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Foreign Investment Alert¹

**Negotiable Hostilities - Part III:
“REXIT” - Doing Business with (or Leaving) Russia in the Current Crisis
Updated As of March 28, 2022²**

[WITH UPDATES ON NEW DEVELOPMENTS TO FOLLOW AT THE WEBINAR]

I. INTRODUCTION

Herodotus tells the tale of Croesus, King of Lydia (modern day Turkey), having consulted the Oracle at Delphi before invading Persia (Iran), was told that he would destroy a great kingdom.³ Armed

¹ While accurate to the best of our knowledge, this discussion is for tutorial purposes only, and is neither a legal opinion nor legal advice. Please contact us if you have any questions regarding this disclaimer.

² The original version of this alert, available at <https://wstecomlaw.com/2022/02/sapronov-associates-p-c-client-alert-webinar-negotiable-hostilities-part-iii/>, was released on February 24, 2022, one day before the invasion of the Ukraine. We have coined a new acronym, “REXIT,” to connote the recent exodus of U.S. companies leaving Russia in response.

³ Herodotus: The Histories: Book 1.91.

with this prophecy, Croesus did just that – and destroyed his own. If asked, surely the Oracle would have foretold the same of Russia.

In prior alerts⁴ and accompanying webinars,⁵ we discussed whether Russian and other foreign investment in U.S. wireless and other telecom markets (as well as cross-border investment in Russia) in the current geopolitical climate was doable. Yes, we concluded, but increasingly difficult with Russia and foreign adversaries.

That obviously is no longer the case. As the Russian-Ukrainian conflict turned into open warfare, Western sanctions have devastated the Russian economy. The U.S.-Russia relationship is at its lowest point since the Cold War⁶ – and worsening by the day. Cross-border commerce and financial transfers between Russia and the West (at least for now) are becoming increasingly difficult if not impossible. Russia, having become a pariah state overnight, has turned to India and China as trading partners, even as its commercial dealings with the West grind to a halt. As a result of the Western sanctions,⁷ Russian counter sanctions and massive social pressure, many Western companies in Russia are heading for the exits (a “REXIT” of sorts).

We thus change the theme of this alert to a practical one: how to dismantle commercial and financial transactions between Russia and the West – and what are the legal (and practical) consequences of doing so. This crisis is unfolding at break-neck speed, making instantly out of date all but a glimpse of these implications. With that caveat, what can erstwhile investors and other commercial parties expect and what do they need to know?

In prior alerts, we had discussed the respective sanctions and counter-sanctions imposed by U.S. and other western nations on Russia (and by Russia on those nations in response). We also discussed the escalating U.S. legislative and regulatory barriers on foreign investment, including the Foreign Investment Risk Review Modernization Act of 2018, the Committee on Foreign Investment in the U.S. (“CFIUS”) and the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (“Team Telecom”).⁸ This was followed by a series of executive orders by the U.S. administration, specifically focused on securing the domestic telecommunications and wireless infrastructure and supply chain, recently broadened to include foreign investors generally – with particular emphasis on Russia and China.

As of this writing, the Russian-Ukrainian conflict continues, largely in response to the Russian Federation’s recognition of the independence of breakaway regions in Donbas, followed by the invasion of Ukraine by Russian military forces on February 25, 2022. Military escalation continues, along with a refugee crisis not seen since World War II. More economic sanctions on Russia pile on daily, as do tit-for-tat Russian reprisals, currency fluctuations, and disruptions to global markets and financial transfers. The current investment environment is thus one of crisis, temporary (one hopes) or apocalyptic (at worst).

⁴ Saprnov & Associates, P.C. Client Alert, “*Negotiable Hostilities: Doing Business with Russia in the Sanctions Era*,” and “*Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration*,” available at wstelecomlaw.com.

⁵The webinars were sponsored by Thomson Reuters and are available for purchase at <https://westlegaledcenter.com>.

⁶**The agenda described below may change, depending upon how events unfold. This discussion addresses fast-moving geopolitical events current only as of the date of this writing. New developments – and an updated alert – will be made available as we get closer to the webinar.**

⁷ See generally, <https://www.trade.gov/country-commercial-guides/russia-sanctions>.

⁸ This legislation (“FIRRMA”) has expanded the scope of CFIUS’s review of foreign investment transactions raising national security concerns. For more on these developments and the expanded role of Team Telecom, see “*Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration*,” available at www.wstelecomlaw.com.

Not exactly good news for parties to foreign investment transactions. A brief overview of the sanctions and ever tightening regulation of foreign entry and investment in U.S. telecom and wireless markets is one topic of this alert. What investors can or should do about it – including review of international contract and dispute resolution clauses – is another. International resolution of inevitable cross-border disputes – especially over international investments - is yet a third. We will discuss these topics at our upcoming webinar. Hosted by Thomson Reuters, the panel will consist of highly experienced regulatory and transactional attorneys. We are also pleased to announce that Professor Adam Stulberg, Chair of the Sam Nunn School of International Affairs, Ivan Allen College, Georgia Institute of Technology (<https://inta.gatech.edu/people/person/adam-n-stulberg>), will join our discussions.⁹

Here is a brief sketch of the program.

II. TIGHTENING ENTRY BARRIERS, SANCTIONS AND “REXIT”

Beginning with the Trump Administration, China (and to a lesser extent Russia) have been the target of governmental supply chain scrutiny and infrastructure protection measures.¹⁰ Expect those to tighten – *e.g.*, the Direct Product Rule¹¹ – with new emphasis on Russia, now more closely allied with China and named as a major adversary for purposes of U.S. technology transfer restrictions.

With the unfolding military action in Ukraine, the threatened Western response has been draconian. (See recent U.S. White House Announcement).¹² Thus far, these have included the disconnection of Russia’s largest Banks from the global banking system, the Swift Network (a measure once thought unlikely)¹³ and greater restrictions on transactions with Russian financial institutions and U.S. technology exports.

But perhaps the most severe sanction that the West can inflict on the Russian economy is to leave it: a self-imposed REXIT. Many companies are suspending their operations in the Russian federation; some are leaving it altogether, facing overwhelming social pressure to do so.¹⁴ Such an exodus will wreak still more devastation on the Russian economy. But it will come at a price. (See discussion about the consequences of international contract termination in **Section III** below.)

⁹ See, *e.g.*, https://iac.gatech.edu/news/item/654746/questions-russia-ukraine-tensions-with-adam-stulberg?utm_medium=email&utm_source=daily-digest&utm_campaign=2022-02-10&utm_content=news; See also https://www.newsweek.com/politics/georgia-tech-experts-available-regarding-escalating-crisis-along-ukraine-russia-border/?article_id=764300.

¹⁰ For a detailed discussion of these entry barriers, see, “*Negotiable Hostilities - Part II: Telecom Deals with Foreign Investors in the Current Administration.*”

¹¹ <https://www.bis.doc.gov/index.php/licensing/reexports-and-offshore-transactions/direct-public-guidelines>. The Foreign Direct Product Rule, promulgated by the U.S. Department of Commerce, expands the jurisdictional reach of the US Export Administration Regulations (“EAR”). Initially the rule expanded to limit the ability of Huawei, a global telecommunications firm controlled by the Chinese government, to procure foreign made semi-conductors (“chips”) using U.S. technology, making such use a violation of the EAR. Similar measures are now being adopted for Russia. <https://www.atlanticcouncil.org/blogs/econographics/foreign-direct-product-rule-is-russia-the-next-huawei/>.

¹² See <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/>.

¹³ <https://www.cnn.com/2022/01/26/investing/swift-russia-ukraine/index.html>. Banning Russia from SWIFT (the Society for Worldwide Interbank Financial Telecommunication) would make it impossible for financial institutions to send money in or out of the country. Russian lawmakers have threatened to cut off shipments of oil, gas, and metals to Europe in response.

¹⁴ <https://www.wsj.com/articles/russia-western-companies-sanctions-mcdonalds-cars-oil-11647437740>.

III. WHAT'S AN INVESTOR TO DO?

So as of this writing, the outlook for future U.S. investment deals involving Russia looks bleak. But what should investors do (if anything) about existing ones? For example, what remedies are available for a Russian investor faced with the precipitous drop in the Ruble against the U.S. dollar in an international financial exchange denominated in dollars? Or for a U.S. investor swept up in retaliatory counter-sanctions imposed by the Russian Federation? How does one anticipate and draft enforceable protections for a currency demise in a Russian real estate contract denominated, say, in U.S. dollars?

As with any contract, international or otherwise, a party may not simply terminate it without consequence. Obviously, unless the contract provides otherwise, doing so may result in breach. Consequence for breach may vary – and termination rights may well have been anticipated (*e.g.*, termination for convenience upon notice; early termination penalties). Alternatively, there may be a termination right under certain circumstances implied by law (see discussion below). But absent such relief, terminating an agreement under REXIT conditions can result in severe penalties – both contractual and a possible seizure of assets (or worse).

Here is where “boilerplate” contractual clauses, often skimmed over when negotiations are focused on price, payment and other business terms, become important. Among these are clauses that may excuse performance, allow termination and/or trigger a default, such as force majeure, change in law and material adverse change provisions. Excuses from performance may also be found under the law governing the contract. For contracts controlled by U.S. law, defenses to enforcement for a party seeking “a way out” of the deal may conceivably be found in common law defenses such as impossibility of performance, impracticability, and frustration of purpose. For international contracts, approaches may vary, especially when the subject matter is subject, in whole or in part, to foreign laws and regulations.¹⁵ Other principles may then apply, such as hardship, change in circumstances or statutory force majeure. Whether or not war or the threat of war relieves a party from performance will depend on the specific wording of the contract and the governing law.

Such provisions provide fertile ground for disputes. While domestic US contracts may provide for US courts or domestic arbitration, disputes arising under international contracts are frequently resolved through international arbitration, for reasons including forum neutrality, confidentiality, finality, and the relative ease of arbitral award enforcement

Finally, for investors seeking international arbitration to resolve cross-border investment disputes arising from the current crisis, one area worth reviewing might be the protections available under bilateral investment treaties concluded by Russia and/or Ukraine and how they might be invoked to preserve the sanctity of investment contracts in the current crisis.

The webinar – a continuation of our “Negotiable Hostilities” series, will include a discussion of these topics along with an update on the U.S. foreign entry and control transfer regulations, along with the current sanctions, counter-sanctions, regulatory restrictions, and entry barriers (in place or threatened) on Russian investment in U.S. telecommunications and technology markets. As events in the current crises unfold, we may add other related topics of interest to practitioners. In the future, we plan to update this alert with a focus on international mediation – a form of alternative dispute resolution (ADR) favored by U.S. Courts - and perhaps a logical, cost-effective alternative to cross border litigation.

¹⁵ See generally, W. Sapronov and R. Butler, “PAX AMERICANA: United States Dispute Resolution of International Telecommunications Contracts,” reprinted in *International Dispute Resolution, The Comparative Law Yearbook of International Business*, Special Issue, 2010, available upon request.

A final comment. There is a Time for Peace and a Time for War (Ecclesiastes 3:8 I). It is thus with heavy heart that we watch the crisis and pray that the settlement negotiations between Russia and Ukraine. bear fruit. All we can say, so to speak, “is give peace a chance.”

Please join us on April 11, 2022 at 10:00 a.m. (Eastern) for a detailed discussion of these topics (additional details available at https://westlegaledcenter.com/program_guide/course_detail.jsf?videoCourseId=100320343&ADMIN_PREVIEW=true). The webinar will be moderated by Walt Sapronov of our firm and James K. Wholey, Phillips Lytle LLP. Speakers include Alla Naglis, Sapronov & Naglis, LLC; Gisele Stephens-Chu, Stephens Chu Dispute Resolution; Daniel P. Brooks, Wiley Rein LLP; and Adam N. Stulberg, Sam Nunn Professor and School Chair, Sam Nunn School of International Affairs, Georgia Institute of Technology Professor.