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Sanctions Disputes and Arbitration: It's a Mess!

Stela Negran (LALIVE) · Friday, January 5th, 2024 · Institute for Transnational Arbitration (ITA)

Another session of [Young ITA Talks](#), this time on sanctions disputes and arbitration, was hosted by Latham & Watkins in London on Wednesday, 22 November 2023. The panel, moderated by Young ITA Regional Co-Chairs Robert Bradshaw and Thomas Lane, offered an overview of the sanctions and related issues from multiple points of view: Katie Palms (DLA Piper, London) introduced what sanctions are and what kinds of sanctions-related disputes we are seeing; Sunny Mann (Baker McKenzie, London) discussed the regulatory aspects of the issue; Charles Claypoole (Latham & Watkins, London) took us through intricacies of complex multi-jurisdictional transactions and how these are affected by sanctions; and Tina Carlile (Shell, London) offered her unique in-house perspective on companies' considerations when it comes to various potentially affected transactions.

What Are Sanctions?

Less than 10 years ago, the [EU](#) published its [regulations on sanctions](#) (or restrictive measures, as the institution officially refers to them) on Russia in light of the invasion of Crimea. The document was only ten pages long and targeted some 20 individuals. Since then, it has expanded significantly, and it now spans over 600 pages and targets over 1800 individuals and entities. Clearly, sanctions have become increasingly important with Russia's invasion of Ukraine. But what are sanctions?

Put simply, sanctions (as we speak about them today) are instruments of domestic law employed for a state's foreign or international policy purposes that restrict specific types of economic activities. They are tools of foreign policy that are intended, by inflicting an economic effect, to promote a particular foreign or international policy objective. From the perspective of a business or company having to navigate sanctions, sanctions can broadly be separated into two primary categories, financial sanctions and trade sanctions, the former most commonly in the form of asset freezes.

That sounds simple enough, but now we get to the complex and interesting part.

How Do Sanctions Affect the Companies and Their Businesses?

Different jurisdictions regulate sanctions differently. For example, the UK and the EU look at conduct within their own territory and by their own nationals. The US' approach is particularly expansive. Sunny Mann explained that the US will look at the same conduct as the UK and the EU, but it will also look at transactions that do not involve its nationals but are carried out in US dollars, through US banks, involving US green-card holders, or simply even involving goods and technology that are US-origin or contain more than the *de minimis* amount of US content. There is even a risk of secondary sanctions which are issued against non-US nationals that conduct business with the countries targeted by US sanctions.

Not only do sanctions complicate conducting business, but they also complicate the companies' exit from the targeted country. The panel discussed the practical, on-the-ground difficulties a company faces when it needs to exit Russia and dispose of its assets there, and it can be messy. For example, Russia has introduced a new approval process before the sale of many assets as well as an "exit tax". Western sanctions have introduced various requirements which in some cases, mean companies must acquire licenses before they can complete these processes or sell/exit. While a company is trying to obtain the approvals and necessary licenses, it faces commercial challenges, for example, trying to manage an effectively stranded asset or being subjected to criticism by the media as operating in and supporting Russia. The value of the asset may be decreasing, but the company may not be able to just abandon the asset (for many reasons, including from an arbitration perspective as that could affect a potential treaty claim that it might have against the State).

From a company's commercial perspective, the panel emphasised the importance of involving all the relevant stakeholders in the decision-making process. For a company to go ahead with a transaction or to terminate a contract, it cannot only consider whether the action is legal, but also whether it might have reputational consequences and whether it would be approved by relevant third parties, such as banks or insurers that may take a more conservative stance. It may be imperative for lawyers to consider the legal, reputational, commercial, and financial policies of the company, because often only once all four aspects are aligned can the company move forward.

And What About Disputes?

Disputes involving sanctions are often complicated. A very common set-up could be an example given by Charles Claypoole: a Swiss company owned by a sanctioned individual conducting business with a UK company through a contract governed by German law with an arbitration clause with a seat in Paris. All the aforementioned jurisdictions may have sanctions regulations with different scopes – an equation that is certain to produce a very complex dispute. The UK company may want to stop trading, but the Swiss company is not concerned about UK sanctions because the contract is governed by German law. The question is whether the UK company can rely on UK sanctions to terminate the contract, and there is no clear answer.

An additional consideration is that expansive sanctions regimes imposed on Russia are relatively new, and sanctions clauses in contracts are unlikely to have been drafted historically with these sanctions in mind. The resulting issues will become clearer as the case law develops, although it is hard to anticipate what direction the resolution will take. As Charles Claypoole warned, some domestic courts and arbitral tribunals will be dealing with some of these issues for the first time.

What Happens Now?

The panel shared some concluding thoughts about what is on the sanctions horizon and what lawyers should look out for, which can be summarised as follows:

1. sanctions are not a “get-out-of-jail-free card” and consideration needs to be given to other avenues of exiting a contract in case the company’s reputation is at stake even if sanctions are not applied;
2. the disputes “mess” related to sanctions, and regulatory investigations, have not even started taking off in any material respect as of yet and will likely be the bulk of the workload for the next decade;
3. authorities may continue to use more innovative types of economic tools to restrict different parts of the global economy in furtherance of international or foreign policy aims; and
4. there is a potential increase in the regulation of international trade motivated by political reasons, for instance concerning China which, although not the subject of many sanctions, has been involved in the imposition of various trade measures.

Lawyers would accordingly do well to continue to follow the incoming case law and new regulations and to wait for the web of sanctions to slowly untangle – or dive into the complexity.

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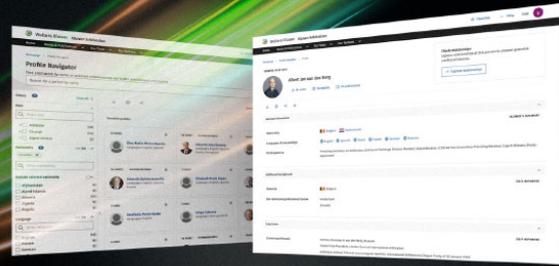
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This entry was posted on Friday, January 5th, 2024 at 8:10 am and is filed under [Economic Sanctions, Sanctions, War](#)

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