

A stylized world map in a light blue color, centered on the Atlantic Ocean, set against a dark blue background with diagonal lines and a subtle grid pattern.

IBA/IFA JOINT CONFERENCE

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IBA/IFA Joint Conference | International Franchising in
Uncertain Times | May 17-18, 2022

Geopolitical Risks in International Franchising

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Introduction

Thomas Friedman's "McDonald's" theory: "No two countries that both have a McDonald's have ever fought a war against each other."

Thomas Friedman, "Foreign Affairs Big Mac I," N.Y. Times, Sec. 4, Pg. 15 (Dec. 8, 1996); Thomas Friedman, "Big Mac II," N.Y. Times, Sec. A, Pg. 27 (Dec. 11, 1996).



The Golden Arches Theory of Conflict Prevention

Not precise, and no longer true; but a conceptual starting point for the proposition that middle class economies have a vested interest in commerce, not conflict.

Introduction



Fundamental notion:
contracting parties require confidence that they have freedom to contract and also that agreed-upon terms will be respected and enforced, as written.

Introduction

Challenges from an administrative perspective



Laws mandating certain values



Laws banning certain values



Administrative impediments (e.g., US state registration processes, commercial agency requirements in Gulf countries)

Introduction

Challenges from dispute resolution process

New York Convention

*United Nations
Convention on the
Recognition and
Enforcement of
Foreign Arbitral
Awards*

(10 June 1958)

Adoption in Canada - 12 May 1986 subject to declaration dated 27 May 1987 that Canada will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec, where the law does not provide for such limitation. R.S.C. 1985, c. 16 (2nd Supp.)

Adoption in UK – 24 September 1975 subject to declaration dated 5 May 1980 that UK will apply the convention only to the recognition and enforcement of awards made in the territory of another Contracting State. Treaty Series No. 20 (1976), Cmnd. 6419.

Adoption in US – 30 September 1970. US adopted the New York Convention and incorporated it into Chapter 2 of the Foreign Arbitration Act. See 9 U.S.C. §§ 201.

Introduction

Challenges from dispute resolution process

Reciprocal enforcement of judgments

Canada - The enforcement of foreign judgments in Canada is mainly a matter of provincial jurisdiction. There are, however, a few international conventions and agreements that Canada has implemented.

For example, Canada is a party to the Convention Between Canada and the UK providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters. This convention was incorporated into federal law in the Canada-United Kingdom Civil and Commercial Judgments Convention Act, R.S.C. 1985, c. C-30, and Ontario law in the Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990, c. R.6.

Several other provinces have enacted their own “reciprocal enforcement of judgments” legislation which applies to judgments from courts in the United States, Australia, Germany, France and more.

Introduction

Challenges from dispute resolution process

Reciprocal enforcement of judgments

UK – See Foreign Judgments (Reciprocal Enforcement) Act 1933 which makes provision for the enforcement in the UK of judgments given in foreign countries which accord reciprocal treatment to judgments given in the UK. The Act applies to judgments from courts in **Australia, Canada (except Quebec and Nunavut), India, Israel, Pakistan, Guernsey, Jersey, and the Isle of Man.**

US – Not a signatory to any convention or treaty that requires recognition or enforcement of non-US court judgments. However, the US is a party to several conventions that bear on US court enforcement of *arbitration awards and settlement*: the New York Convention, the Panama Convention, and the ICSID Convention.

Introduction

Geopolitical events that impact cross-border franchise transactions, include among others -

- Stability leads to confidence in negotiating, entering into, and administering international transactions that in practical terms are decades-long ***commercial marriages.***
- International geopolitical challenges and hotspots
- Second order events, e.g., cyberwarfare



Introduction

Geopolitical events that impact cross-border franchise transactions

Extra political considerations such as:

Climate change

Immigration and
population shifts

Health and well-
being, especially
in view of global
COVID pandemic

Travel limitations

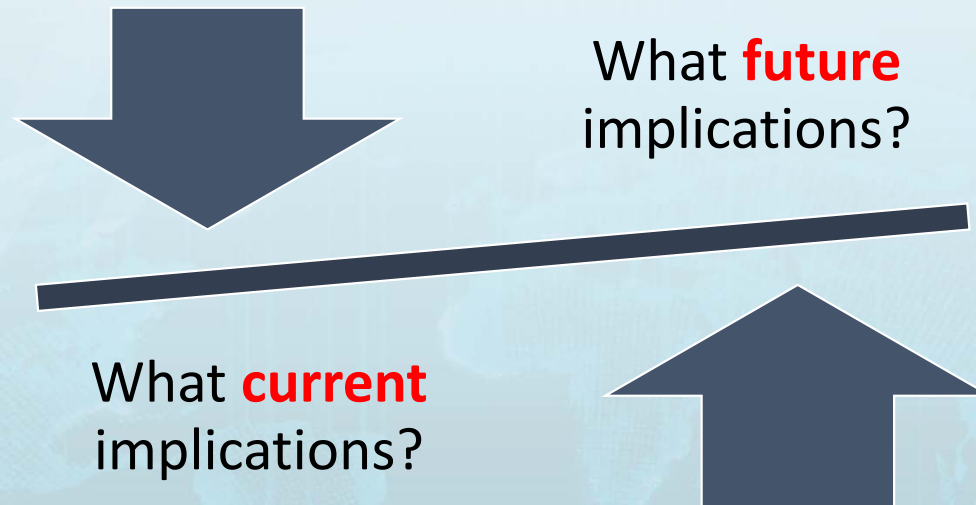
Terrorism

Labor and
Employment
Issues

Introduction

Geopolitical events that impact cross-border franchise transactions

Emerging from pandemic: 2 decades of change packed into 2 years



Contract Terms – How will the challenges impact parties?

Key contract terms that are implicated in a situation such as the Russian invasion of Ukraine:

1. **Force majeure** clauses
2. Common law concepts, e.g., **frustration or illegality**; in civil law: “unforeseen consequences”
3. FE or MFE **requirement to pay FR**
4. Clause permitting termination upon **inability to purchase hard currency**
5. Requirement to **use** only approved vendors and suppliers
6. Requirement to **sell** only approved products and svcs



Contract Terms – How will the challenges impact parties?

Other contractual considerations such as:

1. Availability of offshore security, such as LCs and personal guarantees
2. Withholding access to key inputs, whether supply or digital

Supply Chain Issues

**Generally covered in
Workshop #1**

**Supply and price of
inputs in general, such
as oil, gas, and energy**

Reputation Management

BP exiting stake in Russian oil and gas company Rosneft

By DEE-ANN DURBIN February 27, 2022

HOME > ENERGY

BP dumps 20% stake in Russian oil giant, says its partnership with Rosneft 'simply cannot continue' following attacks on Ukraine

Hannah Towey Feb 27, 2022, 3:15 PM



BUSINESS | EARNINGS

BP Takes \$25.5 Billion Hit From Russia Exit

Oil major falls to first-quarter loss despite soaring commodity prices

Reputation Management

Yale SCHOOL OF MANAGEMENT

<https://som.yale.edu/story/2022/almost-1000-companies-have-curtailed-operations-russia-some-remain>

Prof. Jeffrey Sonnenfeld

Almost 1,000 Companies Have Curtailed Operations in Russia—But Some Remain

May 5, 2022



Reputation Management

Major Companies Leaving Russia

Amazon	Apple	Volkswagen	Toyota Motor	Samsung Electronics
Alphabet	Mercedes Benz	BP	Royal Dutch Shell	ExxonMobil
H&M	Harley-Davidson	Goldman Sachs	FedEx	Ferrari
Eurovision	Electronic Arts	Disney	Credit Suisse	Dell
Deloitte	Coca-Cola	Coinbase	Boeing	Bumble
HSBC	IBM	Ikea	JPMorgan	Kellogg
Kraft Heinz	Levi Strauss	L'Oreal	McDonald's	Mastercard
Meta	Netflix	Nestle	Nike	Nintendo
Paramount	Papa John's	Paypal	Pepsi	Starbucks
Sony	TikTok	Uber	Twitter	VMWare

Reputation Management

Major Companies Remaining in Russia

Cloudflare	Emirates Airlines	Hard Rock Café	Koch Industries	Lenovo
Zippo	Alibaba	Align Technology	Avaya	Bekaert
Cofix Coffee	Diesel	Donaldson Company	Egyptair	Geox
Giorgio Armani	Huntsman Corporation	Industrial Bank (China)	Lacoste	Match Group (Tinder)
Medtronic	Micro-Star Int'l	Pegasus	Paccar	Qatar Airways
Storck	Sun Pharma	Stryker	Tenneco	Valve
Zippo	Ag. Bank of China	Amdocs	Amgen	Benetton
Check Point Software	China Mobile	Coal India	Dessange International	Egger
ELA Container	EMS-Chemie	Flowserve	Fleetcor	Global Fashion Group
Honor	Ideal Molde	Indian Oil Corporation	International Paper	JD.com

Reputation Management

- Why make the decision to leave?
- Why make the decision to stay?
- *Consider impact to a company's reputation (e.g., social media and social networking) through activists, troll farms, and others – all impacting reputation management.*



Sanctions Regimes

- *General Description*
 - **Canada** - See Part II.1 of the Canadian Criminal Code, the United Nations Act 1985, the Special Economic Measures Act 1992, the Freezing Assets of Corrupt Foreign Officials Act 2011 and the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) 2017.
 - **UK** - See the sanctions and Money Laundering Act 2018, the Export Control Order 2008 and the Anti-Terrorism, Crime and Security Act 2001 and summary published by the Foreign Commonwealth & Development Office on 31 January 2020 – <https://www.gov.uk> Trade restrictions on exports
 - **US** – See U.S. Dep't. of Treasury, Office of Foreign Assets Control: <https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information>. See, e.g., list of Specially Designated Nationals and Blocked Persons at <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>; see also Magnitsky Sanctions, Pub. L. 112-208 (Dec. 14, 2012) and implementing regulations at 31 CFR Part 584.

Sanctions Regimes

- **Canada** - See the Special Economic Measures (Russia) Regulations and Special Economic Measures (Ukraine) Regulations under the Special Economic Measures Act.
- **UK** – See Guidance on the Russian (Sanctions) (EU Exit) Regs 2019 guidance note published by Gov.uk
- **US** - US targets critical arteries of Russian economy, fully blocking largest public and private banks, sanctions imposed on Putin’s family and architects of war.
 - Pres. Biden issues **Exec. Order 14071** (Apr. 6, 2022) (banning new investment in Russia and also the provision of certain services) (87 Fed. Reg. 20999). **XO 14071 bans new investment and, possibly, franchisor-provided svcs.**
 - Office of Foreign Assets Control (OFAC) makes **official determination (May 8, 2022) that “management consulting services” are included.**
(https://home.treasury.gov/system/files/126/determination_05082022_eo14071.pdf)
 - OFAC elaborates: “Management consulting sector” includes **strategic business advice**; organizational and systems planning, evaluation, and selection; development or evaluation of **marketing programs or implementation**; mergers, acquisitions, and organizational structure; staff augmentation and human resources policies and practices; and **brand management**. OFAC FAQ 1038 (May 11, 2022) (<https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1038>) (emphasis added)

Sanctions Regimes

- **US** –
 - *See also*
 - OFAC, 87 Fed. Reg. 22284-01 (Apr. 14, 2022) (adding names of Russian persons to SDN List)
 - Dep't of Commerce, 87 Fed. Reg. 20295-02 (Apr. 7, 2022) (adding entities to banned entity list).
 - *See, e.g., United States v. Frade*, 709 F.2d 1387, 1393 (11th Cir. 1983) (prosecution under Cuban Asset Control Regulations and Trading with the Enemy Act, 50 U.S.C.A.App. § 1 et seq.).
 - Two bills have been introduced or discussed in Congress:
 - H.R. 7185 (Federal Contracting for Peace and Security Act)
 - “The head of an executive agency may not enter into, continue, extend, or renew a covered contract to procure any product or service from a company conducting business operations in territory internationally recognized as the Russian Federation during the covered period of aggression.” H.R. 7185, Section 3(a) (emphasis added)
 - Draft legislation to disallow Foreign Tax Credits for companies that pay taxes to Russian government, and other tax benefits. (This legislation would also apply to **Belarus**.)

Sanctions Regimes

Russian Countersanctions

- Russian companies can pay debts to foreign creditors from “unfriendly countries” only in Rubles (Edict No. 95-FZ)
- Permission to use patents w/o consent of right holders from “unfriendly countries” (Government Decree No. 299, Presidential Decree 79 (Feb. 29, 2022))
- Russian legal entities prohibited from providing loans to foreign entities (in any countries) in any foreign currency (Edict No. 79)
- Ban on concluding transactions giving rise to title of securities and immovable property w/ persons from “unfriendly countries” (Edict No. 81)
- Ban on “transferring payments” on securities to any foreign legal entities and individuals (Central Bank Order No. 018-34-3/1202)
- Other countersanctions described in Federal Law No. 48-FZ, Edict No. 83, Decree No. 295, Central Bank Order No. IN-019-12/21DSP, Edict 126.

Sanctions Regimes

Can there be a return to routine commerce?

Future stability?

Stability in Russia?

Stability in rest of the world?



Contract Enforcement

If contract terms allow for termination, how to do so?

Practical considerations in obtaining a judgment, and then enforcing a judgment.

Collect damages?

Future implications for cross-border commerce after geopolitical event has ended

Outbound commerce (e.g., from Canada, UK, US, *into* Russia)

Inbound commerce (e.g., from Russian perspective)

Conclusions

Geopolitical events impact international commerce

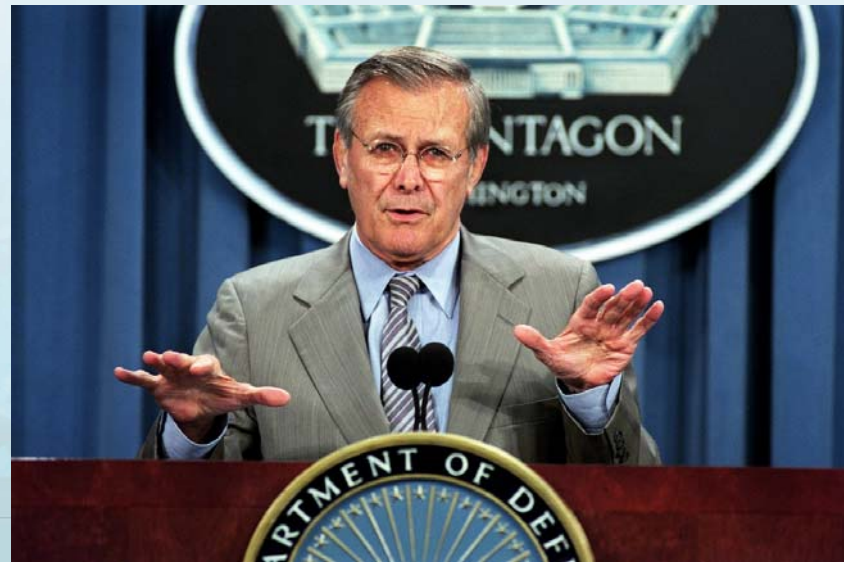
- Kinetic military actions
- Sanctions and countersanctions
 - What effect: will Russian economy be substantially impacted? For how long?
 - Are Russian consumers making discretionary purchases?
 - Do franchisees have legitimate products to sell?
- Asymmetrical issues – e.g., cyberwarfare directed vs hardware and software
- Non-state actors – e.g., social media and social networking impacted by troll farms and other actions directed to reputation management

Some geopolitical events can happen far away, others happen in our home countries

Conclusions: Some threats are discernable today, others not so much.

“Known knowns, known unknowns, unknown unknowns.”

Rumsfeld, D. (2002), NASA (1981) (et al.)



Conclusions: Lessons for future commerce in the face of other possible, likely, or improbable geopolitical events

“Nobody expects the Spanish Inquisition.”

Python, M. (1971).

