

Sanctions and insurance under Swiss law

Sanctions in Insurance Roundtable SIIR

Zurich Development Center, Zurich, 8 December 2016

Sandro Abegglen / Martin Schaub

Overview

- Swiss sanctions and the insurance business
 - Coverage of insurance transactions by Swiss sanctions regulations
 - Direct
 - Indirect or implicit
 - No coverage
 - Retroactivity
- Foreign sanctions and Swiss blocking and secrecy statutes
 - Foreign prohibitions and reporting duties
 - Arts. 271 and 273 Penal Code, art. 47 Banking Act, Data Protection Act
 - Examples:
 - Canadian terrorism- and sanctions-related reporting obligations
 - Extraterritorial U.S. regulations

Swiss sanctions regulations and the insurance business

Coverage of insurance transactions by Swiss sanctions regulations (1)

- International background of Swiss sanctions:
 - Swiss neutrality
 - «*The Confederation may enact compulsory measures in order to implement sanctions that have been ordered by the United Nations Organisation, by the Organisation for Security and Cooperation in Europe or by Switzerland's most significant trading partners [...]*» (art. 1 para. 1 EmbG)
 - Scope usually does not exceed scope of international/foreign «model» regulations; sometimes more narrow
 - «Harmonious» interpretation
 - Practical relevance of Swiss/foreign sanctions

Coverage of insurance transactions by Swiss sanctions regulations (2)

- Example 1: Ukraine/Russia sanctions
- Swiss Ordinance of 27 August 2014 on Measures to Prevent the Circumvention of International Sanctions in Relation to the Situation in the Ukraine
 - Overview: Generally prohibits (or enables the authorities to prohibit):
 - Exportation of certain military or dual-use goods (art. 1)
 - Importation of weapons from Russia and Ukraine (art. 1a)
 - Importation and exportation of goods from or to Crimea (arts. 3, 4)
 - Financial instruments and loans with duration of more than 30 days (authorization possible) (arts. 5, 5a)
 - Loans to and investments in Crimea (art. 7)
 - Opening of new relationships by financial intermediaries with designated persons and entities (art. 8)

Coverage of insurance transactions by Swiss sanctions regulations (3)

- *Explicit* coverage of insurance transactions:
 - «*It shall be prohibited to render financial services and to conclude insurance and reinsurance contracts in connection with the importation of goods originating from Crimea [...].*» (art. 3 para. 2)
 - Identical to EU Council Regulation No. 692/2014, art. 2
- (Potential) *Implicit* coverage of insurance transactions:
 - «*It shall be prohibited to sell, deliver, export and transit [designated goods] to persons, enterprises or organisation in Crimea [...]. It shall be prohibited to provide, directly or indirectly, financing or financial assistance related to the [designated goods] to any natural or legal person, entity or body in Crimea [...].*» (art. 4 paras. 1+2)
 - Identical to EU Council Regulation No. 692/2014, art. 2b
 - Insurance as «providing of financial means or financial assistance»? Implicit coverage of insurance business or exclusion e contrario?

Coverage of insurance transactions by Swiss sanctions regulations (4)

- No legislative materials in Switzerland or EU
- Cf. also E.O. 13'685 of 19 December 2014: «*any approval, financing, facilitation, or guarantee by a United States person, wherever located, of [an import or export transaction from or to Crimea is prohibited].*»
- No coverage of insurance transactions:
 - «*It shall be prohibited for financial intermediaries to open new relationships with [designated persons]*» (art. 8); reporting duty for existing relationships (art. 9)
 - At least under AML law, «financial intermediaries» includes insurances only to a very limited degree (direct life insurance or distribution of collective investment schemes; see art. 2 para. 2 AMLA)
 - Cf. in contrast Council Regulation (EU) No 269/2014 : «*All funds and economic resources belonging to, owned, held or controlled by any [designated persons] shall be frozen.*» (art. 2 para. 1)

Coverage of insurance transactions by Swiss sanctions regulations (5)

■ Example 2: Iran sanctions

- No prohibition of insurance contracts with Iranian government or Iranian entities (not natural persons) anymore, but blocking of assets of designated persons (same as in EU)
- For non-designated persons: U.S. sanctions addressed at U.S. persons and companies, in particular affecting dollar transactions

■ Example 3: Syria sanctions

- Swiss Ordinance of 27 August 2014: *“It shall be prohibited to conclude, to extend or to renew insurance or reinsurance contracts with Syria or its government [...]”* (art. 14 para. 1) (same as in EU)
- Pre-existing contracts not affected (art. 14 para. 5) (same as in EU)

Swiss blocking and secrecy statutes and foreign sanctions

Art. 271 Penal Code (1)

- Art. 271 no. 1 Penal Code: «Prohibited acts for a foreign state»
 - *«Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official, [...] whoever aids and abets such acts, shall be punished with imprisonment for up to three years or a monetary penalty, in serious cases with imprisonment for not less than one year.»*
 - Introduced in 1935 (cf. banking secrecy 1934)
 - Aims to protect Swiss territorial sovereignty
 - No circumvention of official channels (legal or administrative assistance)
 - «Blocking statute»?
 - «for a foreign state»
 - «official act»
 - Aiding and abetting

Art. 271 Penal Code (2)

- Relevance of compulsion
 - Individual order or statutory obligation
- Transmission of «own» information for defense
- Authorisation possible upon request
- Case law:
 - BGE 65 I 39 (1939), «Kämpfer»: Auditing of Swiss assets of a German company by a German auditor in Switzerland by order of German authorities to review compliance with German exchange legislation
 - BGE 114 IV 128 (1988): Questioning of third parties in Switzerland for purposes of a foreign proceeding
 - «for a foreign state» = «any activity in the interests of the foreign state», such as establishing the facts for purposes of law enforcement
 - Despite the defendant (a lawyer) acting for purposes of a client's defense
 - «Official act»: «Collecting evidence»

Art. 271 Penal Code (3)

- Decision of Federal Council of 25 June 1997, VPB 61.82:
 - Banks were ordered by a U.S. court to make documents available in proceeding about «Marcos» assets
 - Federal Council declared document transmission as «assisting a foreign judge in taking evidence»
 - Remaining scope of permissible «self-defence» outside MLAT proceedings?
- Decision of Federal Department of Justice and Police of 12 February 2014, VPB 2016.4:
 - U.S. subpoena against bank to release generic client information
 - Transmitting information to foreign authority not qualified as «official» act, but possibly aiding and abetting foreign «official» act (order)
 - Only transmission of *third-party* information in scope of art. 271 PC

Art. 271 Penal Code (4)

- Reportings to foreign authorities in particular
 - Data «possession» and data content (third party v. «own» information)
 - Voluntariness v. compulsion
 - Art. 42c FINMASA:
 - Reportings to foreign supervisory authorities and (other) «foreign authorities» (sanction enforcement authorities probably excluded)
 - Rights of clients and third parties must be safeguarded (professional secrecy, data protection)

Secrecy and privacy laws

- Banking secrecy (art. 47 Banking Act)
- Industrial espionage (art. 273 Penal Code)
- Data Protection Act
 - Art. 6 DPA for data transmissions to U.S. and other countries without adequate data protection legislation

Example 1: Canadian reporting duties

- Terrorism-related reporting duty:
 - *«The following entities must determine on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed [terrorist] entity: [...] authorized foreign banks [...] in respect of their business in Canada [...]; foreign companies within the meaning of subsection 2(1) of the Insurance Companies Act in respect of their insurance business in Canada; [...] entities authorized under provincial legislation to engage in the business of dealing in securities, or to provide portfolio management or investment counselling services. [They] must report [...] monthly, to the principal agency or body that supervises or regulates it under federal or provincial law either (a) that it is not in possession or control of any property referred to in subsection (1), or (b) that it is in possession or control of such property, in which case it must also report the number of persons, contracts or accounts involved and the total value of the property. » (§ 83.11 Canadian Criminal Code)*

Example 1: Canadian reporting duties

- Sanctions-related reporting duties:
 - E.g. Regulations Implementing the United Nations Resolution on Iran (SOR/2007-44); Special Economic Measures (Iran) Regulations (SOR/2010-165)
- Permissibility under Swiss law?
 - Art. 271 Penal Code
 - «Negative clearance» or authorisation by SECO/WBF
 - Art. 273 Penal Code

Example 2: Compliance with extraterritorial U.S. sanctions

- Extraterritorial U.S. sanctions:
 - 31 C.F.R. §§ 560.215, 561.202: *Subsidiaries* of U.S. companies or financial institutions prohibited from engaging in certain transactions with Iranian entities and subjects (suspended January 2016)
 - 31 C.F.R. §§ 561.201, .203+04: Sanctions for «*foreign financial institutions*» that conduct or facilitate «significant financial transactions» with certain Iranian entities (including IRGC) (suspended January 2016)
 - 31 C.F.R. §§ 515.329, .559: Sanctions against Cuba generally applicable to foreign subsidiaries of U.S. companies
- Permissibility under art. 271 Penal Code: Omissions/acts; «official» nature; voluntariness/compulsion

NIEDERER KRAFT & FREY

Niederer Kraft & Frey Ltd
Bahnhofstrasse 13 · CH-8001 Zurich
Telephone +41 58 800 8000 · Telefax +41 58 800 8080
nkf@nkf.ch · www.nkf.ch

Sandro Abegglen

PD Dr. iur., LL.M., Partner
Niederer Kraft & Frey AG
Bahnhofstrasse 13
8001 Zürich
sandro.abegglen@nkf.ch; www.nkf.ch
Telefon 058 800 8000

Martin Schaub

Dr. iur., Associate
Niederer Kraft & Frey AG
Bahnhofstrasse 13
8001 Zürich
martin.schaub@nkf.ch; www.nkf.ch
Telefon 058 800 8000

NKF