

ARTICLE

INTERNATIONAL ECONOMIC SANCTIONS ADOPTED IN RESPONSE TO THE SITUATION IN UKRAINE AS OF FEBRUARY 28TH, 2022 AND POSSIBLE INVOCATION OF FORCE MAJEURE IN THE CONTEXT OF CONTRACTS IN PROGRESS

| 28/02/22 | Olivier Attias

On February 21st, 2022, the President of the Russian Federation signed a decree recognizing the independence and sovereignty of the two separatist Ukrainian republics in the Donbas region, the republics of Donetsk and of Luhansk, and decided to send in troops to Ukraine. The West reacted immediately to these manifest violations of international law and multilateral agreements by adopting a set of economic sanctions.

First, by the **European Union** which, through the voice of its High Representative for Foreign Affairs and Security Policy, announced on February 22nd the unanimous adoption by the 27 Member States of two successive rounds of sanctions.

The first, targeting close to 400 individuals and entities and introducing restrictive measures of direct application to trade in the Donbass region, took the form of five implementing regulations **published** by the Council of the European Union on February 23rd [1].

Further sanctions drastically restricting trade between the European Union and the whole of Russia, in addition to those adopted back in 2014 in reaction to the illegal annexation of Crimea and Sevastopol, entered into effect on February 26th [2].

To date, more than 600 individuals and 50 entities are the subject of a **ban on entering the European Union** and a **freeze of their assets and funds**, including:

- Russian President **Vladimir Putin** and his Foreign Affairs Minister **Sergueï Lavrov**;
- the 351 members of the State Duma who voted on February 15th in favor of asking President Putin to recognize the independence of the self-proclaimed republics of Donetsk and Luhansk;
- individuals (military leaders, oligarchs, businessmen/women, directors of public corporations);
- leading entities having provided support to Russian decision-makers such as **Promsvyazbank**, **Vnesheconombank VEB.RF** and **Bank Rossiya** or the influencer agency Internet Research Agency.

Additional designations affecting members of the Russian National Security Council and those members of the Duma not previously sanctioned are expected. The Council of the European Union has also decided to “suspend” any and all participation of Russian diplomats and delegates in the main bodies of the pan-European organization with immediate effect.

All individuals and entities in, or operating from, the territory of the European Union are thus prohibited from making funds available, directly or indirectly, to the persons designated by the European Union as subject to sanctions.

Additionally, the sanctions adopted on February 26th comprise **restrictive measures directly affecting trade with the whole of Russia** in sectors such as defense, energy, aviation and finance, by **prohibiting** the sale, supply and **export of goods and technologies** which:

- are **dual-use**;
- might contribute to Russia's **military and technological enhancement** as listed by category in Annex VII of Regulation (EU) 833/2014 as amended;
- are used for **oil refining**, as listed in Annex X of same;
- are suited for use in **aviation and the space industry**, as listed in Annex XI of same.

It should be noted that these bans extend for the most part to the **provision of related services** such as the provision of insurance and reinsurance services, maintenance and technical assistance, or the provision of financing or financial assistance.

Some purchase, sale, investment services for or assistance in the issuance of transferrable securities are also restricted, in addition to the provision of public financing or financial assistance for trade with Russia, are now prohibited.





These sanctions add to the sectoral measures adopted on February 23rd that only targeted transactions between the European Union and the **Donbas regions** by prohibiting:

- the export of certain goods or technology that can be used in the sectors of **transport, telecommunications, energy or the prospecting, exploration and production of oil, gas and mining resources**;
- any import of goods (for contracts entered into prior to February 23rd, 2022, this ban will take effect on May 24th);
- any new financial or real estate investments; and
- the provision of tourism services.

In a joint declaration on February 26th, the European Commission, France, Germany, Italy, the United Kingdom, Canada, and the United States, announced their commitment to:

- excluding selected Russian banks already targeted by sanctions from **the SWIFT messaging system**, one of the most important banking and financial messaging systems, to ensure their disconnection from the international financial system [3];
- imposing restrictive measures to prevent the Russian Central Bank from deploying its international reserves.

By way of reminder, it is a criminal offense in France (§459-1 bis Customs Code), for any natural or legal person to contravene or attempt to contravene European sanctions. The penalties for this offense can go up to 5 years' imprisonment and a fine of at least the amount and at most double (tenfold for legal entities) the amount of the prohibited transaction; and can be accompanied by additional penalties such as disqualification from public contracts, prohibition from serving as a corporate director, etc.

The **United States** has also been very quick in adopting a number of economic restrictions to sanction the actions of the Russian President.

On February 21st, U.S. President Joe Biden signed an executive order [4] banning trade and investment between the United States and the two separatist regions of eastern Ukraine. The executive order prohibits, among other things:

- any **new investment in the region** by a person subject to U.S. law, regardless of where that person is located, and
- **the importation into the United States**, directly or indirectly, of any goods, services, or technology from the covered regions.

In addition, on February 24th, President Biden announced a new set of economic sanctions in response to the invasion by the Russian armed forces, taking the form of a "Final rule" published by the Bureau of Industry and Security and of an update of the persons designated by the Office of Foreign Asset Control (OFAC) comprising:

- **export controls** targeting in particular the **Russian defense, telecommunications, energy, aerospace and marine sectors**, and banning the export of some electronic and telecommunication items and technologies without a license exception;
- targeted sanctions against the main Russian banks and financial institutions and their subsidiaries (**Sberbank, VTB Bank, Okritie, Sovcombank, Novikombank**) and 11 major public corporations such as **Gazprom, Rostelecom, RusHydro** and **Transneft**;
- the designation on the sanctions lists of **many close associates of the Russian President**.

On February 25th, the Russian President, Foreign Affairs Minister and members of the Russian Security Council were added to the list of persons subject to targeted measures.

Accordingly, all of the property of the persons targeted in the United States or in the possession or under the control of U.S. persons are blocked and must be reported to OFAC. In addition, all entities that are directly or indirectly owned 50 percent or more by one or more blocked persons are considered blocked. All transactions by U.S. persons or within (or transiting) the United States that involve any property or interests in property of designated or otherwise blocked persons are prohibited unless authorized by a general or specific license issued by OFAC, or otherwise exempt.

It should be remembered that U.S. sanctions apply directly to the activities in respect of which OFAC enforces economic and trade sanctions:

- Transactions by "**U.S. Persons**" (U.S. citizens or residents of the United States of America, U.S. incorporated entities; and in some cases, the foreign subsidiaries of U.S. companies);

- Transactions taking place on **U.S. soil** or using the **U.S. financial system** (for example, the processing, by U.S. financial institutions, of U.S. dollar-clearing transactions).

So what can a French contracting party do when international sanctions make it impossible to continue a contract with a Russian counterparty?

Based on the foregoing, and in the absence of any real transition period before the sanctions referred to above take effect, many French companies with contractual dealings with Russian counterparts may find themselves unable to fulfil their contractual obligations and facing the possibility of their potential liability being incurred.

The first defense that comes to mind – and rightly so – is that the French contracting party should invoke force majeure.

Without it being useful to further develop the concept of force majeure, it suffices to recall that in application of §1218 of the Civil Code [5], three requirements must be met (i) the event must be unforeseeable (the event "*could not have been reasonably foreseen at the time the contract was entered into*"), external (performance of the obligation is prevented by "*an event eternal to the party owing the obligation*") and (iii) beyond the control of the party owing the obligation ("*the effects could not have been avoided by taking appropriate measures*").

As regards the sanctioned entity, the French Supreme Court (*Cour de cassation*) held in 2020 that the freezing of the assets of a sanctioned person or entity because of his or her activities does not constitute a case of force majeure for that person or entity as the element of externality is missing [6].

This being the case, a French company that finds itself unable to perform its contract due to the sanctions pronounced in recent days, may usefully invoke force majeure to suspend the performance of its contract.

It should also be noted that it is entirely possible, and even advisable, to contractually adjust the force majeure regime.

Depending on the risk level identified for the activities covered by the contract (for example, when they are linked to a country where the diplomatic situation is unstable or a conflict zone), it could be useful to anticipate the possibility of commercial transactions being subject to restrictions during the course of performance of the contract.

In effect, the reference to typical events defining force majeure may not be sufficient if performance of the contract is not, strictly speaking, prevented by the evolution of international sanctions.

This could be the case in the assumption that the counterparty has been designated in a list of U.S. sanctions to which the French company is not, in principle, directly subject or else because the adoption of sectoral or local restrictive measures might make banks reluctant to engage in transactions having any connection with the concerned region.

We would therefore recommend including a specific reference to international sanctions in the contractual definition of force majeure to avoid any sterile discussion about the continued pursuit of the contract and organize the possibility of suspending its performance.

Lastly, the French party should be careful to give prompt notice of the occurrence of the event of force majeure to the other party, as is typically contractually required, otherwise it will risk losing the benefit of the possibility of suspending the contract without any risk of its liability being incurred.

[1] Regulations (EU) 2022/259, 2022/260, 2022/261, 2022/262 and 2022/263 of the Council of February 23rd, 2022 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

[2] Council Regulation (EU) 2022/328 of February 25th, 2022 amending Regulation (EU) No. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

[3] European Commission – Statement, Joint Statement on further restrictive economic measures, Brussels, February 26th, 2022

[4] Executive Order on Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, February 21st, 2022

[5] Applicable if the contract is subject to French law, it being specified that most laws have a similar assessment of the notion of force majeure

[6] Cass., ass. plén., July 10th, 2020, P+B+R+I, No. 18-18.542 and 18-21.814

