

Contracts: sanctions clauses, re-export clauses and disputes

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

Contracts are the second line of defence. Since 2022 trading contracts in Lugano contain sanctions clauses that allocate the risk of new measures. They typically include a representation that neither party nor its owners are listed, an undertaking not to deal with listed persons or sanctioned goods, a right to suspend or terminate performance if performance would violate applicable sanctions, and an exclusion of liability for such suspension. Where goods covered by Article 14f of the Ukraine Ordinance or Article 12g of the European regulation are sold to buyers outside the partner countries, the contract must contain the prohibition of re-export to Russia with adequate remedies, such as contractual penalties or a right of termination.¹

Where a contract does not provide for sanctions, Swiss law decides the consequences through general rules. A contract whose performance is prohibited by a Swiss sanctions measure is void to the extent of the prohibition under Article 20 of the Code of Obligations if the prohibition existed at the time of conclusion. If the prohibition arises later, performance becomes impossible under Article 119 CO and the debtor is released, provided the impossibility is not his fault.² Foreign sanctions, such as American secondary measures, are not Swiss law. A Swiss court or arbitral tribunal may take them into account under Article 19 of the Federal Act on Private International Law if interests that are legitimate and clearly preponderant according to the Swiss conception of law so require and the situation has a close connection with the foreign law.³ The Ukraine Ordinance prohibits the satisfaction of claims made by listed persons or by Russian parties in connection with contracts whose performance was affected by the measures (Art. 30). It also restricts transactions with claimants who have brought proceedings in Russia and limits the recognition of certain Russian judgments (Art. 24b and 29d), which

responds to the Russian courts' claim to exclusive jurisdiction over disputes with sanctioned parties (Chapter F.II).⁴

1 Banks, fiduciaries and service providers

Banks in Ticino carry the heaviest burden. They must freeze listed assets, report them to SECO and apply the deposit and securities restrictions to Russian clients. Where the conditions of the anti-money laundering law are met, they must file a report with MROS in addition to the report to SECO.⁵ In trade finance they must examine the documents presented under letters of credit for sanctioned goods, origins, vessels and ports and obtain price cap attestations where they finance oil cargoes. Since Executive Order 14114 they must also assess whether a client's trade in machine tools, electronics or other specified items could reach the Russian military-industrial base. Banks with branches or subsidiaries in Italy must, in addition, observe the reporting obligations of Legislative Decree No. 109/2007 and the new Italian criminal provisions for the business conducted there.

Fiduciaries, trustees and lawyers have their own obligations. The services ban prohibits accounting, tax advice, consulting and non-contentious legal advice to the Russian state and to entities established in Russia. The ban on trust services prohibits acting for trusts with Russian settlors or beneficiaries. A Lugano fiduciary that acts as director of a domiciliary company owned by a Russian national must examine whether the company's business falls under any of these bans and whether the owner is listed or controlled by a listed person. Fiduciaries that act as financial intermediaries are also subject to the Anti-Money Laundering Act and to supervision by a self-regulatory organization. Trustees within the meaning of the Financial Institutions Act are supervised by FINMA together with a supervisory organization (Chapter E.III). Their sanctions controls can therefore be examined in the course of that supervision.⁶

For the practitioner. A sanctions and export control programme for a Ticino trader or bank should cover at least the following: - A board resolution adopting the programme, naming a responsible officer and fixing reporting lines to the board. - A written risk assessment covering Swiss, European, American and British exposure, reviewed annually and after each sanctions package. - Screening of counterparties, owners, banks, insurers and vessels (by IMO number) against all relevant lists, with documented ownership analysis under both the control test and the 50 per cent aggregation rule. - Classification of goods by tariff number against the annexes of the Ukraine Ordinance, the Goods Control Ordinance and

Regulation (EU) 2021/821. - Evidence of origin for steel inputs, gold and diamonds, and price cap attestations for oil cargoes. - Contractual sanctions clauses and, where required, re-export clauses under Art. 14f Ukraine Ordinance and Art. 12g Regulation (EU) No 833/2014. - End-use and end-user checks for high priority items, with red flags for Central Asia, the Caucasus, Turkey and the United Arab Emirates. - Procedures for freezing and reporting to SECO, for reports to MROS and, for Italian operations, to the UIF. - Training of traders, operations staff and directors, with particular attention to Italian nationals bound by European law. - Record-keeping for at least ten years, and periodic independent testing of the programme.

2 Notes

1. Swissmem, re-export clause (above) ("angemessene Abhelfmassnahmen"); Regulation (EU) 2023/2878 (above), Art. 12g para. 3. ↩
2. CO, Art. 20 para. 1 ("A contract is void if its terms are impossible, unlawful or immoral"), <https://www.droit-bilingue.ch/en-de/2/22/220-20-24.html>; Art. 119 para. 1, <https://www.droit-bilingue.ch/en-de/2/22/220-119-131.html>. ↩
3. Federal Act of 18 December 1987 on Private International Law (PILA), SR 291, Art. 19 paras 1–2, <https://www.droit-bilingue.ch/en-de/2/29/291-19-28.html>. ↩
4. Ukraine Ordinance, Art. 24b and 29d, table of contents (above); Art. 30 (claims of listed persons, of entities owned by them outside Switzerland and the EEA and of other Russian persons, in connection with contracts whose performance was directly or indirectly prevented or affected by the measures), <https://www.droit-bilingue.ch/fr-de/9/94/946.231.176.72-30-53.html>. Federal Law of the Russian Federation No. 171-FZ of 8 June 2020 inserting Art. 248.1 into the Arbitrazh Procedure Code. ↩
5. FINMA, news of 28 February 2022 (above). ↩

6. AMLA, Art. 2 para. 2 lit. a bis and para. 3, <https://www.droit-bilingue.ch/en-de/9/95/955.0-2-5.html>, and Art. 14 (affiliation to a self-regulatory organization); Federal Act of 15 June 2018 on Financial Institutions (FinIA), SR 954.1, Art. 17 para. 2 (definition of trustee) and Art. 61 paras 1–2 (supervision by FINMA in consultation with a supervisory organization), <https://www.droit-bilingue.ch/en-de/9/95/954.1-61-64.html>. ↩

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