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Export controls and trade embargos – with special consideration of the international sanctions against Iran and Russia

Export controls govern the export of weapons and goods that can be employed as weapons. Export controls are to be distinguished from sanctions and embargos that may prohibit the export of goods to certain countries based on security-related foreign policy reasons.

OVERVIEW OF EXPORT CONTROLS

Whereas based on the principle of free trade the export of most goods from Switzerland is not regulated, the export of certain goods from Switzerland is subject to controls based on security-related reasons. The categories of goods covered by the export controls include armaments as well as goods that could be employed for the development, manufacture or distribution of weapons of mass destruction or conventional weapons. Various international export control systems (the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime and the Australia Group) define in detail the subject matter of the export controls.

The resolutions of the international export control regime, which are not binding as a matter of international law, are implemented in Switzerland by means of the War Material Act, the Nuclear Energy Act and the Goods Control Act, with implementing ordinances. Whereas the War Material Act governs the manufacture and transfer (import, export and transit) as well as the trading in war materials, the Nuclear Energy Act covers the handling of nuclear goods in Switzerland as well as the related security questions.

The Goods Control Act governs the export of

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goods that can be used for a dual purpose (so-called “dual-use goods”), i.e., goods that can be employed for both civil as well as military purposes (e.g., certain machine tools). It also covers the export of special military goods (e.g., training aircraft) and the handling of certain chemicals in Switzerland. Applications for the export of dual-use goods and special military goods will be rejected if the export serves the purpose of manufacturing ABC weapons or support systems for such weapons or contributes to the conventional military buildup of a country whose conduct endangers regional or global security.

If there is doubt as to whether an export is permitted, it is recommendable for the exporters to gain legal certainty by obtaining a so-called negative certificate of the SECO.

Even if the goods to be exported are not listed in the annexes to the relevant ordinances, the exporters must nonetheless report the intended export of goods to the State Secretariat for Economic Affairs (SECO) if they suspect that the goods are or could be intended for the development, manufacture or employment of weapons of mass destruction (so-called “catch-all” provision). The export is then prohibited until SECO reaches a decision.

If the export of the relevant goods is not subject to any permit requirement, the SECO will as a rule communicate, in a so-called “negative certificate”, that it has no objection to the export of the goods. In view of the tightened penal provisions of the goods control legislation, it is recommendable for exporters, in case of doubt, to always submit an application to the SECO for the issuance of a negative certificate and thereby obtain legal certainty as to the permissibility of the export. Frequently, the shippers also demand that the exporters produce a negative certificate to demonstrate the permissibility of the export.

OVERVIEW OF SANCTIONS AND EMBARGO MEASURES

In addition to export controls, the export, import and transit of goods to or from certain countries may be prohibited (embargo legislation).

Sanctions or embargo measures consist of sovereign measures that are taken in order to enforce international law. Their objective is to alter the behavior of the affected international law subject so that the subject acts in the future in a manner conforming to international law. The Swiss federal government may issue compulsory measures to enforce sanctions that have been resolved by the UNO, by the

Despite fulfillment of the Iranian obligations, the sanctions against Iran, in particular those by the United States, were only partially lifted. Mainly due to the remaining sanctions for US persons and those under the US dollar embargo, the recommencement of trade with Iran has to date fallen short of expectations.

Andreas Bättig, Attorney-at-Law, lic. iur., LL.M.

Organization for Security and Cooperation in Europe or by Switzerland’s most important trading partners and that serve to uphold international law, in particular the respect for human rights. The compulsory measures issued by the Federal Council may take the form, for example, of goods embargos, services embargos, financial sanctions or import and travel bans.

Currently, sanction measures are in force in Switzerland, in particular, against various countries on the African Continent (Liberia, Myanmar (Burma), Zimbabwe, Ivory Coast, Sudan, Republic of South Sudan, the Democratic Republic of Congo, Somalia, Guinea, Eritrea, Libya, Syria, Guinea-Bissau, Yemen, Burundi, and the Central African Republic). Also to be mentioned are the embargo measures against persons and organizations with connections to Usama bin Laden, the “Al-Qaida” group or the Taliban, against the Republic of Iran, the Islam Republic of Iran, Belarus and the Democratic People’s Republic of Korea (North Korea).

The group of sanction measures also includes measures to prevent the circumvention of international sanctions in connection with the situation in the Ukraine, which Switzerland adopted in conjunction with the Russia crisis.

The sanction measures against the Islamic Republic of Iran as well as the measures in connection with the situation in the Ukraine will be reviewed in further detail below.

SANCTION MEASURES AGAINST THE ISLAMIC REPUBLIC OF IRAN

Background

Sanction measures against Iran were imposed by the United States already in the wake of the occupation of the U.S. Embassy in Teheran in 1979 and were tightened in various ways over the following decades. In 2002, the suspicion arose that Iran was operating a concealed nuclear program and was breaching various restrictions of the International Atom Energy Agency. In the following years, the international community of nations attempted in vain to achieve a peaceful solution of the nuclear conflict with Iran. After the announcement by the new Iran President Mahmud Ahmadineschad in 2006 that the country would resume the enrichment of uranium, the UN Security Council issued four resolutions against Iran imposing various sanctions and embargos in the nuclear and financial area. During the subsequent years, the sanctions were continually tightened, in particular by the United States and also the EU, and, for example, the import into the EU of Iranian crude oil and natural gas was prohibited.

SECO's former paper-based permit processes have been replaced by the Elic electronic permit system. The Elic platform faciltates the continuous electronic processing of export transactions and is being expanded on an ongoing basis.

Marc Metzger, Attorney-at-Law, LL.M.

Sanctions by Switzerland

On the basis of the UN resolutions, Switzerland issued initial sanctions against Iran in 2007. As opposed to the far-reaching sanctions of the EU and, above all, the U.S., which were additionally aimed at weakening the Iranian economy in order to induce Iran to reopen negotiations, the Swiss sanctions were, from the outset, aimed at ensuring the non-proliferation objective (prevention of the proliferation of weapons of mass destruction).

Vienna Agreement

Following the election of the Iranian President Rohani in 2013, the negotiations between the E3+3 (China, Germany, France, Great Britain, Russia and the United States) and Iran were re-opened and resulted in November 2013 in the agreement on the Geneva Plan of Action. On April 2, 2015, the E3+3 and Iran agreed in Lausanne on the cornerstones of a comprehensive nuclear treaty, whereupon the binding Joint Comprehensive Plan of Action was agreed upon in Vienna on July 14, 2015. The Agreement provides, on the part of Iran, for considerable restrictions on the possibilities for the enrichment of uranium, whereas the international community agreed to a step-by-step reduction of the sanctions.

Loosening of the sanctions

The confirmation by the International Atom Energy Agency on January 16, 2016, that Iran had implemented its obligations under the Vienna Agreement (so-called "Implementation Day") laid the groundwork for a loosening of the sanctions against Iran. The partial lifting of EU sanctions led, for example, to Iran's once again being permitted to import Iranian crude oil and natural gas into the EU without restrictions and for most Iranian banks to have the possibility to be re-connected to the SWIFT system.

Following the Implementation Day, Switzerland also put into effect a general overhaul of its "Ordinance on Measures against the Islamic Republic of Iran". This resulted in the lifting of various sanctions against Iran (among others, the trade prohibitions on crude oil and natural gas, money transaction restrictions, etc.). However the permit requirement for the export of nuclear and dual-use goods to Iran and the block on assets of listed persons and organizations remain in force.

On the other hand, the United States loosened its sanctions to a much lesser extent. What were lifted were, above all, the so-called secondary sanctions with respect to non-US persons (persons who are not U.S. citizens, are not resident in the United States and do not hold any U.S. green card). US persons, on the other hand, continue as before to be prohibited from trading with Iran. The U.S. dollar embargo also continues to remain in force.

The restricted loosening of sanctions, in particular by the United States, means that the recommencement of trade with Iran to date has remained well below expectations. One reason for this can be found in the reticence on the part of the European banks to recommence bank transactions with Iran. Many banks apparently continue to view the danger of a breach of U.S. sanctions and the potential consequence of billion dollar fines as too high.

MEASURES TO AVOID THE CIRCUMVENTION OF INTERNATIONAL SANCTIONS IN CONNECTION WITH THE SITUATION IN UKRAINE

In March 2014, in the course of the conflict relating to Ukraine and the annexation of Crimea, the EU imposed sanctions on the Russian Federation. The sanctions were subsequently tightened and, in July 2014, the scope was broadened so that they became far-reaching economic sanctions. The Russian Federation, in return, imposed an embargo on the import of foodstuffs from the EU area.

Switzerland did not join in on the EU sanctions. However, the Federal Council issued measures intended to prevent the circumvention of the EU embargos via Switzerland. These measures provide for, on the one hand, financial restrictions that, for example, prohibit banks from entering into new business relationships with the persons and organizations affected by the EU financial and travel restrictions. On the other hand, trade restrictions exist that prohibit the export of armaments in connection with the situation in Ukraine and prohibit the import of armaments from Russia and Ukraine.

Based on the continued tense political situation with Russia, the EU sanctions were regularly extended. It is to be assumed that the measures issued by Switzerland for the avoidance of circumvention of the international sanctions will also stay in place during the period of validity of the EU sanctions. §

Andreas Bättig

To avoid having to enforce one's own claims before state courts that are deemed to be slow or insufficiently independent, an arbitration clause alone is not enough. Instead, arrangements for a potential enforcement of the arbitral award are also necessary.

Cyrill Süess, Attorney-at-Law, lic. iur., HSG LL.M.

The enforcement of claims against parties headquartered in sanctioned countries

Within the scope of a business relationship with a party headquartered in a sanctioned country, it may become necessary to enforce contested claims against this party by recourse to legal action. In order to facilitate enforcement, international trade contracts usually provide for arbitration as dispute resolution method. These agreements to arbitrate, however, often provide a false sense of security.

If export restrictions are imposed against a country, typically reservations will also exist against that country's justice system. Proceedings before governmental courts in these countries are often deemed to be too protracted and insufficiently independent. In order to reduce the risk of proceedings before these courts, it is possible to include either a choice of jurisdiction or an arbitration clause in the trade contract. The former frequently fail due to a lack of agreement by the parties and the limited selection of courts that can be validly selected. For this and other reasons, the agreement to submit potential disputes to arbitration is therefore the preferred choice.

In order for an arbitration clause to achieve the desired effects, the clause should be adjusted to the specific transaction. Otherwise, there is a risk that specific dispute topics or potentially even important third parties (such as, for example, sub-contractors or suppliers) are not covered by the clause. At the same time, the parties must, among other things, decide on what type of arbitration tribunal and arbitration rules should be applied and where the tribunal should have its seat.

As in the case of a foreign court decision, a foreign arbitral award must also be recognized and declared enforceable by a local court before it can be enforced locally.

DEFENSIVE MEASURES AGAINST A NEGATIVE ARBITRAL AWARD

If an arbitration tribunal has issued its award, the losing party may challenge this pursuant to the relevant law that applies at the seat of the arbitration tribunal. In formulating the arbitration clause, therefore, consideration should already be given to the fact that the possibilities for appeal can be influenced by an informed choice of the seat of the subsequent arbitration tribunal.

Another possible defensive measure arises for the losing party in the country in which the final foreign arbitral award is to be enforced. As in the case of a foreign court judgment, a foreign arbitral award must also be recognized and declared enforceable by a local court before it can be enforced locally.

THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In 1958, in order to standardize and simplify this recognition and enforcement, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed. To date, over 156 countries have already joined this Convention,[1] which means that it is valid in nearly all countries of importance in international trade. Contested arbitral awards may therefore often be recognized and enforced based on the New York Convention also in countries against which export restrictions apply.

The courts in the country of enforcement have considerable scope in interpreting the New York Convention.

The Convention, however, provides that foreign arbitral awards are to be recognized and enforced based on the procedural law of the country of enforcement. This means that the structuring of the legal recourse (number of appeals, duration of proceedings, costs etc.) is determined by the country of enforcement and not by the Convention. The Convention provides for an exhaustive list of reasons for refusing recognition and enforcement of foreign arbitral awards, which is in principle favourable. A reason for refusal is given, for example, if the arbitral award is contrary to the public policy of the country of enforcement. The Convention leaves open, though, what is to be understood by the term "public policy". The courts in the country of enforcement therefore have considerable scope in interpreting the Convention. This scope for interpretation is occasionally used in order to broaden the possibilities for refusing recognition.

Example: Recognition and Enforcement in Russia

In Russia, the decision on the recognition of an arbitral award may be appealed twice, whereby the means of recourse covers a total of three judicial instances. If the counterparty opposes the recognition, based on experience, one can expect proceedings to last at least one year. The enforcement itself takes another three to five months. Therefore, a duration of at least 1 ½ years should be expected.

[1] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

The Russian courts, however, generally do not recognize arbitral awards that are based on an arbitration clause which has been declared invalid in Russia as these awards are deemed to be contrary to the public policy of Russia. If an arbitration award is directed against a Russian contract party, it is therefore not uncommon for a third party who is affiliated with the contract party (e.g. a shareholder), under false pretenses, to contest the validity of the commercial contract that includes the arbitration clause. If this third party wins, the chances of being able to enforce the arbitral award in Russia are low.

Attention should be paid already in connection with the structuring of the agreement as to where an arbitral award will later have to be enforced and as to what precautions are possible.

CONCLUSION AND COUNTERMEASURES

In dealings with parties headquartered in sanctioned countries, the mere agreement on an arbitral tribunal is as a rule not enough to avoid having to enforce one's claims before state courts in these countries. In the absence of corresponding precautions, an expensively obtained arbitral award can ultimately lead to enforcement proceedings before a court in these countries. In connection therewith, the national court has, as mentioned, considerable scope when applying the New York Convention, which facilitates in part unacceptable results.

To avoid this scenario, therefore, attention should be paid already in connection with the structuring of the agreement as to where an arbitral award will later have to be enforced and as to how this enforcement can be transferred to a country in which the recognition and enforcement of foreign arbitral awards occurs as smoothly as possible. Examples that spring to mind include security payments that have to be paid into bank accounts in arbitration-friendly countries, guarantees of international banks or whether the counterparty disposes over assets outside of its home country (such as, e.g. ships anchored in other countries, inventory abroad or credit balances held with third parties). Alternatives also include the involvement of related companies with assets abroad or insurance solutions, such as the Swiss Export Risk Insurance. §

Cyrill Süess

Lodging an objection to the issuance of an inheritance certificate is an important means to prevent a distribution of the estate to the "wrong" heirs. On the flip side of the coin, however, it provides a simple and inexpensive way for troublemakers to delay distribution of the estate to the legitimate heirs.

Gian Andri Töndury, Attorney-at-Law, lic. iur., LL.M. TEP

Objection to the issuance of an inheritance certificate – protective measure or the instrument of a troublemaker?

There is hardly any other legal procedure that sets such low standards in terms of conditions for the lodging of an objection than that of the objection to the issuance of an inheritance certificate. By way of contrast, the consequences of an objection can be all the greater, leading in particular to a complete blocking of the distribution of the estate for an entire year.

WHAT IS AN INHERITANCE CERTIFICATE?

Under Swiss law, in contrast to the Anglo-Saxon legal system, the heirs acquire the inheritance estate as a whole upon the death of a decedent, i.e., the estate legally passes to the heirs already at the point in time of death. Despite this direct transfer, the heirs need to have proof of their identity in order to be able to actually transfer the estate, including accounts and real property, to themselves. In Switzerland, this proof of identity is called an inheritance certificate. In the European Union (with the exception of Great Britain, Ireland and Denmark), the so-called European Certificate of Succession exists since last year.

FROM WHOM DO I RECEIVE AN INHERITANCE CERTIFICATE?

The inheritance certificate will be issued by the inheritance authority at the last f residence of the decedent. If the decedent had his last residence abroad, but leaves behind, for example, a bank account in Switzerland, the corresponding authority abroad is responsible for issuing the foreign inheritance certificate. In order to be able to obtain the assets in Switzerland, the foreign inheritance certificate may first need to be recognized by a court. The Swiss authorities may possibly issue an inheritance certificate, provided that the foreign authority does not deal with the estate assets in Switzerland, which can be the case, for example, in England.

HOW DO I APPLY FOR AN INHERITANCE CERTIFICATE IN SWITZERLAND?

In order to receive an inheritance certificate, the authority requires an opening of the last will and testament, in addition to proof of death and proof that the appointed heirs have not renounced the inheritance. If the decedent

had not made any last will and testament, the statutory heirs must prove their family relationship, whereby the authorities basically recognize this ex officio.

What must be taken into consideration is that the inheritance certificate is subject to legal actions based on invalidity, actions in abatement, inheritance recovery actions and actions for a declaratory judgment and can only be issued once all heirs are known. The inheritance certificate will be issued to the heirs at the earliest one month after delivery of a copy of the order as to the opening of the last will and testament. If the authority responsible for the opening is uncertain as to whether or not the decedent left behind statutory heirs, the one-month period basically does not begin until after a one-year call to all heirs.

If an heir is uncertain as to whether he wishes to accept or renounce the inheritance, it is recommendable as a matter of precaution to refrain from requesting an inheritance certificate.

If an heir is uncertain as to whether he wishes to accept or renounce the inheritance, it is recommendable, as a matter of precaution, to refrain from demanding an inheritance certificate in order to prevent an implicit acceptance of the inheritance. In Canton Zurich, it is possible to first demand a "certificate for information" instead of an inheritance certificate. By means of such a certificate, it is possible to obtain information as to the estate, e.g., from banks, without already accepting the inheritance. If the inheritance has already been accepted once, it is not possible to renounce it anymore, even if the estate is over-indebted.

WHAT TYPE OF DISCRETION DOES THE INHERITANCE AUTHORITY HAVE?

In issuing the inheritance certificate, the authority has a limited power of cognition to the extent that it must decide who to include in the inheritance certificate and who to omit, whereby it must adhere to the last will and testament available to it. In connection therewith, the status as heir need only be credible. The authority does not decide whether or not a last will and testament is valid and must therefore issue an inheritance certificate even if based on a potentially invalid last will and testament. The definitive interpretation of last wills and testaments, however, is reserved for the judge. If the heirs are in agreement regarding the interpretation of the last will and testament, the authority must respect this.

An inheritance certificate can be amended at any time and be corrected by the authority ex officio. This is particular the case in connection with blatant mistakes or when additional last wills and testaments are received.

Trading with formerly-sanctioned countries can present promising opportunities but can also entail numerous risks and dangers for companies. Our experts can help you to recognize the risks and steer clear of dangers so that your company can benefit from the opportunities that arise.

HOW CAN THE ISSUANCE OF AN INHERITANCE CERTIFICATE BE PREVENTED?

A statutory heir (who has been ignored or disinherited) or an heir who has been considered in an earlier last will and testament may lodge an objection to the issuance of the inheritance certificate as long as the certificate has not yet been issued. In this manner, the delivery of the inheritance certificate will be impeded.

Even if the objection is lodged by just one single person, it has an effect on all heirs. The objection must be lodged before the competent authority but is not tied to any formal requirements and can therefore also be made orally and without providing any reasons. If an objection is lodged, the heirs have time to file an inheritance action within the one-year forfeiture period. If no action is filed within this period, the inheritance certificate will be issued. The division of the estate is blocked within this period.

OBJECTION AS MEANS OF SECURITY OR INSTRUMENT FOR TROUBLEMAKERS

An objection to the issuance of the inheritance certificate therefore serves the purpose of securing the estate because the heirs cannot dispose over the estate as long as the status of the heirs is not yet clear. This can be of importance, in particular, if an heir with a compulsory share has been overlooked. In such constellations, an objection to the issuance of the inheritance certificate can prevent the estate from already being disposed over. Namely, once the estate has already been distributed, there is a risk that the heir with a compulsory share may no longer receive his share, even if an inheritance action proves to be successful.

However, the possibility to object to the issuance of an inheritance certificate also entails a potential for abuse: this permits, for example, statutory heirs who do not have any compulsory share to lodge unfounded objections and thereby delay the processing of the estate division by at least one year.

Taking into consideration the fact that other security measures are basically subject to substantive conditions, it is all the more astonishing that an objection to the issuance of an inheritance certificate is only subject to certain formal requirements being met. In order to prevent querulous objections, one should request at least a showing that an action is not to be classified as hopeless from the very outset. This would also not exceed the room for interpretation on the part of the issuing authority because the authority already has a certain power of cognition in connection with the issuance of the inheritance certificate, in particular in connection with the classification of the heir/legatee. §

Gian Andri Töndury, Michael Lüdi