Mitigating Sanctions Risks in Contracts

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Pitfalls in Contractual Language

Sanctions and export controls are not the same thing

Do you have an in-house trade lawyer or commercial lawyer only
• Do they engage their trade compliance team (has the trade compliance team reviewed/approved of the trade clauses and consulted if redlined?)

Know your counterparty
Distribution Agreements will require different language and oversight than a traditional commercial contract

Understand jurisdiction:
you can throw in the kitchen sink but some regulations may or may not be applicable; don’t sign up for regulations that are not applicable

Compliance with all laws and regulation (just bad language)

Ensure you have a clause that allows you to terminate should regulations change and performance is impossible

EX: *nothing in the Agreement is intended to induce or require either Party to act in any manner which is penalized or prohibited under any applicable laws, rules, regulations or decrees.*
Pitfalls in Contractual Language

- Definitions: Check the relevant definitions (Sanction Authority, Sanctions, Sanctioned Jurisdictions, Restricted Party, Sanctions List) in the contract and cross-check against the representations and undertakings.
- Scoping: To whom do the representations and undertakings apply to (company, parent company, directors, employees)?
- Consequence of a breach: Make sure to contractually agree on the parties’ rights and obligations in the event of a breach.
- Make sure to understand the implication of conflicting laws and regulations and blocking statutes on your business activities and consider including a carve-out for compliance with applicable blocking statutes.
Consider any relevant clauses carefully in terms of:
- when they apply,
- who they apply to and;
- what the consequences of exercising the rights under those terms are.

**Currency clause**
- 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
- contractually identify the moment of payment, which technically guarantees that the obligation to pay is formally fulfilled. 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.
- reliable aid in reducing the burden of financial losses in the context of sanctions and 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.

**Sanctions Clauses can be identified in Two Groups:**
- as an indemnity, i.e., providing for the compensation for loss: used when parties “insure” against future risks of imposing or extending sanctions;
- and those formulated as a representation, i.e., statement of facts: used 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).

**Sanctions Clause:**
- 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.

**A force majeure clause** is a potential route you can use to terminate or suspend your dealings if you are either prohibited from performing your obligations under the contract (for example, due to sanctions) or as a result of a conflict and its impact on the contract.
English courts are generally open to accepting non-performance over exposure to US sanctions enforcement risks. However, in all cases, the courts’ analysis are very much focused on the specific wording of the contract clauses.

Considering the court cases, it is recommended to make sure that the scope of applicable jurisdictions are clearly specified in the wording (hence again the emphasis on illegality clauses not being sufficient) and to evaluate upfront for all contracts and engagements which sanctions risks and jurisdictions (from a US perspective, primary or secondary sanctions risks) you are exposed to and how to make sure these risks are covered as much as possible in the language.

Interestingly, in a 2019 court case from the Netherlands in contrast, the court concluded that the mere exposure to the enforcement of US sanctions does not provide valid grounds for terminating a contract, stating the EU Blocking Statute among the reasons (here’s a link to an article in English if you want to read the details: https://www.debrauw.com/articles/terminating-contracts-due-to-us-sanctions-difficult-under-civil-law-and-possibly-illegal)
Thank you
Back-Up
Sample Clauses/Inclusions to Contracts

• [DISTRIBUTOR] understands and contractually accepts that the Seller’s right to sell and export goods, technology, data or services is subject to the continuing approval of U.S and/or EU governmental authorities. Distributor shall agree and cooperate with any verification audit/on-site inspection at their facilities requested by Seller or Seller’s Customs authorities to verify compliance with the regulatory requirements. The Seller shall have the right to immediately terminate any sale or performance under this Agreement upon notice to the Distributor if the Distributor commits a potential breach of any law, including the Export Control Laws or Regulations, or at the request of U.S. and/or EU governmental authorities.

• Purchaser shall agree and cooperate with any verification audit/on-site inspection at their facilities requested by Seller or Seller’s Customs authorities to verify compliance with the regulatory requirements.

• The Purchaser shall indemnify and hold the Seller harmless for any penalties, obligations, fines, liabilities or other similar losses (collectively, “Losses”) incurred by the Seller stemming from violations, charges, investigations or enforcement actions concerning the Export Control Laws and Regulations, to the extent such Losses resulted from actions by the Purchaser.

• The Purchaser acknowledges that it has read and understands this clause. This clause is not intended to provide a comprehensive summary of the Export Control Laws and Regulations that govern the Seller’s product. It is the Purchaser’s responsibility to consult with a legal advisor to ensure compliance with applicable laws. This clause shall survive the termination of this Agreement.

• Each Party shall comply with all applicable Trade Restrictions in performance of the Agreement. For the avoidance of doubt, nothing in the Agreement is intended to induce or require either Party to act in any manner which is penalized or prohibited under any applicable laws, rules, regulations or decrees.