

CLIENT UPDATE

THE EFFECT OF THE CRISIS IN UKRAINE ON RUSSIAN DEALS – PART II

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It has been two weeks since our last analysis on the overall effect of the latest international sanctions on Russian deals [\[http://www.debevoise.com/clientupdate20140313a/\]](http://www.debevoise.com/clientupdate20140313a/). In the meantime, the US and EU have expanded the potential scope of sanctions and several additional people have been specifically targeted. The US has named 27 individuals and one Russian bank, while the EU has sanctioned 33 individuals. Other countries are following suit. Please see our prior updates on the Ukrainian sanctions page of our website [\[http://www.debevoise.com/thesanctionsresource/\]](http://www.debevoise.com/thesanctionsresource/).

This update provides additional thoughts on a wider sampling of topical legal questions. Of course, we expect the answers below to evolve as the facts and law change. We would be happy to discuss any of the following and similar matters as they may apply to a particular transaction or entity.

- *Will there be a grace period for performance of existing contracts with a sanctioned company or individual?*

No. Under both sanctions regimes, the restrictions against named individuals and companies came into effect immediately. However, under the EU regime, application may be made for a license to make payments of obligations already due.

- *I hold listed securities of a company that may become sanctioned. If it does, must I divest? Am I permitted to sell if I choose to?*

There is no requirement to divest the shares, and it is not unlawful to sell them (as long as you are not selling them to a blocked person).

- *If the borrower under a USD loan becomes a blocked person, is it possible for the borrower to service its regular payments of interest and principal?*

Under the US sanctions, this is not possible. To the extent the borrower is trying to use funds located or passing through the EU, that would be blocked by the EU sanctions regime as well.

- *If my contract counterparty is sanctioned as a blocked person, may I assert a defense of “illegality” for failing to perform? Are there any other consequences for me under the contract or otherwise? Does the choice of law for a contract affect sanctions implications?*

The effect of newly applicable sanctions on an existing contract will depend on the choice of law, place of the parties, place of performance, place of enforcement and other factors.

For example, there is a clear defense of illegality under a New York-law governed contract if one of the parties is prevented by US law from performing. However, other considerations will include whether the counterparty may have related claims, such as unjust enrichment, and how the sanctions affect such claims. Furthermore, if the matter is to be resolved in a court outside the US, the substantive contract law is likely to be presented as a matter of evidence, and a local court may be more willing to side against the party asserting an illegality defense.

If the agreement is governed by a law other than the law of the sanctioning jurisdiction, there is an added wrinkle of whether “illegality” includes illegality under foreign law.

NY law on illegality largely follows English law, so the same issues are presented under an English-law contract.

Sanctions may also trigger force majeure clauses, which can be heavily negotiated and/or subject to specific precedential rules of interpretation under the relevant governing law.

Finally, the sanctions may affect obligations under other clauses that themselves create a condition to performance or a defense for breach. For instance, if an agreement requires insurance to be obtained before one party ships goods, and insurance is not available as a result of newly imposed economic sanctions, the obligation to ship may be excused.

- *What if the contract has multiple counterparties, some of whom are blocked and some of whom are not?*

Many of the same considerations discussed above will be relevant. However, in multi-party contacts, the failure of one party to perform will not necessarily relieve the remaining parties of their obligations to each other. Furthermore, parties will need to look at any contractual provisions that require the contract to be reformed in the event of partial unenforceability.

- *Has a “Material Adverse Change” occurred under my share purchase agreement or credit agreement?*

MAC clauses are used in a wide variety of circumstances and are often heavily negotiated. Where they exist as conditions to a SPA or as a limitation to warranties made in an SPA or loan agreement, there may be multiple exclusions, including exclusions based on changes in geopolitical factors that are not specific to the relevant company. Please see <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=a5c37979-882f-43c8-a937-64e3ad5f18dc>

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Please do not hesitate to contact us with any questions.

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