Inside 1Q2022

ACC Association of Corporate Counsel

BALTIMORE

FOCUS

President's Message

Kimberly Neal

Hello, Baltimore Chapter of the ACC! What a long, strange 2 years it has been. And yet, here we are, still strong – if not stronger. This is my first official "President's Message," and, while we are STILL in the midst of a pandemic, I could not be more optimistic about this year for our chapter. We have an incredible leadership team, comprised of Taren Butcher as our new Treasurer/ Vice President, and Kristin Stortini as Secretary. Although we still have the support of our incredible Immediate Past President, Daniel Smith, I have to say that it's exciting to have all female officers! I can say with great confidence that Taren, Kristin and I work well together and, along with our dedicated board and Chapter Administrator, we're ready to serve.

January has offered us two very strong programming opportunities: Leveraging Linked In, presented by Legal Recruiter, Chris Batz, and the Annual Recruiter Update, with a focus on "thoughts on the impact of coronavirus on jobs," with a panel moderated by Taren Butcher and including Amy Hyman Baum of Robert Half Legal and Randi Lewis and Edina Beasley of MLA Global. I am appreciative of the time and advice shared by all of these presenters on these very relevant topics and know the membership has/ will benefit greatly.

While we expect our opportunities to connect this winter to remain virtual, we are hopeful that we can bring back our annual Golf event in the Spring and are working on a date in May. Stay tuned for exciting updates in that regard! I believe we can all agree that the September 28 Golf/ Clinic/ Wine event at Rolling Road Golf Club was a (literal) breath of fresh air; we all felt comfortable to gather and dine outside and it was wonderful to reconnect with so many members and sponsors in person. We plan to continue this year's event at Rolling Road Golf Club and are brainstorming options to make this one even better. If you have ideas or would like to join a committee to plan this event, please contact me or Cory Blumberg.

We could not continue our excellent programming and social events without the support of our sponsors. Thus far, we have commitments of 10 sponsors: Premiere—Nelson Mullins, Jackson Lewis, Miles & Stockbridge, and Womble Bond Dickinson; Gold--Anderson Kill, DLA Piper, Goodell, Devries, Leech & Dann, Saul Ewing, and Shawe Rosenthal. The pandemic could easily have kept sponsors more conservative, but these firms saw the bigger picture and have in fact "upped the ante." Many of us found tremendous benefit in the very timely COVID-related updates that we have received both through webinars and articles shared by sponsors since March of 2020. Since then, our sponsors continue to seek out topics that are important to our membership. We are grateful! Please, never hesitate to send program ideas to me or to Lynne Durbin so we can keep the sponsors informed. We have a strong relationship with these firms and want to continue to provide them with good topics and our membership with solid learning opportunities. Your input is valued.

Last but not least, I have 2 major goals for our chapter and appreciate everyone's support. The goals go hand-in-hand.

(1) I would like to increase our membership. We all know other in-house attorneys who are not currently engaged with the ACC – whether in our own legal departments or through our personal or professional social networks. We need to let them know why joining the ACC and especially our chapter is so rewarding! To that end, I am planning an "ACC Gratitude" virtual happy hour for late February, where we can join together online to share why the ACC has been important to us and we can invite and include non-ACC members, including law students, to raise their awareness about the benefits of membership. This will be a fun opportunity for us to express and feel gratitude and also engage with each

continued on page 15

Operational GC: Journeying Beyond the Law

By Neil Peretz, Sawa Credit Inc.

As a lawyer, whenever we encounter a new potential legal problem, we are rarely provided answers on the spot. Instead, our most common refrain is, "Let me go look that up and study it." We answer this way because law is inherently retrospective. We are studying the past to give guidance to our clients for the future.

But what we do when there is not a sufficiently similar "past" to examine?

Recent technologies and new business models are often unaddressed by laws, regulations, and prior cases. In common law jurisdictions, we are particularly challenged because it is this case law that fills the gaps when statutes and regulations are not sufficiently on point.

In civil law jurisdictions, the court may at least have a guiding principle espoused in law that can be applied to a de novo scenario by the court. By contrast, common law courts have less flexibility in their decision-making due to stare decisis.

It's true some fields are governed by umbrella laws that provide more general principles to follow, such as laws against unfair, deceptive, and abusive Acts and practices (UDAAP). These umbrella laws were created because Congress and regulators could not predict every possible future violation of the law.

Thus, regulators, and possibly private litigants, may develop new causes of action based on broad concepts embodied in these laws. In practice, however, these umbrella laws provide scant prospective guidance because most market participants and litigants wait for regulators to identify which types of fact patterns fall under these umbrella laws.

Given the retrospective nature of law, how should we counsel our clients as in-house attorneys when they are contemplating a new business model or the application of new technologies that are distinct from those covered by existing laws?

In common law jurisdictions, we are particularly challenged because it is this case law that fills the gaps when statutes and regulations are not sufficiently on point.

Rules from the road

Almost a decade ago, I was asked to help a new ridesharing company find a path to legally provide ridesharing services while avoiding becoming saddled by regulations that were inappropriate for their business model. Providing them legal guidance in a truly emerging field taught me many lessons.

1. Set expectations about conflict

In any market where there are incumbent players, someone will be unhappy with a new entrant and even the most airtight legal positioning will not ward off potential litigation and regulatory inquiries.

For example, in ridesharing, the taxi and limousine companies, many of whom held oligopolistic licenses for certain territories, were sure to raise a fuss. Accordingly, my first step in advising my clients was to advise them to set aside a budget for litigation and potential regulatory investigations. Even on the sturdiest legal footing, my clients would be challenged by those seeking to create a public spectacle or perhaps bankrupt my client.

Make sure your client is ready to invest in a fight!

2. Cover stories matter

Even in a strict liability setting, one's state of mind and intentions matter to human factfinders. In a regulatory inquiry or tribunal, one will be treated more sympathetically when one has demonstrated a concerted effort to comply with the law before taking any actions.

For the ridesharing company, I advised my client that we should develop a detailed examination of all potentially applicable legal classifications, regardless of how ill-fitting to their business, and either how my client might be able to comply with each or why the classification was inapplicable.

continued on page 3

continued from page 2

This study enabled my client to say that its intentions were law-abiding because it did not take a single operating step until it uncovered all the applicable laws and determined how it would comply.

3. Find the best basket

A key goal for the in-house attorney is to examine all possible categorizations that could apply to your business and influence the business model or application of technology itself to fit into the most preferred basket.

You should not just be reactive and feel obliged to find a legal home for any technology or business model thrust at you.

You should not just be reactive and feel obliged to find a legal home for any technology or business model thrust at you. You need to learn the levers in the business model and technology that can be twisted without breaking the economics and market impact that your company is seeking.

Think about how manipulating these levers can potentially shoehorn your business into your most favored categorization or escape from the ambit of the most oppressive regulatory schemes.

In the ridesharing world, for example, we looked at a variety of business categorizations: were we a new kind of common carrier? Could we form a private club of company customers, and would it exempt us from certain rules? If we limited ridesharing to friends, how might one define that term "friend" and would it encompass social media friends or friends-of-friends?

A common theme across many regulatory categorizations that were ill-fitting for the business was that they were all on receiving fares. To escape those categorizations, I suggested changing the business model to eliminate charges for transportation and find other ways to recoup costs.

The result was we launched a free ridesharing service, where riders were given an opportunity at the end of the ride to provide a gratuity to the driver. In order to help everyone assess what might be an appropriate tip, we shared information about how much others tipped for a ride of a similar length.

4. Train your people's people

As an attorney, it's likely you will deal with only the most senior executives in the company or your division. Remember that scores of other team members (perhaps thousands) in your organization are describing your business and business model to the public daily.

In the case of ridesharing, each one of our drivers could be asked by a reporter, regulator, or a spy for a competitor about our business terms and business model. If a single driver were to erroneously report that she received a "fare" instead of an "optional tip," this would be duly recorded and used as a weapon to undermine our carefully developed regulatory positioning. To address this, we created talking points for all drivers that explained the business model and requested that they pass inquiries about it to a particular senior executive in the company.

Once you develop the appropriate positioning for the company, make sure that even part-time workers can understand it and communicate it clearly and uniformly.

5. Remember the fragility of the commerce clause

My ridesharing client heard about federal laws and license frameworks that sounded on paper, like a regulatory shortcut for the business that could preempt a complicated patchwork of state laws. In reality, the federal government had not occupied the local transportation field, so it was unlikely that a magic federal silver bullet could solve all our regulatory challenges across the country.

But how could I, the in-house attorney, counteract the enthusiasm of the allegedly expert outside counsel?

The answer: Caselaw.

Not surprisingly, we had outside counsel eager to generate fees by studying these federal options and seek vaguely structured meetings with federal officials on our behalf. My client had a very limited legal budget, and I was worried that the time waiting for the completion of such a study could lead to incorrect representations to investors about our corporate legal positioning.

But how could I, the in-house attorney, counteract the enthusiasm of the allegedly expert outside counsel? The answer: Caselaw.

My law clerk and I looked across the country for cases where a local transportation law violation was preempted by federal law. Not surprisingly, we found extensive caselaw to the contrary. Summarizing the facts and holdings of these cases proved decisive in convincing the business' senior executives to not rely on a non-existent federal solution to inherently local issues.

6. Remember your audience when trying to change laws

As soon as we launched our service, we actively engaged legislators across the state about how current laws were not well-suited to our new business model. While the legislators were polite, they did not want to hear about new opportunities for societal efficiency that our business offered. Nor were they persuaded that the advent of new technologies necessitates the creation of new laws.

Instead, what the regulators cared about was their voting base. We needed to couch our regulatory requests in terms of jobs we could create and pollution we could reduce, because those messages would resonate with the legislators' voting base.

Focus legislative advocacy efforts on how you can help the legislator look effective instead of droning on about your new technology.

Conclusion

The core requirement for implementing each of the lessons discussed herein is that you develop a deeper understanding of your business' economics and building blocks. This represents a great opportunity for you to join the advance party for the next business expedition, rather than being left to pick up the pieces afterward.

Terminating a License When the Licensee Goes Bust

By Lisa Tancredi & Laura Kees, Womble Bond Dickinson (US) LLP

"I did not want you to hear this on the news for the first time, but we are filing for bankruptcy next week." "This is a difficult call to make. We are going out of business and will probably be filing a chapter 7 in the next couple of days." Needless to say, bankruptcy is problematic for a licensor: the licensee may cease performing, the royalty stream may run dry, and the licensee or a trustee could attempt to sell or assign the license in bankruptcy to an undesirable licensee, or even a competitor. There is however one silver lining in these scenarios - the licensor received a heads up about the bankruptcy before it was filed.

With the benefit of advance notice, a licensor should consider terminating the license before the licensee actually goes into bankruptcy.[1] Once the licensee files for bankruptcy protection, the automatic stay will enjoin the licensor from taking any action against the licensee. While termination may still be possible in bankruptcy, first the licensor will need to obtain relief from the automatic stay. Needless to say, it is much easier to terminate a contract outside of bankruptcy than it is to obtain the bankruptcy court's permission to do so.

It is essential to draft licenses with the possibility of bankruptcy in mind. While most of the tips discussed below are straightforward, a recent bankruptcy case from Hawaii, In re Minesen Co., illustrates the peril of seemingly innocuous language on the licensor's ability to protect itself in the event of its licensee's bankruptcy.[2]

Termination before bankruptcy:

But first, what actions can a licensor take with advance notice of a bankruptcy? Step one is to review the license and ascertain whether an event triggering the termination right has occurred. At the drafting stage, include as many default and cross-default triggers as possible. For example, in addition to insolvency and material adverse change clauses, consider authorizing termination if the licensor deems itself insecure, if the licensee fails to pay a debt to a third party over a threshold dollar amount, or judgment of a specified size is entered against the licensee. When drafting, be mindful of the timing of any notice provisions and make certain that the termination will be effective as quickly as possible (ideally, immediately). When pulling the termination trigger, follow the contractual provisions precisely. Send the notice to the right recipient at the correct address, and in the manner specified (i.e., by certified mail, overnight delivery or facsimile). If the address has changed but the license still reflects the old address, send notice to both.

The window during which the termination right can be exercised may be brief. Upon learning that the licensee's financial condition is deteriorating – before the "b" word is even uttered -- review the termination provisions and maybe even compose the termination letter so that it can be ready at a moment's notice.

The licensee may challenge the termination as a breach of the license, or claim that the termination was effectuated improperly, particularly if the license is critical to its operations. In order to prepare for potential court proceedings, retain evidence of the notice and document the event that triggered the right of termination. If the trigger was an oral statement, a person who heard the statement can write a contemporaneous memo to the file or prepare an affidavit memorializing what was said, when, and by whom.

Once in bankruptcy, a licensee may try an additional tactic – reinstating the license by arguing that the termination was a constructive fraudulent transfer. A constructive fraudulent transfer is simply a transfer that satisfies certain statutory tests; it has nothing to do with fraud. The licensee or trustee's biggest hurdle is likely convincing the court that a transfer of valuable property has occurred. Is termination of a contract the type of transfer that could be a constructive fraudulent transfer?

Maybe. Courts are divided on whether the pre-bankruptcy termination of a contract is a "transfer of an interest of the debtor in property."[4] While the cases are fact-specific a frequently-cited 2006 opinion from Delaware is instructive. In that case, the debtor had prepaid for advertising services that it never received. At first blush, a prepayment sounds like a transfer of something valuable, and the court held that the termination of a contract, even in accordance with its terms, can be avoidable as a constructive fraudulent transfer if it results in the loss of valuable rights.[5] The court found however that even though a transfer had occurred, the forfeited contract right (the prepaid advertising services) had no value to the debtor's estate. The court reasoned that the debtor had shut its website down before the contract was terminated and would not have been able to use the advertising services. Moreover, the contract was also not assignable under non-bankruptcy law.[6]

The issue was revisited recently in Illinois, where a licensor terminated a patent license in accordance with the contractual terms, and loss of the license resulted in the licensee's bankruptcy.[7] The bankruptcy trustee tried to reinstate the license, arguing that the termination was a constructive fraudulent transfer. The bankruptcy court refused, finding that the termination did not result in the relinquishment of a cognizable property right and joining those courts that have held that a pre-petition termination of a contract, in accordance with the contract's terms, is not a fraudulent transfer.[8] A constructive fraudulent transfer case has legs only if the license has value, and there are a variety of provisions that may be included to make it less valuable to a bankruptcy estate. These same provisions can also be vital to a licensor's ability to obtain relief from the automatic stay to terminate a license post-bankruptcy.

Termination after bankruptcy:

In the last several years, bankruptcy has most often been used as a vehicle to

continued on page 5

continued from page 4

effectuate a sale of a distressed business. Fundamentally, then, a license that cannot be assigned is likely to be of little to no value to a bankruptcy estate, increasing the likelihood that the licensor can obtain relief from the automatic stay to terminate or successfully resist an attempt to assign the license over its objection. The best language outright prohibits assignment or conditions assignment on the licensor's prior written consent, in its sole and absolute discretion.

Be very wary of softening the consent requirement in any way. The recent case from Hawaii teaches that drafters should resist the temptation to agree to language to the effect that "consent will not be unreasonably withheld." That exact phrase doomed a non-debtor party into accepting assignment of a contract in the *Minesen* case.[9] The bankruptcy court ruled that the language so limited the non-debtor's power to withhold consent that the contract could be assigned over its objection. Abbreviating the term and making the term renewable in the licensor's sole discretion can also reduce the value of the agreement -- a license that has expired cannot be revived, even in bankruptcy court.

In addition to its contractual terms, the nature of the license may be significant. A contract may not be assigned in bankruptcy if non-bankruptcy law would excuse the non-debtor party from accepting performance from, or rendering performance to, an assignee.[10] Courts generally find that non-exclusive licenses of patents, trademarks and copyrights fall into this category and refuse to permit their assignment over the licensor's objection due to their personal nature.[11] Note, however, that this protection can be inadvertently destroyed by including conditional assignment language in the license. In *Minesen*, the court found that the non-debtor party had waived protection under the Anti-Assignment Act when it agreed that its consent would not be unreasonably withheld.[12]

Parting thoughts:

A licensor that transforms itself into an "ex-licensor" before the automatic stay is in place may be able to slip past its licensee's bankruptcy, relatively unscathed. While it may still have claims against the bankrupt, and if it received payments within the 90-day period before bankruptcy it may have preference exposure, it will be free to deal with the licensed property as it chooses. Once in bankruptcy, the fate of the licensor may rest on whether the license can be assigned. Strong notice, termination and assignment provisions can be effective bankruptcy escape hatches. For existing licenses lacking such safety features, a modification for some other reason may provide the perfect opportunity to build them into the agreement.

Authors:

Lisa Tancredi (Of Counsel, Baltimore) - Lisa focuses her practice on restructuring, bankruptcy and creditors' rights matters. She represents a wide range of clients, including financial institutions, funds, sureties, receivers, landlords, businesses, suppliers and contract counterparties, purchasers and high-net-worth individuals, both inside and outside of bankruptcy court. In the syndicated loan arena, she works with agents and participating lenders to address distressed debt facilities.

Lisa Tancredi

Laura Kees (Partner, Atlanta) - For more than 15 years, many companies have turned to Laura Kees to protect and manage their domestic and global trademarks and copyrights. Laura concentrates her practice on managing trademark and copyright portfolios; counseling clients on risks associated with proposed names and marks; evaluating when applications for domestic and/or international registration should be filed and advising how and when to maintain those registrations.

Laura Kees

[1]Even if a contract states that it may be terminated after the commencement of a bankruptcy case, that type of provision (often referred to as an *ipso facto* clause) is generally not enforceable against a debtor under the Bankruptcy Code. *See* 11 U.S.C. §365(e)(1).

[2]*In re Minesen Co.*, No. 19-00849, 2021 Bankr. LEXIS 3178 (Bankr. D. Haw. Nov. 17, 2021).

[3]*See* 11 U.S.C. § 548(a)(1)(B). Broadly summarized, a debtor or trustee may avoid a transfer of an interest of the debtor in property if the debtor received less than reasonably equivalent value in exchange for the transfer and (1) was insolvent when the transfer was made or rendered insolvent by the transfer or (2) was engaged in a business with unreasonably small capital.

[4]*Compare In re McConnell*, 934 F.2d 662, 664 (5th Cir. 1991) (down payment was a fraudulent transfer when real estate sale contract was terminated); *In re Grady*, 202 B.R. 120, 123 (Bankr. N.D. Iowa 1996) (termination of a real estate purchase agreement was a transfer); and *In re Veretto*, 131 B.R. 732, 736-37 (Bankr. D.N.M. 1991) (forfeiture of equity interest in real estate was a transfer) *with Coast Cities Truck Sales, Inc. v. Navistar Int'l Transp. Co.* (*In re Coast Cities Truck Sales, Inc.*), 147 B.R. 674, 677-78 (D.N.J. 1992) (pre-bankruptcy termination was not a transfer); *Edwards v. Fed. Home Loan Mortgage Corp.* (*In re LiTenda Mortgage Corp.*), 246 B.R. 185, 191 (Bankr. D.N.J. 2000) (pre-bankruptcy termination and cessation of rights under contract was not a transfer); *Creditors' Comm. v. Jermoo's, Inc.* (*In re Jermoo's, Inc.*), 38 B.R. 197, 203-06 (Bankr. W.D.Wis. 1984) (pre-petition termination was not a transfer).

[5]*See EBC I, Inc. v. America Online, Inc.* (In re EBC I, Inc.), 356 B.R. 631, 641 (Bankr. D.Del. 2006).

[6]*Id.* at 362-63.

[7]*See Goldstein v. Hass, et al.* (In re VitaHEAT Medical, LLC), 629 B.R. 250 (Bankr. N.D. Ill. 2021).

[8]The court acknowledged that the express terms of the license permitted the licensee to assign its rights to third parties, but that apparently did not factor into the court's decision. *VitaHEAT* at 255.

[9]*Minesen*, 2021 Bankr. LEXIS 3178, at *11-12.

[10]11 U.S.C. § 365(e)(2).

[11]*See, e.g., In re Catapult Entertainment, Inc.*, 165 F.3d 747, 750 (9th Cir. 1999) ("nonexclusive patent licenses are 'personal and assignable only with the consent of the licensor'") (citation omitted); *In re Patient Education Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997) ("licensor cannot assign it to a third party without the consent of the copyright owner"); *In re Trump Entertainment Resorts, Inc.*, 526 B.TR. 116, 123 (Bankr. D. Del. 2015) ("Based on the Court's research and cases cited by Trump AC, it appears that the substantial weight of authority holds that under federal trademark law, trademark licenses are not assignable in the absence of some express authorization from the licensor, such as a clause in the license agreement itself.")

[12]*Minesen*, 2021 Bankr. LEXIS 3178, at *12.

Implications of the End of Mandatory Arbitration Clauses for Sexual Harassment and Sexual Assault Claims

By Jed Charner and Nawal Chaudry, Jackson Lewis P.C.

INTRODUCTION

In recent years, many states have enacted legislation to prohibit employers from mandating arbitration of employees' claims of sexual harassment or assault in the workplace. This trend has culminated in the recent passage of a federal law invalidating mandatory arbitration agreements for sexual harassment or assault claims and class action waivers of such claims. As employees return to working in-person in larger numbers, potential claims of sexual harassment or assault become an increased concern. The new federal law has implications on existing and new employment arbitration agreements.

THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

On March 3, 2022, President Joe Biden signed into law the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" ("The Federal Act").[1]

Under the Federal Act, mandatory arbitration clauses are no longer enforceable with respect to sexual assault or sexual harassment claims. The Federal Act amends the Federal Arbitration Act ("FAA") to give employees who are subject to mandatory arbitration agreements with their employers the option of bringing claims of sexual assault or sexual harassment either by arbitration or in court. The Federal Act also invalidates agreements in which an employee waives their right to participate in a class action lawsuit asserting sexual harassment or sexual assault claims. As a result of this law, an employee raising a claim of sexual harassment or sexual assault will have the choice between arbitrating the claim or pursuing the claim in court, even if the employee had signed an arbitration agreement. Additionally, employees may bring class action claims of sexual harassment or assault even if they previously signed an agreement waiving the right to participate in a class claim.

The Federal Act's restriction on forced arbitration applies to claims that arise or accrue *after* March 3, 2022, but it does not affect claims that arose or accrued before then. The Federal Act applies to all employers, regardless of size.

The Federal Act broadly defines sexual harassment and sexual assault. A "sexual harassment dispute" is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." A "sexual assault dispute" is defined as "a dispute involving a nonconsensual sexual act or sexual conduct."

The new law delegates any disputes regarding the Federal Act, including as to the arbitrability of claims, to the courts, not an arbitrator, to decide, even if the arbitration agreement states otherwise.

The policy motivation behind the Federal Act is to increase public transparency regarding companies' workplace cultures and to allow victims of workplace sexual abuse to air their grievances in the public forum of a court if they so choose. The passing of this law is an extension of the #MeToo movement's goal to empower victims of sexual abuse. During the House Judiciary Committee's hearing on the bill introducing the Federal Act, four survivors of sexual assault and harassment in the workplace testified about the trauma they suffered, which they explained was exacerbated when they found out that their only recourse was to bring their claims in private arbitration.[2] In a press release issued by the U.S. House Judiciary Committee, Congresswoman Cheri Bustos (D-IL), who introduced the legislation, was quoted: "The #MeToo movement has chipped away at the culture of secrecy that protects predators and silences survivors -- but ending mandatory arbitration has the power to bring it all crashing down. . . . [S]urvivors of sexual harassment and discrimination in the workplace deserve to have their voices heard."[3]

MARYLAND'S DISCLOSING SEXUAL HARASSMENT IN THE WORKPLACE ACT

The passing of the federal law is not surprising. In recent years, many states have passed their own laws invalidating forced arbitration clauses with respect to claims of sexual harassment or sexual assault. Maryland is one of those states.[4]

On October 1, 2018, Maryland's Disclosing Sexual Harassment in the Workplace Act of 2018 ("Maryland Act") took effect. Among other legislative protections for alleged victims of sexual harassment in the workplace, the Maryland Act deemed null and void any provision in an employment contract, policy, or agreement that waives "substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment." Effectively, the Maryland Act invalidated mandatory arbitration clauses in employment agreements with respect to claims of sexual harassment or claims that an employee was retaliated against for reporting sexual harassment. In addition, the Maryland Act provided that an employer may not discharge, demote, discriminate against, or otherwise retaliate against an employee who refuses to sign an agreement that would be considered void under the Maryland Act. Lastly, under the Maryland Act, an employer who tries to enforce a provision that is void under the Maryland Act will be liable for the employee's reasonable attorney's fees and costs.

CONSIDERATIONS AND IMPLICATIONS OF THE NEW FEDERAL ACT

The passage of the Federal Act brings to light a number of questions, consider-

continued on page 7

continued from page 6

ations, and implications, some of which are addressed below in question-and-answer format.

1. I am a Maryland-only employer. The Maryland Act already applies to my company. Does the Federal Act have any additional implications?

Yes. The Maryland Act and similar laws passed by other states were subject to a preemption argument. Recent decisions of the U.S. Supreme Court have held that the FAA strongly favors enforcement of arbitration agreements and preempts state laws that prohibit mandatory arbitration.[6] Employers have challenged state laws banning arbitration of sexual harassment claims as preempted by the FAA, and some courts have agreed with this argument.[7] With passage of the Federal Act, that argument is no longer viable. Mandatary arbitration agreements are unquestionably not enforceable with respect to sexual harassment and assault claims because Congress expressly carved out such claims from the FAA.

2. My company has existing mandatory arbitration agreements with employees. Are those agreements valid with respect to claims other than sexual harassment or assault claims, or do we need to draft and execute new arbitration agreements with all existing employees?

It is not necessarily recommended to replace *all* arbitration agreements with existing employees. The Federal Act is limited to cases that "relate to" sexual harassment or sexual assault and allows the claimant to choose to invalidate the arbitration agreement with respect to such cases. Accordingly, most existing arbitration agreements that previously would otherwise be held valid should continue to be enforceable without modification, except as applied to sexual harassment and sexual assault cases.

However, and importantly, if the existing arbitration agreements lack a severability provision (or otherwise have serious flaws unrelated to the Federal Act), then a roll out of new agreements to existing employees should be further evaluated and considered. Agreements that do not expressly exclude claims that, by law, may not be subject to arbitration could be subject to invalidation entirely if they do not contain severability provisions. More on that below.

3. What if an employee brings one lawsuit that includes both a sexual harassment or assault claim and other claims? Does the Federal Act prohibit mandatory arbitration of all of the claims brought, or can the employer compel arbitration with respect to the non-sexual harassment claims?

This is an interesting question that is likely to be litigated, considering the language of the Federal Act. The Federal Act provides, "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which . . . relates to the sexual assault dispute or the sexual harassment dispute." The statute does not preclude mandatory arbitration with respect to *claims* of sexual harassment or sexual assault. Rather, it invalidates mandatory arbitration with respect to *a case* that relates to sexual harassment or assault. It is expected that plaintiffs' attorneys will advance an argument that any *case* that includes sexual harassment or assault claims is not subject to mandatory arbitration with respect to *all claims* asserted in that case. For example, an employee can plead an overtime wage claim or a race discrimination claim and "tack on" a sexual harassment claim in an attempt to avoid mandatory arbitration and present the case to a court. Perhaps more significantly, plaintiffs may plead wage and hour class or collective actions (or class discrimination claims, for that matter) and append class sexual harassment claims in an attempt to invoke the Federal Act's ban on arbitration and class action waivers with respect to "a case" that includes sexual harassment claims.

Although the ambiguity of the statute's language may lend credence to this argument, the legislative history of the Federal Act makes clear that Congress' intent was to invalidate arbitration agreements and class waivers only with respect to sexual harassment and assault claims. Indeed, the Federal Act's bipartisan support likely was attributable to its narrow scope. Broader bills invalidating arbitration agreements for all employment claims did not have sufficient support to pass. During debate of the Federal Act on the Senate floor, Senators Joni Ernst (R-IA), Lindsey Graham (R-SC), and Kirsten Gillibrand (D-NY) stated that the Federal Act was not intended to affect arbitrability of claims unrelated to sexual harassment or sexual assault. Senator Graham specifically addressed the Federal Act's inapplicability to wage and hour claims. Similarly, during debate in the House, representatives similarly expressed the view that the law is intended to be specific to sexual harassment and assault claims.[8] Of course, whether the legislative history will affect the interpretation of the plain language of the statute is expected to be litigated.

In circumstances where an employee files a lawsuit pleading both a sexual harassment or assault claim and another claim, employers will be faced with a strategic decision: either move to compel arbitration with respect to the non-sexual harassment or assault claim and simultaneously litigate two separate matters with an employee in two different forums or allow the entire case to proceed in court and litigate just one case.

4. Should my company review its existing arbitration agreements? If so, what should we be considering?

Yes. In light of the passage of the Federal Act, now would be an opportune time to review existing arbitration agreements to consider the new law's implications on the agreements. The following are some of the provisions—and revisions—that should be considered:

- **Severability Clause:** Ensure that arbitration agreements have a well-drafted severability provision. Now that mandatory arbitration clauses and class waivers of sexual harassment and assault claims are invalid, it is critical that an arbitration agreement contains an explicit clause stating that: (1) if any part of the agreement is held to be invalid, it shall be interpreted or modi-

continued on page 8

continued from page 7

fied in a manner to make it enforceable; and (2) if that is not possible, the invalid part of the agreement shall be severed, and the remaining provisions remain in full force and effect. If existing arbitration agreements do not contain severability clauses, a roll-out of new arbitration agreements should be considered.

- **Jury Trial Waiver:** The Federal Act does not prohibit jury trial waivers for sexual harassment and assault claims. In states where jury trial waivers for sexual harassment and assault claims are permissible, consider including a jury trial waiver provision with respect to non-arbitrable claims. Where enforceable, such a provision can limit the risk of a runaway jury in a sexual harassment or assault case, notwithstanding that the case must be litigated in court.
- **Exclusion and Inclusion Clauses:** For new arbitration agreements, consider adding explicit language excluding claims of sexual harassment and assault from the arbitration provision and the class waiver provision, in accordance with the Federal Act. However, as the Federal Act did not expressly invalidate jury trial waivers, consider carefully drafting the arbitration agreement to exclude sexual harassment and assault claims only from the mandatory arbitration and class waiver provisions, but include sexual harassment and assault claims within the scope of the jury trial waiver provision.
- **Potential for Class Arbitrations:** The Federal Act contains the following ambiguity. The law provides that, "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed . . . and relates to the sexual assault dispute or the sexual harassment dispute." Plaintiffs may argue that the law gives them the power to invalidate an arbitration agreement, a class action waiver, or both, at their discretion. This opens the door for plaintiffs to elect to invalidate only the class action waiver and not the arbitration agreement, and thus elect to pursue class action sexual harassment claims in arbitration. This is a potentially troubling scenario for employers, considering that obtaining certification of a class claim often is more easily attainable in arbitration than in court. To help mitigate this risk, consider adding language indicating that, with respect to any claims for which the class waiver is unenforceable, such claims are not covered by the arbitration agreement and must be litigated in court. Additionally, a provision excluding sexual harassment and assault claims from the arbitration agreement, as discussed above, would help protect an employer from facing class claims of that nature being filed in arbitration.

MOVING FORWARD

The above considerations are not exhaustive but are some of the primary implications of the new federal law. It is expected that some of these issues will be litigated. A review of existing arbitration agreements by counsel experienced with drafting arbitration agreements is recommended.

Finally, considering that employees will have the option to litigate sexual harassment and assault claims in court, despite having signed an arbitration agreement, employers must be vigilant and fully investigate and address complaints of sexual harassment and assault.

Authors:


Jed Charner

Jed Charner is a Senior Associate in the Baltimore, Maryland office of Jackson Lewis P.C. Jed represents management in all aspects of labor and employment law, with a focus on defending employers in wage and hour litigation and claims of discrimination and harassment, including single plaintiff and collective/class action cases. Jed also advises employers on compliance with federal, state, and local wage laws, as well as other employment matters.


Nawal Chaudry

Nawal Chaudry is an Associate in the Baltimore, MD office of Jackson Lewis P.C. She represents employers across many industries in employment litigation matters and provides advice and counsel for a wide-variety of employee-related matters. Nawal also represents employers in equal opportunity employment matters, including charges of discrimination.

[1]*See* Pub. L. No. 117-90 (March 3, 2022).

[2]*See* https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4793.

[3]*See id.*

[4]Other states that have enacted similar laws include California, Maryland, New Jersey, New York, Vermont, and Washington. Virginia and the District of Columbia have not passed similar laws.

[5]*See* MD Code Ann., Labor & Employment § 3-715.

[6]*See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (Supreme Court concluded that where a "state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."). In *Kindred Nursing Centers LP v. Clark*, 137 S. Ct. 1421 (2017), a 7-1 majority of the Supreme Court held the FAA preempts state laws that single out arbitration agreements for disfavored treatment.

[7]*See, e.g., Latif v. Morgan Stanley & Co. LLC*, No. 18cv11528 (DLC), 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019) (upholding the parties' mandatory arbitration agreement for plaintiff's sexual harassment claims because the FAA "sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by [state law].").

[8]As an example, Congressman Morgan Griffith (R-VA) stated, "I believe pre-dispute arbitration agreements are useful in some circumstances. They can allow common, foreseeable disagreements to be resolved quickly and efficiently, but we must acknowledge in the case of sexual assault and sexual harassment, nobody signs on to an employment agreement thinking that oh, I am going to be sexually harassed or I am going to risk sexual abuse…." *See* https://www.congress.gov/congressional-record/2022/02/07/house-section/article/H983-9.

ACC News

2022 Virtual Cybersecurity Summit: March 8-10, 2022

Registration is now open for the 2022 Virtual Cybersecurity Summit. These program offers three days of live educational sessions and networking opportunities, designed to engage and educate professionals about today's most pressing cybersecurity concerns.

ACC In-house Counsel Certification Program: March, 21-31, 2022 Virtual

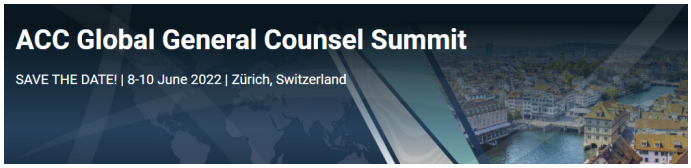
The In-house Counsel Certification Program covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

ACC Europe Annual Conference: May 22-24, 2022 Madrid, Spain

Join your in-house colleagues from across Europe in creating, collaborating, and connecting on topics including ESG, outstanding leadership challenges, DEI, risk management, counsel in a crisis, variance in global anti-trust regimes, legal operations, and much, much more. Early bird rates end 1 April!

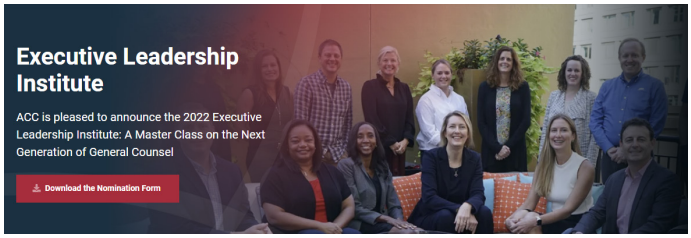
2022 ACC Global General Counsel Summit: June 8–10, 2022 Zurich Switzerland

Save the date for the 2022 Global General Counsel Summit, 8-10 June 2022, in Zürich, Switzerland, to collaborate and share ideas on critical trends and challenges facing general counsel with your global chief legal officers in a small, highly interactive setting. Seats are limited. Questions? Want to reserve your seat? Contact Ramsey Saleeby.



ACC Executive Leadership Institute: July 26–29, 2022 Chicago, IL

Invest in your high-performers and put your succession plan in place. Nominate your rising stars to gain the professional development they need to one day lead your department at the 2022 Executive Leadership Institute. Seats are limited



DEI Maturity Model

The DEI Maturity Model is designed for legal departments to benchmark their diversity, equity, and inclusion efforts across a wide range of functional areas. Download the model.

Renew Your ACC Membership

Don't forget to renew your ACC membership!

ACC Chief Legal Officers Survey Report Now Available

Uncover CLO's priorities, role, and value to their businesses from ACC's annual in-depth survey of global chief legal officers and general counsel. Download your free report today! Be sure to join us on Wednesday, March 2 to discuss the findings in this year's report.

SAVE THE DATE FOR THE 2022 ANNUAL MEETING IN LAS VEGAS! OCTOBER 23RD TO 26TH.

U.S. Sanctions and Export Controls: A Swift Response to the Invasion of Ukraine

By Karl W. Means, Tara D. Hopkins and Russell V. Randle, Miles & Stockbridge

On February 24, 2022, Russian forces invaded Ukraine and the world community quickly responded with significant and far-reaching sanctions and export control restrictions intended to impose immediate and severe economic costs on Russia. Russia's continued war operations in the Ukraine have only served to motivate the U.S. government and its allies to further isolate Russia from global energy and financial markets. Coordinated actions by the U.S. and over 25 of its allies and partners around the world have targeted Russian financial institutions, Russian state-owned enterprises, Russian elites, and key sectors of the Russian economy such as industrial production, commercial aviation, and energy.

President Biden has stated that these new measures are designed to "impose severe costs on the Russian economy" to "maximize the long-term impact on Russia". The U.S. began by targeting the core infrastructure of the Russian financial system, including sanctions against Russia's largest financial institutions, restricting the ability of the government of the Russian Federation to raise capital, and cutting it off from access to critical technologies. Now, the sanctions and export controls reach almost every facet of the Russian economy.

For many U.S. companies and their foreign sister companies, the result is a rapidly changing regulatory environment requiring swift adjustments to stay in compliance with U.S. law, as well as similar legal changes made by NATO and other allied countries. If the past is any indication, many of the changes will result in costly surprises and legal challenges for inattentive businesses. Below we summarize some of the sanctions and controls put in place to-date, but it is likely that these will change by the time this article is published and for some time afterward.

Current Sanctions from the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC)

Since the invasion, the Office of Foreign Assets Control (OFAC) has added dozens of entities (both businesses and individuals) to the Specially Designated Nationals and Blocked Persons List (SDN List). President Vladimir Putin, Foreign Minister Sergei Lavrov, and Minster of Defense Sergei Shoigu have all been added to the SDN List, along with numerous other senior Russian government officials, officials of certain Russian banks, and oligarchs and other malign actors worldwide.

In addition, OFAC has issued new sectoral sanctions and announced new restrictions on financial institutions and state-owned enterprises, including:

- ***Banking and Financial Institutions.*** As part of the U.S. effort to cripple the Russian banking industry, OFAC issued sanctions on banks and financial institutions and designated several Russian banks on the SDN List and imposed lesser restrictions on some others. U.S. persons, including U.S. financial institutions and corporations, are generally prohibited from engaging in any unlicensed transactions with SDNs and are required to block, or freeze, any property or interests in property belonging to SDNs that are or come into U.S. possession. Additionally, under OFAC's ownership rule, entities that are owned 50 percent or more, directly or indirectly, by one or more SDNs are also subject to OFAC's sanctions. This is true even if OFAC does not specifically list those entities as SDNs. U.S. companies, therefore, will need to conduct due diligence review of foreign counterparties to ensure they are not owned 50 percent or more by an SDN. Restrictions have been imposed on the export of dollar-denominated bank notes.
- In addition, non-U.S. persons may be exposed to secondary sanctions risk. For example, non-U.S. persons could be identified for property-blocking sanctions in relation to specific activities related to persons subject to property-blocking sanctions under Executive Order (E.O.) 14024. Activities subject to secondary sanctions include assisting, sponsoring or providing financial, material or technological support for, or goods or services to or in support of persons blocked pursuant to E.O. 14024.
- In conjunction with its Russia-related sanctions, OFAC has issued a number of general licenses, allowing limited continued transactions during a wind-down period for many entities on the SDN List. Note, however, that OFAC has previously interpreted the language about providing support broadly, so non-U.S. persons should treat any transactions with these banks with great care. In addition, efforts to hide transactions with these parties will draw OFAC scrutiny.
- ***Correspondent & Payable-Through Account Restrictions.*** Separately from the SDN designations, Sberbank, which is Russia's largest bank and a bank involved in many international transactions, was targeted with sanctions, along with 25 of its subsidiaries. OFAC Directive 2 (dated February 24, 2022), issued pursuant to E.O. 14024, will require U.S. banks to sever correspondent and payable through accounts with Sberbank and reject future transactions involving Sberbank by March 26, 2022. The bank's assets are not blocked or frozen, but this measure effectively cut off Sberbank from being able to wire or otherwise engage in U.S. dollar transactions.
- ***SWIFT.*** After initial hesitancy, the United States, along with many allies including the European Commission,

continued on page 11

continued from page 10

France, Germany, Italy, the United Kingdom and Canada, announced on February 26, 2022, that they would expel selected Russian banks from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) messaging system. This action ensured that these banks are disconnected from the international financial system and will harm their ability to operate globally. The following day Japan announced it will also join this measure.

- ***Russia Foreign Reserves.*** The United States and key allied nations also imposed restrictive measures that will prevent the Central Bank of Russia from deploying its international reserves - currently estimated at $630 billion - in any way which may undermine the impact of the sanctions. On February 28, 2022, OFAC implemented additional restrictions with respect to the Central Bank and published Directive 4 under E.O. 14024, which prohibits any transaction involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, or the Ministry of Finance of the Russian Federation.
- ***Sovereign Debt.*** OFAC Directive 3 (February 24, 2022) issued pursuant to E.O. 14024, imposed sectoral sanctions prohibiting U.S. persons from providing new debt or equity to several Russian state-owned entities, including Sberbank, Gazprombank, Russian Agricultural Bank, Gazprom, Transneft, Rostelecom, Alrosa, Sovcomflot, RushHydro, Russian Railways, Alfa-Bank and Credit Bank of Moscow. While typically "new debt" means a loan or other extension of credit, OFAC interprets the term "new debt" to specifically include payment terms, or allowing an entity to not pay for longer than the relevant period (14 or 30 days depending on the entity). Thus, such terms and other loans or extensions of credit constitute "new debt" requiring an OFAC license. U.S. companies with existing sales contracts for goods or services to any of these entities should carefully check credit terms and NOT extend credit to these entities on any future transactions.
- ***Energy, Maritime and Sovereign Debt.*** Other OFAC measures implemented include:
  - Prohibition of all new investment in the energy sector in the Russian Federation by a U.S. person, wherever located, as well as the facilitation of such an investment. This may include providing services, goods, or technology.
  - Designation of Nord Stream 2 AG and Matthias Warnig as SDNs, with a short wind-down period ending March 2, 2022. Nord Stream 2 has now filed for bankruptcy.
  - Designation of five Russian-flagged oil tankers and container ships owned by PSB as SDNs.
  - Expansion of existing sovereign debt restrictions. Specifically, the action prohibits U.S. financial institutions from engaging in the secondary market for bonds issued by the Central Bank of Russia, the National Wealth Fund of Russia or the Ministry of Finance of Russia after March 1, 2022.
- ***Maritime and Express Couriers.*** On March 1, 2022, major steamship lines announced they were suspending bookings to and from all Russian ports. Two container carriers had previously announced suspension of service, and both UPS FedEx stopped inbound service to Russia. The carriers indicated they would still attempt to deliver in-transit shipments to their destination(s) although delays are likely as countries in-route hold vessels to search for restricted commodities. It is also likely that shipments already underway or awaiting loading aboard vessels are financed with documentary letters of credit (DLCs) issued, confirmed or advised by now sanctioned Russian financial institutions for the benefit of exporter sellers. For cargo not financed by DLCs, the bills of lading and dock receipts or other negotiable instruments and non-negotiable sea waybills issued by the ocean carriers for all sorts of shipments may present a problem when goods arrive and have to be released at their destination.

Current Export Control Restrictions from the U.S. Department of Commerce Bureau of Industry and Security (BIS)

In addition to the sanctions imposed by OFAC, the U.S. Department of Commerce Bureau of Industry and Security (BIS) has imposed sweeping export restrictions on exports to Russia and Belarus. Final Rules effective February 24, 2022, and March 2, 2022, drastically limit exports of sophisticated goods, software and technology to Russia impacting Russia's ability to develop its aerospace and defense sectors and compete globally.

The new export control measures are intended to protect U.S. national and foreign policy interests by:

- Imposing new Commerce Control List (CCL)-based license requirements for Russia, covering all Export Control Classification Numbers (ECCNs) in Categories 3-9 of the CCL. Some of the items were not previously subject to license requirements.
- On top of the new license requirements, implementing a stringent licensing review policy of denial for export, reexport, or transfer (in-country) of items that require a license for Russia means that licenses will be significantly harder (if not impossible) to obtain.
- For Russia exports, reexports, and transfers (in-country), restricting the use of most EAR license exceptions.
- Moving all Russian entities on the MEU list to the Entity List of proscribed parties maintained by BIS (Entity List) (Supplement 4 to Part 744 of the EAR) and, going forward, new persons and entities will be added directly to the Entity List. This effectively prohibits unlicensed exports of any item subject to the EAR (including EAR99 items) to such entities. A license is now required to export, reexport, or transfer (in-country) all items subject to the EAR (including foreign-produced items under the Russia-MEU FDP rule) to

continued on page 12

continued from page 11

these entities. In addition, applications for such licenses will be reviewed under a policy of denial in all cases.

- Adding two new "Foreign Direct Product" (FDP) rules that control certain foreign-produced items: the "Russia FDP Rule" and the "Russia-MEU FDP Rule". The practical effect is to bar many third-country suppliers from shipping items such as semiconductors and other advanced electronics to Russia, items that are essentially inputs to Russia's key technology sectors.

  The "Russia FDP Rule" establishes controls over: (i) the direct product of certain U.S.-origin software or technology subject to the EAR; or (ii) produced by certain plants or major components thereof which are themselves the direct product of certain U.S.-origin software or technology subject to the EAR. The Russia FDP rule does not apply to foreign-produced items that would be designated as EAR99 (items not listed on the CCL), which includes many consumer items used by the Russian people.

  The "Russia-MEU FDP Rule" is more extensive than the Russia FDP rule and applies to foreign-produced items that are: (i) the direct product of any software or technology subject to the EAR that is on the CCL; or (ii) produced by certain plants or major components thereof which are themselves the direct product of any U.S.-origin software or technology on the CCL. These restrictions apply to all items, including those designated EAR99, with certain exceptions, and impose a license requirement for Russian military end users with an Entity List Footnote 3 designation.

- Expanded and Revised Restrictions on Crimea to Cover Donetsk and Luhansk Regions to cover these regions and prohibit the export or reexport of items subject to the EAR, except food, medicine and certain software for personal communications. There is thus a virtual embargo on sending U.S. origin goods, technology, or software to these areas.

We note that certain partner countries that are adopting or have expressed intent to adopt substantially similar measures are not or will not be subject to the Russia and Russia-MEU FDP rules. Exports, reexports and transfers (in-country) from the following countries are not subject to these rules: Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

Other Actions Targeting Russian Strategic Industries

Export Controls on Russia's Oil Refining Sector. On March 3, 2022, BIS took additional actions targeting Russia's oil refining sector with new stringent export controls and identified additional entities that support Russian military activities.

Banning Russian aircraft from entering and using domestic U.S. airspace. The United States has closed off American air space to all Russian flights. This ban includes aircraft certified, operated, registered or controlled by any person connected with Russia and will affect many airlines which use aircraft leased from Russian entities. This step also includes revoking all Russian airlines' - both passenger and cargo - ability to operate to and from U.S. destinations, as well as refusing entry of any Russian-operated aircraft into U.S. airspace. This step brings the United States in line with over thirty other countries, including most of Europe and Canada.

Ban on the Import of Russian Oil, Liquified Natural Gas, and Coal. On March 8, 2022, the U.S. banned the import of Russian oil, liquefied natural gas, and coal and uranium to the United States. The move had bipartisan support on Capitol Hill and was considered overdue by some. In Executive Order 14066, President Biden banned:

- The importation into the United States of Russian crude oil and certain petroleum products, liquefied natural gas, coal, and uranium. This will deprive Russia of billions of dollars in revenues from U.S. drivers and consumers annually.
- New U.S. investment in Russia's energy sector, which will ensure that American companies and American investors are not underwriting efforts to expand energy production inside Russia.
- American "facilitation" of new investment in Russia, which includes financing, insuring, or enabling of foreign companies that are making investment to produce energy in Russia.

Prohibiting Certain Imports, Exports, and New Investment, and Revoking Most-Favored Nation. Building on Executive Order 14066, on March 11, 2022, President Biden issued another Executive Order to ramp up pressure on Russia and further isolate it from the global financial system. The March 11th actions were taken in conjunction with G7 leaders from Canada, France, Germany, Italy, Japan, and the United Kingdom, and included:

- *Revoking Russia's Most-Favored Nation Status.* President Biden indicated he would sign legislation revoking Permanent Normal Trade Relations for Russia. This action may have the effect of imposing a 35% tariff on most Russian goods imported into the United States, though there are likely to be few such goods after the effect of other sanctions.
- *Denying Borrowing Privileges at Multilateral Financial Institutions.* The G7 Leaders will agree to ensure Russia cannot obtain financing from the leading multilateral financial institutions, such as the International Monetary Fund and the World Bank.
- *Full blocking Sanctions on Additional Russian Elites and their Family Members.* This follows up on prior efforts, along with U.S. allies and

continued on page 13

continued from page 12

partners, to target Russian elites and their family members who are profiting from the war in Ukraine, and cuts them off from the U.S. financial system, freezes any assets they hold in the United States and blocks their travel to the United States.

- *Banning the Export of Luxury Goods to Russia.* The Executive Order ends the exportation of luxury items to any person located in the Russian Federation.
- *Banning U.S. Import of Goods from Several Signature Sectors of Russia's Economy.* The Executive Order will also prohibit the import of goods from several signature sectors of Russia's economy – including seafood, spirits/vodka, and non-industrial diamonds. This will deny Russia more than $1 billion in export revenues
- *New guidance by the Department of Treasury to Thwart Sanctions Evasion, including through Virtual Currency.* The Department of the Treasury, through new guidance, will continue to make clear that Treasury's expansive actions against Russia require all U.S. persons to comply with sanctions regulations. Treasury is closely monitoring any efforts to circumvent or violate Russia-related sanctions, including through the use of virtual currency, and is committed to using its broad enforcement authorities to act against violations and to promote compliance.
- *Create the Authority to Ban New Investment in Any Sector of the Russian Federation Economy.* The Executive Order will establish the legal authority for future investment restrictions in any sector of the Russian economy, as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, by a United States person.

Steps to Take to Reduce Risk

While the array of export controls, sanctions, import bans and other measures can seem confusing, there are steps to take and questions to ask that will help assess a company's commercial exposure and manage any legal jeopardy in this fast-changing situation:

1. **Review current sales and purchases from Russia, Belarus, and Ukraine, as well as pending proposals to determine exposure in the event of an embargo.** Keep in mind that the restrictions also bar imports, and you should review your supply chain accordingly.
2. **Review current financing to determine any Russian financing in transactions and in development projects.** Expelling Russian banks and financial institutions out of the world financial system will disrupt payments in many transactions and raise credit risks.
3. **Review current personnel to determine if there are any Russian or Belarussian nationals working for the company who are not permanent residents of the United States or of the foreign country where they are working.** Disclosing proprietary technical information to them is considered an export, and such disclosure may require an export license where such disclosure did not previously require such a license. ***Make sure that any such check complies fully with anti-discrimination and applicable privacy laws.***
4. **Review current procedures used to screen parties to transactions, not only customers or suppliers, but also including banks, insurers, and carriers to assure that these procedures will stop transactions with forbidden parties and destinations, including parties and destinations recently added.** Also review procedures to document that this screening was done, by whom, and when. OFAC's SDN List and BIS's Entity List are already lengthy and growing, and they will continue to change. For practical purposes, until shown otherwise, no unlicensed transactions should be conducted with any party on these lists.
5. **Review current force majeure contractual language** both for sales contracts and for purchases to determine whether there is explicit language making embargoes and licensing difficulties an event of force majeure.
6. **Review current sales contract language to assure that there is express language barring the unlicensed resale to denied parties, destinations, or uses forbidden by U.S. law.** U.S. parties cannot rely on contractual language such as F.O.B. or ex works to avoid their duty to prevent diversion of their product contrary to U.S. export controls and sanctions rules. These rules address not only tangible products, but also software, technology, and services, including services done in the United States but which benefit a proscribed party or country.
7. **Review export shipping and sales documentation to assure that these contain "destination control" statements** making clear that exports contrary to U.S. law are forbidden, and that unlicensed resale to denied parties, forbidden uses, and proscribed destinations are not permitted.
8. **Review sales and marketing procedures to assure that the company does NOT refer transactions that it cannot lawfully perform** to parties in other countries who might be able to do so. Under current sanctions rules, such referrals are considered "facilitation" of illegal activity and are themselves a violation.

Summary

U.S. entities qshould anticipate any business with Russian entities will be increasingly limited. Companies that choose to continue doing business with Russia-related entities must be prepared to analyze complex – and constantly changing – rules, and the penalties for non-compliance are stiff. Now is the time to conduct thorough diligence of all operations and counterparties to determine where Russian touchpoints exist. Operating policies and procedures should be updated to conform to the new rules, and those policies and procedures must be enforced. Companies that are agile and forward-thinking will benefit from being prepared.

continued on page 14

continued from page 13

Authors:


Karl W. Means


Tara D. Hopkins


Russell V. Randle

Karl W. Means began his legal career with the United States Customers Service, now known as U.S. Customs and Border Protection. Since joining Miles & Stockbridge, Karl has drawn on his prior experience to advise clients on issues ranging from international trade and border enforcement to IP development and management, and from transactional due diligence to corporate governance and import/export compliance.

Tara D. Hopkins is a government contracts lawyer whose practice spans both litigation and transactional work. She has a particular focus on bid protests, procurement contracts, and export control/trade sanctions.

Russell V. Randle is a seasoned environmental and export control practitioner with decades of experience managing litigation, regulatory compliance and transactional due diligence for his clients. In his export controls and sanctions practice, Russ covers the full spectrum of compliance, enforcement actions and audit issues related to defense trade, financial transfers and non-governmental organizations working in areas affected by U.S. sanctions.

Miles & Stockbridge continues to closely follow developments in this area and assess impact on U.S. and non-U.S. businesses operating generally in Eastern Europe and the Russian Federation and Ukraine specifically. Reach out to the team of Russ Randle, Karl Means, Jim Doub, Tara Hopkins and Ashley Triplett to help you understand the impact on your business.

Disclaimer: This is for general information and is not intended to be and should not be taken as legal advice for any particular matter. It is not intended to and does not create any attorney-client relationship. The opinions expressed and any legal positions asserted in the article are those of the authors and do not necessarily reflect the opinions or positions of Miles & Stockbridge, its other lawyers or the Association of Corporate Counsel.

Are you charging credit card surcharges correctly?

By Christopher R. Rahl, Gordon Feinblatt LLC

Many businesses sell products and services and take credit cards as payment. Costs are imposed by the major card associations (e.g., MasterCard, Visa and American Express) and third-party payment networks on the "merchants" that accept payments in this way. Merchants, in turn, generally pass these costs on to their customers, while some mark up the processing costs. Charging a consumer a fee for accepting payment by credit card is generally viewed as a surcharge.

The processing costs merchants pay vary based on card association, credit card type and payment network. Historically, card association merchant rules have contained "anti-steering" provisions and "no surcharge" provisions. The anti-steering provisions prohibited merchants from encouraging consumers to use a form of payment other than a credit card. The no surcharge provisions prohibited merchants from adding a surcharge to a transaction to cover some or all of the processing fees the merchants pay to the card associations, payment networks or both.

In 2005, merchants joined together and filed suit in the U.S. District Court for the District of New York against MasterCard and Visa challenging certain anti-steering and no surcharge merchant provisions.

The lawsuit alleged various antitrust violations, including price fixing, monopolization and stifling competition. The lawsuit was settled in 2012 and the settlement was approved by the court in 2013.

As a part of the settlement, MasterCard and Visa changed their respective merchant rules to permit surcharges, subject to certain limits (including notices to consumers and a cap on the surcharge amount). Despite the MasterCard and Visa surcharge changes, several large merchants opposed the settlement and appealed the court's approval of the settlement agreement.

The Second Circuit Court of Appeals overturned the approval of the settlement in 2016 and the U.S. Supreme Court then denied certiorari. The parties eventually reached a settlement in September 2018 that included the surcharge rule changes implemented in 2013 and provided for payment of more than $6 billion to merchants that accepted MasterCard and Visa transactions starting in 2004. American Express was involved in similar litigation and also changed its surcharge rules to permit merchants to impose a surcharge subject to certain limits.

On the state level, after the card association surcharge changes in 2013, 10 states enacted surcharge restrictions that limited or restricted merchants from imposing surcharges in connection with credit card transactions. These states are California, Colorado, Connecticut, Florida, Kansas, Massachusetts, Maine, New York, Oklahoma and Texas.

Nearly 10 years later, there have been changes in state laws and a number of challenges to state surcharge restrictions based on the First Amendment. The challenges alleged that the state restrictions purportedly regulated commercial speech by permitting merchants to offer

continued on page 15

continued from page 14

discounts to consumers for payments in cash but restricting how merchants communicate with consumers.

As a result of these challenges and changes in a few of the noted states, as of early 2022, only two of the 10 states, Connecticut and Massachusetts, still have surcharge restrictions that have remained intact. Businesses that have customers in Connecticut and Massachusetts should review these state restrictions to ensure any fees imposed in connection with taking a credit card for payment follow the applicable state requirements.

In addition, businesses that impose surcharges need to be aware of applicable card association limits and requirements concerning surcharges. Each credit card association now permits surcharges (subject to the above limits in Connecticut and Massachusetts). Generally, the surcharge amount must equal the applicable "merchant discount rate" (what the credit card association charges each merchant) and be no higher than 4% for both MasterCard and Visa and 5% for American Express.

The interplay between card association rules can impact the maximum permissible surcharge, and there is a "level playing field" concept among the card associations. Merchants can generally assess a surcharge on one card type that is equal to the surcharge permitted by a competing card type (e.g., the surcharge for MasterCard transactions cannot generally exceed that permitted for American Express transactions).

Because the calculation involves the applicable merchant discount rate for each card type and can be based on purchase amount, merchants should check with their merchant processing vendor concerning specific surcharge amount limitations in addition to the general rules above.

Also, each credit card association requires a merchant to provide at least 30 days' advance notice to the credit card association that the merchant intends to begin surcharging its customers. Each credit card association also requires that surcharges be imposed uniformly to people who pay the merchant by credit card.

Violations of the major card association rules may subject merchants to fees for noncompliance, termination of privileges or both to participate as a merchant. Fees take the form of "non-compliance assessments" and vary based on the number of violations and the nature of the applicable violations.

For example, under Visa rules, noncompliance with any rule may result in an assessment of up to $1,000 for a first violation with assessments increasing for each similar violation in a 12-month window: second violation at $5,000, third at $10,000, fourth at $25,000, and fifth at Visa's discretion. The assessment amounts for "willful or significant" rule violations are higher: $50,000 for a first violation and assessments between $100,000 and $1,000,000 for additional similar willful and significant violations.

In Connecticut and Massachusetts where surcharges have additional unchallenged restrictions, none appear to have specific penalties associated with violations of the applicable surcharge provisions. It is likely that state violations would be pursued as unfair trade practices with violation fines determined under each state's respective consumer protection and unfair trade practices act (e.g., in Connecticut, up to $5,000 per violation for willful practices that result in unfair trade practices).

Merchants that impose surcharges or wish to do so should be mindful of the card association requirements and penalties for noncompliance. In addition, merchants should ensure that they provide notice of surcharge practices to their customers and obtain customer consent to the applicable fee at time of imposition.

Christopher R. Rahl

continued from page 1

other. Look for exciting surprises as well to liven up the experience!

(2) I would like to increase our chapter's exposure through marketing and PR initiatives. More to come on this at our next board meeting, but we have many untapped opportunities to get our name out and to share the wonderful educational and networking experiences afforded by joining the ACC. And yes, this should help us achieve the first goal of attracting new members. A win-win!

Without further ado, let's get excited about what 2022 will bring to our chapter! I look forward to working with each of you and to seeing and "seeing" you soon!

All my best,
Kimberly Neal

Board Leadership

President
Kimberly Neal
General Counsel
Harford County Public Schools

President Elect
Taren Butcher
Allegis Group
tbutcher@allegisgroup.com

Immediate Past President
Larry Venturelli
Zurich North America
410.559.8344
larry.venturelli@zurichna.com

Secretary
Kristin Stortini
Assistant General Counsel
Baltimore Ravens

Communications Chair
Raissa Kirk
Senior Associate General Counsel
The Johns Hopkins University
Applied Physics Laboratory

Program Chair
Matthew Wingerter
Catholic Relief Services
matthew.wingerter@crs.org

Board Members
Tyree Ayers
Cory Blumberg
Taren Butcher
Dee Drummond
Heather Gorin
Joseph Howard
Raissa Kirk
Shawn McGruder
Kimberly Neal
Danielle Noe
Shane Riley
Kristin Stortini
Michael Wentworth
Matthew Wingerter

Past Presidents Advisory Board
Larry Venturelli
Dan Smith
Prabir Chakrabarty
Karen Gouline
Melisse Ader-Duncan
Frank J. Aquino
Ward Classen
Maureen Dry-Wasson
Lynne M. Durbin
Lynne Kane-Van Reenan
Andrew Lapayowker
William E. Maseth, Jr.
Christine Poulon
Dawn M. B. Resh
Mike Sawicki

Chapter Administrator
Lynne Durbin
ldurbin@inlinellc.net