

Sanctions in the courts: contracts that could not be performed

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The sanctions produced a wave of commercial disputes. Traders had concluded long-term contracts with Russian producers and with customers who had counted on Russian supplies. When the sanctions prohibited performance, the parties disagreed about who should bear the loss. Contracts governed by English law, which many commodity contracts are, often contain sanctions clauses and force majeure clauses, whose interpretation became the subject of litigation in London.¹ Contracts governed by Swiss law are subject to the general rules on impossibility of performance, under which a debtor is released if performance becomes impossible for reasons for which it is not responsible.² Arbitral tribunals seated in Switzerland have had to decide how to treat sanctions that did not bind them directly. A tribunal seated in Zurich must apply Swiss sanctions as part of Swiss public policy. Foreign sanctions, such as those of the United States, may be taken into account as facts that made performance impossible or unreasonable, or as mandatory rules of a closely connected state. The practice is still developing and has given the Swiss arbitration community a new field of work, which is likely to occupy it for years.

1 Notes

1. UK Supreme Court, RTI Ltd v MUR Shipping BV [2024] UKSC 18, judgment of 15 May 2024 (summary by Harneys, "RTI Ltd v MUR Shipping BV: Sanctions and force majeure clauses", harneys.com): after US sanctions on RTI's parent company made payment in US dollars difficult, the Court held unanimously that a reasonable endeavours proviso in a force majeure clause does not oblige a party to accept non-contractual performance, such as payment in euros. The underlying sanctions predate 2022. ↩

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2. Art. 119 CO (SR 220), English text via droit-bilingue.ch: an obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor (para. 1); in a bilateral contract the released obligor returns consideration already received under the rules on unjust enrichment (para. 2). MME, "Force Majeure in Contract Law", 19 March 2020, mme.ch: an official order that enters into force after conclusion of the contract and makes performance impossible falls to be examined under Art. 119 CO. ↩

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