GLOBAL K: SANCTIONS APPLIED, LESSONS IMPLIED

London, UK: Current events smiled on GLOBAL K last week and offered an example of how contemporary economic sanctions programs interact with transnational contract activity. (*See* last week's Global K, http://lawprofessors.typepad.com/contractsprof_blog/2013/12/global-k-economic-sanctions-and-transnational-contracts.html.) While I was lecturing at the Centre for Commercial Law Studies in London, the news broke about possible sanctions violations by a British bank in its payment transfer practices.

On December 11, 2013, the British press was full of the news that Royal Bank of Scotland plc (RBS) had agreed to pay £62 million ($100 million) to settle charges by U.S. state and federal banking authorities that it had violated U.S. sanctions against Iran, Burma, Libya and Sudan, and possibly Cuba according to some news accounts. The three agencies involved – the Office of Foreign Assets Control (OFAC) in the Treasury, the Federal Reserve Board, and the New York State Department of Financial Services – coordinated their investigation with the UK Financial Conduct Authority. According to OFAC, from 2005 to 2009 (the Daily Mail asserted it was 2002-2011), RBS payment practices impeded U.S. economic sanctions. References to critical information about certain payment transfers that would have triggered a blocking of funds and payments – such as the fact that an Iranian party might be interested in one end or the other of the transfer – were excluded from documentation covering payments sent to or through U.S. financial institutions. By some accounts, these payment transfer practices involved more than 3,500 US dollar transactions worth £320 million ($523 million) routed through US banks. Two aspects of this situation are worthy of specific comment.

First, the nature of the claimed violations varies somewhat as you look from one sanctions program to the next, even if the payment activities were essentially the same. For example, under the Iran sanctions, foreign financial institutions such as RBS are quite specifically target by prohibitions in the sanctions program. A foreign financial institution would be prohibited from knowingly "[f]acilitat[ing] the activities of ... a person subject to financial sanctions" under U.N. sanctions against Iran," engaging in "money laundering to carry out" such an activity, or facilitating "efforts by the Central Bank of Iran or any other Iranian financial institution to carry out" such an activity. 31 C.F.R. 561.201 (2013). Under the Burmese Sanctions Regulations, the focus would be on transactions and transfers involving "property and interests in property" of the direct targets of the sanctions, which would be prohibited where the property or interest was "in the United States, ... hereafter [came] within the United States, or … [came] within the possession or control of U.S. persons." 31 C.F.R. 537.201 (2013). The Sudanese Sanctions Regulations contain a similar prohibition on transactions and transfers (31 C.F.R. 538.201 (2013)), but its facilitation prohibition applies on its face only to "U.S. persons." 31 C.F.R. 538.206 (2013). Likewise, the Cuban Assets Control Regulations would prohibit transactions and transfers involving "property and interests in property" of any Cuban national. (31 C.F.R. 515.201 (2013).) However, beyond this basic sanction, if RBS were considered to be acting on behalf of a blocked Cuban national in these transfers, then it might be deemed to be a "specially designated national" of Cuba and as such it would itself be a direct target of the Cuban sanctions. *See* 31 C.F.R. 515.302, 515.306 (2013) (defining "national," "specially designated national"). Hence, given the incidence of significant variation as one moves from one sanctions program to the next, it becomes more difficult in managing risk in transnational contract activity to generalize as to the risks and appropriate risk management strategies.

Second, the likely implications of transnational contract activity on domestic contract activity may also vary significantly as our attention shifts from program to program. Take, for example, the situation of a U.S. citizen who is a holder of a credit card issued by RBS NA, a national bank subsidiary of RBS. In many of the sanctions situations identified above, the impact of the RBS violations on her contractual relationship would be adventitious. The substantial fine might marginally raise the cost of doing business with the card issuer, assuming that the bank chose to pass some portion of this indirect cost of doing business throughout the enterprise. Even at $100 million, it is unlikely that the credit card holder would even feel the effects of the event. However, if aggressive action had been taken against RBS under the Cuban sanctions – a contingency that is essentially eliminated by the bank's settlement, one would imagine – the effect on the credit card holder would be quite dramatic. As an ongoing contract party of a specially designated national, she herself would be potentially committing a direct violation of the Cuban Assets Control Regulations, because U.S. persons are prohibited from entering into contracts with Cuban

nationals – even with specially designated nationals – in the absence of a license. So unless you are a great humanitarian like Beyoncé and hence above the law, avoid entering into contracts and other transactions with specially designated nationals of Cuba.

Michael P. Malloy