinction indicates that knowledge of the facts that might lead to a breach would satisfy the warranty provided the assured could influence the navigation of the vessel either him(her)self or via his authorised managers.[141] In that respect, s. 41 of the 1906 Act requires a lower threshold of application than s. 39(5), with the central issue being whether the insured could avoid breaching the sanctions by establishing monitoring and reporting procedures.

It is submitted that such breach of the sanctions would discharge the insurers from liability from the moment of the breach, provided the 1906 Act is applicable. In cases where the 2015 Act applies, cover will be suspended pursuant to s. 10(2). Any argument that this breach could be remedied, for example, when the ship sails away from the designated port, is not likely to succeed. Much will depend on which view prevails on the nature of the warranty of illegality, with the author endorsing the view that it has a special public policy status which prevents remedying the breach.[142]

At the same time, any argument that the warranty of legality falls into s. 11 of the 2015 Act can be dismissed. It is submitted that the warranty of illegality is a "term defining the risk as a whole" rather than a term that tends to reduce the risk of a loss of particular kind/at a particular location/ at a particular time. This is because "the function of the warranty of legality is to assist risk assessment, and this term in all probability relates to the contract (and risk) in a more general fashion".[143]

3.4 The common law on illegality

If a similar prohibition is imposed on airlines, for example, a prohibition on landing at designated airports in a sanctioned country, and the loss occurs during the inbound flight, the application of the doctrine of illegality will not be straightforward. There is no implied warranty of legality in non-marine insurance, which means that the common law test on illegality is applicable.

Its application complicates things as it (a) requires that that the loss in question be directly connected to the unlawful act or the illegality is pleaded to support the insured's claim,[144] and (b) gives the court discretion to "hold that the public interest [is] best served by making it impossible [or possible] for [the insured] to protect himself by insurance against loss or damage occurring to it".[145]

If the statute in question expressly prohibits the provision of insurance, there is little discretion for the court even under common law. In our scenario, the flights to designated airports are prohibited rather than the airlines' (liability) insurance. It is

140 See *St John Shipping Corp* v *Joseph Rank Ltd* [1957] 1 QB 267.
141 Soyer (n 129), at paras. 4–36 – 4–37.
142 *Ibid*., para. 4–45.
143 *Ibid*., para. 4–46.
144 *Les Laboratoires Servier* v *Apotex Inc* 2014] UKSC 55; [2015] A.C. 430; [2014] 3 W.L.R. 1257, at [18] *per* Lord Sumption.
145 J Birds; S Milnes and B Lynch, *MacGillivray on Insurance Law* (14th ed, Sweet & Maxwell 2019), para. 14–021.

arguable that the court interprets the prohibition to include insurance on the basis that it prohibits contracts which involve the commission of the sanctions' breach. Deciding otherwise would permit the insured to take advantage of its own offence.

Yet it is equally plausible that the court will use its discretion to treat this situation similarly to motor insurance cases where "the overwhelming requirement of public policy is that insurances against casualties inflicted by the wrongdoer must be fully effected – short of the point where the insured actually inflicts damage on purpose - especially when the position of the innocent victims…is considered".[146] Considering that airlines' liability insurance is compulsory, this looks likely as a situation that, to paraphrase Diplock LJ, the gravity of the social harm, that is, denying or reducing compensation to injured passengers as a result of the accident, outweighs the anti-social harm, namely, the breach of the sanctions.[147]

Following the Supreme Court's decision in *Patel v Mirza*,[148] it is likely that courts will be able to exercise this discretion, as the application of the doctrine of illegality depends on a value judgment about the significance of the illegality or the consequences for the parties of barring the claim. It would have been otherwise if Lord Sumption's "rule-based" approach was endorsed.[149] Under his approach, the focus would be on the "relation that the turpitude has to the claim".[150] Seeking indemnity for a loss that happened during the breach is likely to satisfy this requirement, yet this might not be the case if the indemnity is sought for an accident that took place on a subsequent to the breach route.

The Nancy confirmed that the common law test is relevant to marine insurance when there is illegality under foreign law, essentially when the insured (in a post-Brexit world) breaches the sanctions regime of a country other than the UK.[151] Blair J in *The Nancy* was not required to make a "value judgment", as the facts required a straightforward application of the causation test: the unlawful freight payments (at least under US law) under a voyage charterparty did not taint the hull policy as "the claimants do not have to rely on the processing of the freight payments…in order to claim an indemnity under the policy, nor are they seeking to profit in these proceedings from the unlawful processing of the freight payments…".[152]

An opportunity to go into such discussion was opened up by the defendants when they argued that "sanctions...implemented by the UN, EU and the UK" against a state that bears a well-known nuclear threat can be constructed as a relevant illegality although they were not breached.[153] It is likely that this was an attempt by insurers to argue that allowing the claimants to recover would run counter the objective of imposing sanctions against Iran. With Iran being still very much a threat at the time, any remedy would compromise their integrity, and in effect the integrity of the English

146 *Ibid*., at para. 14–050.
147 *Hardy* v *Motor Insurers Bureau* [1964] 2 Q.B. 745, 767–768.
148 [2016] UKSC 42; [2016] 3 W.L.R. 399.
149 *Les Laboratoires Servier* v *Apotex Inc* 2014] UKSC 55; [2015] A.C. 430; [2014] 3 W.L.R. 1257, [18] *per* Lord Sumption.
150 *Les Laboratoires Servier* v *Apotex Inc* 2014] UKSC 55; [2015] A.C. 430; [2014] 3 W.L.R. 1257, [22] *per* Lord Sumption. See *Allen* v *Hounga* [2014] UKSC 47; [2014] 1 W.L.R. 2889.
151 *The Nancy* [2013] EWHC 2116 (Comm), at [294]-[295] *per* Blair J.
152 *Ibid*., at [300].
153 *Ibid*., at [304].

legal system, by appearing to encourage entities in the position of the claimants to enter into contracts in breach of the sanctions.

Blair J rightly dismissed this argument on the basis that public policy considerations would not be entertained on the basis of international sanctions alone, without specific reference to a breach under domestic laws. Such breach took place under the US law, yet it shall be dismissed on the basis of causation: "there is no reason why public policy should be applied so as to give insurers a defence to a claim under an insurance policy which is completely unconnected with the breach of US law".[154]

4 Concluding thoughts

This paper demonstrates that the importance of insurance prohibitions has grown exponentially since 9/11. They are now part of the front line of measures, and they are appreciated for their versatility, having the potential to support different types of sanctions. Furthermore, they have established themselves as one of the most potent sanction tools in cases of energy- and transport-reliant targets, where they seem to have direct constraining effects. The latest sanctions imposed against North Korea demonstrate that insurance prohibitions are here to stay, with the Russian sanctions seen as another case where they play an active role.

With the UK preparing a post-Brexit sanctions regime, it is likely that we will experience a surge of insurance-related cases. Marine insurance law provides for more straightforward solutions, courtesy of s. 41 of the 1906 Act; yet the intricacies of English law on illegality might affect it in cases of foreign illegality that is subject to common law principles. As for non-marine insurance law, any judicial pronouncement is welcome as it would contribute to the unravelling of the illegality defence, a task that has already raised forceful disagreement at the level of the Supreme Court.

154 *Ibid*., at [305].