

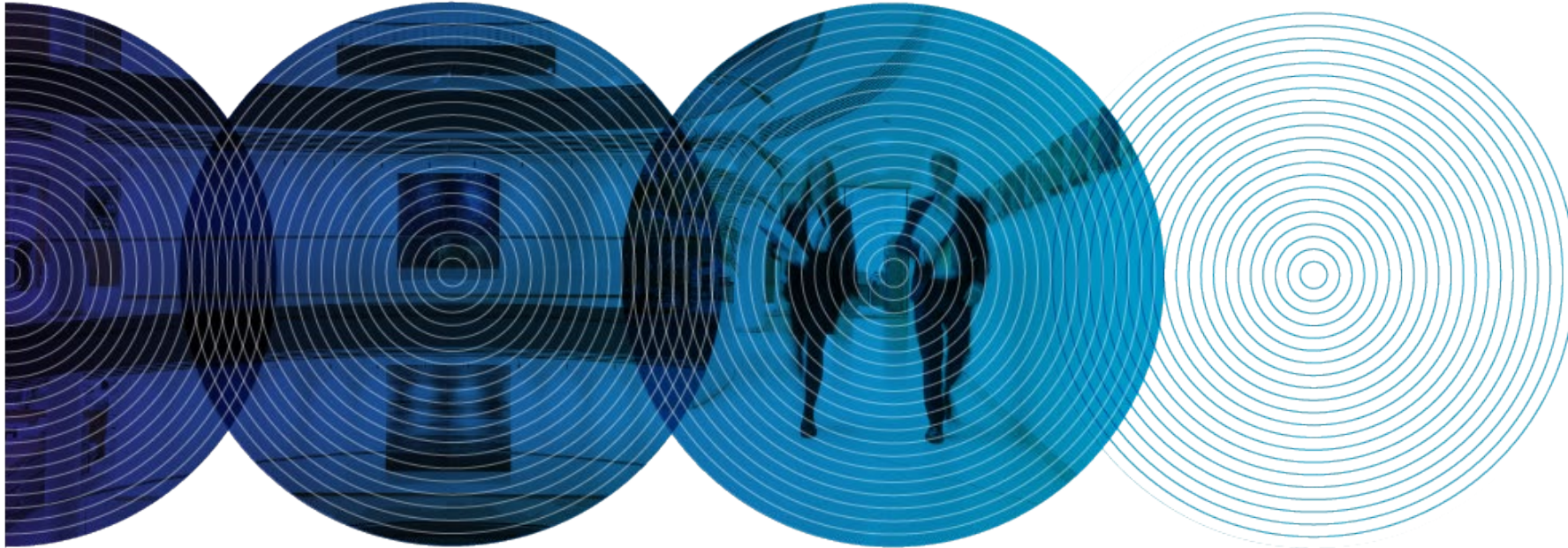
Sanctions, Liability and Managing Risk

Satellite Event – Dublin International Disputes Week

Thursday 16 June 2022 1:30pm – 2:30pm

Chaired by Audrey Byrne – McCann FitzGerald LLP

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Speakers

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Sanctions

- The EU, UK, US and Ukraine have introduced restrictive measures against Russia targeting a variety of persons and sectors in response to the war in Ukraine
- The measures vary and include financial, economic and commercial restrictions as well as limiting Russian propaganda
- In a globalised world organisations may need to assess their position in terms of liability and potential risks from both a criminal and civil perspective across the various sanctions regimes
- There is a challenge in ensuring that sanctions compliance measures are appropriate in an ever evolving landscape with complimentary but different sanctions regimes
- This webinar will explore the issues arising with perspectives from the EU, UK, US and Ukraine, drawing on experience from previous comparable sanctions regimes where appropriate

Brief overview of EU, UK, US and Ukrainian Sanctions

- Birdseye view of key features of each sanctions regime
- They are complimentary regimes, but be alive to differences- the detail is important
- Jurisdictional and cross border considerations
- Enforcement
- Member States are responsible for the implementation of EU Sanctions and for imposing penalties. The UK has a similar regime in place for designated natural persons or entities controlled by designated persons
- On 17 March, The Commission set up the ‘Freeze and Seize” Task Force, to encourage EU level coordination to implement sanctions against listed Russian and Belarusian Oligarchs

The Ukrainian Perspective – General Overview

- Subject to limited exceptions, Ukrainian sanctions are in response to the Russian aggression since 2014
- Individual sanctions are passed by the National Security and Defence Council and approved by the Presidential Decree
- Sectoral sanctions – in addition to the above procedure – are additionally approved by the Resolution of the Parliament (e.g., sectoral sanctions against Nicaragua)
- Some measures are within the competence of the Cabinet of Ministers (e.g. import embargo with Russia)
- Shift from endless lists of specific designated persons towards a general prohibition of affiliation with Russia or even dealing with Russia, its armed forces, etc.
- Criminal liability for collaborative activity and for helping the aggressor state (such liability – in certain instances – applies also to foreign organizations and individuals)

The Ukrainian Perspective – Efficiency of the Ukrainian Sanctions

- Restrictions on dealings with the EU, UK and US (as opposed to dealings with Ukraine) are still more tangible for Russia, for its residents, for its economy and for its aggressive attempts to occupy the Ukrainian territory
- Historically Ukraine has not been an important enough jurisdiction for foreign businesses to consider its Russia-related sanctions
- When introducing sanctions, Ukraine currently should make sure not to prejudice its own interests and those of its European allies (e.g., gas and oil transit via Ukraine)
- “Do what you can” approach
- The Supreme Court has now effectively “cancelled” the sovereign immunity of Russia in Ukraine. This means that anyone who has suffered damage from the Russian aggression (Ukrainian and foreign organizations and individuals) can sue Russia – as the aggressor state – directly in a local Ukrainian court by bringing a tort claim. NB: recognition of the resulting Ukrainian judgments in foreign jurisdictions needs to be considered separately

The Ukrainian Perspective – Horizon Scanning

- Ukraine will need to finetune its own sanctions regime, but the role of the EU, UK and US sanctions will, in any event, be more important going forward
- Crucial points: compliance with the sanctions regime, preventing evading the sanctions, pumping up the sanctions instead of their lifting / relaxation
- Lots of Russian assets have been frozen in various jurisdictions and the legal mechanisms to forfeit them and to transfer them to some sort of “Ukraine Rebuilding Fund” are currently being developed
- Recognition of Russia as a sponsor of terrorism is likely to become relevant (1) for what the Russians are doing with Ukraine and (2) for creating, supporting and even promoting its proxies (“DPR” and “LPR”)
- Ideal scenario: lifting the sanctions only after the end of hostilities and complete de-occupation of Ukraine, as well as adoption of the mechanism for compensation of colossal damage, which has been / is being caused by the Russian large-scale aggression

EU/UK Perspectives on asset freezes and the prohibition to make funds and economic resources available to sanctioned persons – appropriate due diligence and managing risk

- Under EU Law an entity that is owned or controlled by a designated person is effectively also sanctioned
- Making funds or economic sources available directly or indirectly or for the benefit of sanctions targets is prohibited and in breach of restrictive measures
- If a designated person is deemed to own or control a non-designated person, it can be presumed that control also extends to the assets of that entity, including in a corporate structure
- EU guidance on ownership and control contains a number of criteria by which control can be assessed including voting rights, ownership criteria and influence. It also contains catch all provision which considers the de-facto position
- Circumvention is prohibited under Article 9 of Council Regulation (EU) No 269/2014. Article 9 can be breached even if the freezing of assets is not discontinued and no assets reach or benefit the now-listed person; mere participation in a structure created for that purpose can be considered as a breach
- It is important to look beyond the entity and assess the sanctions risk arising from its structure and those that may have an influence, both directly and indirectly. This task can be challenging and appropriate due diligence must be undertaken. The level of due diligence required is fact specific. An organisation can on a case by case basis rebut a presumption of control and/or satisfy a competent authority that no funds or economic benefit will reach sanctioned persons

Aggregation and Control – EU, UK, US Differences

- The EU Commission recently issued guidance in respect of aggregation, which states where joint control is established, it can be presumed that all assets of that entity are controlled by the designated persons unless it can be shown otherwise
- If the aggregated ownership of a company /group by listed persons meets the 50% threshold, the company/group should be considered jointly owned
- In the US, any company that is owned 50% or more by blocked person (s) are blocked as a matter of law, regardless of whether OFAC actually lists them on the SDN list.
- The UK's asset freeze provisions automatically extend to assets owned or controlled by a designated person but the UK has its own test for whether control is met. The UK does not aggregate ownership in the same way as the EU/US.
- Local advice is key if your organisation is potentially subject to different sanctions regimes

Criminal Liability – General Comments

- A breach of sanctions may impose strict liability offences and both civil and criminal penalties can be imposed
- Offences can relate to a breach of sanctions and also a circumvention of same and so a high degree of caution is required
- Inadvertent breaches are also a huge risk for organizations, particularly where there is a possibility of criminal liability for senior executives
- Many jurisdictions lack sufficiently robust legal frameworks to seize criminal assets

Criminal Liability – EU

- Breaking EU Sanctions is now a criminal offence in 12 countries, including Ireland. On 25 May, the EU Commission issued a proposal that would make breaking EU sanctions against Russia an EU crime. This aims to unify the all 27 Member States in an approach
- Penalties include possible conviction, fines and severe reputational damage
- A defence is available under Article 10 (2) of Council Regulation (EU) No 269/2014 where no liability of any kind will arise for a person who did not know and had no reasonable cause to suspect that their actions would infringe the restrictive measures
- Dan-Bunkering case - test applied by Danish authorities was “known or should have known” that EU sanctions would have been breached
- In Ireland, penalties are set out by statutory instrument, which provides that a person contravening a provision of the relevant EU regulation is guilty of an offence. On indictment, penalties can include maximum of three years in jail or a maximum fine of €500,000 for any breaches

Criminal Liability – The UK

- New UK powers:
 1. To designate those already designated by the EU, US, Canada or Australia, even where our threshold for designation has not been met; and
 2. Strict liability civil penalties, due to come into force in the UK from 15 June

Criminal Liability – Ukraine

- Ukraine has criminalised collaborative activity and helping the aggressor state
- Both crimes are defined quite broadly and somewhat vaguely (they also partly overlap with each other). Therefore, the hope is that the Parliament will tighten up the language or the Supreme Court clarifies certain points
- Both crimes may be committed not only by Ukrainian nationals
- Depending on the particular facts, breach of sanctions may be part of *corpus delicti*.
- Punishment for these crimes varies between a fine and a life sentence

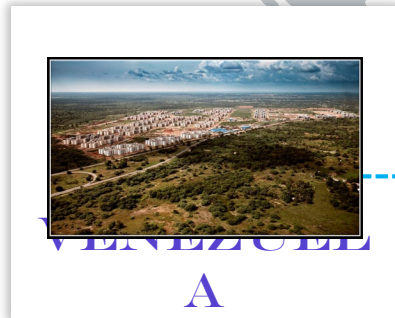
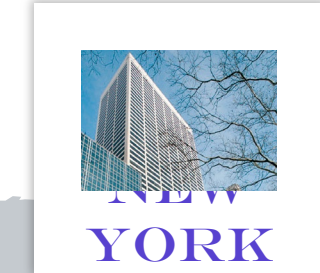
U.S. Sanctions

- Jurisdiction
- Office of Foreign Asset Control administers over 30 sanctions programs
 - Countries/regimes
 - Individuals/entities/organizations
 - Certain property (e.g., vessels, aircraft, websites)
- Other export control restrictions aside from OFAC
- Criminal prosecution possible for “willfully” violating most sanctions; otherwise, civil penalties

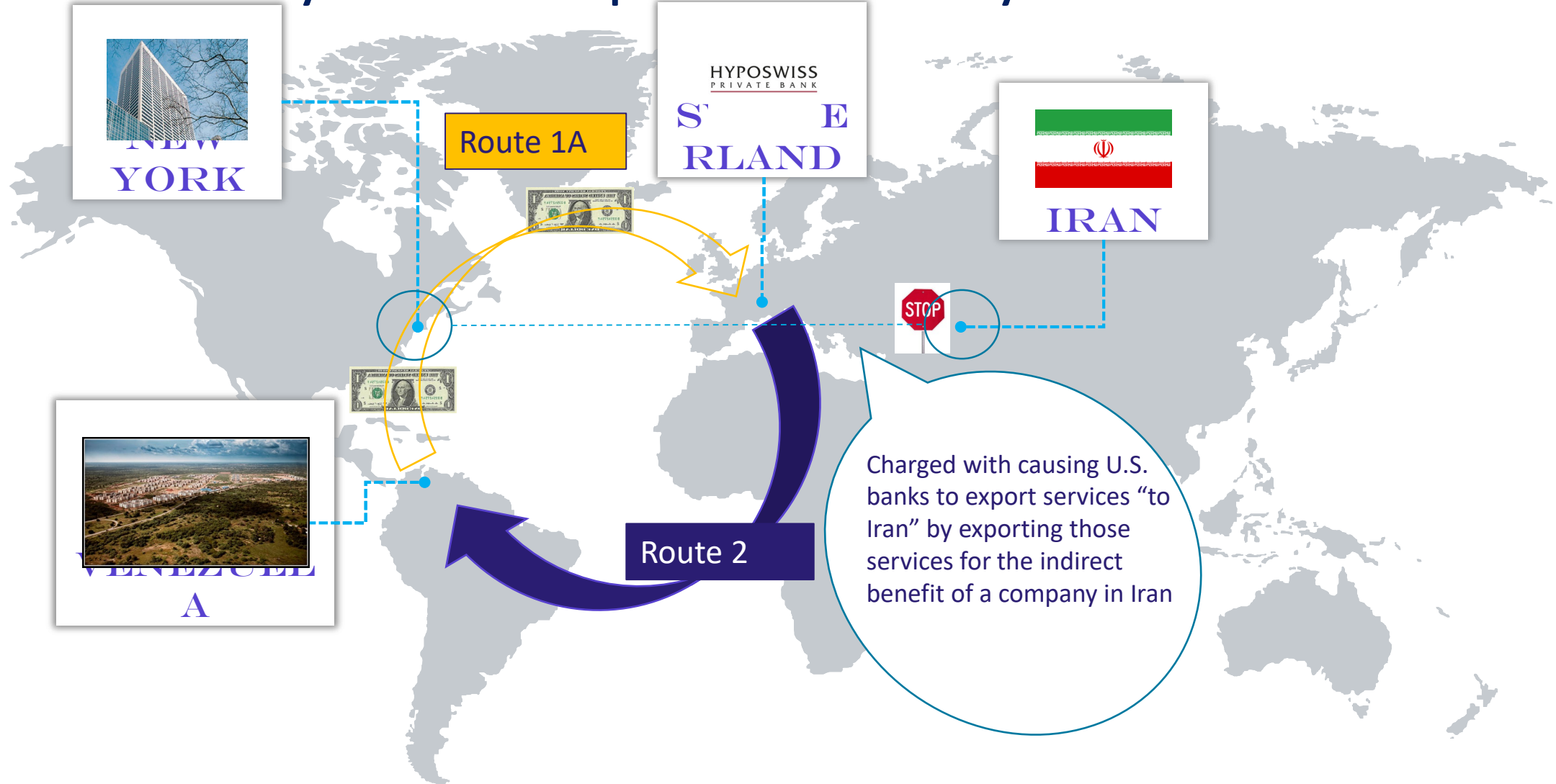
U.S. Sanctions (cont.)

- Typical prohibition: (A) Exporting goods, services, or technology to sanctioned countries or individuals/entities; (B) Transacting with blocked property; (C) Evading or avoiding any prohibition
 - U.S. government interprets “to” broadly
 - U.S. government interprets these actions to include facilitation of others’ actions
- Who is prohibited from exporting/transacting/evading?
 - U.S. persons/entities or persons in the U.S.
 - Non-U.S. persons/entities owned or controlled by U.S. persons*
 - Non-U.S. persons “causing” actions in the U.S. or arguably even working with U.S. persons

Criminal Liability from a US Perspective: A Case Study



Criminal Liability from a US Perspective: A Case Study



U.S. Sanctions (cont.)

- Examples of non-U.S. person sanctions liability:
United States v. Ali Sadr (2020 trial)
- Two years under house arrest
- Two-week trial in New York City
- Conviction and potential sentence
- Vacated due to hidden evidence of innocence
- Other examples include *United States v. Atilla/Zarrab* (Turkish banking) and *United States v. Nikitin* (upstream European company)

Civil Liability and Contracts

- Sanctions may also have significant consequences for ongoing contractual relationships, as future performance may be in breach of the restrictive measures as set out by the EU.
- EU law overrides any non compliant contractual provisions
- Consider sanctions, force majeure, frustration and termination clauses
- Dispute resolution clauses, choice of law and jurisdiction clauses will need careful review
- Who is responsible for maintaining a frozen asset and how does that impact on liability
- As with many EU sanctions regimes, the EU's Russian sanctions contain so-called 'no claims' provisions, which protects a party who refuses to perform a contract on the basis that they may breach EU sanctions from potential claims. This prohibits designated parties or any Russian person (whether designated or otherwise) from bringing claims in connection with the non-performance of a contract or transaction, which has been affected by the EU's sanctions

MUR Shipping BV v RTI Ltd [2022] EWHC 467 (Comm) (03 March 2022)

- A recent UK case where the parties relied on force majeure, even though they were not themselves sanctioned
- The UK Commercial Court held that a ship operator was entitled to rely on a force majeure clause in a contract where its charterer's parent company became subject to US Sanctions
- The Court allowed reliance on force majeure despite the fact that the sanctions did not directly apply to the ship-owners
- The provision did not require the owners to accept non-contractual performance, meaning that 'reasonable endeavours' obligations do not require those affected by international sanctions to act outside the scope of the contract

Lending Facilities and Insurance

- Sanctions are not confined to particular financial products. Lenders and insurance providers will also have stringent obligations to comply with the EU restrictive measures
- For lenders, stringent due diligence must be carried out not only on the potential borrower but all parties to the transaction both directly and indirectly. Where there is potential for sanctions compliance to be at risk, undertakings in respect of how the loan proceeds are to be used and repaid are essential
- A mandatory prepayment clause can also be used to include prepayment in the case of a sanctions related event
- Insurers must also take great care to ensure a claimant and the proceeds resulting from a claim are not in breach of the restrictive measures
- Sanctions clauses will also protect from an onset of claims as cover is nullified once sanctions are present

Managing Risk

- All organizations in all sectors are obliged to comply with sanction screening requirements and to have robust sanctions controls in place in addition to AML requirements
- This screening involves vetting individuals, groups or companies against designated sanction lists and their alliances and being alert to developments on an on-going basis. Due diligence is key in managing sanctions related risk
- **Prevent the Risk**
- **Detect the Risk**
- **Respond to the Risk**

Questions?



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