Legal aspects of voluntary restriction of service provision in contracts with reference to Russia

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Key takeaways

- **Many business relationships with Russia are not directly affected by the sanctions but contract performance is indirectly made more difficult by the sanctions**
- **Voluntary restrictions on service provision in contracts related to Russia may constitute a breach of contract with corresponding financial risks**
- **Before limiting the performance of contracts, contracts related to Russia should be reviewed and analysed for legal and contractual options to deal with contractual obligations**

Introduction

In response to the sanctions imposed by the US, EU and Switzerland against Russia or Russian nationals and institutions, and in light of the uncertain situation, some companies have suspended economic relations with Russia or restricted the performance of Russia-related contracts. This legal update provides an overview of what to consider when voluntarily restricting business relations or contract performance.

Direct applicability of sanctions

In principle, it should be noted that not all economic relations with Russia or Russian companies are prohibited at the present time. Nor are all Russian companies or Russian nationals considered to be sanctioned. Economic relations that do not involve any prohibited, controlled or reportable goods or services and that are not related to sanctioned persons can in principle be continued.

In a first step, companies should analyse to what extent the business field or individual goods and services are affected by the sanctions. Criteria for the applicability of sanctions are not

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only the goods and services offered or purchased, but also the domicile of the parties, the place of performance or delivery, or the final place of use or application. Next, a distinction must be made between activities that are prohibited outright and activities that are subject to a reporting requirement. Under certain circumstances, the question of whether a field of activity is affected by sanctions cannot be assessed easily.

If contractual relationships are directly affected by sanctions, various options for action are available when dealing with the contractual obligations.

Indirect effects of the sanctions

If the sanctions are not directly applicable, they may nevertheless have an indirect impact on the ability to fulfil contractual obligations. One example is the exclusion of Russia from the international payment services system Swift. On the one hand, this impairs payment transactions and, on the other, makes it more difficult to finance and hedge transactions. However, payment transactions with Russia have not been completely banned. The measure "merely" makes the flow of payments and goods more difficult, but not impossible. Russia still has its own payment network SPFS and the Chinese alternative CIPS at its disposal for handling international money transfers. Such effects raise the question of the extent to which additional effort is still justified in the fulfilment of contracts.

An important factor that qualifies as an indirect impact is a political or the risk-based positioning of the company, which may require the discontinuation or restriction of business relationships related to Russia. This also includes the restriction of services in anticipation of sanctions that have not yet been decided, but are anticipated in the near future. In the case of such voluntary measures, withdrawal from the contract or non-performance is usually not easy to justify. If contractual obligations are unjustifiably not fulfilled or not fulfilled in accordance with the contract, claims for damages or any contractually stipulated contractual penalties could be made.

International corporations also face the question of how to deal with group companies based in Russia. Certain groups have restricted their internal relations with Russian-based companies. In this context, global contracts containing obligations to be fulfilled by Russian-based group companies may pose difficulties. Such contracts cannot be suspended easily, especially if no direct impact of the sanctions can be determined. In order not to risk a breach of contract, multilateral contracts should be carefully screened. This requires a detailed examination of the specific circumstances, the applicability of the sanctions to the business relationship concerned and the impact on possibilities of performance. Intra-group cash flows associated with the goods and services covered by the contract must also be analysed in this context.

Legal scope for action in contract performance

In Swiss contract law, the principle of pacta sunt servanda applies. Contractual obligations must generally be fulfilled unless the law or the contract itself provide scope for rescission of the contract or other deviations from contractual provisions. For companies, it is therefore important to ensure that appropriate measures are taken to comply with sanctions without violating contractual obligations that are not affected by sanctions. At the legal level, the following aspects in particular need to be examined, which trigger different consequences:

- Clausula rebus sic stantibus
- Force majeure
- Culpable subsequent impossibility (objective / subjective)
- Subsequent impossibility without fault (objective / subjective)
- Creditor default/default of acceptance.

The applicability of these legal instruments is only possible on the basis of the relevant contract and taking into account the specific circumstances of the individual case. We will be happy to support you with an individual analysis and advise you on the further procedure.

Next steps

Companies with ongoing business relationships related to Russia should review existing contracts in light of the sanctions. In particular, a distinction should be made between situations in which sanctions have a direct impact on contractual obligations and those in which obligations cannot be fulfilled, or cannot be fulfilled in the intended manner, due to strategic, financial or other additional compliance costs and considerations. Depending on the business area and the specific contract design, various instruments are available for dealing with contract fulfilment.

Pestalozzi has many years of experience in drafting, negotiating and enforcing contractual obligations. We are happy to assist you in analysing your business relationships and can advise you on the options available to deal with direct and indirect effects of sanctions on contractual relationships.

Pestalozzi has set up a team to address the wide range of legal issues companies are facing with regard to sanctions. Visit our Sanctions Resource Center to receive fast, practical and effective advice.

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No legal or tax advice

This Legal Update provides a general overview of the legal situation in Switzerland and does not claim to be exhaustive. It does not constitute legal or tax advice. If you have any questions about this Legal Update or need legal advice regarding your situation, please contact your Pestalozzi Attorneys-at-Law Ltd. contact person or one of the contact persons mentioned in this Legal Update.

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