



Negotiable Hostilities - Part IV

“REXIT” Roadmap

Managing Contract & Investment Disputes When Leaving Russia

**CONTINUING LEGAL EDUCATION
THOMSON REUTERS**

JUNE 22, 2022

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Negotiable Hostilities - Part IV

Introduction & Overview

- A “REXIT” Roadmap
- How to Leave Russia - Practical Steps
 - Sanctions Update & Diligence
 - Moving the Money
- Dispute Resolution
 - Contract / Investment Disputes
 - International Arbitration
- Round Table Discussion

Negotiable Hostilities - Part IV

Introduction & Overview

- REXIT Roadmap: Introduction & Overview
 - Managing the Exit
 - Avoiding Sanctions / Countersanctions Violations
 - Moving the Money (in and out of Russia)
 - Contract Disputes Inevitable
 - Anticipating Dispute Resolution
 - Identifying Bilateral Investment Treaties

Negotiable Hostilities - Part IV

Overview

- Sanctions Update
 - U.S. Executive Order (EO) 14071
 - Sanctions Relief
 - Exceptions / OFAC Licenses
 - Russian Countersanctions
 - Asset Nationalization (“External Administration”)
 - Licensing restrictions on Asset Transfer out of Russia

Negotiable Hostilities - Part IV

Overview

- REXIT: Dispute Resolution
 - Inevitable Upon Leaving Russia
 - Review Contracts
 - Term and Termination Rights
 - Force Majeure: Jurisdictional Interpretations
 - Choice of Law; Forum
 - Bilateral Investment Treaties
 - International Arbitration; Award Enforcement

THE DAY AFTER...

Alla Naglis
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Russia's Counter-Sanctions

Stage 1: Moving the Money:

First restrictions introduced in late February (Presidential Decree No. 79 of February 28, 2022) and were largely aimed at the protection of Russia's internal currency market.

- prohibitions on loans in foreign currency by residents to non-residents;
- residents: mandatory sale of 80% of foreign currency proceeds from cross-border operations (retroactive – from January 1);
- restrictions on transfers by residents of foreign currency to their accounts beyond Russia and receipt of foreign currency in such foreign accounts.

Transformations of Counter-Sanctions after February 28

Since February 28, the set of restrictions on money transfers and currency exchange has undergone a number of transformations and expansions.

Stage 2: Lesser pressure on Russian residents:

- ▶ mandatory sale requirement in respect of foreign currency proceeds from cross-border operations was first lowered to 50% (Presidential Decree No. 303 of May 23) with the extension of time for the sale from 3 to 120 days; and recently abolished by Presidential Decree No. 360 of June 9 (new limits to be set by the Governmental Commission on foreign investments);
- ▶ restrictions on transfers by residents of foreign currency to their accounts beyond Russia went up from US\$10,000 first to US\$50,000, and with effect from June 8 to US\$150,000 (same applies to foreign residents who are not “unfriendly.”)

Foreign Residents: Tightening up on “Unfriendly”

List of “unfriendly countries” now includes 21 individually named country and all of the EU countries (Ordinance of the Government No. 430-r of March 5, 2022)

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The rules with respect to operations by/ payments to non-residents from “unfriendly countries” have been tightening up:

- With effect from March 1, extension by Russian residents of credits and loans in rubles to “parties connected with” or “under control” of “unfriendly countries” is prohibited (unless cleared by the special Governmental Commission) (Presidential Decree No. 81);
- Deals with securities or real property with “parties connected with” or “under control” of “unfriendly countries” are restricted (Presidential Decree No. 81);

Restrictions on “unfriendly” (Contd.)

- Advance payments by residents to non-residents for services, works, IP results to limited to 30% (Presidential Decree No. 126 of March 18 and issued in its pursuance Central Bank’s Regulation of April 1);
- transfers by foreign residents from “unfriendly countries” of funds in foreign currency from their accounts in Russian banks to accounts abroad prohibited (with restriction to buy foreign currency in the Russian currency market (Ibid.);
- special way of performance of obligations under loan and credits and arising from financial instruments (if exceeding the equivalent of 10 million rubles per month) – Russian payors to pay in rubles to special “type S” accounts to be opened with Russian banks (Presidential Decree No. 95 dated March 5);

Restrictions on “unfriendly” (Contd.)

- “Ruble payments for gas” supplied to purchasers from “unfriendly countries” (Presidential Decree No. 172 of March 31) – foreign purchasers of Russia-supplied natural gas are supposed to be paying via special type (“K”) accounts (in foreign currency and in rubles) with Gazprombank;
- Payments for IP licenses: payments to “*unfriendly*” licensors are to be made in rubles by transfers to special (type “O”) ruble accounts to be opened with Russian banks meeting the criteria set by the Government (Russian rating agencies’ “A” rating) (Presidential Decree No. 322 of May 27).

Payments for IP Licenses: Novelties

NB: The Decree No. 322 has gone beyond all prior definitions of the categories of “restricted” counterparties, as “unfriendliness” is not limited to the geographical criteria

6 categories of restricted foreign rightholders:

- associated with “unfriendly states” (exemption for the rightholders continuing to fulfil their contractual obligations towards Russian licensees);
- publicly supporting the imposition and extension of foreign politic or economic sanctions against Russia;
- those who ceased the provision of their IP rights to Russian licensees in compliance with foreign sanctions or other non-economic reasons;

“Unfriendly” IP Rightholders (Contd.)

- those who stopped, suspended or limited the supply of goods or the provision of services in Russia after February 23, 2022;
- those that publicly expressed positions “aimed at the defamation of the engagement of Russian armed forces, and/or at actions of the Russian authorities outside of Russia, or spreading fake information about the Russian armed forces and/or actions of the Russian authorities outside of Russia;”
- Those who published in the media or the internet information in “indecent” form showing evident disrespect to the Russian public, Russian State, state symbols, the Russian Constitution or Russian state authorities.

New Rules on Payments to IP Rightholders: Issues

No clear mechanism for the determination who is “unfriendly” (licensee are supposed to figure it out based on information in open sources).

Exemptions:

- Certain categories of IP rights:
 - necessary for importation or manufacturing in Russia of pharmaceutical and medical products, industrial and agricultural products, food products;
 - IP rights for telecommunication services, including data transfer and Internet services;
 - For development or use in Russia of software of databases or for operation of data processing centers;
- personal (non-commercial) use of IP rights involving payments not exceeding RUR 100,000);
- Payments to rightholders continuing to fulfil their contractual obligations.

Restrictions on “Unfriendly” Counterparties

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A new “recommendation” to Russian borrowers came from the Ministry of Finance on May 30, 2022: in the published minutes of the meeting of the subcommittee of the Governmental Commission on Foreign Investments (No. 49 of May 18), Russian borrowers are “recommended” to repay debt owed to Russian lenders participating in international syndicates directly (rather than via facility agents).

Opening the Door to Defaults?

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□ Potential Disputes:

(1) Businesses level:

- Potential differences in interpretation of material adverse change; force-majeure; frustration of contract;
- Enforceability issues (if in Russia)

Potential Disputes (Contd.)

(2) Investor claims:

Russia has 80 bilateral investments treaties

➔ Supremacy of international law over domestic rules
Multilateral – EEU Investment treaty

(3) WTO level



NEGOTIABLE HOSTILITIES – PART IV

“REXIT”: POTENTIAL CLAIMS AND DISPUTE RESOLUTION

SAPRONOV & ASSOCIATES / THOMSON REUTERS WEBINAR 22 JUNE 2022

THE DISPUTES LANDSCAPE

- Sanctions and countermeasures
- Business withdrawals, termination of M&A deals
- Suspension of infrastructure projects (e.g., Nord Stream)
- Non-performance of existing contractual arrangements (e.g., energy supply agreements), supply chain disruptions
- Breaches of foreign-owned IP and patents
- Price-review disputes
- War damage to infrastructure
- Seizures of assets and nationalizations

CONTRACTUAL NON- PERFORMANCE / TERMINATION

Excusing non-performance (contractual or at law)

- Force majeure
- MAC clauses
- Change in law
- Frustration / impossibility / impracticability
- Hardship
- Change in circumstances

Termination rights (contractual or at law)

Alternative remedies (e.g., suspension)

LEGAL AND STRATEGIC CONSIDERATIONS

- Governing law and forum
 - International arbitration allows adjudication of dispute in a neutral seat, and global enforcement of resulting arbitral award
- Effect of contractual provisions
 - Scope – events covered?
 - Suspension or termination of obligations?
- Timing and notice requirements
- Sanctions compliance
- Legislative relief
- Countermeasures

INVESTMENT PROTECTION

- Protection of qualifying foreign investors and their qualifying investments in contracting state
- Substantive protections, e.g.:
 - Against expropriation without due compensation
 - Fair and equitable treatment
 - Full protection and security
 - National treatment / most favoured nation treatment
 - Free transfer of funds
 - Compensation for war losses (in some cases)
- Direct right of recourse against the State through international arbitration (ICSID, UNCITRAL, other)



- BITs in force with 62 States (NB BIT with USA not in force)



- BITs in force with 65 States

RECENT PUBLICIZED DISPUTES AND ARBITRATIONS

Commercial arbitrations against Gazprom

- Disputes over Gazprom's demands that its European counterparts under gas supply contracts pay for gas in rubles
- Ensuing suspension of supplies to Bulgaria and Poland
- Gasum (Finland) recently announced arbitration proceedings; Eni also threatening arbitration
- Dispute with Naftogaz (Ukraine) over the latter's demand to reroute gas volumes away from Russian-occupied territories in Eastern Ukraine

Investment treaty disputes

- Threat of international proceedings against Russia by Ukrainian oligarch (R. Akhmetov) over war damage to assets in Mariupol (eg Azovstal steelworks) and elsewhere
- Arbitrations threatened by Russian banks Sberbank and VEB against Ukraine relating to legislation allowing seizure of their Ukrainian assets

Negotiable Hostilities: Overview & Context of Sanctions on Russia

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FORCE MAJEURE IN RUSSIAN LAW

What is Force Majeure [in Russian legal system]

- ▶ Article 401 of Russian Civil Code:

“Unless otherwise is provided by law or contract, a person that failed to perform / properly perform its obligation while carrying out business (entrepreneurial) activity is liable unless it proves that proper performance became impossible as a result of force majeure that is extraordinary and non-preventable circumstances.”

- ▶ Extraordinary – “not usual” or rather: “exceptionally rare” (in the given conditions)
- ▶ Non-preventable - any person conducting similar business activity would not be able to avoid such event or its circumstances (some statutory exceptions apply)
- ▶ Some legal sources further elaborate that a Force Majeure Event (also “FME”) must be:
 - ▶ Unforeseeable – that is: at the time of signing contract the parties could not reasonably expect it to occur
 - ▶ Out of control of parties to contract
- ▶ Parties (or law) may provide that Force Majeure (or a specific FME) do not relieve from liability; any contractual carve-out should be carefully worded
- ▶ Parties may (and should) list in contract certain events as FMEs; still, the courts will inevitably test them against the Force Majeure statutory definition



► What is NOT Force Majeure Event

- Event which occurrence was dependent upon will or actions of party referring to it
- Events caused by “entrepreneurial risks” – the list is open-ended but examples provided by Article 401 of the Civil Code and other regulations include:
 - Breach of obligations by debtor’s contractors
 - Absence on the market of goods necessary for the performance of obligation
 - Lack of money on debtor’s side
 - Financial, economic crisis
 - Currency devaluation, exchange rate fluctuations

► Consequences of Force Majeure

- FME does not in itself terminate obligation – it would need be performed once FME ends
- Creditor which has “lost [economic] interest in performance” is entitled to terminate obligation – in which case debtor is not obliged to compensate losses
- Debtor must undertake all reasonable measures to minimize creditor's losses including timely notification on occurrence of FME; failure to do that entitles creditor to compensation of losses – but only those caused by such failure
- Russian Chamber of Trade and Industry:
 - Issue of Force Majeure certificates for international transactions and since March 2020 (COVID-19 impact) – for internal transactions as well
 - Guidances for verification of Force Majeure events issued by Board of the Russian Trade and Industry Chamber for international and Russian internal transactions provide examples of FMEs:
 - Natural calamities, fire, epidemics, strikes, military actions, terrorist attacks, diversions, transportation restrictions, *prohibitive measures of state, prohibition of trade transactions (including - with specific countries) as a result of adoption of international sanctions, prohibitive measures of state or municipal authorities*

Post 22-2-22 use of Force Majeure doctrine

- ▶ Massive sanctions. Numerous “chain” failures to perform international and Russian contracts.
- ▶ Inapplicability of Force Majeure doctrine to a number of cases of non-performance
- ▶ Actions and position of Russian Chamber of Trade and Commerce
- ▶ Competing draft of the Head of the Committee on State Institutions Development and Legislation of the Russian State Duma (Parliament)

Draft Law “supplementing” Force Majeure regulations

- ▶ Novelties will apply to:
 - ▶ Contractual relations formed after February 24, 2022; and
 - ▶ Obligations under contracts signed earlier which became due after February 23, 2022
- ▶ Wording of the current draft:
 - ▶ (1) If due to unfriendly actions of foreign states and international organizations connected with restrictive measures against Russian citizens and organizations (“Sanctions”) performance of obligation *objectively* becomes *irreversibly* impossible, such obligation terminates
 - ▶ (2) If due to Sanctions *proper* performance of obligation *objectively* becomes *temporarily* impossible, party that failed to perform is not liable for such failure. In such case, for the purposes of application of legislation on security measures ensuring performance of obligations, the debtor shall not be deemed to be in breach; however, parties may overrule this in contract

- ▶ (3) If due to Sanctions performance of a contractual obligation *objectively* became *temporarily* impossible and, as a result, the debtor has failed to perform / properly perform it, the creditor is entitled to terminate the respective agreement subject to notifying the debtor on such intention reasonably in advance. Unless otherwise is provided by law or contract, security means ensuring performance of terminated obligation continue to secure those obligations that survive termination or relate to it
- ▶ (4) Agreement entered into after February 23, 2022, may provide that *security payment* may consist of shares, bonds, other securities and fungible things
- ▶ (5) In the situation of Sanctions, the refund of a loan given to a Russian JSC by the foreign entity controlling it can be made through issue of additional privileged shares *of certain type*. Provided that their nominal value cannot exceed 25% of the charter capital of such JSC
- ▶ (6) *A minor caveat: persons that facilitated implementation of Sanctions are not entitled to anything listed above*

- ▶ Finally, draft law also provides some protective measures for the use of intellectual property:
 - ▶ In the situation of sanctions, unilateral termination or alteration of agreements relating to exercise or protection of IP rights is prohibited on any statutory or contractual ground except for a *material* breach of obligations by the opposite party
 - ▶ Term of agreements permitting a Russian person to use IP rights is deemed extended ~~until the Sun turns into a white dwarf~~ for the period of Sanctions – unless such person notifies that it is not interested in the extension.

Sanctions' induced change to Russian Criminal Code

- Current situation with criminal prosecutions relating to sanctions
- Draft law amending Article 201 "Abuse of Authority" of the Russian Criminal Code
- Once amended Article 201 *may* read as follows (the italicized text is taken from the draft):
 - (1) If a [physical] person performing in organization managing functions uses his authority in contradiction with lawful interests of such organization and for the purposes of gaining profits or benefits for himself or other persons or making harm to other persons and provided such action caused material harm to rights and lawful interests of citizens or organizations or interests of society or state protected by law – [penalty]
 - (2) *The same action committed for the purposes of fulfilment of decision of a foreign state, union of states or international organization on implementation of restrictive measures against Russian Federation, or if it has caused more serious consequences – [penalty]*
- For the purposes of this Article, "a person performing managing functions" will mean CEO, member of board or another collective managing body or otherwise authorized (permanently, temporarily or under a specific empowerment) to perform managing, administrative, commercial functions in the respective organization
- Expectations

Negotiable Hostilities - Part IV

Round Table Discussion

Thank you for Attending

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Walt Saprnov has represented corporate clients in telecom transactions, regulation and privacy for over thirty years. He has been named in Georgia Super Lawyers and in the International Who's Who of Telecom Lawyers. Together with his affiliates, Saprnov & Associates with offices in the U.S. and Eastern Europe, represent clients in complex commercial transactions, cross-border finance, and international dispute resolution.

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Mr. Wholey has broad experience at the intersection of federal government, national security and international business. His specific focus is on the legislative, policy and compliance issues involved in international investment, trade and business development. Through his international business and federal government relations practice, he assists clients with transnational compliance matters (Foreign Corrupt Practices Act, EAR, ITAR, export licensing and involvement with various sanctions regimes) and works frequently with the Administration and Capitol Hill. He spent more than a decade as a senior staff member for several U.S. senators, including three years as chief of staff to then-Senate Leader Bob Dole (R-KS), for whom he also handled trade and telecommunications issues.



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Alla Naglis is a co-founding partner of the Eastern European arm of Sapronov Group. She has over 20 years of advising on a daily basis major U.S., European and Russian companies on virtually all aspects of media and entertainment industry, telecommunications, e-commerce and IT, technology and know-how protection; and data privacy and security issues. The scope of her expertise ranges from counselling and contractual matters to regulatory advice and representation of clients in courts and arbitration. In data privacy area, her experience includes counseling on internal compliance policies and audits for major international players, as well as compliance checks of local vendors or partners. Ms. Naglis has been consistently ranked as one of the leading Russian TMT lawyers.

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Gisele's experience spans many industry sectors and jurisdictions, including very significant disputes in Russia and Ukraine.

Gisèle is recognized by Who's Who Legal: Arbitration 2022 as "a meticulous, knowledgeable and very able counsel" and "a brilliant advocate".

Yuri Lebedev

Yuri Lebedev, Russian Attorney and Advisor to our Moscow Office, concentrates his practice on a Russian commercial real estate and construction. He has over 20 years' experience in Russian real estate transactions, including title matters, commercial leasing, land rights, zoning, mortgage documentation, shared construction, various forms of foreign investments, project finance, suretyship, bank guarantees and other financial instrument drafting and negotiation. He has been advising various types of clients including some biggest US, European and Russian corporations, intergovernmental organizations and wealthy individuals.

Yuri has held positions of Counsel for Baker & McKenzie – CIS, Limited, Moscow, an Associate for Linklaters, Moscow and London, an in-house legal counsel working on corporate matters and international mergers and acquisitions for S.P.I. Spirits (Cyprus). He also worked as a legal assistant to the Supreme Soviet (Parliament) of the Russian Federation, Committee on Local Administration.



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