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**Implications of Russian Invasion of Ukraine:
Remedies for Sanctions and Armed Conflict**

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Impact of Sanctions on Cross-Border Contracts

- Sanctions can become a **legal impediment to performance** when:
 - Sanctions are enacted by the State whose law was chosen by the Parties to govern the contract; or
 - Sanctions are enacted by a foreign State whose law **must** be taken into consideration by the Parties regardless of their choice of law (*lois de police*)
- Overview of U.S., E.U., and Swiss sanctions on Russia and Belarus available [here](#)

Impact of Armed Conflict on Cross-Border Contracts

- Armed Conflict is a **physical impediment** to performance if it directly interferes with the performance of obligations
- Examples include:
 - Destruction, damage, or seizure of goods or equipment
 - Interdiction of ports and shipping lanes
 - No-fly zones
- Overview of force majeure remedies in armed conflict available [here](#)

Hypothetical Scenario One: Sunk Vessel

- Charter from Odessa to Istanbul (contract concluded on 1.1.2022)
- Vessel hit by heavy artillery on 26.2.2022, sinks in port of Odessa
- Shipowner cannot perform its obligations under the contract
- Charterer threatens arbitration

Contractual Remedy: Force Majeure

- Rules for force majeure depend on the **wording of the force majeure clause** and the **law applicable** to the contract
- In common law systems (including English law), force majeure can only be invoked if there is a force majeure clause in the contract
- There is often a requirement that force majeure be **promptly notified** to the other party to the contract

Contractual Remedy: Force Majeure (cont.)

- Removes liability for non-performance, if non-performance was **prevented** by an event that is
 - unforeseeable; and
 - unsurmountable; and
 - irresistible

Contractual Remedy: Force Majeure (cont.)

- Armed conflict is usually listed as a “force majeure event” in force majeure clauses
- Armed conflict is **presumed** to be unforeseeable, unsurmountable, and irresistible
- Armed conflict must have **actually prevented performance**, as opposed to making it difficult or unprofitable
- If the armed conflict was foreseeable **at the time the contract was concluded**, then force majeure usually cannot be invoked

Hypothetical Scenario Two: Refusal to Provide Vessel

- Charter from Istanbul to Odessa (contract concluded on 1.1.2022)
- Shipowner refuses to hand over vessel to charterer following invasion of Ukraine by Russia
- Charterer threatens arbitration

Contractual Remedy: Hardship

- Hardship is an event that
 - is unforeseen; and
 - fundamentally alters the equilibrium of the contract; and
 - places an excessive burden on one of the Parties
- No excuse if performance is merely more onerous than reasonably anticipated
- English law: no doctrine of hardship, but can be incorporated in contract

Hypothetical Scenario Three: Supply Chain Disruption

- Charter from Odessa to Istanbul (contract concluded on 1.1.2022)
- Warehouse in Odessa holding the cargo (wheat) is destroyed on 26.2.2022
- Charterer refuses to take delivery of vessel in Odessa
- Shipowner threatens arbitration

Hypothetical Scenario Four: Sanctions

- Swiss charterer contracts with Russian shipowner (contract concluded on 1.1.2022)
- On 28.2.2022, Switzerland enacts sanctions prohibiting payments to Russian shipowner
- Swiss charterer no longer able to pay as agreed
- Shipowner threatens arbitration

Contractual Remedy: Impossibility (Civil Law)

- The obligation is deemed extinguished where its performance
 - is made impossible
 - by circumstances not attributable to the obligor
- The obligor remains liable under principles of unjust enrichment for any payment received prior to performance
- Liability may be extinguished if the risk of performance has passed to the obligee

Contractual Remedy: Frustration of Contract (Common Law)

- A contract may be terminated without liability
- Frustration of contract requires an event which
 - renders it physically or commercially **impossible to fulfil the contract**; or
 - transforms the obligation to perform into a **radically different obligation**
- Contractual provisions cannot exclude frustration due to **supervening illegality**

Remedies under International Investment Agreements

- Possible claims against Ukraine or Russia in connection with damaged or lost investments located within their territories?
- Ukraine and Russia are party to many international investment agreements, including with Switzerland and the UK
- Ukraine is also a party to the Energy Charter Treaty, which seeks to promote and protect investments in the energy sector

Remedies under International Investment Agreements (cont.)

Possible Claims Against Ukraine?

- Failure to provide full protection and security
- Failure to provide fair and equitable treatment
- War clauses

Remedies under International Investment Agreements (cont.)

Possible Claims Against Russia?

- Expropriation
 - Host State must compensate investor for any property seized or nationalized by the Host State
- Failure to provide fair and equitable treatment
 - Foreign investments must be treated the same (or better) than those of the Host State's citizens



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Suggested Additional Reading

- **Overview of EU, Swiss and UK sanctions against Russia and Belarus** (updated 11 March 2022), Daniel Lucien Bühr, Jonathon E. Boroski, Michael Neumann, Lea Murphy, Vivien Altwegg, available at https://www.lalive.law/wp-content/uploads/2022/03/LALIVE_Sanctions-overview-11-March-2022-Update.pdf
- **Overview of EU, Swiss and UK sanctions against Russia and Belarus** (updated 4 March 2022), Daniel Lucien Bühr, Jonathon E. Boroski, Michael Neumann, Lea Murphy, Vivien Altwegg, available at https://www.lalive.law/wp-content/uploads/2022/03/20220304-LALIVE_EU-UK-Swiss-Sanctions-4-March-2022-Update.pdf
- **Overview of EU, Swiss and UK sanctions against Russia and Belarus**, Daniel Lucien Bühr, Jonathon E. Boroski, Michael Neumann, Vivien Altwegg, available at https://www.lalive.law/wp-content/uploads/2022/03/20220228_LALIVE_Sanctions-overview.pdf
- **Armed Conflict and Force Majeure**, Christophe Guibert de Bruet, available at <https://www.lalive.law/wp-content/uploads/2022/03/Force-Majeure-and-Armed-Conflict.pdf>