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SAPRONOV & ASSOCIATES, P.C.
ATTORNEYS AT LAW

info@wstelecomlaw.com
www.wstelecomlaw.com

1300 I STREET, NW, SUITE 400
WASHINGTON, D.C. 20005
TEL. 770.309.0462

5555 GLENRIDGE CONNECTOR
SUITE 200
ATLANTA, GEORGIA 30342
TEL. 770.399.9100

10 VOZDVIZHENKA STREET
MOSCOW, RUSSIA 125009
+7 985 920-89-93

Foreign Investment Alert¹

Negotiable Hostilities - Part III:

Doing Business with Russia in the Current Crisis

As of February 24, 2022

[WITH UPDATES ON NEW DEVELOPMENTS TO FOLLOW AT THE WEBINAR]

I. INTRODUCTION

In prior alerts² and accompanying webinars,³ we discussed whether Russian and other foreign investment in U.S. wireless and other telecom markets in the current geopolitical hostile climate was doable. Yes, we concluded, but increasingly difficult with Russia and foreign adversaries.

That is now an understatement. This alert and our upcoming webinar follow recent events in Russia, the Ukraine and the European Union (EU) that have brought Russia and Ukraine to the brink of war – and the U.S.-Russia relationship to its lowest point since the Cold War.⁴

Even so, countless commercial and financial transactions, albeit under a cloud of sanctions⁵ and market turbulence, occur daily. This alert addresses the implications for investors and commercial parties involved in such cross-border dealings, with emphasis on telecommunications

¹ While accurate to the best of our knowledge, this discussion is for tutorial purposes only, and is neither a legal opinion nor legal advice. Please contact us if you have any questions regarding this disclaimer.

² Sapronov & Associates, P.C. Client Alert, “*Negotiable Hostilities: Doing Business with Russia in the Sanctions Era*,” and “*Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration*,” available at wstelecomlaw.com.

³ The webinars were sponsored by Thomson Reuters and are available for purchase at <https://westlegaledcenter.com>.

⁴ **The agenda described below may change, depending upon how events unfold. This discussion addresses fast-moving geopolitical events current only as of the date of this writing. New developments – and an updated alert – will be made available as we get closer to the webinar.**

⁵ See generally, <https://www.trade.gov/country-commercial-guides/russia-sanctions>.

and information technology. This crisis is unfolding at break-neck speed, making instantly out of date all but a glimpse of these implications. With that caveat, what can investors and other parties expect and what do they need to know?

In prior alerts, we had discussed the respective sanction and counter-sanction regimes imposed by U.S. and other western nations on Russia (and by Russia on those nations in response). This is as a result of hostilities among Russia, the Crimea, and the Ukraine. We also discussed the escalating U.S. legislative and regulatory barriers on foreign investment, including the Foreign Investment Risk Review Modernization Act of 2018, the Committee on Foreign Investment in the U.S. (“CFIUS”) and the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (“Team Telecom”).⁶ This was followed by a series of executive orders by the U.S. administration, specifically focused on securing the domestic telecommunications and wireless infrastructure and supply chain, recently broadened to include foreign investors generally – with particular emphasis on Russia and China.

As this writing, the escalation now rapidly continues, having expanded to newly announced Western sanctions in response to the Russian Federation’s recognition of the independence of breakaway regions in Donbas, a disputed area on the Russian-Ukrainian border that is seeing increasing military escalation and potential refugee crisis. Increasingly worrisome now is the possibility of war between Russian and the Ukraine portending, at a minimum, still more economic sanctions, reprisals, currency fluctuations, and disruptions to global markets and financial transfers. The current investment environment is thus one of crisis, whether real, imagined, contrived, temporary (one hopes) or apocalyptic (at worst).

Not exactly good news for parties to foreign investment transactions. The heightened uncertainty, market disruption, sanctions and ever tightening regulation of foreign entry and investment in U.S. telecom and wireless markets is one topic of this alert. What investors can or should do about it – including review of international contract and dispute resolution clauses – is another. These topics will also be the focus of our upcoming webinar. Hosted by Thomson Reuters, the panel will consist of highly experienced regulatory and transactional attorneys as well as our Moscow-based Partner, Alla Naglis (see announcement below). We are also pleased to announce that Professor Adam Stulberg, Chair of the Sam Nunn School of International Affairs, Ivan Allen College, Georgia Institute of Technology (<https://inta.gatech.edu/people/person/adam-n-stulberg>), will join our discussions.⁷

Here is a brief sketch of the program.

⁶ This legislation (“FIRMA”) has expanded the scope of CFIUS’s review of foreign investment transactions raising national security concerns. For more on these developments and the expanded role of Team Telecom, see *“Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration,”* available at www.wstelecomlaw.com.

⁷ See, e.g., https://iac.gatech.edu/news/item/654746/questions-russia-ukraine-tensions-with-adam-stulberg?utm_medium=email&utm_source=daily-digest&utm_campaign=2022-02-10&utm_content=news; See also https://www.newswise.com/politics/georgia-tech-experts-available-regarding-escalating-crisis-along-ukraine-russia-border/?article_id=764300.

II. The Coming Storm (Maybe)

Depending upon who (and where) one hears about the growing East-West conflict, the resulting threats to cross-border investment are immanent, overblown, or simply possible. U.S. press reports had predicted a Russian invasion of Ukraine on a more or less daily basis, citing threats of economic sanctions and loss of access to the SWIFT financial network, among other penalties, that Russia – and therefore its investors – will face as a result. Russian news has described this as a Western-press instigated hysteria that exaggerates the standoff. Dialogue, until now, has continued: Macron with Putin (France and Russia), Scholz with Biden (Germany and the U.S.), with some EU countries (along with Israel) refusing to serve as arms merchants for the Ukrainian conflict. What happens next is anyone’s guess – and a future publication of this alert will soon follow.

So, for now, war (economic or worse) between the U.S. and Russia will not necessarily happen. But what if it does?

III. Tightening Entry Barriers and More Sanctions

Entry barriers, at a minimum, will tighten. Beginning with the Trump Administration, China (and to a lesser extent Russia) have been the target of governmental supply chain scrutiny and infrastructure protection measures.⁸ Expect those to tighten – *e.g.*, the Direct Product Rule⁹ – with new emphasis on Russia, now allied with China, already named as an adversary for purposes of U.S. technology transfer restrictions.

But with the unfolding military action in Ukraine’s break-away republics, the threatened Western response could be still more draconian. By some accounts, the U.S. Senate was close to introducing what Senate Foreign Relations Chairman Menendez (D-NJ) calls the “mother of all sanctions bills,” a measure threatened by Vice President Kamala Harris as well.¹⁰ Also rumored was the possible disconnection of Russia from the global banking system, the Swift Network (a measure most observers now believe unlikely).¹¹ Other sanctions discussed by U.S. policy makers include greater restrictions on transactions with Russian financial institutions and U.S. technology exports. Some new sanctions had been announced by President Biden and other world leaders – but much has been left on the table.

⁸ For a detailed discussion of these entry barriers, see, “*Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration.*”

⁹ <https://www.bis.doc.gov/index.php/licensing/reexports-and-offshore-transactions/direct-public-guidelines>. The Foreign Direct Product Rule, promulgated by the U.S. Department of Commerce, expands the jurisdictional reach of the US Export Administration Regulations (EAR). Initially the rule expanded to limit the ability of Huawei, a global telecommunications firm controlled by the Chinese government, to procure foreign made semi-conductors (“chips”) using U.S. technology, making such use a violation of the EAR. Similar measures are now contemplated for Russia. <https://www.atlanticcouncil.org/blogs/econographics/foreign-direct-product-rule-is-russia-the-next-huawei/>.

¹⁰ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/20/remarks-by-vice-president-harris-in-press-gaggle-2/>.

¹¹ <https://www.cnn.com/2022/01/26/investing/swift-russia-ukraine/index.html>. Banning Russia from SWIFT (the Society for Worldwide Interbank Financial Telecommunication) would make it impossible for financial institutions to send money in or out of the country. Russian lawmakers threaten to cut off shipments of oil, gas and metals to Europe in response.

That said, sanctions against Russia have long been in place (since at least the 2014 invasion of Ukraine) and even official government reports question their effectiveness.¹² Additional sanctions, especially if they individually reach Russian President Vladimir Putin or cut off Russian's Nord Stream 2 gas pipeline to Germany, would almost certainly trigger a retaliatory response including a possible cutoff of energy supplies to Europe - which depends on Russia for a lot of them. Our own (obviously unofficial) view is that further sanctions, technology, and financial transfer restrictions may differ in the future marginally from those now in place to some degree but – barring an outbreak of war – will not necessarily differ in kind (or in deterrent effect). Life and commerce will almost certainly go on.

IV. What's an Investor To Do?

Still, as of this writing, the outlook for future U.S. investment deals involving Russia looks increasingly difficult. But what should investors do (if anything) about existing ones? For example, what remedies are available for a Russian investor faced with a precipitous drop in the Ruble against the U.S. dollar in an international financial exchange denominated in dollars? Or for a U.S. investor swept up in retaliatory counter-sanctions imposed by the Russian Federation? How does one anticipate and draft enforceable protections for a currency demise in a Russian real estate contract denominated, say, in U.S. dollars?

Here is also where “boilerplate” contractual clauses, often skimmed over when negotiations are focused on price, payment and other business terms, become important. Among these are clauses that may excuse performance, allow termination and/or trigger a default, such as force majeure, change in law and material adverse change provisions. Excuses from performance may also be found under the law governing the contract. For contracts controlled by U.S. law, defenses to enforcement for a party seeking “a way out” of the deal may conceivably be found in common law defenses such as impossibility of performance, impracticability, and frustration of purpose. For international contracts, approaches may vary, especially when the subject matter is subject, in whole or in part, to foreign laws and regulations.¹³ Other principles may then apply, such as hardship, change in circumstances or statutory force majeure. Whether or not war or the threat of war relieves a party from performance will depend on the specific wording of the contract and the applicable law.

Such provisions provide fertile ground for disputes. While domestic US contracts may provide for US courts or domestic arbitration, disputes arising under international contracts are frequently resolved through international arbitration, for reasons ranging from the neutrality of the forum, confidentiality and finality, to the ease of enforcement of the resulting arbitral award.

Finally, for investors seeking international arbitration to resolve cross-border investment disputes arising from the current crisis, one area worth reviewing might be the protections they

¹² U.S. Sanctions on Russia, Congressional Research Service (Updated January 18, 2022) <https://sgp.fas.org/crs/row/R45415.pdf>. Summary. (“In terms of economic impact, studies suggest sanctions have had a negative but relatively modest impact on Russia’s growth.”)

¹³ See generally, W. Saponov and R. Butler, “PAX AMERICANA: United States Dispute Resolution of International Telecommunications Contracts,” reprinted in *International Dispute Resolution, The Comparative Law Yearbook of International Business*, Special Issue, 2010, available upon request.

can invoke under bilateral investment treaties concluded by Russia and/or Ukraine and how they might be invoked to preserve the sanctity of investment contracts in the face of challenges by warring countries.

The webinar – a continuation of our “Negotiable Hostilities” series, will include a discussion of this topic along with an update on the U.S. foreign entry and control transfer regulations, along with the current sanctions, counter-sanctions, regulatory restrictions, and entry barriers (in place or threatened) on Russian investment in U.S. telecommunications markets. As events in the current crises unfold, we may add other related topics of interest to practitioners.

A final comment. There is a Time for Peace and a Time for War (Ecclesiastes 3:8 I). It is thus with heavy heart that we watch the crisis, pray that the time for war has not come upon us, and all we can say, so to speak, “is give peace a chance.”

V. And a Special Announcement

We take this opportunity to make a special announcement. This webinar and the crisis that it examines comes at a propitious time for our Firm as we have expanded our practice in Russia, proudly announcing that Alla Naglis, one of Russia’s leading Technology, Media and Telecom (TMT) attorneys and formerly a partner in King & Spalding’s Moscow office (now closed) is now one of ours. Please join us in welcoming Ms. Naglis to our Firm. See <https://wstelecomlaw.com/2021/12/alla-naglis/>. Ms. Naglis will be a speaker at our webinar, offering unique insight into the implications of the current crisis on communications and information technology transactions between the two countries. We look forward to seeing you there. Details are set forth below.

Please join us on April 11, 2022 at 10:00 a.m. (Eastern) for a detailed discussion of these topics (additional details available at <https://westlegaledcenter.com/home/homepage.jsf>). The webinar will be moderated by Walt Sapronov of our firm and James K. Wholey, Phillips Lytle LLP. Speakers include Alla Naglis, Sapronov & Naglis, LLC; Gisele Stephens-Chu, Stephens Chu Dispute Resolution; Daniel P. Brooks, Wiley Rein LLP; and Adam N. Stulberg, Sam Nunn Professor and School Chair, Sam Nunn School of International Affairs, Georgia Institute of Technology Professor.