

International Litigation & Contracts

International Contracts and War in Ukraine

Legal consequences

By Thierry CLERC

The news shows us the daily life of companies since the beginning of the conflict.

We are talking about an increase in the prices of supplies, the shortage of raw materials preventing the performance of contracts, advance repayment due to the termination of contracts, exchange rate risks, ban on the sale of products to embargoed countries, closure of companies in countries impacted by the conflict, seizure of property belonging to Russian oligarchs, the suspension of export guarantees, cancellation of leisure trips, criminal risks, cyberattacks ...

1) Background history

- 2012: IRAN
The embargo had been the subject of European Regulation No. 267/2012 and most of the sanctions had been lifted by the Vienna Agreement of 16/01/2016.
The sanctions related to the sale of dual-use items referred to in the annex to the European Regulation.
The penalties related to the assets of persons subject to the Regulations.
- 2014: RUSSIA (Crimea)
Provisions similar to those of 2022 had been provided for at the time.
EU Regulation 269/2014 of 17/03/2014.
EU Regulation 833/2014 of 31/07/2014.
- 2022: RUSSIA (UKRAINE)

2) Public Order Texts

- **European Regulations**

Several European sanctions regulations have been published:

- . EU 2022/328 of 25/02/2022,
- . EU 2022/428 of 15/03/2022,
- . EU 2022/576 of 08/04/2022.

These Regulations have established measures to freeze assets and economic resources against nearly 900 natural and legal persons and restrictions on commercial activities between the European Union and the regions of Donbass and then whole of Russia.

The number of people targeted was subsequently increased.

Were added:

- The ban of overflights of airspace by aircraft owned by Russian persons;
 - The ban of the export and sale of certain products in RUSSIA, in particular dual-use goods and technologies, which are listed in the annexes (oil, aircraft, space industry, provision of related services);
 - The ban of any transaction with the Central Bank of RUSSIA and certain other financial operations;
 - The ban affecting specific commercial activities with Belarus;
 - Disconnection from the SWIFT network for financial transfers;
 - The application of criminal sanctions of up to 5 years' imprisonment and fines as well as additional exclusions from public procurement and prohibition to do business.
- **Martial Law in UKRAINE (24/02/2022)** whose main terms are as follows:
- Export-import : Reduction of settlement deadlines for transactions of Ukrainian residents to 90 days as from 05/04/2022;
 - Transfer of foreign currency for the limited purchase of goods, such as military items;
 - Foreign currency: Exceptions are provided for transfers of funds between RUSSIA and UKRAINE for the payment of salaries or social security contributions or taxes;
 - Energy control is instituted, particularly for gas, both for export and import;
 - Food: ban on the import of any food from RUSSIA;
 - Intellectual property: the Ukrainian Intellectual Property Institute continues its activity and legal deadlines are suspended or extended;
 - Real estate : the activity of the property register is suspended and no transaction can therefore be recorded;
 - Specific measures are taken for transport.
- **Other countries** published sanctions as well: USA, Switzerland, Japan, Australia, New Zealand, Taiwan, UK ...
- **Web sites** for information on the competent authorities and sanctions:
- . France: <http://www.diplomatie.gouv.fr/fr/autorites-sanctions/>
 - . Belgium: https://diplomatie.belgium.be/en/policy/policy_areas/peace_and_security/sanctions
 - . Germany: <http://www.bmwi.de/DE/Themen/Aussenwirtschaft/aussenwirtschaftsrecht,did=404888.html>
 - . Italy: https://www.esteri.it/mae/it/politica_estera/politica_europea/misure_deroghe

3) Aid from the European Union and the Member States

At the same time, Europe has decided to subsidise companies affected by the conflict and indications are provided for.

The European Commission, in a statement of 23/03/2022, adopted provisions to support the economy in the context of RUSSIA's invasion of UKRAINE.

Greater flexibility in state aid rules is established to deal with this situation, while preserving a level playing field in the Single Market.

Provision is made for measures to compensate companies for the additional cost due to the exceptionally high price of gas and electricity.

The aid amounts are limited to €35,000 for companies in the agricultural sector and €400,000 for other sectors.

Cash support measure in the form of a public guarantee and a subsidised loan.

In France, measures were provided for to compensate for the losses of public procurement holders for unforeseeability and compensation principles were established.

4) The Fate of Contracts

From a legal point of view, we can refer to the concepts of force majeure including, where appropriate, embargo, hardship for the excessive cost of contracts.

In civil law countries, there are often laws that are suppletive to the will of the parties.

On the other hand, in common law, it is necessary to provide for the conditions of force majeure, embargo and hardship in a contract.

Customers are advised to review their contracts in this regard and to include for the future provisions allowing them to withdraw from contracts in the event of a conflict of the type we are experiencing as it may have been done during the Covid period.

It is also necessary to refer to what may have been done under Iran's embargo or under Russia's embargo during the invasion of Crimea.

Force Majeure at the international level

Cancellation of contracts under Vienna Convention for the International of Sale of Goods

(CISG 11/4/1980)

Exemption: Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

Effect of Avoidance: Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due.

Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Force Majeure Clause by ICC (International Chamber of Commerce)

The standard form of the ICC 2003 clause provides for war, armed conflict as case of force majeure (3a).

In the New FM Clause, the following events are not listed, contrary to the 2003 FM Clause: armed conflict or serious threat of the same (including but not limited to hostile attack, blockade, military embargo), civil commotion or disorder, mob violence, act of civil disobedience, curfew restriction, and compulsory acquisition.

On the other hand, taking the recent global developments into account, currency and trade restrictions, as well as embargos and sanctions, are now included in the list. Certain other changes have also been made, such as the rewording of "act of God, plague, epidemic, natural disaster, such as, but not limited to, violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought" as "plague, epidemic, natural disaster or extreme natural event" for simplification purposes.

The parties may of course modify the list in their contract by adding expressly other events or excluding some of them.

Be careful, however, of restitutions.

Indeed, force majeure exempts the debtor from the obligation to perform it and from any damages.

But the parties are returned to the state they were in before the contract was signed and if one of the parties has received an advance, they must return it.

Another consequence: Force majeure can be a cause of **suspension** of the contract. It is therefore necessary to know who will pay the safeguard costs if any.

Notification: In any case, if the conflict has had an impact on the contract, the victim party must notify the other party of the cause of force majeure or hardship or embargo to benefit from it.

Cascading of cancellations in a chain of contracts

Examples of contracts cancelled due to the ban on trade with Russia

Consequences for commercial agent contracts: cancellation

Consequences for a distribution contract: cancellation

Consequences for an autonomous subsidiary in Russia or Ukraine: remaining if autonomous

Consequences for a branch: cancellation

Freezing of assets: seizure of the assets of the persons concerned, ban on the sale or let of a building, of a ship or shares, ban on receiving dividends.

Unpredictability clause/hardship

This clause, different from force majeure in that it deals only with the financial aspect, allows for a price revision in the event of an excessive increase in the cost of the manufacturing.

The question is at what point the performance of the contract becomes "excessively expensive for a party that had not agreed to take the risk"? It is then necessary to provide financial criteria for triggering the re-negotiation mechanism provided for by the text, with the possibility of intervention by the judge and/or cancellation of the contract in case of disagreement (article 1195 of the French Civil Code).

5) Export insurance

The main bodies have downgraded the rating of RUSSIA and UKRAINE, which no longer covers trade relations with these two countries.

6) Cyber Attacks Insurance

The conflict has led to an overactivity of cyberattacks and insurance must be provided on this subject.

A New Jersey Court ruling of 06/12/2021 sentenced the insurer of a pharmaceutical company to the sum of \$ 1.4 billion in order to compensate them following a cyberattack by ransomware.

An example of the interest of insurance.

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