CLIENT ALERT – RUSSIAN SANCTIONS

The Impact on Cross-Border Commercial Transactions Involving Non-Sanctioned Parties, and on the Ability to Conduct Business

By Timothy Mills[1]
Of Counsel, Washington, D.C.
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I. INTRODUCTION

As counsellors of businesses throughout the United States, Europe and Asia, and as long-standing practitioners of international economic sanctions law, the attorneys of Aliant International Law are acutely aware that thousands of non-sanctioned businesses throughout the world need to answer extraordinary questions and face stark challenges about how best to minimize the collateral damage that appears to be at hand, while at the same time complying with all applicable sanctions laws.

For example, a non-Russian business with a contract to supply or provide services to a non-sanctioned Russian entity, initially may have believed itself to be clear of potential harm, and therefore, may not have taken appropriate measures when sanctions were just in the officing to reduce or mitigate sanctions risks.

[1] Timothy B. Mills is co-counsel with the international law firm Aliant, and also is the founder and Managing Partner of the global-reach law firms Asia and Middle East International Law Group P.C. and Mills Law Group LLP headquartered in Washington, D.C. Mr. Mills has over 30 years' experience representing companies (including Fortune 100 enterprises) and their officers and directors in high-risk enforcement and compliance matters arising both from international economic sanctions imposed by the United States, the United Nations, the European Union and other jurisdictions, and from U.S. export control restrictions. Simultaneously with his private practice of law. Mr. Mills' expertise on issues of U.S. national security and defense issues is born of more than 23 years of service as a commissioned legal officer in the United States Army Reserve. Prior to his retirement from the U.S. military, Mr. Mills rose to become a senior international law advisor in an integral part of the U.S. national security community, the U.S. Army Special Operations Command.

First, when looking at the transaction at that moment, the non-Russian business did not appreciate that its performance of the contract might become frustrated or made impossible by virtue of no longer being able to fulfill the CIF (Carriage, Insurance Freight) requirements, or get paid under a documentary letter of credit for the transaction because, as a consequence of sanctions measures such as closed airspace and shipping prohibitions, freight forwarders no longer are able to arrange carriage, and insurance companies no longer will ensure the goods against risk of loss. Additionally, the non-Russian business may not have appreciated the risk that the letter of credit for the transaction – issued by one of the seven Russian banks that now are blocked from the SWIFT network – in effect will have become non-negotiable by the Negotiating Bank (who negotiates the documents pertinent to the LC that the non-Russian business delivers to the negotiating bank) because the issuing Russian bank has been disconnected from the SWIFT system, resulting in the Negotiating Bank no longer being able to communicate the documents through SWIFT to the issuing Russian bank (*i.e.*, the standard, immutable practice throughout the international banking system).

Second, similarly, by way of example, a non-Russian business that has been a repeat buyer of goods, services or commodities from a non-sanctioned Russian business, also initially believed itself to be clear of sanctions-related risk. Historically, the non-sanctioned Russian business has been an excellent customer of the non-Russian buyer, has always performed satisfactorily, and the financial arrangements (consisting of an LC provider by buyer's bank) have become routine and completely effective. Now, however, the non-sanctioned Russian business cannot deliver the contracted-for goods, services or commodity, for one or more of the previously-mentioned reasons. And, accordingly, the non-sanctioned Russian business will not obtain or be able to produce the documents necessary for the non-sanctioned Russian business to negotiate the LC. Additionally, the Negotiating Bank for the LC is one of the 7 Russian sanctioned banks who are prohibited from participating in the SWIFT network.

Third, by way of further illustration, your company is a European business that has contracts with Russian enterprises to sell items that embed U.S. technology but did not require an export license issued by the U.S. Department of Commerce Bureau of Industry and Security (BIS) (*i.e.*, microelectronics, telecommunications items, certain software, certain encryption items, sensors and optics, navigation equipment, avionics, marine equipment and aircraft components). You are about to ship, and you see an announcement in the trade press that BIS has changed the rules. But no one has notified you not to ship, and your export agent cannot provide with you definitive answers about what you should or should not do. And, you are not yet certain whether BIS' jurisdiction to impose new rules binds you, a company in the UK, or the EU, or Switzerland.

Fourth, as a final illustration, you are an EU citizen, a UK resident, and the business agent for a Russian oligarch who owns properties and assets (including a major sports team) in England. The sale of €1 billion asset legally held by your client in the UK, and physically partially located within the EU, has been negotiated and agreed to, with a closing date on 1 March 2022. In late February, your client the oligarch, was placed on the assets freeze sanctions list in the EU for his close ties to Putin, but has not yet been sanctioned by the UK – even though the word is that the UK will act imminently to follow the EU's lead. However, the UK has sanctioned Russian oligarch Alisher Usmanov (who has links to Everton football club and is your client's good

friend), freezing all of his assets in the UK. Should you continue to assist your client to close the asset sale, and collect the €1 billion 1 billion sale price? What are the legal risks to your client, to you and to the buyer is you do close the asset sale? Where and when does your client move the money? What are the implications for your client and the buyer if the asset sale does not close?

The information provided in this article does not, and is not intended to, constitute legal advice. Instead, these illustrations and the discussion that follows are intended to illustrate the complexities of the business and legal issues now at the forefront of cross-border business in Europe, Switzerland, the UK, the United States, Canada, Japan and Australia now that the 2022 Russian sanctions have turned once-straightforward business dealings between Russian entities and non-Russian counterparts into anything-but-simple high-stakes legal navigational puzzles, as well as to provide some general observations about the attendant legal issues.

II. RUSSIAN SANCTIONS – MARCH 2022 QUICK SUMMARY

Within only a few days after Russia invaded Ukraine on 22 February 2022, the governments of the **United States**, the **European Union**, **Switzerland**, the **United Kingdom**, **Norway**, **Canada**, **Japan**, **Australia**, **Singapore**, **New Zealand**, **South Korea**, and the **Bahamas** (the "Sanctioning Countries") responded with the most comprehensive-ever constellation of economic and trade sanctions against Russia and Belarus ever seen from nations not at war with the sanctioned parties. Since the initial rounds of sanctions, Russian President Putin has not relented. Instead, Putin has escalated Russia's military violence in Ukraine, violating the international law of war by targeting, maiming and killing innocent Ukrainian civilians. In response, the Sanctioning Countries have imposed additional rounds of ever more serious sanctions, with new sanctions being announced several times a week.

As of 18 March 2022, sanctions now include:

-●**Blocking sanctions against the Russian energy sector, including:**
▪ **Prohibitions on importation of Russian crude, petroleum and petroleum-related products** into the U.S.;
▪ **Dealings sanctions prohibiting any "U.S. Person" from engaging in any transactions involving Russian crude and petroleum, and petroleum-related products, and the financing of any such prohibited transactions;**
▪ **Prohibitions by the US and EU against exports to Russia of equipment, technology and services for the Russian energy industry;**
▪ **Dealings sanctions prohibiting new investment in Russia's energy sector by any "U.S. Person"** – i.e., U.S. citizens, corporations and other business entities, as well as prohibition on any dealings relating to the financing of such sanctioned crude oil purchases;

-●**UK prohibitions on importation of all Russian crude oil and refined product purchases by the end of 2022**.

-●**Blocking sanctions that prohibit all dealings by citizens and business entities of the Sanctioning Countries against dozens of Russian State-owned companies** who

themselves have thousands of contracts with non-Russian joint-venture partners and suppliers;

-●**Blocking sanctions against Russian banks (i.e., sanctions that require the freezing of the sanctioned party's assets and prohibition on any dealings with the sanctioned party by citizens and business entities of the Sanctioning Countries)** that have between stalwarts of Russian President Putin, but also have supported Russian companies with trade finance for activities (such as contracts) with non-Russian counterparties;

-●**Prohibition against the largest and most powerful Russian and Belarussian banks having access to or using the Society for Worldwide Interbank Financial Telecommunications (SWIFT) systems to conduct financial transactions** (SWIFT consists of the systems through which international letters of credit, wire transfers, VISA and Mastercard transactions and most other financial transactions are documented and authorized between international financial institutions);

-●**EU sanctions prohibiting any EU person or entity from providing credit rating services to any Russian person or entity**;

-●**Prohibitions on exportation, reexportation, sale, or supply of US dollar-denominated currency and any Euro bank notes to the Government of the Russian Federation or any person located in the Russian Federation**;

-●**Blocking sanctions against Russian President Putin and most of the senior political, legislative and military leadership of Russia and Belarus numbering in the hundreds**, and also some travel bans, triggering a near-immediate, very frenetic search to locate and seize secreted assets of as many of these sanctioned persons as possible;

-●**Similar blocking sanctions against dozens of Russian oligarchs** (including **Sergei Roldugin**, formerly a high-profile orchestra cellist, the godfather of Vladimir Putin's daughter, and also known as "Putin's wallet:"; **Roman Abramovich,** owner of the Chelsea Football Club; **Gennadiy Timchenko**, founder and owner of private investment group Volga Group**; Boris Rotenberg**, co-owner of the SGM group, the largest construction company for gas pipelines and electrical power supply lines in Russia; and **Igor Rotenberg**, oldest son and heir to Arkady Rotenberg, Russian billionaire businessman and co-owner with brother Boris Rotenberg, of the SGM group) – thus making the sanctioned oligarchs' assets in the Sanctioning Countries subject to being frozen.

-●**Prohibitions on Russian aircraft and vessels from entering the airspace or waters of the Sanctioning Countries, or using any air or sea ports in the Sanctioning Countries; detention of Russian aircraft and vessels found within the waters or ports of Sanctioning Countries; and termination of registration of Russian aircraft in the Sanctioning Countries;**

-●**Prohibitions on unlicensed exports, re-exports and country transfers to Russia and Belarus (in particular to Russian and Belarussian State-owned companies in the military sector) of technology and an expansive list of other items** to which such export controls did not apply previously, with no realistic prospect ever obtaining such licenses, except for food and other humanitarian items.

-●**Prohibitions on exportation, reexportation, sale, or supply of:**
▪ **Russian iron and steel**; and
▪ **Luxury goods to Russia or any Russian person**; "luxury goods" includes high end-watches, luxury vehicles, high-end apparel, jewelry and other goods frequently purchased by Russian elites.

Much guidance already has been given by the sanctions authorities of the various Sanctioning Counties about the obligations and responsibilities of persons who either hold assets or were engaged in dealings with the sanctioned persons and entities. However, little discussion or guidance has followed on the collateral consequences of these sanctions on businesses in the EU, UK, Switzerland, the US, Canada, Japan and Australia.

Accordingly, this article is aimed at generally providing such discussion – keyed to the four hypothetical (albeit realistic) fact scenarios presented in the Introduction.

III. DISCUSSION

A. General Observations

At first blush, the business and legal issues implicated by the 2022 Russian sanctions may seem novel – but they are not.

The business and legal issues are common to the international imposition of sanctions against belligerent States at the onset of an invasion or hostilities. Most of the same issues here presented themselves in 1990, upon the imposition of UN sanctions against Iraq following the Saddam Hussein regime's invasion of Kuwait. The same issues arose again in 2014, with the imposition by EU, US, UK, Norway and other nations against Russia for annexing Crimea and providing military support to separatists in Donetsk and Luhansk.

However, even though international legal practitioners are aware of this body of law developed over the last 32 years, it nevertheless remains a truism that analysis and resolution of the business and legal issues at hand is fact-specific and dependent on application of local national laws concerning the contractual obligations of the parties, and whether any or all of the parties are excused from performance without liability as a consequence of applicable legal doctrines such as *force majeure*, frustration and impossibility of performance.

It is in that vein that we offer our observations on the business and legal circumstances of the parties in the four scenarios.

B. First Scenario

Generally

In a scenario in which the performance of a cross-border commercial contract has been interfered with by an unexpected event, and payment is to be made through an irrevocable commercial documentary LC ("Documentary LC"), the starting point for determining the parties' respective responsibilities is the contract itself, followed by consideration of the effect of the unexpected interference with performance on the negotiability of the LC.

In all events, the parties first will seek to determine whether the remains any means of each of the parties fulfilling its contractual obligations to the another. And, if not, then each party must determine for itself, and in consultation and negotiation with the other party, how best to close out the uncompleted transaction with the least legal exposure to the other, as well as maximum mitigation of one's own direct economic damages – i.e., recovery of performance costs to that point.

Relevant Contract Law: Near-Uniform Principles in Across Jurisdictions

In the context of analyzing and determining the impact of sanctions on the parties' respective obligations under sanctions-interfered contracts, a series of mixed questions of fact and law must be asked and answered:

- Have sanctions – or the collateral effects of sanctions – interfered with either or both of the parties' performance of contractual obligations?
  In particular:
  - Seller's capacity to produce and timely deliver in accordance with the contract delivery terms (typically CIF (Carriage, Insurance, Freight)[2];
  - Buyer's capacity to effect timely payment in accordance with the contract payment terms (typically by Documentary LC in favor of Seller, the LC beneficiary, that Buyer provides through arrangements with a mutually agreed-upon issuing bank);

[2] Most cross-border contracts for the purchase and sale of goods incorporate the International Commercial Terms ("Incoterms") into the contracts as the governing set of universally understood terms. (Incoterms are published periodically by the International Chamber of Commerce.) Each Incoterm contains a set of rules of interpretation for the obligations of seller and buyer.

Incoterms are divided into four principal categories for delivery of goods, each bearing distinct risk-allocations: (1) Category E (Departure): Ex Works (EXW); (2) Category F (Main Carriage Unpaid): Free Carrier (FCA), Free Alongside (FAS), Free on Board (FOB); (3) Category C (Main Carriage Paid): Carriage Paid To (CPT), Carriage and Insurance Paid (CIP); Cost and Freight (CFR); and Cost, Insurance, Freight (CIF); (4) Category D (Arrival): Delivered at Place (DAP); Delivered at Place Unloaded (DPU); and Delivered Duty Paid (DDP).

The Incoterm subcategories are applicable according to the means of transportation, as follows:
Incoterms for any mode of transport: EXW, FCA, CPT, CIP, DPU, DAP and DDP; and
Incoterms only for sea and inland waterway transport: FAS, FOB, CFR and CIF.

- Does either the contract – or the law governing the contract – define such collateral effects of sanctions as *force majeure*, and, therefore, entitle the parties to suspension of contract performance for the duration of the *force majeure* event?

- If, as a matter of law, the interfering events do not constitute a *force majeure* event, then:

  - Does the change in such circumstances that unforeseeably occurred after the contract was entered into make either buyer's or seller's performance worthless to the other, thus frustrating the purpose in making the contract.

    Under such circumstances, each non-performing party to be excused from all further performance obligations as well as contractual liability under the *legal doctrine of frustration of purpose*, provided:

    ► The law governing the contract recognizes frustration of purpose doctrine;

    ► There is no alternative method of performance; and

    ► Neither the governing law nor the contract makes one of the parties responsible for the frustration event.

  - Does the change in such circumstances make either buyer's or seller's contract performance objectively impossible?

    Similar to the result in the doctrine of frustration, under such circumstances, a non-performing party may be excused from all further performance obligations and contractual liability under the *doctrine of impossibility*, provided that:

    ► The law governing the contract recognizes the doctrine of impossibility;

    ► There is no alternative method of performance. Otherwise, the doctrine would not apply because performance, while difficult or expensive, would be possible;

    ► The incapability to perform is *objectively* impossible – meaning that the party claiming impossibility has tried all practical alternatives to avoid the impossibility of performance' and

    ► A party seeking relief under the impossibility defense did not contribute to the occurrence of the impossibility of performance.

1. Position of the Non-Russian Seller of Goods Under a CIF Contract

Under a CIF contract, the non-Russian seller owes the following performance obligations to the non-sanctioned Russian buyer, each of which has become impracticable, and perhaps impossible as a consequence of the collateral effects of Russian sanctions:

- To contract for carriage of the goods (*i.e.*, ocean or air freight to Russia);
- To contract for insurance of the goods to cover risk of loss in transit;
- To timely place the goods "on board" the nominated vessel or aircraft by the contractually-specified "ship by" date;
- To negotiate the documents through the LC "negotiating bank," by presenting the required documents to the negotiating bank, that ordinarily "negotiates" the LC documents to the issuing bank in Russia via the SWIFT system.

  Such documents include, but are not limited to the following documents that the present circumstances make impracticable to impossible for seller to obtain and negotiate:

  - The Certificate of Insurance, which, together with the contract for insurance, is now impracticable to impossible for a seller to obtain and negotiate under the LC because insurance companies have ceased issuing insurance for shipments to Russia; and
  - An "On Board Certificate" issued by the master of the vessel once the goods are on board the vessel, or an equivalent provided by the air cargo carrier, which also is now impracticable to impossible for a seller to obtain and negotiate under the LC because, as a consequence of sanctions: (1) ships have ceased carrying cargo to Russia; and (2) air cargo carriers also have ceased operating to Russia, either because the Russian government has closed Russian airspace to such aircraft, or air cargo carriers have elected to cease Russian operations because of war and business risk.

Accordingly, the seller will be compelled to claim excuse from all performance obligations.

To be most effective in obtaining this relieve through negotiations with buyer (as well as the LC banks), seller should obtain the assistance of a legal team consisting of accomplished international sanctions lawyers plus commercial lawyers who are licensed and experienced in the jurisdiction of the law that governs the contract.

Additionally, Seller simultaneously will be pursuing effective means of mitigating damages, including:

- Seller's re-sale of the goods that are the subject of seller's now-excused contract with buyer, if practicable, or scrapping of the goods if not practicable; and

- Seller making and pursuing business-interference claims under any insurance policies maintained by seller that might provide such coverage.

  For best effect, seller's preparation and submission of such insurance claims should be done in consultation with highly-experience insurance litigation lawyers practicing in the jurisdiction in which the insurance policy dispute provisions establish as the forum for dispute resolution.

2. Position of the Non-Sanctioned Russian Buyer under a CIF Contract

Under a CIF contract, the non-sanctioned Russian buyer owes the following performance obligations to the non-Russian seller, only one of which has become impracticable or arguably impossible of performance as a consequence of the collateral effects of Russian sanctions:

- To provide a commercial documentary LC from a mutually acceptable international financial institution.

  In this scenario, seller did so by providing an LC issued by Sberbank – a Russian bank that, through no fault of seller or buyer, is now sanctioned and is now excluded from SWIFT.

- To accept the goods when delivered to Buyer in Russia in accordance with the CIF contract.

  For the reasons discussed immediately above, this is now certainly impracticable, and highly likely objectively impossible.

Buyer, not having any prospect of receiving the goods, also has grounds for claiming relief from its performance obligations and any liability to seller under the contract.

Buyer will seek: (1) early termination of the LC by consent of seller and the LC banks; and (2) release of the credit support or cash collateral, or combination thereof, that Buyer provided to the issuing bank to obtain the LC. *Please see* discussion of the Second Scenario, immediately below, for a more detailed discussion of this process.

In the most likely circumstance, buyer will require the release of the LC credit support/cash collateral to enable buyer to arrange a replacement LC in support of a "cover" contract for the goods with another supplier – assuming that the buyer is able to:

- Locate and contract with a "cover" supplier that is willing to do business with a Russian company under the present circumstances and is able to fully perform by producing and shipping the goods to Russia; and

- Arrange a replacement LC with a financial institution acceptable to the "cover" supplier – i.e., one that can accept seller's negotiation of the LC documents and make payment under the LC.

Each of these actions presents the buyer with daunting challenges under the present circumstances.

Indeed, the likelihood of the non-sanctioned Russian buyer being able to find a "cover" seller and to arrange a functioning LC are practically nil.

C. Second Scenario

Generally

This scenario presents the question of what the non-Russian Seller must do to mitigate loss – and, in particular, to effect release of the LC cash collateral or credit support that the Seller provided to the issuing bank to obtain the LC.

Several fundamental rules of LC's apply to this scenario:

- An LC – whether a standby LC or a commercial LC – is irrevocable. Meaning that neither of the parties nor the issue and confirming banks may unilaterally modify or terminate the LC.

- An LC may be modified or terminated prior to the expiry date by authenticated written agreement of the initiating and beneficiary parties, plus the issuing and confirming banks.

  Under international banking practices, such written consents to modification or early termination are presented and confirmed through the SWIFT system.

  As a practical matter, the Russian sanctions prohibition against the seven Russian banks use of SWIFT has the effect of curtailing all subsequent consent modifications and terminations of LCs for which such sanctioned Russian banks functioned as the confirming bank or the Negotiating Bank in support of the LC beneficiary (*i.e.*, the non-sanctioned Russian buyer).

- Pursuant to the ICC Uniform Customs and Practice for Documentary Credits (UCP 600),[3] each LC must clearly state:

[3] UCP 600 ("Uniform Customs & Practice for Documentary Credits") is the official publication issued by the International Chamber of Commerce. UCP 600 consists of a set of 39 articles on issuing and using Letters of Credit.

- A defined "delivery date" for the purchased goods or services;

- A defined, "presentment period" for the beneficiary to negotiate all required documents (*i.e.*, pertinent shipping and insurance documents) with the Negotiating Bank; and

- That if the goods or services are not delivered in accordance with the terms of the LC by the delivery date, or all pertinent documents are not appropriately presented to the Negotiating Bank by the last date in the presentment period (and each confirmed to the issuing bank through SWIFT), then thereafter the LC may not be negotiated.

- An "expiry date", after which the LC may not be negotiated and shall be deemed terminated by operation of expiration per the LC's terms.

- Under international LC banking practices, upon expiry of the LC, the credit support/cash collateral provided by the LC applicant (in this scenario, the non-Russian buyer) prior to or at the time of LC issuance will be released or returned in accordance with the agreements between the applicant, the issuing bank, and any other involved financial institutions that have been involved in providing the credit support or cash collateral.

  The applicant thereafter will be released from liability under such agreements.

1. Position of the Buyer/LC Applicant

In this scenario, the Buyer/LC applicant has two primary concerns:

- As promptly as possible, terminate the LC by mutual consent, so as to obtain the promptest release of the credit support/cash collateral for the LC.

  In most instances, this is essential to buyer having the financial means to mitigate Buyer's damages by engaging in a "cover" transaction for purchase of the goods or services from other sources or suppliers.

- Finding an alternate source of supply for the goods or services, and then concluding a "cover" deal as promptly as practicable.

Credits that are issued and governed by UCP 600 will be interpreted in line with the entire set of 39 articles contained in UCP 600.

UCP 600 applies to documental LCs issued by financial institutions in 175 countries. UCP 600 is voluntarily incorporated into a trade finance contract through standard terms and conditions; subsequently, UCP 600 s incorporated into the resulting documentary LC.

UCP 600 is accompanied by the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), ICC Publication 745. ISBP assists with understanding whether a document complies with terms of the LC.

2. Position of the Seller/LC Beneficiary

In this scenario, the non-sanctioned Russian Seller/LC Beneficiary also has two primary concerns:

- As promptly as practicable, amicably reach a settlement agreement with Buyer that:

  - Releases Seller from any liability to Buyer, including any claim to any work in process or to finished goods or services; and

  - As a practical matter permits the Seller to most promptly mitigate damages, including by pursuing resale of the goods or services to another buyer.

Accordingly, while Buyer/LC Applicant's primary interest is to obtain Seller's most prompt consent to termination of the LC, the Buyer's interest is to leverage Buyer's "time is of the essence" considerations to motivate Buyer to agree to a "no-liability for Seller" global mutual release.

3. Means to Achieving Buyer's/LC Applicant's Business/Legal Objectives with respect to LC Termination and Release of the LC Credit Support/Cash Collateral

In this scenario, Buyer/LC Applicant has only two options:

- Achieve early termination of the LC and early release of the credit support/cash collateral by the LC issuing bank (and other involved financial institutions) by way of negotiated consent of the Buyer, Seller, and the LC issuing and confirming banks.

  To arrive at this goal, Buyer:

  - Must reach an amicable settlement with Seller, which almost certainly will include Buyer waiving any claims Buyer might have against Seller under the contract to provide the goods or services.

    It should be noted, however, that in this scenario, such Buyer claims might not have much legal merit, if Seller's performance is excusable under the legal doctrines of force majeure, frustration of performance or impracticability/impossibility of performance available under the law governing the contract. *See above* (discussion of Scenario 1).

  - In concert with Seller, and the LC issuing and confirming banks, Buyer must solve the conundrum of the Russian Seller and the Russian LC confirming bank communicating their written consents to the LC issuing bank through the now-unavailable SWIFT systems.

This is an issue of apparent first impression that is only now being preliminary addressed by the international banking community – and is yet unanswered.

- Wait for the LC to terminate by operation of the expiry clause, by virtue of Buyer not negotiating LC, for whatever reasons, by the expiry date.

Under either option, the LC credit support/cash collateral will be credited back in accordance with the banking agreements entered into between Buyer/LC Applicant, the LC issuing bank and other involved financial institutions (if any).

At either point, the LC issue becomes settled and closed.

D. Third Scenario

Generally

This scenario implicates six critically-important principles concerning US export controls laws and implementing US Export Administration Regulations (EAR) (administered and enforced by BIS), and companion EU export control regulations, particularly in the context of the 2022 Russian sanctions:

- If a product contains US technology, then US export control laws and licensing controls, re-export and country-transfer of the product is governed and controlled by the US EAR for the life of the product – regardless of whether the product already has been exported from the US and received by a foreign (non-US) importer.

- Material changes to US EAR – and particularly new restrictions on the re-export or country transfer of the technology to Russian intermediaries or end users – will apply immediately upon the effective date of the changes, regardless of the terms of the previously-issued export documents (including any US export permissions and licenses).

- In all instances, it is the responsibility of the exporter/re-exporter/country transferor to become aware of and *comply* with all changes to the EAR applicable to the exported US technology.

  In most instances, no individual official notice will be sent to the exporter/re-exporter/country transferor.

  However, customs/export agents customarily notify their clients of changes in US EAR; however, customs/export agents are not in a position to make legal determinations with respect to applicability and compliance.

- Owing to complexity of the EAR – including the new Russian sanctions provisions – making a determination of the applicability of such sanctions provision to the potentially-affected US technology, and whether any exceptions apply – almost always requires the assistance of American legal counsel well versed in both the US EAR and the new Russian sanctions.

- Non-compliance and violation of the EAR – particularly sanctions provisions – by a US person/entity or a non-US person/entity who has received US technology and who has illegally re-exported US technology to a sanctioned person, entity or territory is a serious civil and criminal offense under US criminal law and the EAR that is aggressively investigated and enforced by BIS, the US State Department and the US Department of Justice (DoJ).

  The legal and financial risks posed by US BIS/DoJ sanctions enforcement actions are so serious that such cases have the potential to become "bet-your-company" matters that the targeted companies must defend by engaging experienced US white collar criminal attorneys and sanctions counsel, and then negotiating a global settlement.

- Without regard to the applicability of new US Russian export control sanctions, new EU Russian export control sanctions are likely to apply, and must be taken into consideration in the exporter/re-exporter/country transferor's decision whether to proceed with the planned export to its Russian customer. *See* EU Council Decision 2022/328 (25 February 2022) at Article 1, prohibiting the "sale, supply, transfer or export, directly or indirectly" of "dual-use goods and technology" (as listed in Annex I to Regulation (EU) 2021/821 of the European Parliament and Council), "whether or not originating in [the EU], to any natural or legal person, entity, or body in Russia or for use in Russia."

Steps with Respect to the Contemplated Export Transaction

Under this scenario, a responsible exporter/re-exporter/country transferor that learns of the new US and EU Russian export control sanctions should respond with the following actions:

- Immediately place the export transaction on hold pending determination of the extent to which the new US and EU Russian export control sanctions apply;

- Give written notification to the Russian importer of this action, including reasons why;

- Engage with highly-qualified US and EU export control/sanctions attorneys to receive advice and counsel concerning the applicability of the new US Russian export control sanctions, and the way forward;

- If the export transaction cannot proceed, then give such notice to the Russian importer pursuant to terms of the current controlling contract instrument between the non-US exporter and the Russian importer.

- In consultation with legal counsel that are experienced in dealing with the legal implications of sanctions frustrating commercial contracts under the law governing the contract between the non-US re-exporter/country transferor and the Russian counterparty, determine the best course to:

  (1) Mitigate risk of breach of contract claims by the Russian counterparty; and

  (2) Mitigate economic losses resulting from failure of the contract.

  As part of this mitigation effort, the non-US re-exporter/country transferor should whether there are non-Russian customers for the product, and, if so, whether re-exporting/country transferring the product to such other customers requires any amendment of the existing US export/customs documentation or a new license, or additional EU export authorization.

E. Fourth Scenario

General Considerations

The threshold questions for both the transacting oligarch and the business agent are:

- What sanctions apply to the transacting oligarch and to the business agent, who is both an EU citizen and a UK resident, as well as to the transacting oligarch's assets; and

- What limitations or prohibitions do the applicable sanctions impose on the transacting oligarch, the business agent and the assets in relation to the transaction.

1. Position of the Transacting Oligarch and Asset Dealings

The transacting oligarch is subject to sanctions laws worldwide – that is to say, if the oligarch's assets are found within the jurisdiction of any Sanctioning Countries, then the any blocking or dealings sanctions of that country will apply to the assets. As well, the transacting oligarch will be directly limited in his dealings with the assets, as such sanctions law so provide.

As a matter of sanctions law, it is irrelevant whether the Accordingly, so long as the oligarch has a controlling interest in the assets, or is a beneficiary of the asset sale, then blocking and dealings sanctions apply.

In this instance, the transaction is being conducted in the UK and involves the transfer of parts of the transacting oligarch's assets located within the EU jurisdiction.

Thus, because UK sanctions law presently does not block the assets or prohibit dealing with the transacting oligarch or the assets, under UK law the transaction can move forward. But time is of the essence, since the UK sanctions authorities have announced that the UK is quickly moving toward imposing blocking and dealings sanctions upon the transacting oligarch and his assets within the jurisdiction of the UK.

This does not finish the question, however, because the transaction involves dealings with assets that are within the jurisdiction of the EU, and to which EU blocking and dealing sanctions apply. Therefore, effectively the transfer of those assets are blocked, and the dealings sanctions prohibit the transacting oligarch from *any* dealings with *any* others with respect to the blocked assets. In sum, any transfer of any of the transacting oligarch's blocked assets under EU law, but attempted elsewhere in the world, is void as a matter of law. The effect of EU sanctions law reigns supreme over any dealings with the assets.

2. Position of the Business Agent

EU sanctions law prohibits any EU citizen from any dealings with the transacting oligarch. Post-BREXIT, EU sanctions law does not apply within the UK to non-EU citizens.

However, the business manager is an EU citizen who, under EU sanctions law, is prohibited from dealing with the transacting oligarch's assets.

Because dealing with the EU-sanctioned oligarch's assets is one of the business agent's primary responsibilities, the business agent has been in civil and criminal violation of EU sanctions law since the effective date of the EU sanctions imposed on the transacting oligarch.

Thus, the business manager and the transacting oligarch are subject to administrative, civil and criminal enforcement proceedings in the EU, initiated by EU sanctions authorities but carried out through pertinent Member State agencies and courts.

3. Effect on the Assets

The transacting oligarch's assets within UK jurisdiction remain unblocked, and subject to dealings, but only with citizens of countries that have not imposed dealings sanctions upon the transacting oligarch.

The transacting oligarch's assets within the jurisdiction of the EU or any other country that has imposed blocking or dealings sanctions are blocked, and, therefore, as a matter of law, are prohibited from transfer.

4. Effect on the Transaction

The applicability of EU blocking sanctions to some of the assets covered by the sale-purchase agreement and the EU dealings sanctions applicable to the transacting oligarch and the business agent has tainted the entire transaction.

Among other things, the typical sale-purchase agreement (SPA) has representations and warranties, as well as covenants, concerning compliance with laws, and the seller's authority and power to enter into the SPA and to perform the transactions contemplated by the SPA – including transfer of the EU-blocked assets.

For these reasons alone, the transacting oligarch no longer is able to validly carry through with the transaction contemplated by the SPA. In other words, there can be no closing as provided in the SPA – including no transfer of the EU-sanctioned assets.

In such instance, it is certainly inevitable that the buyer will "call the question" and seek to hold the transacting oligarch liable for compensation, at the very minimum under the provisions of the SPA "breakup" clause.

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In any event, upon the realization that sanctions might affect the transaction, it is advisable and appropriate for all parties to the transaction, as well as the business agent, to seek counsel from attorneys highly experienced in the applicable sanctions law, in addition to the parties' respective transaction counsel.

IV. ESSENTIAL ADDITIONAL ACTIONS FOR MITIGATION AND AVOIDANCE OF SANCTIONS RISK

In sum, it is evident that the recent and ongoing imposition of unprecedentedly sweeping and complex Russian and Belarussian sanctions have grave implications for companies with cross-border operations – even impacting businesses with no immediate or direct involvement with Russia and Belarus.

In the current environment, each international business must take the following actions it wishes to mitigate and avoid the risks presented by the 2022 Russian sanctions:

- It is essential for international businesses to conduct risk assessments at an enterprise level to determine the potential and actual risks and impacts of sanctions on all lines of business, and to very promptly take mitigation measures.

- In particular, international businesses must move expeditiously to wind down and quit any involvements with sanctioned Russian entities and persons by the end of the very abbreviated and soon-approaching wind-down periods that have been specified by sanctions authorities in the US, the UK, the EU and Switzerland, Canada and Australia. By way of example, US sanctions on certain Russian financial institutions authorize the wind down of certain transactions by "12:01 a.m. eastern daylight time, March 24, 2022."

- In light of the US, EU, the UK, Canada and other sanctions countries recently adding new sanctions several times a week since 22 February 2022, international businesses must be extraordinarily alert to the new sanctions, and must immediately perform supplemental

sanctions risk assessment to determine whether such additional sanctions apply to the business.

- The 2022 set of Russian sanctions contain very few generally applicable rules, are complex and require highly fact-specific analysis to determine the impact and, then, what is required for a business to come into compliance and avoid potentially grave consequences.
