



Ep. 4: Sanctions and Transactions

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Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

In a recent episode, three of Akin Gump's international trade partners discussed U.S. economic sanctions and their impact. The discussion covered the U.S.'s recent sanctions moves regarding Russia and Iran, and how these are viewed in, and felt by, Europe and the Middle East.

In this episode, we'll zoom in on these policies and the sanctions risk for businesses. We have with us today Akin Gump cross-border transactions partner Melissa Schwartz, who has worked in the firm's New York and Moscow offices, serving as Moscow partner in charge from 1998 to 2000. She is currently resident in the firm's Washington D.C. office, her practice focusing on helping clients navigate complex international trade and policy issues. We'll be looking at sanctions and the real-world risks for businesses trying to execute transactions in a very fluid and occasionally volatile environment, as well as some concrete steps businesses might consider taking to minimize their risk exposure.

Welcome to the podcast.

Melissa Schwartz: Thank you, Jose.

Jose Garriga: Melissa, yes, thank you for appearing on the show today. As I mentioned, we discussed in a recent podcast how the Trump administration's use of sanctions differs from that of previous administrations, and, in particular, the administration's "America first" approach, and how U.S. sanctions policy is diverging from that of the EU. So, to get the ball rolling, let's just talk about how is U.S. policy splitting off from that of the EU, and what effect have you seen it having on businesses?

Melissa Schwartz: Well, that's a great question, is actually the impact on the businesses. Under the prior administration, we saw really remarkable coordination in the launching of a new sanctions program relating to Russia following the events in Ukraine and Crimea. What we're seeing under the current administration is a divergence. The one that we all see on the front page of the news is about Iran and the U.S. withdrawal from the JCPOA [*Joint Comprehensive Plan of Action*], the agreement relating to sanctions relief for Iran. But, in addition, we're seeing a U.S. sanctions policy targeting Venezuela that is more unilateral, as well as actions being taken unilaterally by the U.S. with respect to the Russian sanctions program. This creates, increasingly, a challenging environment for global

companies who would like to have a uniform compliance policy and a uniform approach for their global operations when they're trying to comply with sanctions regimes which are quite different in the EU and in the U.S.

Jose Garriga: Looking at it, I know one of the things that we discussed with the three trade partners whom I interviewed a few weeks ago, was the question of a secondary sanctions risk. Can you talk a bit about that because I know that's something that is perhaps newer on the scene than other aspects that are more traditionally associated with U.S. sanctions policy?

Melissa Schwartz: It is, and, from a business perspective, sometimes it may not seem as intuitive as to our trade partners who live and breathe this every day. In the past, there have always been two main types of sanctions programs that businesses were accustomed to dealing with: the comprehensive sanctions, where there'd be an embargo on a country—and the example we often think of for that in the past had been Iran—or a list-based sanctions program that targeted specific entities or specific persons for their behavior. Typically, what people were concerned about were U.S. primary sanctions, where if there was a connection to the U.S., what we lawyers would call a “jurisdictional nexus,” that there would be a violation, for instance, of U.S. sanctions for engaging in a transaction with one of those parties.

The jurisdictional nexus could be signing a contract in the U.S., negotiating here, involving U.S. persons or U.S. dollars has been something that's been scrutinized. That's in the basket of U.S. primary sanctions. But, as you mentioned, secondary sanctions are a real concern for global businesses. It does not require U.S. jurisdiction or a connection. Instead, it's covering conduct that's contrary to U.S. foreign policy or national security interests. For instance, under the legislation enacted here in the U.S. last year called CAATSA [*Countering America's Adversaries Through Sanctions Act*], there are provisions to impose secondary sanctions on non-U.S. persons for engaging in certain types of transactions which the U.S. deems to be contrary to its foreign policy.

We saw just last week on the 20th [*of September*], the first imposition of secondary sanctions under CAATSA's provisions for defense and intelligence sectors of Russia. Specifically, what we saw was the Trump administration sanctioning a Chinese entity which had acquired fighter jets as well as military equipment from a Russian defense company, which had been listed on one of these lists issued under CAATSA. The implications of this really show the reach of U.S. secondary sanctions. It shows some of the complexities that companies throughout the world need to take into account when determining how to conduct their business, not simply for compliance with law but also to assess this very important risk that could affect their business.

Jose Garriga: The notion of the U.S. jurisdictional nexus that you mentioned is an interesting one, since it seems to be expanding the reach effectively of U.S. law considerably beyond that which it might have just on a facial basis. Looking at it then on sort of at the nitty-gritty working level, how are these risks—both the secondary sanctions risk and just risk in general of violating U.S. sanctions policy—how are they affecting businesses concretely?

Melissa Schwartz: Well, I think when I look at this with clients, I look at it from three or four different perspectives. So, the first question, which sometimes is the most straightforward is, “Do I have a risk of violating the law that's applicable to my business?” So, if I'm doing business in the U.S., but with a counterparty abroad, is there a risk of a violation of U.S. law? Second, “Is there a risk of these secondary sanctions?” So, am I (the client) engaging in a transaction with a counterparty that runs counter to the national security interest and that has been identified as a potential target for secondary sanctions?

And as I mentioned, the imposition last week related to the defense and intelligence sectors of Russia, but we've also seen in the legislation that was enacted last year references to other sectors that the U.S. has deemed important and for which secondary sanctions could be imposed for certain very specific types of transactions.

The third risk that I look at more as a transactional lawyer when I look at these risks is, "Is there any question of a breach of another arrangement for the client?" For instance, businesses that have debt facilities and loan agreements, those agreements often require companies to comply with sanctions, not just of their own jurisdiction, but of wherever the lenders are located, which is part of what makes this really a global economy. So, a U.S. borrower who's borrowing money from a European bank most likely has clauses in their debt agreements that require them to comply with both U.S. **and** EU sanctions. A default on debt is something nobody wants to see, so we look at that quite carefully.

And finally, although not least, is the reputational and franchise risk associated with transactions which raise issues, because, remember, sanctions are a tool of foreign policy. Sanctions that are being administered are done from the perspective of the U.S. government or the EU government having identified an issue and wanting to address it with this tool. So, when looking at any potential violations, we also have to look at the reputational or franchise risk.

Jose Garriga: Going back a bit to what you talked about earlier, and just to provide a little bit of a context for listeners, I mentioned Russia and Iran, and then you'd also brought in the issues of China involved, a Chinese acquirer of Russian military systems. You talked about Venezuela. So, are these what you would call the real hotspots globally in terms of, from a sanctions perspective, or are there other places, other regions, that listeners might want to also be thinking about in terms of either primary or secondary sanctions risk?

Melissa Schwartz: That's a very good question because I think in today's interconnected world, global businesses just need to be mindful of sanctions regardless of where they're operating, and I'll explain why. The key sanctions programs people often think about are, in today's world, Iran, Russia, a new program like we mentioned earlier with Venezuela—it's only, I think, a little bit over a year old—and there are other list-based programs that affect certain countries, for instance, in Africa. Because of the way the sanctions programs are designed in both the EU and, importantly, in the U.S., subsidiaries of these entities are also typically deemed to be sanctioned parties.

We saw this as a significant issue following the U.S. designation, on April 6th of this year, of a series of wealthy Russian businessmen who found themselves designated as SDNs [*Specially Designated Nationals*], and all entities that were 50 percent or more owned by those individuals were also designated. I should note that in those designations there were some companies as well, but not all of the companies were located in Russia. In fact, these were entities throughout the world. So, I believe that the best advice, the prudent path that we're seeing all companies take is to have a compliance program that is global in nature, so that, while we do have certain hotspots, you do need to know who is your counterparty, who owns your counterparty, and the source of their funding, and make sure that the compliance practices that you're following will track all of these counterparties regardless of where they're located.

Jose Garriga: Well, that sounds like a fairly challenging environment for businesses who work across borders. With these various sanctions programs. I mean, would you count, for example, something like conflict diamonds as something that people might understand as being a sanctioned type of an activity?

Melissa Schwartz: It is, and that's actually a good example of part of the risk profile. When a company is looking at, "Well, how do I address these issues?," because it can seem daunting, is look at the risk profile of the business and map it out. Look at where the supply chain is. Look at where the customers are. Look at where the financing is coming from and the geographies. Based on that, it's possible to map out a plan to address the risk that's associated with the company's business. Once that's done, in the current environment where we're seeing sanctions increasingly used as a tool of foreign policy, I think the next and most critical step is to be proactive. Keep in mind that when sanctions designations are made, there's not advance notice typically.

What we saw on April 6th, for instance, with Russian designations was just an announcement. We all knew that there was a risk of increasing Russian sanctions that had been talked about for quite a while, but the specific designations, there weren't warnings of those coming out. So, I think for businesses, what's most important is to be prepared and be a bit proactive. Be mindful of the overall political environment in which we're operating and monitor the political developments, so that, as there's talk about sanctions, we're keeping up on that, and we'd be able to then assess the impact of new sanctions on the business very quickly, because, unfortunately, the way sanctions work—and I say "unfortunately" from a business perspective—is since they're effective immediately, it's important for business to be able to respond very quickly.

Jose Garriga: One thing that you mentioned, and ... The concept of diligence, is this something that I think that businesses would pursue independently? Is this something that they're best advised doing in conjunction with counsel? How do you best approach diligence in this kind of an environment given how volatile, as I mentioned, it is?

Melissa Schwartz: Having a strong diligence program, which can be developed in-house, or it can be developed in conjunction with counsel depending on the nature of the business and the nature of transactions that we're talking about, is critical. You know, looking at it and saying, "Okay. I want to do X, a specific transaction, thinking about the geography, the sector where you're operating. Is this something that has garnered attention from OFAC [*Office of Foreign Assets Control*] or the corresponding agencies in Europe?" It is something that should be done as a first step.

And if it is an area of heightened risk, and depending on the specific transaction, we work with clients all the time who say either, "I am a U.S. person, and here's my concerns. I want to make sure I comply with the law," or, equally, we're getting a lot of questions from clients who are saying, "Look. I'm not a U.S. person. My operations are completely outside of the U.S. Not even using U.S. dollars to settle the transaction, but it is in a specified industry, and we'd like to assess whether or not or how to gauge the secondary sanctions risk of this type of transaction." As the issue becomes more complex, we are seeing clients come more frequently to us to help them assess the risk and, to the extent possible, mitigate.

Jose Garriga: That certainly is a challenging environment, but that's a very good overview of the situation. Thank you for that, Melissa. Listeners, you've been listening to Akin Gump cross-border transactions partner Melissa Schwartz. Thank you for joining us today, Melissa, and for sharing your thoughts on the business-critical issue of sanctions risk.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you don't miss an episode. We're on, among others, iTunes, Google Play and Spotify.

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