ЗАРУБЕЖНОЕ И МЕЖДУНАРОДНОЕ ПРАВО

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The impact of foreign economic sanctions on commercial contracts

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Foreign economic sanctions were in the focus of domestic lawyers' attention for half a dozen years. The new legal regime for persons directly or indirectly involved in sanctioned cross-border commercial activities has been studied in science mainly in the context of public law, and — in the applied aspect — through the prism of compliance procedures. However, no less important is the problem of sanctions regulation in its embodiment in the private law instruments of contract law. The purpose of the study is to summarize and analyze the effectiveness of the accumulated practice of the use of pre-contractual and contractual mechanisms to manage the risks caused by foreign restrictive measures. To achieve the goal, general scientific methods of analysis, synthesis, generalization, as well as the comparative legal method and approaches of economic and empirical analysis of law are used. Following the presentation of the leading approaches of the Russian state courts to the legal qualification of economic sanctions, the most promising options to manage the risks of sanctions for business at the pre-contractual and contractual stages are studied. In line with best business practices, pre-contractual mechanisms of compliance procedures (external and internal compliance) as well as contractual ways to mitigate sanctions risks proved to be the most effective for alleviation of the sanctions burden. Both sets of measures are developed and introduced into the daily routine by business participants themselves. Contractual regulation makes a decisive contribution to reducing the degree of negative legal consequences for business. To effectively manage risk, representatives of the business community use a wide range of contractual provisions: sanctions clauses, force majeure clauses, currency choice clauses, applicable law clauses and arbitration clauses. The success of such contractual initiatives, strengthened by the development of standard forms and terms of commercial contracts, is confirmed by judicial and business practice.

Keywords: economic sanctions, sanctions compliance, sanctions clause, commercial contracts, legal risk management, contract work.

1. Introduction

Whether lawful or not from the perspective of international law, economic sanctions have become entrenched in the realities of Russian business, dictating to participants in commercial turnover the need to make notable adjustments to their activities. Sanctions-related legal risks in many aspects of business, from choosing a counterparty to resolving commercial disputes, are forcing international corporations to improve internal procedures, develop standard forms of documents and incur additional costs for their implementation. Against this background, pre-contractual and contractual ways of managing the risks associated with the impact of economic sanctions on cross-border commerce become particularly relevant.

2. Basic research

2.1. Foreign economic sanctions and the Russian approach to their legal qualification

Economic sanctions in a broad sense are restrictive measures of an economic nature imposed by foreign states and international organisations[1]. The political objective of sanctions is to damage the economy of a certain state, which will potentially serve as a catalyst for a change of foreign policy course (Keshner 2019, 57). This goal is achieved by imposing on entities subordinate to the state that has initiated the sanctions transactional restrictions that such former entities enter into with persons from the target state of the restraining measures.

The sanctions regime accompanying cross-border and domestic business operations in the Russian Federation since March 2014[2] distinguishes between blocking and sectoral measures, territorial sanctions, restrictions in relation to certain types of goods, and secondary sanctions linked with support to sanctioned persons (Keshner 2019, 57).

Blocking sanctions have been imposed by the U.S., the European Union (EU) and some other states. It should be noted that in today's environment the originator of the most extensive and severe sanctions is the United States; therefore, in practical terms, businessmen are primarily guided by the legal provisions of this particular state. In the United States, inclusion of an individual or an entity in the Specially Designated Nationals and Blocked Persons List (SDN)[3] has at least two material consequences. First, transactions pertaining to the assets of such a listed person that happen to be in the possession of a U.S. person must be immediately blocked (U.S. regulations use the term "blocked property", while in Europe it is "asset freezing"). In the U.S., "asset freezing" means that funds are placed in an interest-bearing account from which only debits authorised by the Office of Foreign Assets Control (OFAC) are permitted[4]. Second, U.S. persons may not

[1] On the legal characteristics of economic sanctions, see: (Starzhenetskii, Butyrina, Dragunova 2018, 126).

[2] This article examines the regulations and legal doctrine as of May 31, 2021.

[3] "The SDN List of persons is available on the U.S." *Department of the Treasury website*. N. d. Accessed May 31, 2021. https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

[4] "OFAC Frequently Asked Questions. Question 32". *U.S. Office of Foreign Assets Control website*. N. d. Accessed May 31, 2021. https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1601.

enter into any business relationship with the listed individuals and entities. Restrictions imposed by other jurisdictions are similar in content[5].

Sectoral sanctions apply to persons operating in specific sectors of economy, such as defence, subsoil use, and banking. The U.S. maintains a Sectoral Sanctions Identifications List (SSI)[6]. The EU, Canada and Australia have introduced equivalent restrictions. Sectoral sanctions impose a ban on transactions related to lending or participating in the equity of the companies concerned.

It has to be emphasised that the scope of the sanctions regime can be quite broad. In the U.S. version, it applies not only to individuals and entities specified in the SDN and the SSI lists, but also to companies that are more than 50 % directly or indirectly owned by one or more listed persons[7]. For the EU, this rule is clarified by establishing a "controlling" relationship of the sanctioned person with the controlled companies. This significantly broadens the range of business actors interested in the legal formalisation of the civil law consequences associated with the extension of the sanctions regulation.

Finally, the phenomenon of secondary sanctions appears to be even more dangerous for businesses, demonstrating the extraterritoriality and elasticity of the sanctions restrictions. Under the U.S. Countering America's Adversaries through Sanctions Act of 2017, foreign companies that do not initially fall under sanctions may be made subject to the sanctions regime as a result of providing financial, organisational or other assistance to sanctioned individuals. Such expansion of economic sanctions has been characterised in legal doctrine as "toxicity" of sanctions (Primakov 2018, 8). Although, according to legal practitioners, such scenario has not been actively followed (Khokhlov 2019), the risks associated with secondary sanctions cannot be completely ruled out.

For business activity, it is important to identify and assess the effect of the restrictive measures on a range of individuals — both to identify liability risks within the company and to set expectations for interactions with counterparties. A specific feature of sanctions' impact is that while *de jure* sanctions apply to individuals of the imposing state, *de facto* a much wider range of entities demonstrates compliance with these measures (or is interested in demonstrating such compliance): these are listed public corporations, companies dealing with Western counterparties, domestic businesses receiving foreign funding, companies that are part of cross-border groups with a U.S./ European nexus, other entities for which access to Western technology and finance is essential[8]. Thus, in enforcement terms, given the increasing conservative interpretation by official bodies and experts, as well as due to the growing concerns among businesses, the sanctions regime with respect to the individuals and companies concerned is continuously spreading.

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[5] See: "EU Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine". *Official Journal of the European Union*. 2014. L 78: 16–21. Accessed May 31, 2021. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:078:0016:0021:EN:PDF.

[6] "The SSI List and relevant official clarifications are available on the U.S." *Department of the Treasury website*. N. d. Accessed May 31, 2021. https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/ukraine-russia-related-sanctions.

[7] "Revised guidance on entities owned by persons whose property and interests in property are blocked". *Department of the Treasury website*. 2014. Accessed May 31, 2021. https://home.treasury.gov/system/files/126/licensing_guidance.pdf.

[8] For more details, see: (Savel'ev 2015, 121).

The Russian courts' approach to the private law qualification of sanctions restrictions[9] in the absence of specific terms to that effect in the counterparties' commercial contract is threefold. According to the first position, sanctions can potentially be defined as a force majeure circumstance, and in a particular case they can serve as a basis for absolving the defaulting party from liability, for example under Item 3 of Art. 401 of the Russian Civil Code[10]. At the same time, Russian courts are cautious in classifying circumstances as force majeure (Voitovich 2015, 121). For example, it is noted that "the imposition of economic sanctions against Russia by the U.S. (EU) does not *per se* indicate that the breach of an obligation was a consequence of this very circumstance"[11]. The judicial practice, although in some cases it recognises the sanctions as an event of force majeure, imposes restrictions on the exemption from liability of an entrepreneur in connection with the sanctions. In international commercial practice, such an outcome is only possible where there is an established causal link between the sanction and the breach and where the offending party has taken measures to prevent the breach.

The second, but even less promising in terms of domestic enforcement practice, legal interpretation of foreign economic sanctions is linked to the inability to perform an obligation[12]. The legal consequence of such an approach is termination of the beached obligation. According to domestic scholars, the qualification of sanctions imposed by foreign states as a legal impossibility of performance is inadmissible, since only acts of Russian state bodies, but not foreign ones, can produce such a legal result (Savel'ev 2015, 122). Court practice confirms the theoretical conclusions: Russian judges are more willing to qualify sanctions as a "circumstance of insuperable force" (being a close Russian law synonym of a "force majeure" concept known in international commercial law) which exempts a party from liability for non-performance, rather than serves as a ground entailing termination of an obligation.

Finally, the third position reflected in judicial practice merely attaches no particular legal significance to foreign sanctions in the civil law context. A party unable to perform an obligation due to a sudden sanctioned obstacle is not relieved by the court from the obligation to perform the contract and the obligation does not become terminated either[13]. This approach, which is most widely practiced by domestic courts, is extremely dangerous for business as it is associated with material negative economic consequences (fines, etc.) and significant reputational losses for the defaulting party.

Due to the generally unfavourable approaches to the legal interpretation of economic sanctions and their civil-law consequences in the Russian commercial turnover, the need for the business community to take independent measures to address the legal implications caused by sanctions has come to the fore. Practice shows that such initiatives gain measurable effect within the framework of sanctions compliance introduced by corpora-

[9] The international public law context of unilateral economic sanctions is explained in detail in the works of M. V. Keshner and S. V. Glandin (Keshner 2015; Glandin 2018).

[10] See, e. g.: Ruling of the Arbitrazh (Commercial) Court of the Moscow District of 20 February 2018 No. F05-21409/2017 in case No. A40-39224/2017 (hereinafter all the Russian acts and court decisions are cited from SPS "ConsultantPlus". Accessed May 31, 2021. http://www.consultant.ru).

[11] Ruling of the Arbitrazh (Commercial) Court of the North-Western District of 18 April 2018. No. Ф07-1614/18 in case No. A56-89542/2016.

[12] Item 1 of Art. 416 and Art. 417 of the Russian Civil Code.

[13] See, e. g.: Ruling of the Supreme Court of the Russian Federation of 23 May 2017 No. 301-ЭС16-18586 in case No. A39-5782/2015.

tions as well as through targeted contractual work by the companies. Compliance regulation that considers the sanctions component has been reflected in the publications of some Russian scholars (Primakov 2018) and discussed in academic forums (Glandin, Gladysheva, Keshner 2018). The contractual dimension has not received considerable attention in the legal literature, but due to its high applied significance and relevance, it deserves a separate study.

2.2. Reduction of sanctions risks at the pre-contractual stage

Liability measures for breaches of the sanctions regime, such as fines imposed by state authorities of sanctioning countries, potential criminal liability of executives in those jurisdictions, and the risk of secondary sanctions force corporations to introduce internal practices of preliminary analysis and a set of compliance procedures. Compliance is understood as ensuring conformity of the corporation's activities with Russian and foreign laws and other binding regulatory documents, as well as establishing internal mechanisms for identifying, analysing and assessing the risks of statutory violations and assuring comprehensive protection of the corporation. In cross-border relations, when a business is present in a country associated with sanctions regulation, there is a need for the so-called sanctions compliance (Glandin, Gladysheva, Keshner 2018, 149–150). It should be pointed out that sanctions compliance is now common in domestic business relations as well: for example, it is widely used by Russian divisions of international corporate groups, Russian companies interacting with them, etc.

Sanctions compliance can be roughly divided into two categories: internal and external. Internal measures are designed to answer two questions: firstly, whether the company or its structural subdivisions are initially subject to sanctions; secondly, whether the company or its related persons are ultimately subject to sanctions. These tests are needed in order to determine the subsequent course of negotiations with foreign counterparties and some other issues, such as the authority of those on the SDN list to represent the company. Internal measures include, but are not limited to, establishing the presence of a U.S., EU citizenship or that of another jurisdiction that supports sanctions for the company's employees and officers, and the existence of foreign assets or registration in sanctioning jurisdictions for shareholders and members of management bodies (Khokhlov 2019).

Identifying individuals within the company who are subject to sanctions restrictions can prevent not only administrative and criminal law risks, but also significant civil law risks. For example, according to the explanations on the website of the U.S. Office of Foreign Assets Control, the body authorised to oversee compliance with the sanctions regime, the inclusion of a person on the SDN list means that she or he cannot represent the interests of the company that is not itself subject to sanctions[14]. Consequently, such a representative is not formally entitled to participate in negotiations or to sign a contract on behalf of a legal entity, even if the representative has the required authority under personal statute. Thus, the risk of invalidity of a contract due to the representative's lack of authority can be mitigated by the timely determination of the sanctions features that accompany the negotiation and conclusion of the contract.

[14] "OFAC Frequently Asked Questions. Question 8". *OFAC website*. N.d. Accessed May 31, 2021. http://treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx 8.

External compliance procedures involve due diligence of potential and existing counterparties and other elements of a future or existing legal relationship. Such due diligence primarily examines the subject matter of the transaction, the destination of the goods or services (territory/economic sector), and the status of the counterparty and its authorised representatives. The Supreme Court of the Russian Federation has stated that economic sanctions fall within the scope of circumstances that any entrepreneur *must* consider in the course of due diligence conduced while entering into a contractual relationship[15]. The universal formula for checking the counterparty is: "To whom? What? Where? For what?" sells goods / provides services the counterparty (Butakova 2019). Importantly, due diligence is conducted on an ongoing basis, including with respect to contracts that are already in effect. This approach is linked to the dynamic character of sanctions regulations: what is permissible at the time of a commercial transaction negotiation may become prohibited during the contract's performance as a result of an update to the range of foreign restrictive measures or due to the emergence of a new official interpretation.

From a practical point of view, the risk of adverse consequences of sanctions at the pre-contractual stage can be reduced (but not completely eliminated) by requesting a letter of assurance from the counterparty that neither the counterparty itself, nor its controlling or affiliated persons (founders, beneficiaries), or its subsidiaries are included in the sanctions lists. As a measure to reduce the sanctions burden, practicing lawyers also recommend that either a "non-disclosure agreement" (NDA) executed at the pre-contractual stage, or the main contract oblige the counterparty to notify about such an inclusion or about the threat of the inclusion of a person (or persons related to her/him) on any of the sanctions lists.

2.3. Contractual mechanisms of sanctions risks management

In addition to compliance, mitigation by contractual instruments plays an important role in dealing with sanctions risks. The main legal techniques include sanctions (anti-sanctions) clauses, force majeure clauses, legality clauses, representations and warranties, indemnity clauses, choice of law and choice of the forum clauses. Noteworthy are (not directly related to sanctions) commercial contracts clauses on the choice of payment currency, currency clauses, penalty clauses and some other contractual provisions that help contracting parties to hedge against sanctions risks.

2.3.1. Sanctions clauses

A key contractual mechanism for mitigating sanctions risks are contractual provisions that set out the legal consequences for the parties in relation to economic sanctions. *A sanctions (anti-sanctions) clause* is understood as a provision aimed at preventing conflicts among counterparties caused by economic sanctions. As V. V. Starzhenetskii and his peers point out, the negotiation of anti-sanctions clauses is in line with international best practice. For example, the UNIDROIT Principles of International Commercial Contracts, which reflect the most progressive business contracting practices, state in Art. 3.1.3 (Ini-

[15] Ruling of the Supreme Court of the Russian Federation of 23 May 2017 No. 301-ЭС16-18586 in case No. A39-5782/2015.

tial Impossibility) that the validity of a contract itself is not affected by the fact of its initial impossibility of performance (Starzhenetskii, Butyrina, Dragunova 2018, 132).

Such a clause is intended to provide for the rights and obligations of the parties in the event sanctions are imposed. It may include, as legal consequences, termination of the contract, modification of its terms, payment of compensation, an obligation to negotiate a new agreement, an obligation to apply to the regulatory authority for a license to support the transaction and other consequences. For certain types of contracts, such as transportation, it is possible to specify special conditions, such as alternative payment currencies in case of sanctions (Midwinter 2018). In addition, among the possible beneficial purposes of including a sanctions clause in the contract is the confirmation to the regulator that the parties have considered the issue of compliance with sanctions when drafting the contract and have provided guarantees against accidental breach of the sanctions measures[16].

To date, some international organizations have developed sanctions clauses that are recommended to participants of commercial turnover. Due to the high level of legal technique and comprehensive commentaries, the clauses can be adapted to many areas of business.

The International Chamber of Commerce (ICC) Guidelines on Sanctions Restrictions (last revised in 2020)[17] are available to banks and are specifically designed to cover the sphere of international payments. The ICC provides the following guidelines for drafting sanctions clauses: such a clause may refer to the specific act by which sanctions restrictions are imposed. In contrast, the use of broad wording such as "any applicable domestic and foreign laws" is not recommended. It is mentioned that sanctions may be applied as mandatory rules in a number of cases: as the law applicable to the bank issuing the obligation in question; as the law applicable to the payment currency of the instrument in question; as the law governing the performance of the obligation in question, whether by choice of law or due to conflict of laws provision; as public policy for a state court or for an arbitration.

The London International Underwriting Association has drafted a clause exempting the insurer from performing its contractual obligations if such performance may result in a breach of applicable restrictions, including extraterritorially extended restrictions not inconsistent with the law applicable to the insurer[18]. The consequences envisaged by the clause include, for example, the parties' recourse to the regulator for a license to operate[19].

Model sanctions clauses have been published by the Baltic and International Maritime Council (BIMCO) for time charter contracts[20] and for voyage charter contracts[21]. The clauses are a hybrid of a representation that there are no sanctions restrictions and of an indemnity.

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[16] IUA 09-065: International Sanctions Clause (Commentary). N. d. Accessed May 31, 2021. https://www.iua.co.uk/IUA_Member/Clauses/eLibrary/Clauses.aspx.

[17] "Addedum to the ICC Guidance Paper on the Use of Sanctions Clauses for Trade Related Products". *ICC Banking Committee*. 2014. Accessed May 31, 2021. https://iccwbo.org/content/uploads/sites/3/2020/05/20200504-addendum-to-sanction-clauses-paper.pdf.

[18] IUA 09065: International Sanctions Clause.

[19] IUA 09-048: Direct Insurance Sanctions and Embargo Clause; IUA 09-049: Facultative Reinsurance Sanctions and Embargo Clause. N. d. Accessed May 31, 2021. https://www.iua.co.uk/IUA_Member/Clauses/eLibrary/Clauses.aspx.

[20] Sanctions Clause for Time Charter Parties 2020. Accessed May 31, 2021. https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/sanctions_clause_for_time_charter_parties_2020.

[21] Sanctions Clause for Voyage Charter Parties 2020. Accessed May 31, 2021. https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/sanctions_clause_for_voyage_charter_parties_2020.

As a matter of commercial legal practice, sanctions clauses can generally be roughly split into two groups: those formulated as an indemnity, i. e., providing for the compensation for loss and those formulated as a representation, i. e., statement of facts. The difference in the practical application of indemnity and representation in the context of sanctions is that the indemnity model is used when parties "insure" against future risks of imposing or extending sanctions, whereas representation is more often included in a contract at a stage when sanctions are already in place, in which case one party guarantees that sanctions will not extend to the other party (for example, one party assures or promises receipt of a special license exempting the transaction from the sanctions regime) (Primakov 2018, 14). The Russian statutory model of "representation of circumstances" can be used, among other things, to confirm the absence of control by persons on sanctions lists, to ascertain the receipt of a special license, etc. False representation entitles the relying party to claim damages caused by the unreliability, as well as the right to withdraw from the contract in case of material unreliability under Art. 431.2 of the Russian Civil Code. A peculiarity of indemnification in the context of Russian civil law and Art. 406.1 of the Russian Civil Code is that the amount of compensation agreed upon by the counterparties cannot be reduced by a court and it does not have to be proved in court. Thus, the scope of a party's potential risk may cover fines and other negative financial consequences of the transaction with a sanctions component. In practice, mixed approaches are also implemented in contracts where the representation structure is complemented by a compensation guarantee. Such integrated approach provides for greater predictability in contractual relationships.

There are known "inverted" contractual models in which it is not the contracting party on the sanctions list that is penalised, but its counterparty that is forced to terminate the contract due to sanctions circumstances. For illustration: the sanctions clause included in the contract between the Russian oil company "Rosneft" (Rosneft) and the international consulting firm PricewaterhouseCoopers (PwC) gives PwC the right, in case new sanctions are imposed on its client, to choose between terminating the contract and paying compensation to Rosneft in the amount of double the cost of services (the consulting services fee amounts to RUB 1.18 billion) or continuing to perform its obligations under the contract, which would entail material sanctions risks for the consultant[22]. As can be seen, the client risking sanctions is not liable to the consultant in such a case. It should be noted that the agreement described above is governed by Russian law. This is an unusual way of dealing with the allocation of sanctions risks between the parties driven by business considerations.

A force majeure clause is an instrument of reducing adverse consequences that overlaps with the sanction clause. As Professor V. A. Kanashevskii rightly points out, the understanding and interpretation of force majeure varies from legal order to legal order, and in some legal systems this institution is not disclosed in principle, which makes it difficult to understand force majeure and its consequences uniformly (Kanashevskii 2009, 91). In cross-border contracts, even when the parties choose applicable law, it is reasonable to define the events that the parties attribute to force majeure. However, contracting parties who include in the contract a clause on exemption from liability on the basis of force majeure must take into account that not all the circumstances listed in the clause will automatically be considered by a court as grounds for exemption from liability when a dispute

[22] PwC agrees to share sanctions risks with Rosneft. N. d. Accessed May 31, 2021. https://openmedia.io/news/pwc-soglasilas-razdelit-s-rosneftyu-sankcionnye-riski.

arises (Voitovich 2015, 122). The attribution of sanctions to events of force majeure, or an express exclusion thereof, is possible due to the general dispositiveness of civil law and may contribute to a fairer resolution of a dispute. As the German scholar J. Rimke rightly concluded, a force majeure clause that does not set out consequences for the parties in the event of such an occurrence is a waste of contract text (Rimke 2000, 228). In addition to *removing* liability from the defaulting counterparty, it is possible to *limit* a party's liability by contract as an alternative consequence of force majeure. Such a condition, however, may itself be limited by statutory imperatives — for example, the prohibition to limit the carrier's liability under Art. 793 of the Russian Civil Code.

A legality clause is also frequently used in commercial contracts under sanctions, largely due to the extraterritoriality of U. S. law. As explained earlier, prior legal scrutiny of the subject matter of a transaction with a U. S. nexus must consider U. S. sanctions restrictions on the export of certain goods. A peculiarity of export laws is their "follow the item" feature: they apply also to foreign (non-U. S.) companies that export or re-export goods, even if such items are parts of other goods produced outside the U. S. The legality clause on export control compliance is a specific provision of contracts with U. S. counterparties. As A. I. Savel'ev explains, a legal compliance clause in a contact can serve as a starting point in establishing good faith before U. S. authorities (Savel'ev 2015, 114).

2.3.2. Payment terms in the context of sanctions restrictions

The currency clause and choice of payment currency in a situation of economic instability are valuable tools to control sanctions risks.

Firstly, preferring a different payment currency to the U. S. dollar and Euro is useful to reduce the risk of non-payment in case sanctions restrictions are imposed on any of the counterparties. The existing blocking sanctions regime implies freezing of payments, which banks of sanctioning states are obliged to enforce. If a transaction is executed through such credit institutions, the payment may be stopped. However, choosing a different payment currency does not fully eliminate the risk of not being able to make a contractual payment: if the correspondent banking chain includes a sanctioning state's bank, such payment may also be blocked.

With this in mind, the second-best solution is to contractually identify the moment of payment, which technically guarantees that the obligation to pay is formally fulfilled. Execution of the payment obligation can be linked to debiting the debtor's current account or correspondent account of the debtor's bank, or by crediting the creditor's bank correspondent account or the creditor's current account. Accordingly, it is beneficial for the paying party, being at risk of becoming subject to sanctions, to determine the fulfilment of its payment obligation by the time the funds are debited from its current account. Obviously, the interests of the counterparties in agreeing such a moment of performance are likely to be opposed to each other.

Thirdly, *the currency clause* can be a reliable aid in reducing the burden of financial losses in the context of sanctions. It is known that against the background of the U. S. and EU sanctions concerning Russia, currency appreciation has not been recognised by Russian courts as a force majeure circumstance[23]. Moreover, it follows from the analysis

[23] See, e. g.: Decision of the Arbitratzh (Commercial) Court of the Kemerovo Region of 25 March 2015 in the case No. A27-819/2015.

of domestic court practice that an increase in prices for goods supplied as a result of the exchange rate fluctuation and due to the introduction of retaliatory economic measures by Russia against certain states is not even a ground for reducing contractual penalties under Art. 333 of the Russian Civil Code[24]. Therefore, inclusion of a currency clause in the contract can insure the parties against exchange rate rises and falls. Such a clause can be worded in a multitude of variants: as a multi-currency, a commodity-price (escalator, index) clause, etc.

It should be noted that, apart from the legal nuances, in commercial terms many foreign suppliers increasingly prefer to deal with Russian clients on prepayment terms in order to avoid the risk of the transaction being recognised as a loan (which is prohibited by sanctions regimes) or the risk of the bank freezing a post-supply payment.

2.3.3. Choice of applicable law and choice of dispute settlement forum under sanctions

Applicable law clause acts as yet another contractual risks mitigation strategy. Lawyers have found that for newly concluded cross-border contracts in times of sanctions, the applicable Russian law is becoming increasingly popular and the previously frequently used law of the Anglo-Saxon legal family is becoming less so. Often, under sanctions circumstances the law of a "neutral" jurisdiction is chosen, for example, the law of Singapore (which contract law is close to that of England and Wales).

As noted by Leiden University legal scholars, there remains a risk in foreign courts and arbitral tribunals of recognising foreign sanctions as "overriding mandatory rules" (De Brabandere, Holloway 2017, 306) and, thus, there remains a chance of their application to contractual relationships regardless of the law chosen by the parties. This conclusion is supported by the recent practice of the English courts in *Lamesa Investments LTD v. Cynergy Bank LTD*, the dispute heard in 2019–2020[25]. As per the case file, a loan agreement was entered into between Lamesa Investments LTD (the lender) of Cyprus and Cynergy Bank LTD of England (the borrower) which contained a clause relieving the borrower from liability for failure to pay "such sums as will not be paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction". During the performance of the agreement, the lender's beneficiary was placed by the U.S. on the SDN list and, as a consequence, Cynergy Bank LTD stopped paying under the agreement, citing the risk of secondary sanctions and a specified clause in the parties' agreement. Notably, the agreement was governed by English law and payments were made in pounds sterling. The creditor objected, arguing that by applying English law to the contract, the limitations of foreign countries, in particular the U.S., did not fall within the scope of the clause and could not be relied upon as a basis for the borrower's default under the contract[26]. The High Court of England and Wales recognised the borrower's right to

[24] Decision of the Arbitratzh (Commercial) Court of the Kemerovo Region of 25 March 2015 in the case No. A27-819/2015.

[25] Lamesa Investments Ltd v. Cynergy Bank Ltd [2019] EWHC 1877 (Comm) (12 September 2019). Accessed May 31, 2021. https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2019/1877.html&query=(Lamesa)+AND+(Investments)+AND+(Ltd).

[26] See also: Sanctions clauses and U.S. extraterritorial sanctions — Lamesa v. Cynergy appeal. Accessed May 31, 2021. https://sanctionsnews.bakermckenzie.com/sanctions-clauses-and-us-extraterritorial-sanctions-lamesa-v-cynergy-appeal.

cease payments, and, in June 2020, the Court of Appeal agreed with the lower court, thus extending the concept of "validity" to foreign statutory provisions[27].

The doctrine confirms that the choice of foreign law may be seen by courts outside the Russian Federation as an action to circumvent sanctions which course of action is expressly prohibited by the U. S. sanctions regime (Savel'ev 2015, 120). Based on our practical experience, we are inclined to believe that applicable law alone is not a reliable measure to effectively mitigate sanctions risks. However, by simultaneously identifying the place of dispute resolution, the applicable law, as well as providing a detailed sanctions clause and adapting other contractual terms to the sanctions regime, the parties can more confidently predict the consequences of their contractual relationship, including the outcome of their potential legal dispute.

A dispute resolution clause under sanctions should be as carefully drafted as the other contractual clauses described above. When an arbitration clause is included in the contract, possible bargaining points for the counterparties can be the choice of arbitral institution, the appointment of arbitrators, applied aspects such as the making of payments related to the proceedings, etc. In the sanctions environment, complex issues arise concerning the eligibility of foreign arbitral tribunals to hear disputes from claims under sanctioned contracts and the risks of subjecting arbitrators, representatives and experts to sanctions restrictions. Difficulties emerge from the prohibition on the satisfaction of claims in arbitration, as well as from the risks of asset freezing and blocking payments. This area deserves a separate in-depth study from a procedural law point of view, which is beyond the scope of our analysis[28].

3. Conclusions

Being a public law and policy tool, sanctions have an impact on private law contracts, reflecting the risky nature of business activities and imposing notable restrictions on their implementation. Obstacles caused by foreign sanctions force business corporations to introduce extensive due diligence practices in relation to counterparties and transactions entered, as well as to constantly update and improve internal processes concerning contract work. Sanctions clauses and other contractual means addressed to control undesirable consequences are implemented with an objective to share among the counterparties the contract's fate and to balance the risks from the impact of sanctions by compensating one of the parties. Such contractual practices are enshrined in model contract forms and, through the operation of contractual mechanisms, they are extended to entire sectors of the economy, often with a cross-border reach.

The issues related to the extraterritorial effect of economic sanctions remain the most difficult and still unresolved problems in law enforcement practice. For example, in applying secondary U. S. sanctions, there is no clear algorithm for the identification of the circle of individuals who may be held liable for interaction with the sanctioned persons, nor is there a mechanism for recognizing the facts of interaction that would allow for legal certainty in this aspect of sanctions policy.

[27] Lamesa Investments Ltd v. Cynergy Bank Ltd [2020] EWCA Civ 821 (30 June 2020). Accessed May 31, 2021. https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2020/821.html&query=(lamesa).

[28] For more on this, see: (Starzhenetskii, Ochirova 2020).

Finally, other legal concerns are intricately connected with the applicability of sanctions rules under the chosen applicable law of a neutral state, as well as with the impact of sanctions regimes on dispute resolution in international commercial arbitration.

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