

## Supply agreements during the war in Ukraine

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Introduction of martial law as a result of full-scale invasion of Ukraine by the Russian Federation has caused significant adjustments in the procedure of concluding and executing supply agreements. Along with general issues that remain relevant during wartime, peculiarities of legal regulation of supplies during wartime should be considered as well.

### 1. Counterparty screening

Counterparty audit has always been an important aspect of the establishment of a contractual relationship. In terms of legal analysis, this primarily involves verifying the counterparty's legal capacity and its representatives' authority.

The counterparty's legal capacity is usually verified on the basis of documents proving its proper registration and the absence of restrictions that could affect the conclusion and fulfilment of the supply agreement. In this case, the basic documents for verification are the counterparty's registration documents (extract from the state register, extract from the commercial or court register, depending on the jurisdiction in which the counterparty is registered) and its constituent documents (articles of association, agreement, etc.).

The authorisation of the counterparty's representatives is verified against the information contained in the registration and incorporation documents. In addition, it is necessary to check separate documents confirming the authorisation of each representative individually. The incorporation documents enable the identification of the counterparty's authorised person entered in the registration data (e.g., the director of the company who, according to the incorporation documents, is authorised to represent it). The incorporation documents establish the scope of authority granted to the counterparty's representative, the procedure for granting such authority, as well as restrictions and conditions for the exercising thereof (e.g., the director of the counterparty is authorised to enter into contracts of up to EUR 1 million without the consent of the participants/shareholders, except for transactions involving the sale of real estate and securities).

The documents proving the authority of the representatives individually bind the

powers defined in the incorporation documents to a specific person (e.g., a decision of the participants/shareholders appointing a director, an order appointing a director, a decision granting certain powers for which there are corporate restrictions, a power of attorney). It is also necessary to establish the identity of the representative (e.g. on the basis of their passport).

It is important to note that a supply agreement is usually a complex document, with additional documents (specifications, invoices, agreements on amendments and addenda to the supply agreement) being signed in the course of its execution. The counterparty's representative should be authorised to sign not only the specific agreement, but also other documents related to its fulfilment. It is also important to ensure that such documents are signed by authorised persons (in practice it is often the case, for example, that a director signs a contract and a sales manager signs an invoice or specification). More often than not, such mistakes are made when entering into standard arrangements under general supply agreements or on the basis of standard proformas. In such cases, agreements may actually be concluded by duly authorised managers.

Particular attention should be paid to the communication means when concluding supply agreements remotely and drawing up documents when executing them. Each communication channel (email address, fax number, etc.) must be clearly associated with an authorised representative of the counterparty in order to confirm their authority. The contract should stipulate that it is the counterparty's responsibility to ensure that such a communication channel is only used by authorised persons.

## 2. Sanctions risks

In the current circumstances, a distinctive feature of counterparty screening is the need to establish whether the counterparty belongs to the sanctioned individuals/entities. The global sanctions policy, presently being pursued in connection with the Russian Federation's invasion of Ukraine, affects many companies and individuals. Careless dealings with a sanctioned counterparty not only present a risk to contract performance, but also pose significant reputational risks.

Based on the registration details obtained from the counterparty, it is possible to check it using international and national sanctions and blacklists or databases, for example:

- EU sanctions decisions
- The UK sanctions list
- Sanctions List Search application by Office of Foreign Assets Control (USA)
- Consolidated Canadian Autonomous Sanctions List
- State Secretariat for Economic Affairs SECO (search for subjects of sanctions, Switzerland)

In addition to the lists of sanctioned individuals, legislative changes made during the war also restrict interactions with Russian citizens and/or related persons. If there is a suspicion that a counterparty might be subject to sanctions or is attempting to avoid sanctions, additional scrutiny of the counterparty should be undertaken. This may be done using the guidelines set forth in the Financial Crimes Enforcement Network (FinCEN) document. According to these guidelines, caution

should be exercised if:

- there is information about a change in the counterparty's ownership structure in the previous 3-4 months;
- the structure of the chain of ownership to the ultimate beneficial owner is opaque and confusing;
- open data on the counterparty indicates its long-term co-operation with sanctioned companies and individuals;
- the counterparty's bank accounts were opened shortly before the contract was concluded;
- the counterparty insists that the agreement be concluded with newly established companies that have not been publicly associated with the counterparty in the past.

### **3. Procedure for concluding supply agreements**

It is extremely important to clearly understand the procedure for concluding a supply agreement. Given the current circumstances, most supply agreements are concluded remotely, by exchange of documents or by using electronic signatures. In addition, some contracts are concluded according to international proformas or on relevant electronic platforms, as well as through the exchange of standardised messages containing the essential terms of supply agreements.

In order for such agreements to be deemed concluded, attention must be paid to whether the manner and form of conclusion is compliant with the law governing the agreement or with the agreed rules for concluding agreements.

For instance, if an agreement is governed by Ukrainian law, it must contain the essential terms as defined in the Commercial Code and the Civil Code of Ukraine. If the parties conclude an agreement in the standard form of GAFTA contracts, they must agree on the terms in accordance with the chosen standard GAFTA contract.

When concluding a supply agreement, the algorithm for its conclusion, which the parties have fixed in the agreement, must be strictly adhered to. If the contract provides for the exchange of scanned copies followed by the mailing of signed paper originals, this procedure must be observed.

A common mistake is amending a supply agreement after it has been entered into without following the procedure specified in the agreement. If an agreement does not stipulate a separate procedure for making changes, all changes thereto must be made according to the same procedure that is prescribed for the signing of the agreement itself.

### **4. Adherence to document flow rules**

It is also important to comply with the flow of documents set out in the agreement. This is especially important in the case of notices that have contractual consequences, such as termination, postponement, return of goods or rejection of the entire obligation.

Examples of such notices include complaints regarding improper quality of the goods (the agreement may set a deadline and content requirements for notices

regarding improper quality), notices of force majeure (the agreement may set a deadline for such notices), etc.

## 5. Legislative restrictions

The fulfilment of supply agreements during martial law in Ukraine is affected by restrictions and conditions that may apply to payment procedures, customs clearance of goods, import and export regimes. It must be taken into account that such restrictions are subject to dynamic changes depending on the current situation.

Since the outbreak of the full-scale war in Ukraine, a significant number of restrictions and conditions have been imposed on supply procedures and performance of obligations under supply agreements with foreign counterparties.

For example, with regard to currency settlements, the National Bank of Ukraine adopted Resolution No. 18 of 24 February 2022 "On the Operation of the Banking System during the Introduction of Martial Law". According to this resolution, in particular, the following was introduced:

- prohibition to carry out settlements on obligations in foreign currency (except for settlements, inter alia, for goods of critical import; on performance of obligations secured by state guarantees or on account of credit funds received from the state or an international financial institution; refund of an advance received from a non-resident after 23 February 2022 and in some other cases);
- amended settlement term for export and import transactions (the term was set at 120 calendar days and applies to transactions made after 5 April 2022);
- suspension of debit transactions on accounts of companies resident in the Russian Federation and the Republic of Belarus, as well as companies whose ultimate beneficiaries are residents of the Russian Federation and the Republic of Belarus.

From 24 February 2022 to 16 June 2022, this Resolution was amended 23 times. The situation is also similar with other regulations directly or indirectly governing transactions related to the execution of supply agreements.

Given the above conditions, it is necessary to thoroughly analyse the current information about the legal regulation of such operations when entering into each supply agreement. It is also advisable to stipulate in agreements the consequences for the parties in case of any changes in such regulation.

## 6. Force majeure

Obviously, the war in Ukraine and its consequences constitute a major cause of non-performance or improper performance, in particular of supply agreements, which is not likely to change in the near future. This may be directly attributable to the hostilities, but also to the dynamic of legislative developments. Therefore, force majeure clause as an instrument of crisis management in contractual relations assumes a critical importance for supply agreements.

Click for further information about circumstances which may be considered as force majeure in Ukraine

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The main prerequisite for the effective implementation of force majeure clauses is their clear and correct wording in supply agreements.

It must be remembered that force majeure circumstances are not predetermined. The party to the contract invoking the force majeure must prove its existence.

In Ukraine, the existence of force majeure is confirmed by the Ukrainian Chamber of Commerce and Industry by the relevant certificate.