



Impact of President Obama's April 13, 2010 Executive Order on Somalian Piracy - The UK Insurance Perspective

April 2010

Overall Effect

On a first reading, the Executive Order appears to have quite restricted effect. It refers only to designated individuals and groups who must not benefit from ransom or other payments. It is directed only at "US entities". Currently there are no defined penalties for contravention.

However, on more detailed reading, many potential ramifications are apparent, and it is important to proceed with caution. Further detail will be fleshed out in due course by the US Treasury/OFAC.

Which Entities are Affected?

The Order applies to US entities and their overseas branch offices. This is likely to be broadly interpreted. Notwithstanding that they may have entirely separate corporate identity, prudence suggests that any company which has a US parent or affiliate or, indeed, has access to US capital should proceed with caution and seek clarification from OFAC on a case-by-case basis.

What Payments are Covered?

The stated purpose of the Order is not to prohibit the payment of any ransoms to any Somalian pirates, but the scope of the Order is unclear. There can be no doubt that a ransom payment to an individual or group who has been designated pursuant to the Order is now illegal under US law. However it is not clear what the position might be if that designated individual or group is not the party receiving payment but is merely involved in the background receiving a percentage of the ransom. That may not even be known at the time the payment is made. The level of due diligence required of the paying party has not been made clear.

Many insurers do not themselves make ransom payments but reimburse their insureds or contribute in some way, eg: by way of general average. Such indirect payments would be illegal if subject to US law if they relate to a ransom payment made to a designated individual or group.

Even if there is no connection with US jurisdiction, a ransom payment in US dollars will pass through a US clearing bank and will thereby render the funds susceptible to US jurisdiction. Even if no sanctions can be brought against the paying party, the bank would be acting illegally in helping to effect a prohibited payment. Therefore, where the paying parties are clearly not within the jurisdiction of the Executive Order but there is concern about the identity of the receiving party, then payment should be made in a currency other than US dollars so as to be certain.

Public Policy

The Order characterises acts of piracy off Somalia in general as an extraordinary threat to US national security. In those circumstances, it may come in due course to be decided that ransom monies paid to any Somali pirate is contrary to US public policy and therefore irrecoverable as illegal even if no specific sanction applies to the paying party. This is something which the US authorities can be asked to clarify. As matters currently stand, ransom payments to Somali pirates are not contrary to UK public policy, but the UK authorities may choose in due course to follow the US lead. The UK authorities are also being asked to clarify their intentions.

Conclusions

There is much uncertainty at present. Matters will become clearer when further regulations are put in place by OFAC. Unless it is absolutely clear that the paying party has no US connection and the payment is not to be made in US dollars, the most prudent course of action is to contact OFAC and obtain clearance before making payment.

Further information

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