Saint Petersburg State University

***Shilnikov Dmitry Vladimirovich***

**Final Qualifying Work**

**“Transformative (potestative) rights, and the legal consequences**

**following a party's unilateral decision to refuse to perform its obligation**

**in an international commercial contract due to restrictive measures**

**imposed on the other party to the contract”.**

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| --- |
| Scientific Adviser:  Professor of the Department of  Civil Law,  Doctor of Legal Sciences (Habilitation)  Rudokvas Anton Dmitrievich |

|  |
| --- |
| Reviewer:  Director of Legal Department  PAO “Bank Uralsib”  Khuzziatov Artur Arslanovich |

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**Introduction**

The scope of this work is to determine the legal difference between the unilateral alteration or termination of obligation in a contract (which is not legitimate by default) and an exercise of a potestative right to change, or terminate a contract as a legitimate remedy against a breach of contract committed by the counterparty. As long as the exercise of a transformative right does create legal consequences for both parties to a contract, there is also a practical side of this research, where I attempt to investigate the conditions precedent and motives, which are essential for the lawful exercise of a potestative right.

The first chapter is dedicated to the doctrinal view on transformative rights, and the legal mechanic of their implementation. To make sure that it is clear in every case whether you meet an unlawful refusal of your counterparty to perform a contract, or the lawful *and* reasonable action, at the end of the first chapter there is a legal test elaborated to reveal all the distinctive features of the transformative rights, as opposed to renunciation. This can be a useful tool for any practitioner who can nowadays unforeseeably face an unjust termination of a contract by his/her counterparty, for example, due to international sanctions in force against Russia. Knowing the atom and cell of the transformative right will also help the practicing lawyer to build his/her own strong argumentation in order to urge the other party to withhold from possibly wrong actions, and bypass contract execution issues, as well as expensive international arbitration.

The second chapter contains the legal analysis of some cases (deriving from real international commercial practice) when a party to a contract has unilaterally changed or terminated it, as a result of a national public law’s sanctions imposed on the other party. I shall try to use the mentioned above legal test to determine whether such actions were lawful from the point of view of contract law / civil law in every case, and if they were not, why exactly. The conclusions deriving from this analysis will form the content of the third chapter.

The third chapter of this work reviews the legal consequences arising out of unilateral change or modification of an international commercial contract introduced on the basis of the sanctions, with the prognosis on the future of international trade relations, and the enumeration of possible remedies to avoid unjust termination of deals. In conclusion, I would like to dwell on the pending question if a national public law infringing international commerce leaves a space for any lawful actions in the international private law.

**Chapter 1. Doctrinal view.**

**Legal nature of the transformative rights.**

**Structure of the right.**

**Classification of the transformative rights.**

There is a cornerstone principle of contract law, which sets the strict prohibition of a contract’s unilateral modification: once the parties of a contract agreed to its terms and conditions, then, from the time of the contract’s conclusion it is not possible for any party to unilaterally modify the terms of the contract. This principle applies worldwide in the countries of civil law, as well as in the countries of common law. The prohibition of unilateral modification (or termination) of obligation is either codified in a national law (e.g., part 1 of Article 310 of the Civil Code of Russian Federation), or has for ages been present in case law (e.g., *year 1821*, English law judicial precedent case, cf. Shepherd v. Kain, 5 B & Ald 240 (106 ER 1180)[[1]](#footnote-1).

As for international commercial law, the principle of prohibition of unilateral amendments or termination is enacted in the Vienna Convention on Contracts for the International Sale of Goods 1980, Article 29, directly stating that only all the parties of the contract may together agree to modify or terminate it.

However, there are special legal norms that do allow a party of the contract to change the clauses unilaterally, or to perform unilaterally its contractual obligations in a way different from that agreed. Of course, these specific legal arrangements represent the exception from the principle of prohibition. They are deemed admittable by law to such an extent, which is necessary to protect the infringed rights of a party, to secure the performance of the *mutual* obligations of parties in a contract, or to prevent the other party of a contract from causing damage to the other in the future.

Therefore, a party’s discretion for unilateral modification or termination of a contract is firstly limited, by contract law itself (with what exactly the parties agreed to be acceptable limits of discretion). Then in turn, such contractual discretion ends where the civil law provisions direct it to end (e.g., Part 2 of Article 310, Article 327.1 and Article 450.1 of the Civil Code of the Russian Federation). Last but not least, a national public law’s directives also set the limits for unilateral contracting actions-at-own-will.

Hence, it is clearly seen that the law leaves small space for just one party’s amendment or termination right, in order to keep secure and stable the civil circulation, and also, to protect the public order. It is well known, that unreasonable unilateral refusal to perform a contractual obligation constitutes a fundamental contract breach (repudiatory breach)[[2]](#footnote-2), and therefore, it allows the aggrieved party to use, for example, such a universal remedy as quitting the contract and claiming damages. On the other hand, the right to unilaterally modify or terminate the contract is deemed justified, once being enforced so that law finds it “quite acceptable”. The scope of this legal research is to investigate the structure, and to define whether an exercise of a potestative, or *transformative* right, how it is called in the doctrine, is deemed:

**a) lawful;**

**b) reasonable**;

**c) expedient**;

**d) bona fide**;

**e) proportional**

in nowadays international commercial legal practice. The second practical question to answer in this work may be formulated as follows: which are the essential, integral features to distinguish an exercise of a potestative right from manifestly unjust (i.e., unlawful and unreasonable) non-performance or termination of a contract.

Let us now briefly review two examples (taken from the real-life international commercial practice) of enforcement of the right for unilateral alteration of the contractual obligations. Both examples refer to the denial of performance of an obligation in an agreed contract. But one refusal was temporarily, while the other appears permanent, with the right-holder’s intentional will neither to negotiate, nor to withdraw.

**Example 1**

The parties A and B 12 years ago concluded a long-term framework contract (also known as an “umbrella” contract in western countries) for international manufacture and supply of automotive spare parts shipped on periodical basis against the buyer’s orders. The contract is valid nowadays. Party A was the buyer, which chose Party B as the winning supplier in the result of a private, but open for everyone competitive bidding process, with a *non-negotiable* supply contract. Among other provisions in the contract, there is a clause aiming at preserving the supplier’s competitiveness for a long-term period. This clause allows Party A to unilaterally decide to suspend ordering of Party B’s products and consequently, to cease paying to Party B in the event of an inbound third party’s advantageous offer (Most-Favorable Supplier Clause). Party B agreed with this condition and signed the contract. The clause runs as follows: “*Competitiveness. The contract products must be in line with comparable products of the Supplier’s competitors in technology, quality and price. If the Buyer receives from a third party a serious comparable offer concerning a contract product at a lower price and/or at more favorable conditions (price, quality, technology as aggregate) than agreed in the purchase orders, the Buyer shall notify the supplier of this in writing. The Supplier will be entitled within 7 days from receipt of this notification to make a written statement containing a bid matching the competitive offer. Otherwise, in 14 days the Buyer can withdraw from the legally binding purchase orders, taking into account the agreed production periods*”. In this scenario, Party A may undertake withdrawal from obligation if Party B does not succeed in keeping its product in line with market average in the course of time and development of technology. There have been four times since the conclusion of the contract that Party A applied to this provision and put its purchase orders on hold, but not a single time Party B finally persisted in keeping the earlier agreed price, thus receiving zero purchase orders. We can notice from the above-mentioned example that every time Party A exercised its right to suspend the contract in the whole, then Party B had nothing to do but suffer the legal and commercial consequences of the decision, though temporarily. Party B had not any duty to perform as answer to Party A’s enforcement of the special unilateral alteration right. The contract keeps on bringing profit for both the parties nowadays. None of the parties consider the past contract suspense incidents illegitimate and unlawful. The reason is probably this provision is a part of the contract law, which both the parties agreed to 12 years ago.

**Example 2**

Party C, a legal entity under Russian law, in year 2000 concluded a long-term supply contract for certain scope of works with Party D, a legal entity incorporated in accordance with law of Germany. The subject of the contract is manufacture and supply of unique, sophisticated long-lead equipment bearing know-how technological art. The product’s lead time per each order counts up to 5 years. The contract presumes Party C’s necessary series of advance payments in the long intervene while Party D executes a purchase order.

In the recent time, the Party C’s order had been ready at 80%, with the correspondent number of advance payments already received by Party D by the time that the latter became familiar that Party C was ‘personally’ sanctioned by the executive authorities of a third country, not Germany. The essence of the sanctions imposed on Party C meant that Party D could possibly become sanctioned too, and moreover, could bear serious reputational and financial risks if it continued to work with the Client. It is worth noticing the parties could not take into consideration any possibility of sanctions and the possible mutual remedies (e.g., force-majeure clause with agreed mutual termination of the contract in case of sanctions) when they concluded the contract in 2000.

Having weighed the significance of risks, Party D notified Party C on some public law’s act of a third country on extraterritorial prohibition to supply this exactly equipment to Russia and, on the decision taken to immediately stop manufacturing of the ordered equipment, effective from the date of notification. Party D also notified that it did not consider the contract terminated, but “just suspended” because of the third country’s restrictive legislation, but anyway, no equipment would be dispatched.

Party C in reply notified Party D on its decision to terminate the international contract on scope of works, and ordered immediate return of the advance payments received by Party D by that time. The answer of Party D was that it did not will to return the advance payments received, because the third country’s sanctions do not allow any banking transactions to the accounts of Party C listed in the contract”. At the end of the day, Party C received neither equipment nor money. Currently, litigation is pending. *End of Examples 1 & 2*

**Definition and Structure of the Transformative Right.**

From the above facts, it appears that the legal nature of the powers of a party for unilateral modification or termination of a contract is different from both the traditional right and law, thus forming quite a special legal mechanic. A generic (subjective) legal right of a party in a contract always targets any material or intangible asset, that is, something that finally may be rendered in monetary value[[3]](#footnote-3). Moreover, a generic legal right (right in rem & right in personam) always requires the other party to perform duties and bear responsibilities towards the exercised right, thus forming the dual structure of an obligation in a contract. Two mutual obligations of the parties in a contract build up a synallagmatic link, depending on each other. For example, an opening consideration of one party is to provide some goods, while the closing consideration of the other party is to pay for the received goods *and* accept them.

With the unilateral transformative rights, the situation is quite different. Transformative, or potestative, right does not target any asset, it always targets the existing legal relationship between the parties, and nothing more[[4]](#footnote-4). It is possible to state it *modifies the initial subjective right of another party in an obligation*. Once exercised, the transformative right does not create any correspondent duty and/or responsibility of the other party to the contract, instead, it transforms the content of the current legal relationship (of an obligation) *in favor* of the transformative right-holder. Anything that the other party may do facing the enforcement of potestative right is to accept it, to suffer it and to adopt oneself to the new legal conditions risen from the enforcement[[5]](#footnote-5).

With this in mind, **the legal definition of transformative right may have the following wording**: “*Transformative, or potestative, right is an individually applicable legal power (in Russian: «правомочие») to transform the concrete legal relationship by means of unilateral declaration. This action aims at creation, alteration, or termination of a legal relationship between the legitimate right holder and another person*”[[6]](#footnote-6). Hence, the main features of a transformative right, differentiating it from generic (subjective) legal right, are:

1) absence of correspondent duty of the other party;

2) thus, impossibility to violate a potestative right;

3) enforceability on legal relationships only, not assets;

4) act at own will, no consent needed;

5) lawfulness to exercise only for specific person, and under specific circumstances, e.g., under conditions precedent.[[7]](#footnote-7)

Coming back to Examples 1 and 2, it is true that in both cases we come across the enforcement of some kind of a transformative right by the party in the contract. The source of appearance of the potestative right in Example 1 is **contract law**, “*the Parties agreed that …*” (deriving from another, cornerstone legal principle of freedom of contract). The nature of the potestative right in Example 2 is determined by **national public law** (and probably, the newest quasi-legal phenomenon known as “world order based on rules”). But the structure, i.e., legal mechanic of the rights in these two cases is the same: the emergence of the justified grounds for the exercise of the potestative right led to comprehensive amendment of the synallagmatic obligations at will of just one party.

The consequences of enforcement of these two kinds of transformative rights, however, differ dramatically from one case to another. In order to investigate why it happened so, we need to reveal what are the integral features of the right to refuse to perform a contractual obligation. Also, in order to find a possible remedy for practical purposes, we need to scrutinize even deeper the nature and the teleology of potestative rights, thus turning to the doctrine of law.

As a matter of fact, the category of transformative, or potestative rights was born in late XIX century in the German legal doctrine[[8]](#footnote-8). The term “das Sekundarrecht” itself first appeared as invention of an outstanding German scholar in the field of law, Dr. Emil Seckel in 1903. However, he preferred to use the other term “die Gestaltungsrechte” instead, which can be translated as “the legal powers to transform”. Dr. Seckel underlined that the power to transform displays itself in a unilateral act of expression of will, emerging either from the parties’ consent, or from a public authority’s act. Investigating the nature of the transformative rights further, he proposed following three criteria for their classification.

**Classification by Dr. Seckel.**

The first criterion is based on the *final result of implementation* of transformative right. It gives rise to **generative, alterative and terminating** transformative rights[[9]](#footnote-9).

The second criterion as proposed by Dr. Seckel is based on the *subject, whose legal sphere was changed* by implementation of transformative right. It gives rise to **transformative right of seizure** and **transformative right of intervention**.

The third criterion of Dr. Seckel is based on *relativeness to other legal rights and duties*. It gives way to classification of transformative rights on **autonomous** (existing irrespective of any other legal relationships) and **depending** (on some other existing legal relationships). This category is especially interesting in the light of the issue that we dwell on. As an illustration of autonomous right, Dr. Seckel names the right of pre-empt (priority purchase). On the contrary, transformative right to terminate contract is purely dependent right, because its exercise may only take place against the other party’s legal performance (non-performance) in the existing obligation[[10]](#footnote-10).

A great soviet jurist, Mark Arkadievich Gurvich contributed to further determination of the integral, distinguishing features of transformative right with the following definition[[11]](#footnote-11): “*A right for unilateral exercise of legal powers differs from the general, abstractive legal capacity to have rights and perform duties, which every person has. The ground for the exercise of this right is only in certain legal facts, prescribed by law, … consequently, only certain person may exercise it under specific circumstances*”. Following the thread, a bright representative of the today’s Russian legal doctrine, Andrey Olegovich Rybalov observed[[12]](#footnote-12) that transformative right always *acts “against”* *somebody*: either against this certain person, or against public at large *in legitimate favor of the right-holder.*

**Classification by Prof. V.A. Belov**

Vadim Anatolyevich Belov, professor of civil law of the Moscow State University, several years ago elaborated and presented to the public the most detailed classification of transformative rights[[13]](#footnote-13). The clear logical system, elaborated by him, is based first of all, on Russian civil legislation, of course. Although neither the Civil Code of the Russian Federation, nor the codified foreign sources of civil law (e.g., German Civil Code (Bürgerliches Gesetzbuch, or BGB) contain direct references to the transformative rights, it is worth mentioning that plenty of articles in civil law codifications (to be described in details further) refer to the cases prescribing a party’s discretion to use a transformative right in specific circumstances. This is typical for any country of pandect system of law: there is no any separate chapter in a Code dedicated to the transformative rights; neither any mentioning of this term – “potestative” or “transformative” rights – can be found in it, but the statutory is saturated with the basic norms which directly determine legal mechanic typical for unilateral acts of own will changing the legal landscape of the other party in certain civil law legal relationship[[14]](#footnote-14). It appears necessary indeed, to briefly quote here the doctrinal work of Prof. Belov, in order to finally determine full scope of the legal signs of the transformative rights, and to distinguish them from, and compare them with the signs of manifestly unjust denial to perform an obligation in a contract.

According to prof. Belov, transformative (potestative) rights are naturally divisible by the essence of the ***causa***, that is, ***the final result that the right-holder aims at***[[15]](#footnote-15). The target may be either positive, or negative[[16]](#footnote-16). And, in tune with the above-mentioned features of transformative rights, this target is of purely legal nature, not of material asset. Thus, Prof. Belov points at **positive transformative rights**, which **generate** a new legal relationship from the current, or even **create** primary legal relationship ***and*** at the same time provide positive legal result out of their usage (compare it with generative transformative rights theory of Dr. Emil Seckel). The positive transformative rights are divided in two subcategories: **1) binding transformative rights**, and **2) preferential transformative rights**. By contrast with them, the other category of **negative transformative rights** **alters or terminates** the current legal relationship (compare it with the alterative and terminating transformative rights theory of Dr. Emil Seckel[[17]](#footnote-17)) ***and*** simultaneously cancels existing relationship or prevents any new to occur, therefore providing negative legal effect when exercised. The negative transformative rights have, according to Prof. Belov, three subcategories: **alterative** (changing), **deprivation** (cancelling), and **preventive** (maintaining prohibition of unwanted legal actions of the other party in future)[[18]](#footnote-18).

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| --- | --- | --- | --- | --- |
| **Transformative (Potestative) Rights**  Causa (Result-Oriented) Overview | | | | |
| **1. Positive rights**  (Create new legal relationship) | | **2.** **Negative rights**  (Alter or cancel existing legal relationship) | | |
| **a) binding** | **b) preferential** | **a) alterative** | **b) deprivation** | **c) preventive** |

The system of Prof. Belov seems very logical, and quite convenient to use and highlight the legal target of a certain transformative right: for example, the right for unilateral refusal to perform an obligation, or the right for unilateral modification of the agreed conditions in obligation (as provided by force of part 2 of Article 310 of the Civil Code of the Russian Federation), clearly falls in the category of *deprivation or alterative negative transformative rights*, while the right to postpone or refuse a so-called ‘close-down’, or counter-consideration in obligation (provided by Article 328 of the Civil Code of the Russian Federation) aims at preventing the omission of other party’s duty, therefore being a *negative preventive transformative right*. The transformative right to terminate an existing obligation by offsetting a counter-claim, giving to a creditor in an obligation a discretion of choice of consideration, thus creates *a positive binding transformative right*.

With this, the Civil Code of the Russian Federation, though never directly naming transformative rights, appears to be full of them, allows to use them in the certain legal circumstances, for the certain parties, and with the certain targets:

**1.A.** **Positive Binding Transformative Rights**.

These are the rights, which the Civil Code of the Russian Federation determines as the lawful ground for a party of a contract to have a unilateral *freedom to choose* an object of the future consideration, in order for the other party to perform and close down an obligation[[19]](#footnote-19).

Article 429.1 contains a transformative right for a buyer party to order a wide range of undefined goods, or scope of works, within one framework industry-specific contract – just by filling in another order in a series determining the certain needed name of the goods and its price.

Part 2 of Article 509 provides to a buyer a positive binding transformative rights to use at its choice the multiple delivery addresses (with various consignees) where the supplier is obliged to deliver the goods in accord with *shipping orders* furnished within one contract.

Part 4 of Article 753 allows a contractor to unilaterally sign the statement of work completion in the sphere of building and construction in the case when a customer refuses to sign it without proper and due reasoning. The result of the exercise of the positive binding transformative right in the latter case shows the creation of new legal aftermaths for unwilling customer – as if the statement of works completion were signed by both the parties thus binding the obligor (the customer) to pay off duly executed contract.

The causa of the binding transformative rights might be expressed as “***getting the best value out of existing legal relationship for mutual civil benefit of a party to a contract***”.

**1.B. Positive Preferential Transformative Rights.**

These are the special transformative rights, the execution of which places the right-holder on a higher, preferential legal position (and welfare position as well) among the other participants of the civil circulation. These transformative rights are so rudely outside of the principle of equal opportunities of parties in the civil circulation that their list is therefore *exhaustive*, allowing the right-holders strictly only that what is clearly defined by Russian law, with no freedom of inventing their own provisions[[20]](#footnote-20).

Part 3 of Article 250 of the Civil Code of the Russian Federation gives preferential transformative rights for shareholders of common ownership in real estate to block any sale *of share in the right of ownership* by anybody of them to external buyer without consensus, i.e., full consent of all other shareholders. The preferential right however, does not give its holders the power to legally void an unconcerted bargain. Rather it gives them the power to demand, by means of litigation, a transfer of full scope of the rights and duties of the unapproved external buyer in such contract to a shareholder interested in obtaining more shares in the common real estate.

Another wide-known preferential transformative right is the right of a pledgee to receive satisfaction of the pledge-secured claim preferentially before other creditors of the pledgor, conditions precedent (part 2 Article 334 of the Civil Code of the Russian Federation). This preferential transformative right leaves the claims of other creditors pending until full satisfaction of a pledgee.

Article 621 of the Civil Code of the Russian Federation gives, in its part 1, a transformative preferential right for a faultless existing lease-holder to conclude agreement for a new term first in the queue among the other willing potential tenants. Thus, the exercise of this certain preferential transformative right limits the principle of counterparty choice of own will and discretion for public at large.

The causa for the above-mentioned preferential transformative rights might be described like “***creating new legal relationship out of existing with the same parties, at the expense of public at large***”. Neither of two types of positive transformative rights presumes any kind of civil damage to be the main and the final goal of their enforcement.

**2.A. Negative Alterative Transformative Rights.**

Prof. Belov points out that the distinctive sign of this type of transformative right reveals in the power to unilaterally modify an existing legal relationship *without* its transformation into new[[21]](#footnote-21). The causa for the exercise of given-by-law alterative transformative right is always ***an attempt to redress a generic (subjective) right violated by the other party, simultaneously saving the existing relationship***. This attempt in turn, aims at restoration of the benefit, which the right-holder expected from the execution of a contract but did not receive, generally because of the other party’s actions.

In order to illustrate the unilateral alteration of obligation, it is worth paying attention to the transformative right given by force of Part 2 of Article 811 of the Civil Code of the Russian Federation, also known as “*Forced Acceleration of Debt*”: “if a loan agreement provides for the return of the loan in parts (by installment), then with the breach by the borrower of the period, fixed for the return of the regular part of the loan, the lender shall have the right to *demand the anticipatory return of the entire remaining sum* of the loan together with the interest for using the loan which are due at the time of its repayment”. The enforcement of the alterative transformative right does not lead to termination or rescission of a contract; however, it completely changes the legal discretion of the obligors forcing them to speed up performance of their obligation without taking into consideration their actual will or capacity to do so.

Another example of acceleration of debt forced by transformative right can be met in provisions of part 1 of Article 351 of the Civil Code of the Russian Federation: “The pledgee has the right of claiming early performance of the pledge-secured obligation, conditions precedent: a) the subject of pledge that remained with the pledgor has ceased to be in his possession otherwise than according to the terms of the pledge contract; b) the subject of pledge has perished or been lost due to circumstances beyond the control of the pledgee”.

A very important for this work example dedicated to unilateral change of an existing obligation is the alterative transformative rights given by the Civil Code of the Russian Federation to a buyer in legal relationship of sale-purchase agreements regulated by part 1 of Article 475 “The Consequences of the Transfer of Goods of Improper Quality”, and by parts 1 & 2 of Article 503 “Rights of Purchaser in the Event of Sale to Him of Goods of Improper Quality”. Once a buyer receives the goods of improper quality, which the sale-purchase agreement did not cover, the duty of the buyer to pay the *agreed* price of the proper goods turns into transformative alterative right to unilaterally demand from the seller the performance of any of three actions: either a *proportionate reduction* in the purchase price; or *gratuitous removal of defects* in goods within the reasonable period of time; or *compensation of his expenses* incurred in the removal of the defects of goods.

Article 503 of the Civil Code of the Russian Federation, which specifies the regulation of retail sales only, adds the fourth unilateral deed available for the buyer: *replacement of poor-quality goods with goods of proper quality*. The seller then has nothing to do but to suffer the legal circumstances incurred by the buyer’s unilateral decision, and to perform the action chosen by the other party unless he wants an invitation to the court of justice. Refusal of the seller to perform an action chosen and imposed unilaterally by the buyer shall be deemed by law as manifestly unjust refusal to perform contract (repudiatory breach).

This is the greatest, to my mind, and the most important feature of the transformative rights in the sphere of commercial contract execution: **any of negative transformative rights, which a party to a contract chooses as remedy, does not amount to repudiatory breach as long as such a right is explicitly defined and directed by civil law, with its limits of application**. In turn, the contract law’s acceptable discretion (bracketing the transformative rights) is always nationally determined and limited by the principle of freedom of contract. In every country these limits are slightly different, but are always tied to another, cornerstone principle of good faith: while some legislations, for example, Belgium Civil Code declare purely potestative conditions (which the parties agreed in the contract) as void[[22]](#footnote-22), the other legislations (e.g., the Civil Code of Russian Federation in its Article 327.1) leave certain space for realization of purely potestative rights fully depending on the volition of just one party.

Vice versa, any of cardinal unilateral action of a party to a contract, falling beyond the boundaries *unambiguously* prescribed in law regulating the contractual civil relationships (that is, civil law) is always deemed a repudiatory breach but not a legitimate exercise of transformative right, thus leading the aggrieved party to lawfully claim the damages inclusive both direct damages real loss and loss of profit (or whatever stipulated by this certain contract law) from the breaching party.

Exercise of a negative transformative right by an aggrieved party in a contract, being a unilateral action, of course may also be challenged in a court. The difference is that civil law does not directly and unconditionally protect the party, which made a repudiatory breach of contract and therefore suffers legal consequences arisen out of exercise of transformative rights as legitimate counter-action by the aggrieved party in the contract[[23]](#footnote-23).

In order to support above conclusion, one can apply to the Civil Code of the Russian Federation, as it ties the realization by a party of alterative transformative right to the following must-have conditions precedent (Parts 1 & 2 of Article 450.1): the specific transformative right must be included either in the signed contract itself, or must be present in the Civil Code, or in *other laws* and legal acts (**condition 1**); the contact, i.e., the parties’ essential obligations, is deemed amended only after written notification of the party who uses its transformative right to the other party of the contract (**condition 2**). The latter condition was adopted from the German Civil Law (BGB), where any legitimate unilateral action of a party in a contract always requires a notification in written, which is crucial for transformative rights of such powers[[24]](#footnote-24).

**To summarize**: The exercise of **alterative transformative right** by the *innocent* party forces the other party in a contract to suffer the negative legal consequences.

Exercise of alterative transformative right is a counter-measure to the undue behavior of the other party in a contract, for the most of circumstances directly stipulated by law[[25]](#footnote-25). This is the causa.

Absence of this causa makes the executed alterative transformative right to be nothing but the repudiatory breach of a contract.

The formal side of realization of alterative transformative right is a written notification sent to a party ‘suffering’ from the unilateral expression of will[[26]](#footnote-26).

The existing legal relationship between the parties shall remain in force after the alterative right has been executed, but remains modified by one of the parties in the limits allowed either by law or by contract itself[[27]](#footnote-27).

**2.B. Negative Deprivation Transformative Rights.**

The causa for the exercise of this specific potestative right appears to be quite obvious: a party of a contract declares a unilateral action of this kind, when it would like to quit the agreement, the performance of which has gone too wrong and too far from what the party expected[[28]](#footnote-28) when it entered the contract. For the other party in a contract this usually means a forced cancellation of the signed agreement, loss of profit and, probably, loss of reputation, plus the damages claimed.

Coming back to the cause-and-effect relation, we need to review here the legal terminology common for all legal systems: unilateral termination of a contract is a legitimate counter-measure to *fundamental breach* of a contract by the other party. The Civil Code of Russian Federation formulates it so (Article 450): “As an essential breach shall be recognized such breach of the contract by one of the parties, which entails for the other party *the losses, to a considerable extent depriving it of what it could have counted upon when concluding the contract*”. At the international level of private law, the notion of fundamental breach is agreed in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG), Article 25: “*A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result*”. Consequently, *only* the cause of fundamental breach of a contract wakes up a negative deprivation transformative right of the other party to unilaterally terminate the contract. There are multiple Articles in the Civil Code of the Russian Federation, which directly prescribe the ability of remedying a bad legal situation by usage of deprivation transformative right, for example, part 2 of Article 475 and part 4 of Article 486 regulating sale-purchase agreements; Article 523 regulating supply agreements; part 2 of Article 719 regulating contracts for scope of works; part 4 of Article 1237 regulating license agreements in the sphere of intellectual property etc. At an international level of private law, one may refer to Articles 49, 64 & 72 of the Convention on the Contracts for International Sale of Goods, CISG 1980.

The significant effect of enforcement of deprivation potestative right appears in full unilateral termination of existing legal relationship[[29]](#footnote-29). The Civil Code of the Russian Federation dictates that the party, which legitimately holds and is willing to exercise this right, must follow the global bona-fide principle of stability of the civil circulation. As well, it must follow another, crucial principle of reasonability of such legal action (part 4 of Article 450.1). But the general statute of Russian law regulating the right of unilateral termination of contract is represented in parts 1 & 2 of this Article: “*The Repudiation of a Contract (the Refusal to Perform a Contract) or the Refusal to Exercise the Rights under a Contract*

*1. The right to unilaterally repudiate a contract (the refusal to perform a contract) (Article 310) granted by this Code, other laws, other legal acts or contract may be exercised by the authorized party by way of notifying the other party about the repudiation of the contract (the refusal to perform the contract). The contract shall be terminated from the time of receiving the given notice, unless otherwise provided for by this Code, other laws, other legal acts or the contract.*

*2. In the event of unilateral renunciation of a contract (the refusal to perform it) in full or in part, if such renunciation is allowed, the contract shall be deemed terminated or amended*”.

As it can be seen from the statutory, for an exercise of unilateral right to terminate a contract there are the following needed, in all cases:

1) legal ground (causa);

2) written notification;

3) adherence to bona fide *and* reasonable actions.

A breach of any of these three conditions gives way to challenge of the legitimate actions, or even to deprivation of legal protection guaranteed by the state in case of deliberately unconscientious deed (part 2 of Article 10 of the Civil Code of the Russian Federation).

The border between the transformative right to terminate a contract and the manifestly unjust repudiatory breach of a contract thus lies between the presence or absence of a legal ground for such a unilateral termination (set forth by civil law). Last but not least, the target of such termination (from the moral agent’s point of a view) defines it as the legitimate remedy when it is applied in order to save the bad situation acting in good faith. Otherwise, it is defined as repudiatory breach when it is used in order to display a self-will and to punish a counter-party, or to gain benefit out of bad-faith conduct (unconscientiousness). However, the latter may only be proven and recorded as legal fact only in the court.

The existing legal relationship between the parties shall **not** remain in force after the deprivation right has been exercised[[30]](#footnote-30), however, the former parties to a contract are still eligible to claim damages, but the synallagmatic pair of initial mutual obligations no longer exists (parts 2 & 5 of Article 453 of the Civil Code of the Russian Federation).

**2.C. Negative Preventive Transformative Rights.**

From the point of view of contract law, these are the unilateral rights which either directly stipulate, for a time being, the loss of power of the existing legal relationship[[31]](#footnote-31), at the same time preserving it (type 1), or this may be also such rights, which cancel a certain legal action already taken place in the past (type 2). Prof. Belov points at the causa for exercise of preventive transformative right of the 1st type as the will of a party in an obligation to remedy a breach of performance which may occur in the future, as based on the current actions of the other party.

To illustrate the 2nd type of the preventive transformative rights, which Prof. Belov calls a *unilateral right to cancel*, he draws one’s attention to the right to cancel offer - even irrevocable, - next from moment the term of its validity expires (Article 436 of the Civil Code of Russian Federation). The same expiration term evokes the right to cancel ever irrevocable letter of credit (item 1 of part 1 of Article 873 of the Civil Code of Russian Federation), payable cheque (part 3 of Article 877 of the Civil Code of Russian Federation).

But, within the scope of the current work the most interesting type of the preventive transformative right is the 1st one. It is known to be present in every codified civil statutory law in the counties of Europe and Northern America[[32]](#footnote-32). As for Russia, its Civil Code formulates this unique right as follows: “*Article 397.* Discharge of the Obligation at the Debtor's Expense*. In case of the non-discharge by the debtor of the obligation to manufacture and transfer the thing into the ownership … of the creditor, or to perform for him a certain job, the creditor shall have the right … to entrust to the third parties with the performance of the obligation … and to claim that the debtor reimburses the necessary expenses and the other losses he has borne*”.

In practice, this transformative right is rarely exercised in Russia, but quite intensively used by the western commercial entities, especially in the international contracts. The legal mechanic of this preventive transformative right is outstanding, the causa aims at saving just-in-time receipt of the goods or services or works at any price, as allowed by law – by placing this “any price” on the account of the ‘guilty’ debtor. This scenario quite commonly happens in the course of execution of certain long-term supply contracts when one of the shipments (in a series of many) is not duly performed by the debtor. In such case the creditor, for whom the importance of shipping in time prevails over the importance of claiming damages to supplier for being late, then exercises his transformative right to cancel this shipment, to refuse accepting it, to order the very same amount of the same (or like) ready-made goods from a third party, to receive and pay them off, and then to place all the expenditures on the existing liable counter-party. This preventive transformative right here appears to be really outstanding because the right to suspend the performance of the current obligation, and to partially cancel it, is *preceded* by the unique transformative right to assess the future risk and unilaterally decide that the risk probability is currently so high that it must be eliminated in order to avoid the worst circumstances, should it happen. It is worth now remembering another piece of legal terminology which gives way for this unilateral judgement and consequent action changing the legal relationship, and namely, part 2 of Article 328 of the Civil Code of Russian Federation. The trigger for unilateral assessment of risky performance of a counter-party in an obligation is legally initiated by the right-holder in the following manner: “*In the event of failure of the liable party to provide performance of an obligation or* ***where there are the circumstances clearly showing that such performance will not be provided in due time …***”. This double-layer transformative right by its nature requires the mandatory notification of a suffering party on its enforcement. This case just underlines that in majority of enforcement situations, any unilateral decision on the change of obligation, not supported with the preliminary written notification, loses much of its power and might be contested.

The creditor’s unilateral impairing of the rights and duties of the debtor in the current obligation also presumes that the right-holder does not want to terminate it. The act of exercise of the right to temporarily modify the current legal relationship targets the future, not the past actions, and most important, it targets to prevent unwanted legal facts from coming true[[33]](#footnote-33).

**To summarize**: the exercise of preventive transformative right brings the other party in a contract to *temporarily* suffer the negative legal consequences. Exercise of preventive transformative right is not a counter-measure to the undue behavior of the other party in the recent past, rather it is a suppression of the future unduly behavior of a counter-party.

Any of three following conditions:

* absence of risk assessment measures (as due diligence evidence) *(1)*;
* absence of the recorded faults of the counter-party, which would inevitably lead to risk event *(2)*; and
* absence of notification on exercise of preventive measures *(3)*,

may change the preventive transformative right into a repudiatory breach of a contract. The existing legal relationship between the parties shall remain in force and unchanged, after the alterative right has been exercised, but modifications by one of the parties will impose one-time loss and damages on the other party.

**The Inseparable Features of the Transformative Rights to Change or Terminate a Legal Relationship.**

As we can see from the above structural research of the transformative rights, there are some new integral, essential features of these rights (which we can add to main five listed in the beginning) revealing themselves opposite to the signs of either the repudiatory breach of contract, or renunciation. This is really necessary, to highlight the border existing between these two legal phenomena: they do share plenty of common essential features, but the doctrine and the law name one phenomenon to be lawful, and the other illegitimate, thus implying dramatically different consequences to their exercise.

Taking the above into consideration, let me point out that the sixth integral feature of the transformative right (especially the transformative right of negative nature) is the assumed legitimacy to exercise it only **in reply** to some kind of unduly behaviour of the other party in an obligation. This underlines the ultimate strength and power of implication of such rights in general, their dangerousness to the civil circulation due to completely new legal circumstances arising out of the exercise of such rights. The parallel line from the real life illustrating the righteousness of those who act last, might be here taken from the Russian doctrine of a nuclear weapon deterrence (a document bearing full legal power for public authority’s deeds): any country of the world, which *first* uses it, is presumed to be *very incorrect* in any case[[34]](#footnote-34); while the country, which uses the same nuclear intervention in reply to the unlawful actions, is on the contrary, presumed to be righteous in taking the necessary and proportional remedy to defense itself [[35]](#footnote-35).

The situation with the legal ground to exercise any of the negative transformative rights is just the same. For example, either repudiatory breach, or total renunciation of contract performance by one of the parties invokes a legal ground for the other to counter-act with the legal remedy of the equal strength, like notifying on the unilateral termination of the supply contract by virtue of Article 523 of the Civil Code of the Russian Federation, as legal remedy to the trigger actions enumerated in parts 2 and 3 of this article. The transformative right of unilateral termination of supply contract hence has the same legal nature as the manifestly renunciation, i.e., refusal to perform the contract, but for one cornerstone thing: it has a legal ground for the exercise and therefore is lawful. Renunciation *for no reason* is not lawful, therefore it is not a right at all, but attempt of the assertion of administrative self-will over the party with equal rights.

In practice, one should be very careful in using any negative transformative rights at own will, - just because to avoid the unwanted consequences arising out of insufficient knowledge of the Civil Code of the Russian Federation, for example. As mentioned, the law in Russia greenlights the use of pure (unconcerted) transformative right in reply to fundamental breach of a supply contract introduced by the other party. Let us model the situation of the same conditions (contract breached illegitimately and many times by one party), but the nature of the contract is not supply but say, commercial lease of a building. If we imagine ourselves in the position of a landlord who faces the facts that the tenant has not paid for the last 3 months of the lease, and moreover, his actions indicate that he does want to continue such unlawful behaviour, do we have the transformative right to terminate the lease contract with the faulty tenant and deprive him of the building in his possession? The answer from the emotional and logical point would be ‘yes, let us do it immediately’, but from the point of a view of law an exercise of the transformative right to terminate the contract with the faulty tenant would not be legitimate: Article 619 of the Civil Code of Russia, unfortunately, does not give a landlord the right of unilateral termination of a contract, but only through civil litigation **unless** the parties clearly and explicitly agreed in the **signed** contract that the landlord is eligible to enforce unilateral termination of contract conditions precedent faulty actions of the tenant. In the case there is **no such provision** in the contract, then the landlord, in accordance with Russian law, has nothing to do but to protect his infringed subjective right in the court of justice, by filing termination claim against the infringer. Vice versa, his unilateral decision to quit the lease contract with the faulty tenant would have no legal circumstances at all (in force by item 12 of the Plenum of the Supreme Court of Russia #54 dated back 22.11.2016), though naturally it looks solidly reasonable. This all taken in consideration, leads us to another integral, inseparable feature of the transformative rights.

The seventh unique feature of the transformative right, especially the rights of negative nature (alterative, deprivation, preventive), covers the notion of unilateral binding of the suffering party. This binding nature implied on the ‘suffering’ party is presumed by contract law (opposite to the self-will of unlawful renunciation), i.e., by the provisions what the parties agreed earlier in the course of the pre-contractual negotiations, and reflected in the signed contract.

Alternatively (and this is most important), the unilateral binding of the faulty party is prescribed by the civil law itself in its specific provisions dedicated to this or that model of contractual relationship. The exercise of the transformative right therefore must have the solid legal ground as the allowed behavioristic pattern lest it should be treated as illegitimate measure and there are not any legal circumstances it can raise.

The presumption is that the ‘suffering’ party knows itself the reason of the exercise of the transformative right, and knows that reason is within the limits allowed by law. That is, the suffering party knows why the certain transformative right has been implemented against it.[[36]](#footnote-36) The source of any specific transformative right is directly prescribed in the statutes, or the contract itself. Once it is not, the ‘suffering’ party knows it is illegitimate and easily challengeable. As a result, it may not be taken into consideration as the true, lawful legal remedy and may not create legal aftermaths. This observation in its turn creates another very specific feature of the transformative rights, and namely, bona-fide or moral agency of their enforcement.

Thus, the eighth inseparable feature of the transformative rights, which strongly differs them from the repudiatory breaches or renunciation, should rather be settled in the field of moral agency than legal norms. But, to my mind, this is the most crucial feature for drawing the legally correct line between abuse of right by contract termination, and the legitimacy of the transformative right. The right-holder, which prepares to exercise its transformative right, and change or terminate the existing obligation unilaterally, must be a moral agent for the himself and other party to, in the full meaning of this term and always act *conscientiously*. Transformative right only exists there, where its causa (subjective motivation to use it, and the estimated final result) is always bona-fide[[37]](#footnote-37).

Unilateral change of a contact’s conditions, allowed by law, covers only those legal scenarios, which aim at the result of saving the current legal relation from the risk of litigation, and aim at forcing the counter-party to duly perform the obligation and bring to the creditor the result exactly as he expected when entered the obligation. The causa of legitimate unilateral modification of obligation is to get the expected final result whatever. This is good-faith causa in all cases: it is either the modification to bring down the contract price to the market average (as illustrated by Example 1), or it is a postponement of the closing consideration until the other party duly performs its contractual obligation, as for example, is stipulated by force of Article 328 of the Civil Code of Russia.

Unilateral termination of a contract in the exhaustive list of scenarios, which are only allowed by law, aims at preventing the bigger losses in the unwanted and unexpected bad course of a contract’s execution by the other party of the contract. Otherwise, keeping the contract valid would bring even more loss and damage to both the parties, due to the illegitimate behaviour of one of them. The causa for unilateral termination is *rather* to save the right-holder assets than to punish the faulty party. For civil legal relationship this certainly is the good-faith causa, at least because all civil legal relationships do not cover the legal notions of fault and punishment taken together.

Any bad-faith causa hence, targets to undermine the primary global principle of private law, and namely, the principle of equality of the parties. In other words, the bad-faith causa appears there, where the exercise of the unilateral change or termination of obligation attempts *to turn* the civil legal relationship (where the parties are equal) into the relationship of social or politically motivated *dependence,* ***and*** gain illegitimate benefit out of such transformation[[38]](#footnote-38). It is enough to interpolate this trigger action to any legal dispute in the contract performance area, and we can take notice of bad-faith causa always escorting the repudiatory breaches and renunciations, as the law treats them (e.g., in part 5 of Article 426 of the Civil Code of Russian Federation). On the contrary, the good-faith causa in any exercise of the negative transformative rights is *presumed* by law (part 4 of Article 450.1 of the Civil Code of Russian Federation).

A German legal scholar Tim Lassen made an interesting conclusion in respect with vertical or horizontal legal relationship, stating that the exercise of the transformative right is only possible in the civil legal relationship, where the parties are equal in their legal capacity, and there is no such relation as social dependence or subordination between the right-holder, who exercises a transformative right, and the one from the other side, who has to accept the change of his legal status with none of his own volition taken into consideration[[39]](#footnote-39). It is possible to continue this statement of reason made by Mr. Lassen and propose that the transformative right to change or terminate the obligation no longer exists where the civil legal relationship ends, and there starts a power-subordination legal relationship instead.

Let us presume that a weaker party in the imperative power-subordination legal relationship (which is legally bound and suppressed by the other, so-called authoritative party, to use a transformative right in its current civil legal relationships with the goal to terminate the latter only for the sake of termination), makes a repudiatory breach of contract law just because any transformative right cannot, by its nature, bear such the features as:

- the defect of volition (acting against own will expressed at the conclusion of the contract), and

- bad-faith causa (reason to terminate the obligation with the main goal to impose damage to the party, which will suffer from the abrupt and unreasonable termination).

However, the question whether a provision of a national public law, demanding that a national company should mandatorily terminate (under the fear of criminal prosecution) its international commercial contract, concluded with a foreign party, which did not provide any legal grounds stipulated by international private law to terminate the contract, still remains unanswered.

Coming back to the transformative rights, with the above-mentioned conclusions elaborated by the doctrine-makers, it is possible now to portray all the features of the transformative right in the scrupulous legal test.

Made for practical purposes, this test intends to answer the question whether the unilateral steps (which you, as a party to a contract, are going to take) shall by treated by law as renunciation (which is not lawful), or as an exercise of the transformative right (which is lawful):

**Legal Test**

**for the Eligibility of Exercise of the Right**

**to Change or Terminate the Contract**

**by Unilateral Declaration**

1. **Common features of the unilateral modification or termination of obligation typical for the transformative right, as well as for the unlawful renunciation:**
2. *Act at own will: no consent of the other party requested;*
3. *It targets the sphere of legal interest of the other party;*
4. *It is always directed against somebody’s subjective rights;*
5. *It results in changes (either lawful, or void) to the current legal relationship, but not to the assets of the parties;*
6. *It does not create a correspondent duty of the other party;*
7. *It cannot be violated;*
8. *It refers to civil legal relationship only, not to any relationship of social or administrative dependence (a state-enforced directive).*
9. **Distinctive Legal Aspects Test.**

|  |  |  |
| --- | --- | --- |
| **Criteria of assessment:**  **Is this action ...?** | **In the form of**  **the exercise of**  **a transformative right** | **In the form of repudiatory breach, or in the form of renunciation**  **(Unlawful refusal to perform an obligation)** |
| **Lawful**  (It has a solid legal ground in civil/contract law) | **Yes**.  Allowed by the explicit statement of law (you must know exactly **what, where and when**).  Allowed also by the mutual consent of the parties within the limits set by law (limits of the freedom of contract). | **No.**  Prohibited by civil law.  Even being a result of mutual consent of the parties in a contract, it is considered **nullity** by force of law [[40]](#footnote-40). |
| **Reasonable**  (It aims at the redress of infringed right, or otherwise aims at legitimate improvement of the position of the right-holder) | **Yes**.  But **only** in the limits set by civil law for the certain exhaustive list of legal scenarios. Generally, it is applicable as a **reasonable remedy against unduly legal conduct of the other party in an obligation, especially as a legitimate reaction to a fundamental breach.**  (*As an essential violation shall be recognized such violation of the contract by one of the parties, which entails for the other party the losses, to a considerable extent depriving it of what it could have counted upon when concluding the contract*). | **No.**  It is considered unreasonable in **any** case. |
| **Expedient**  (It is useful, under the conditions set by civil law/contract law, for the innocent party to pursue a practical economic goal) | **Yes**.  But **only** under condition precedent: the certain transformative right is exercised in the certain legal circumstances[[41]](#footnote-41) (described by law *and* allowed by law) *and* it is exercised by this certain party of a contract, which met this exactly legal circumstances (by the so-called innocent, or aggrieved party). | **No.**  The distinguishing signs of repudiatory breach exist therefore in the sphere of moral agency, i.e., ethical motivation. Please refer to “Bona fide” section of the test. |
| **Bona Fide**  (It is intended to gain proper fulfillment of obligation, or lossless and legitimate quitting the obligation) | **Yes**. Good-faith causa\*.  Whichever type of transformative right is exercised, its causa is **always** bona-fide:   * Positive causa aims at forcing the other party to finish performance of the obligation and saving the legal relationship. * Negative causa aims at legitimate terminating the obligation because of fundamental breach of the other party, *and* in order to prevent own loss to occur in the future due to that.   \* To be legitimately judged by the party exercising a transformative right. | **No.** Bad-faith causa\*.  Among the main unconscientious causae of exercising repudiatory breach there are the following:   * Attempt of evading legal consequences of own illegitimate actions in an obligation; * Attempt of illegitimate enrichment at the expense of the other party in an obligation; * Self-will to unjustly transform a civil relationship into illegitimate vertical subordination, in order to punish the other party   \* To be decided by a court of justice only, which presumes litigation. |
| **Proportional**  (It is exercised in order to balance the stability of the civil legal circulation) | **Yes**.  The limits of proportionality are directed by the correspondent statute[[42]](#footnote-42) of the civil law only, for every specific case (*e.g., legitimate refusal to perform supply contract from the party of the buyer*). | **No.**  Presumed improper and unproportioned in all cases. |
| **Requires Notification** | **Yes**.  Though not always directly prescribed by law. But logically, this is what must-be-done for establishing a fact of legitimate exercise of any transformative right. | Does not matter |
| **Contestable**  (It can be challenged in the court of justice, or in the international arbitration) | **Yes**. | Yes. |
| **Creates Legal Consequences** | **Yes**.  Always. | **No.**  (Para 12 of Plenum No 54) [[43]](#footnote-43). The obligation is deemed remaining in force despite a party’s will. |

Answering ‘Yes’ to **all** the listed criteria will surely confirm your legitimate actions as the exercise of a transformative right, that is, a legally meaningful change by means of legitimate unilateral declaration. Answering ‘No’ to **at least** one criterion will prove your action to be a repudiatory breach, or in other words, unlawful refusal to perform the contract.

In the conclusion of the current chapter, it is worth reiterating that the transformative right to unilaterally change or modify a civil commercial contract appears only in the certain legal scenarios directly prescribed by law (1), then, the exercise of the transformative right must always pursue good-faith goal (2); then, the parties to a contract are eligible to use transformative right only in reply to undue contractual behaviour (conduct) of their counter-parties (3); in most cases, a pre-requisite for duly exercise of the transformative right is a legal notification forwarded to the other party (4).

Let us now proceed to the analysis of some cases from the actual commercial practice through the prism of the elaborated legal test, and find out which of international commercial contracts were terminated lawfully, and which were not.

**Chapter 2. Practical Review.**

**The western unilateral restrictions (sanctions)**

**as the legal source of new-growth transformative rights.**

**Conflict between international private law and national public law.**

**Legal impact on the performance of obligations.**

Before attempting to apply the legal test elaborated in the previous chapter on some contract non-performance cases taken from the real life (as per March, 2023), we definitely need to consider the legal mechanic standing behind the word “sanctions”, so well-known nowadays.

This is the main and the only legal excuse that the western parties to the commercial contracts use to justify their unilateral, irrevocable decision to abruptly terminate performance of their international commercial contracts with plenty of the Russian (and some other nations too) counter-parties. “*The law gives me the solid legitimate ground for the exercise of unilateral right and change the course of the performance of our contract. From now on, I am free not to pay the goods that I received from you, and bear no legal consequences out of that; however, please be assured this unilateral declaration of our lawful right to renunciate obligation does not make our contract terminated, just suspended*”, as the legal councillors of many western companies use to say at the beginning of any trouble-shooter negotiations in the present times. How lawful such unilateral declaration is for the civil regulation, we shall try to determine it here. It is worth noticing that the innocent parties, suffering from such allegations, in most cases had concluded the disputed contracts prior to the date when the “sanctions” came into effect, and the unilateral notifications of quitting the contractual obligations started spreading from their counter-parties.

So, what are these sanctions, from the point of a view of the civil law? In order to highlight the essence, please let me turn to the legislation of the European Union, probably being nowadays the most outrageous example.

There are four pieces of the European Union’s public law that aim at bringing as much damage to the international contract law relationships with the targeted Russian counter-parties, as it is possible:

1) Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, in its current consolidated version of February 8, 2023 [[44]](#footnote-44);

2) Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, in its current consolidated version of February 2, 2023 [[45]](#footnote-45);

3) Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, in its consolidated version of October 6, 2022 [[46]](#footnote-46);

4) Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the illegal recognition, occupation or annexation by the Russian Federation of certain non-government controlled areas of Ukraine[[47]](#footnote-47).

These four regulations have been constantly updated since they came into effect, with the new announced targets of “legal punishment”. As these regulations are mandatory for execution for all the individuals as well as for the public and private entities of the EU, their targets are updated in the consolidated lists of prohibitions, having the same official power as the legal acts listed above: the EU Commission Guidance Note on the Implementation of Certain Provisions of Regulation (EU) No 833/2014 [[48]](#footnote-48) and the EU Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014 [[49]](#footnote-49).

Of course, all of them negatively impact nothing but the international commercial contracts and investment agreements with the Russian Federation, and specifically, the performance of synallagmatic obligations under such contracts and agreements. As per March of 2023, the following Russia-related civil institutions have become the *outlawed* targets:

1. In respect with the **economy sectors** of international contracts [[50]](#footnote-50):
   1. 18 industry sectors inclusive banking, investment, aircrafts, hi-end advanced technology, dual use technologies; oil, gas etc.
   2. Any financial transactions; any auditing legal services; maritime and port services; visa services and travel permits.
2. In respect with **entities and individuals** (the parties to the contracts) [[51]](#footnote-51):
   1. 1386 individuals inclusive the President of Russian Federation;
   2. 171 state and private entities.
3. In respect with **subject** of international commercial contracts [[52]](#footnote-52):
   1. Means of production (crucial manufacturing machinery);
   2. Spare parts for **any** advanced technology’s western machinery;
   3. Consumer goods that Russia currently is not able to manufacture.
4. In respect with **nature** of international commercial contracts:
   1. Export of ‘sensitive technologies’ from the EU to Russia [[53]](#footnote-53);
   2. Import of crucial raw materials from Russia to the EU [[54]](#footnote-54).
5. In respect with opportunity **to redress of the violated right** in the EU courts:
   1. No opportunity for the targeted Russians (per item 2) [[55]](#footnote-55);
   2. No opportunity for EU entities with part of Russian ownership [[56]](#footnote-56).

Now that the targets of the EU sanctions toward Russia are listed, let us consider which exactly legal actions EU law prescribes to impose on the targeted economy sectors, individuals and entities:

1. Freezing the funds and economic resources of persons and entities[[57]](#footnote-57).
2. Prohibition to conclude and perform the contracts in the future[[58]](#footnote-58);
3. Explicit statement of law to a) terminate performance of all the valid contracts subject to the entities and persons listed above; b) obtain approval/rejection of authority for the performance of all the valid contracts subject to the industry sectors listed above [[59]](#footnote-59);
4. Explicit statement of law to stop any payment pending against the valid current contracts, after certain date [[60]](#footnote-60);
5. The EU courts of justice must ignore any claims from the targeted entities and individuals for redress of their infringed rights [[61]](#footnote-61).
6. The International Commercial Arbitration awards for the plaintiffs from the targeted individuals and entities must not be enforced [[62]](#footnote-62).
7. The above authority’s orders do not represent any right given to a party’s discretion whether or not to unilaterally terminate the contracts and payments, but do comprise the duty (mandatory) to terminate.
8. Enforcement of the orders is the duty of the individuals and entities involved in the civil circulation with the targets. The control of the enforcement is on the authority’s side.

This work reviews the legal plight of those international commercial contracts that had been concluded prior to sanctions, and are being badly influenced by them nowadays. From this point, the following pieces of EU public law appear the most interesting for the analysis, in their official interpretation by the EU Commission as “Rules that Must Be Followed”. The reason is clear: they are invented to completely destroy a synallagmatic pair of obligations, typical for any civil law contract, by forcing a ‘preferential’ party to the contract (non-Russian, of course) to use the unilateral declaration of non-performance of obligations (new-growth authoritative transformative right) without any consequences at all:

On August 25, 2017, the EU Commission issued an official interpretation of the provisions of Regulation (EU) No 833/2014 on how exactly implement financial ban on the Russian contracts. Among other directions, the full prohibition of payments in accordance with the international contracts took place: ***“… the processing of payments linked to the sale, supply, transfer or export of prohibited items, is prohibited***” (the EU Commission Guidance Note dated back 25.8.2017, Question and Answer No 1)[[63]](#footnote-63). As the “prohibited items” are met in the listed 18 sectors of industry, this official interpretation of law had made it impossible for the Russian businesses to receive international payments under, literally, thousands of working long-term contracts.

Further, on August 26, 2022 the EU Commission issued another interpretation of sanction law, now concerning the closing obligation in a civil synallagma.

This rule clarified the fate of the import contracts, their subjects being the goods originating in Russia, which had been received, the title is deemed to transfer to EU buyers, but the goods remain unpaid: “***Question****: When an article of Council Regulation 833/2014 provides for an exception allowing for the performance of a prior contract until a specific date, does it allow for the payment on the basis of such contract by the EU operation to its Russian counterpart after this date?* ***Answer****: It is the Commission’s view that an exception allowing for the performance of prior contracts until a specified date would not allow for a payment to be made to the Russian counterpart beyond that date.* ***Since the payment is part of the performance of the contract,******EU operators are prohibited from making such a payment thereafter, even if the goods originating in Russia have already been received.***” (EU Commission Consolidated FAQs on the implementation of Regulations 833/2014 and 269/2014 updated March 21, 2023, Section A. Horizontal Legal Relationships, Subsection 3. Execution of Contacts and Claims, Question and Answer No 10) [[64]](#footnote-64).

Last but not least, the redress of the infringed right of the aggrieved party was completely rejected by force of Articles 11 in both the EU Regulations 833/2014 and 269/2014, which run as follows (taken from 833/2014 as the more detailed version) [[65]](#footnote-65):

“*1.* ***No claims in connection with any contract*** *or transaction the performance of* ***which has been affected****, directly or indirectly, in whole or in part,* ***by the measures imposed*** *under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form,* ***shall be satisfied****,* ***if*** *they are* ***made by****: ….****any******other Russian person, entity or body;*** *…any person, entity or body acting through or on behalf of one of the [Russian] persons, entities or bodies …*

*2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim.*

*3. This Article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1* ***to judicial review*** *of the legality of the non-performance of contractual obligations in accordance with this Regulation.”*

It is worth mentioning there soon followed, from the EU Commission, the official interpretation of this Articles 11 in both the Regulations, bearing the force of practical rule that must be adhered to in the commercial daily routine. Let me quote them too:

“*Article 11 relates to claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly by Regulation (EU) 833/2014, made by a counterpart referred to in Article 11(1) under (a), (b) or (c), who would have suffered an alleged damage due to the compliance with the Regulation by an EU operator -* ***for example if a contract with this counterpart cannot be performed or was terminated due to the restrictive measures****. This Article seeks* ***to protect EU operators from having to satisfy damage claims of any types in connection with such contract or transaction****, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form. … According to Article 5”L” of the Regulation, it is prohibited to provide direct or indirect support, including financing and financial assistance … to any legal person, entity or body established in Russia with over 50 % public ownership or public control. It must therefore be understood that* ***payments prohibited by Article 5”L” must be withheld while the sanctions are in force. Interests claimed by Russian contractual counterparts for alleged damages originating by this prohibition qualify as a form of compensation. Hence, they cannot be satisfied*** *if brought forward by the persons indicated in Article 11(1)(a)-(c)*” (EU Commission Consolidated FAQs on the implementation of Regulations 833/2014 and 269/2014 updated March 21, 2023, Section A. Horizontal Legal Relationships, Subsection 3. Execution of Contacts and Claims, Questions and Answers No 6-9) [[66]](#footnote-66).

Of course, the enforcement of the rules listed above resulted in massive unilateral termination of valid international commercial contracts by their EU signatories, leaving the Russian counter-parties with either money paid in advance of a supply, to which no satisfaction will ever be provided, or vice versa, with the goods supplied to the EU and received by the European counter-parties, which remain unpaid until now. All these massive unilateral terminations of the private international contracts were simply based on the discrimination by a national origin, as prescribed by the EU authorities. This, by the way, can be considered the gravest possible violation of a piece of the ultimate law of the European Union, the principle of prohibition of any discrimination, expressed in Article 14 of the European Convention on Human Rights. However, the question if a Sanction Regulation of the European Commission has superior legal power over the European Convention of Human Rights is not the subject of the current review.

*To resume*, it is prohibited by law for any EU entity or individual who must execute his part of mutual obligations in an effective (active and valid) international contract with the targeted Russian individuals and entities:

* **To perform a contract’s opening obligation (e.g., to make and supply);**
* **To perform closing obligation of paying off the received goods;**
* **To satisfy claims arising out of non-performance of the contracts.**

The latter prohibition also refers to the courts and partially, to the international arbitration institutions: arbitrators of course, may find the concrete sanctions illegitimate and award the aggrieved party compensation for damage and losses, but the award will probably never be exercised in the EU for the very reasons.

The pair of synallagmatic obligations in any international commercial contract consist of two mutually satisfying obligations, which make the contract legally completed, once performed from both the parties. If any of the parties does not perform its obligation in a synallagma, the innocent party suffering from renunciation has the transformative right either to terminate the contract and claim damages, or to demand specific performance of the contract in the court. This is typical for every country, no matter whether the contractual relationships are regulated with civil law or common law[[67]](#footnote-67). However, the new-growth transformative right given by a national public law prescribes a party to a civil contract to terminate its part of contract’s synallagma in the abrupt, unjust, unlawful (from the point of civil law) manner leaving the innocent party with no redress of its infringed right or to simply claim damages. Thus, it is possible to state that the complete crash of cornerstone civil law (and contract law) principles in this case is stipulated by public law, pursuing purely unconscientious causa to bring maximum damage to a party of the international civil legal relationship, based on nationality discrimination. The causa itself has never been concealed by the lawmakers of the European Union: ***“… Sanctions are designed to maximise the negative impact for the Russian economy while limiting as much as possible the consequences for EU businesses and citizens***.” (EU Commission Consolidated FAQs on the implementation of Regulations 833/2014 and 269/2014 updated March 21, 2023. Section A. Horizontal Legal Relationships. Subsection 1. General Questions, Question and Answer No 6) [[68]](#footnote-68).

**New-growth type of the negative transformative right**

As the declared aim of sanction laws by their legal mechanic appears to publicly punish a chosen party in an obligation, and to impair its contractual rights without taking the consequences into consideration, I would expand the family of negative transformative rights as proposed by Prof. Belov and call this new-growth type a “*negative discriminative transformative right*”. This type does not serve as remedy against any undue performance of obligation by the faulty party. Neither it aims at re-balancing the civil rights of the parties after a fundamental breach in performance of an obligation by a party in an obligation. In other words, this discriminative transformative right is the legal power given by a state authority to a participant of civil circulation in order to declare unilateral renunciation of its own obligation, to transform this obligation from a valid to imperfect (having no judicial review admissibility), and finally, to bear no legal costs at all for doing so.

A unilateral declaration of such kind ruins the obligation itself for a discriminated party of the obligation, allowing the right-holder to benefit: a) from own bad-faith behavior (no matter whether he wished it or not), and, b) at the account of the innocent party.

The other crucial point consists in the fact that discriminative transformative right has nothing in common with civil law / contract law in principle because it is spawned from a national public law. Therefore, by its nature the discriminative transformative right stands rather to a duty than to a right: an entity in EU may, of course, refrain from ruining its own international commercial contract by rejecting to exercise the discriminative transformative right (required by state) on its legal relationship with the Russian counter-party. Many have been acting exactly this way.

But such non-execution of discriminative transformative right is treated by the controlling authorities in the EU and US nowadays as administrative offence[[69]](#footnote-69), and moreover, surefootedly goes in the future into the area of criminal offences[[70]](#footnote-70). Thus, no room is actually left for discretion of a party to civil obligation to avoid this.

Let us now move on to the real-life examples of unilateral termination of international commercial contracts and investigate the legal mechanics standing behind.

**Example 3. Public source[[71]](#footnote-71). PJSC United Aircraft Corporation v. EASA**

**The Plot**: In December of 2021, prior to implementation of the latest waves of anti-Russian sanctions, PJSC United Aircraft Corporation (*in Russian: ПАО Объединённая авиастроительная корпорация*) duly represented by its branch company PJSC ODK-Aviadvigatel, in the course of performance of its valid international certification services contract with the European Union Aviation Safety Agency (EASA, headquarters in Cologne, Germany) sent to the latter the request with the data necessary to issue an international certificate for new jet engine type PD-14, and placed on EASA’s account the agreed advance payment in the amount of Euro 409 400. EASA confirmed receipt of both the request to provide its services, and the advance payment, and started routine cycle of certification activities. Soon, on the 15th of March, 2022, the Russian customer of EASA appeared to be thoroughly, with all its branch companies, legally banned by the European Union[[72]](#footnote-72). It is really worth noticing that EASA had suddenly broken all communications with UAC significantly earlier, on the 28th of February 2022, by means of blacklisting all the customer’s e-mail addresses and telephone numbers so that no person from UAC could reach EASA (comments omitted). Currently, there is no certificate obtained, no advance payment returned, domestic litigation pending[[73]](#footnote-73). Notably, but nowadays EASA considers the contracts and the valid certificates with the targeted by sanctions Russian entities not terminated, but “suspended”, and strongly believes there was not any breach of those contracts that ever occurred on its side[[74]](#footnote-74). No notification of termination of the contract has ever been issued and sent to UAC.

**Legal Analysis**: The type of this international contract is a mixed-type contract for scope of works (and services). In the absence of legal ground and notification, any arbitrary and unforeseeable action of a party to a contract becomes legally significant when it creates itself certain legal consequences (i.e., legal action implied by conduct). The actions of EASA appear to unfairly break the synallagmatic pair of mutual obligations in the contract, being exactly the thing ultimately defended by contract law worldwide. Hence, the suffering party appears to be Russian UAC just because it had duly performed its opening obligation to pay advance payment, and by no other means had violated any contractual or civil law provisions when the termination occurred. In return the innocent party received implicative conduct of the other party in the form characteristic for unilateral renunciation of the contract.

Further on, the German Civil Code regulates termination of such type of contracts with the following provisions: “*Both contractual parties may terminate the contract for a compelling reason without observing a period of notice. There is a compelling reason if, having considered all the circumstances of the specific case and having weighed the interests of both parties against each other, the terminating party cannot reasonably be required to continue the contractual relationship until the work is completed. … Following the termination, each contractual party may demand of the other party that it cooperate in jointly determining the status of the work. Where one contractual party refuses to so cooperate, or where it fails to attend a meeting agreed for determining the status of the work, or a meeting scheduled by the other contractual party within a reasonable period, the burden of proof concerning the status of the work as per the date of the termination will be incumbent on that party. This does not apply if the contractual party fails to attend due to a circumstance for which it is not responsible and of which it has notified the other contractual party without undue delay… Where a contractual party terminates the contract for a compelling reason, the contractor is entitled to demand only whatever remuneration covers the portion of the work performed up until the termination. The termination does not rule out the entitlement to demand compensation of damages.”* (Sections 314 (1) and 648a of BGB)[[75]](#footnote-75). So, it is clear that there is no legitimate ground for this implicative conduct of EASA in German law.

Moreover, one may observe that with the exercise by EASA of the transformative discrimination right (not even prescribed by law at the moment) to unilaterally renunciate its contractual obligation, this European entity fundamentally breached at least three doctrinal principles of law, known from the times of Roman law: 1) Pacta Sunt Servanda (What is Agreed, Obliges), 2) Any benefit resulting from the unlawful or unfair conduct is prohibited, 3) A party to a deal is fully autonomous and independent in its will. Now, that what boils down to is: unrecovered loss of funds by UAC; unilateral decision of EASA to transform its contractual obligation before its creditor into imperfect obligation, leaving the creditor without judicial review to redress his infringed rights.

**Legal Test**:

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| **Criteria of assessment:** | **EASA unilateral decision to “suspend” the execution of the contract with UAC (ODK Aviadvigatel) without notification** |
| **Lawful** (it has a solid legal ground in civil/contract law) | **No**. Neither Civil law of Germany, or of Russia, nor the Contract law between the parties provided any ground for this legal action of the party.  BUT: EU’s public law considers this action toward this exactly Russian entity to be lawful and moreover, mandatory. |
| **Reasonable** (it aims at the redress of infringed right, or otherwise, aims at legitimate improvement of the position of the right-holder) | **No**. The unilateral decision of a party to the contract has not any cause-effect relationship with other party’s actions in the course of the performance of the contract. |
| **Expedient** (it is useful, under the conditions set by civil law/contract law, for the innocent party to pursue a practical economic goal) | **No**. The right-holder was *not* in a position of the innocent party, neither it had any legitimate aim to pursue in the area of civil / contract law by the unilateral declaration. |
| **Bona Fide** (it is intended to gain proper fulfillment of obligation, or lossless and legitimate quitting the obligation) | **No**. The causa is vice-versa, to ruin the contract together with its execution, without paying damages, meanwhile providing as much economic harm as it is possible to the innocent party. |
| **Proportional** (it is exercised in order to balance the stability of the civil legal circulation) | **No.** It aims at disbalancing the stability of civil circulation on international level. |
| **Contestable** (it can be challenged in the court of justice, or in the international arbitration) | **No**. The claims arising from the sanctioned Russian counter-parties are not “allowed” ([Article 11 of EU Council Regulation (EU) No. 833/2014](http://data.europa.eu/eli/reg/2014/833/oj)) |
| **Creates Legal Consequences** | **Yes**. But only from the point of view of a national public law of Europe, directing this unilateral action to create negative legal consequences for the innocent party. |

The test results can clearly show us that the action of precommitment of restrictive measures against Russian company in the case of EASA has a nature fully similar to a trivial fundamental breach of the contract, but for two things, which affected the civil legal relationship in an even worse manner: strongly negative legal consequences occurred a) legally reasoned by pubic law, b) only for the innocent party to a contract (1); the opportunity of the innocent party for a judicial review of the action does not exist at all (2). Finally, I would like to stress that this discriminative transformative right exists in the sphere of the civil legal relationships only because the government-imposed rules (public law) make legal intervention in there, and deliberately undermine the parties’ autonomy[[76]](#footnote-76) and fair play toward each other, - for the purposes, which are completely outside the paradigm of private international law. This is the real western lawmakers’ goal by spawning the imperative new-growth “rules” substituting private international law principles. To resume, this goal might only be described as mutually excluding with the cornerstone principles of civil / contract law. Legitimacy of the new-growth legislation should therefore be questioned.

**Example 4. Public source**[[77]](#footnote-77)**. Rosatom v. Fennovoima (Finland).**

**The Plot.** In 2013 Rosatom, the Russian State Nuclear Energy Corporation, concluded a long-term and quite complex EPC[[78]](#footnote-78) contract for construction of a Nuclear Power Plant (NPP) on the north-eastern shore of the Gulf of Bothnia, in the place called Hanhikivi, Finland. The Hanhikivi NPP site construction activities started at the same time with green-field design and survey works, site geo-preparation, research and development of the long-lead equipment for the specific project, licensing works etc.

By the beginning of spring of 2022 there had been reported several billion euros already invested[[79]](#footnote-79) by the Russian party in the project (run by the designated general contractor of Rosatom, a 100% Rosatom affiliate company RAOS-Project), when Fennovoima Oy (the customer holding company from the Finnish party) unforeseeably announced unilateral EPC contract termination, the decision being tied to some well-known geopolitical events[[80]](#footnote-80),[[81]](#footnote-81). The whole multi-billion NPP project is now dead, it will not probably ever restart in the future. The scope of the works done but unpaid is quite impressive. The customer rejects any payment, as well as all the recent works done by the general contractor. Neither the customer wants to pay off the loss and damages to the Russian counter-party for the compensation of the consequences of his unilateral decision. Litigation is ongoing.

**Legal Analysis.** There are two legally important things very remarkable for underscoring at which background the Finnish customer decided to use his “legitimate unilateral right to terminate the contract with Russians”:

1) the state of performance of the EPC contract by the Russian party was showing really significant progress when the unilateral declaration of termination took place: in early 2022, Fennovoima Oy representatives publicly announced the licensing work had reached the “homestretch” with the final licensing materials expected to be submitted to the Radiation and Nuclear Safety Authority (STUK) for assessment of the construction license application over the next couple of months[[82]](#footnote-82). Notwithstanding the fact, the Finnish party officially tried to justify their unilateral termination by statement "due to RAOS Project's significant delays and inability to deliver the project"[[83]](#footnote-83) (which looks itself as a good case for legal class students to get familiar with the usage of estoppel principle in civil law).

2) By the time of Finnish unilateral declaration to terminate the contract, neither the USA, nor the EU had ever applied any restrictive measures on the Russian nuclear energy industry (the very first of the nuclear anti-Russian sanctions to be ruled out by the US in spring 2023 only [[84]](#footnote-84)). As a matter of fact, there were no sanction “laws” at all (national or international) which could give birth to the customer’s discriminative transformative right at the time of event.

This exactly was investigated, figured out and established by the Dispute Review Board of the International Chamber of Commerce of Paris (provided by the EPC contract as the effective legal mechanism of dispute resolution between the parties), which finally declared the unilateral termination unlawful [[85]](#footnote-85). Currently, litigations from both the parties to the contract are still pending on the amount to claim damages from each other. What really appears interesting in this case, is the fact that DRB[[86]](#footnote-86) used by Rosatom to redress its rights violated by the unilateral declaration of Fennovoima, is a working legal tool to counteract the restrictive measures implied by the western authorities to the non-grata companies from Russia. Although it belongs to system of international commercial arbitration, and therefore might be chosen as the dispute resolution tool by consent of both the parties to a contract only, it is of great importance nowadays as a working way to establish the legally binding fact of breaking law by imposing sanctions to an innocent party in a civil relationship.

However, the question whether Rosatom at the end of the day will be successful in getting compensation for all the expenditures since 2013 and damages, remains pending. It looks *highly likely* that once the EU legislation adopts the recent US sanctions against nuclear energy industry of Russia, following the “global” western trend[[87]](#footnote-87) in such a way that Rusatom Overseas (a mother company of RAOS-Project responsible for international construction) falls under virtue of Article 11 of EU Council Regulation No. 833 [[88]](#footnote-88) or Article 11 of EU Council Regulation No. 269 [[89]](#footnote-89), the Paris DRB resolution will stop being a sufficient effective legal tool: it will be ignored in Europe, Finland included, at the attempt of enforcement. However, as of April 2023, there are not known any anti-Russian legislative measures regarding nuclear power international projects, thus the chances of Rosatom to enforce the DRB award look optimistic.

Let us apply the legal test on the case:

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| **Criteria of assessment** | **Unilateral declaration of Fennovoima Oy**  **to terminate the EPC contract with Rosatom** |
| **Lawful** (it has a solid legal ground in civil/contract law) | **No**. Neither in civil law of Russia[[90]](#footnote-90), in respect with contracts for scope of works, nor in private international law there is opportunity for a contractor to quit a halfway-run contract without paying the expenditures of the customer. The EPC contract’s choice of law clause is outside the public access, unfortunately.  Sanctioning public law is not applicable in the case, as it does not exist for this industry (as of current, April 2023). |
| **Reasonable** (it aims at the redress of infringed right, or otherwise aims at legitimate improvement of the position of the right-holder) | **No**. The aggrieved party to the contract did not perform its obligation in undue manner recognized as an essential violation, which could be a legal excuse for the other party to exercise the transformative right to terminate. |
| **Expedient** (it is useful, under the conditions set by civil law/contract law, for the innocent party to pursue a practical economic goal) | **No**. There was not any event happening in the course of execution of the contract, which could justify any legitimate aim requiring the exercise of negative transformative right by Fennovoima to terminate the contract. The right-holder was not in the position of the innocent party (which suffered from the customer’s wrongful actions). |
| **Bona-Fide** (it is intended to gain proper fulfillment of obligation, or lossless and legitimate quitting the obligation) | **No**. It is established by the Dispute Review Board (ICC, Paris) that the right-holder did not pursue a proper fulfillment of obligation with the exercise of his unilateral decision. |
| **Proportional** (It is exercised in order to balance the stability of the civil legal circulation) | **No**. The exercise of unilateral decision ruined execution of the EPC contract, and cancelled it. |
| **Contestable (**it can be challenged in the court of justice, or in the international arbitration) | **Yes**. Termination of the EPC contract was challenged successfully. |
| **Creates Legal Consequences** | **No**. As long as it is established unlawful by International Commercial Arbitration. |

Again, the assessment of the structure of the unilateral declaration of Fennovoima Oy shows that it has all distinctive features of unlawful renunciation of obligation, not of any transformative right prescribed by civil law / contract law. The international commercial arbitration process proved this fact. Again, this renunciation may be called “discriminative transformative right” because of one thing of utmost importance: this right is embodied in the public legislations of the western countries. It is worth noticing that once the innocent party (Rosatom’s affiliate company) falls under the sanctions of the EU, the chances for further fair international commercial arbitration will plummet down.

**Example 5. Public source**[[91]](#footnote-91)**. Russian Railways v. Siemens Mobility GmbH (Germany)**

**The Plot**. In mid-2019, Russian Railways placed a reorder to German techno-giant Siemens for supply of 13 more proprietary high-speed comfortable trains, known in Russia under the brand “Sapsan”, by concluding an international manufacture and supply contract with Siemens’s mother-company in Germany, as well as by concluding a maintenance contract with Siemens affiliate company in Russia. Total value of the manufacture and supply contract amounted to 513 500 000 euro.

After that the events took place in a usual scenario: the contract had been partially executed by the manufacturer, the customer had placed certain number of advance payments for the long lead equipment when the European Union, the Great Britain and the USA solemnly announced the Russian customer to be fully sanctioned, i.e., banned as regards to technology supplies and international financial transactions[[92]](#footnote-92). The advance payments reported unreturned and unrealized, the German manufacturer informed the customer on unilateral termination of contracts due to “force-majeure events”, the customer understood that current EU legislation provided the full impairment of a Russian sanctioned party’s right for the judicial defense at the respondent’s domicile.

The exercise of discriminative transformative right by a party to a contract led to a stalemate situation, legally and economically, where one party lost the money and the future development opportunities on the national level, while the other party lost the order and reputation, known as lose-lose situation.

The scenario completely coincides with the EASA case (Example 3) but for one thing: the respondent, Siemens Mobile GmbH, has until now plenty of high-value assets on the territory of Russia, as well as it has several working legal entities incorporated under Russian legislation and, consequently, court’s jurisdiction. This gave way for the aggrieved party, Russian Railways, to use domestic legal redress, and recover losses and claim damages from the respondent in the situation, which from the first look appeared hopeless.

**Legal Analysis**. There are known at least 2 judgements of a national commercial court of the Russian Federation, in which they ruled unlawful the unilateral decisions of Siemens Mobile GmbH to terminate the ongoing contracts with Russian Railways. In the judgement №А40-264063/22-141-2007 of the Moscow City Commercial Court dated August 9, 2022 on the terminated supply of 13 high-speed trains, the court found the unilateral decision of Siemens to quit the contract in response to sanctions against its customer “*violating the cornerstone provisions of international private law, ius cogens norms, and public order of the Russian Federation*”[[93]](#footnote-93). Therefore, the unilateral termination of the contract was declared by court as null and void, having no legal consequences (alas, in Russia only).

It is worth noticing that in another decision[[94]](#footnote-94) relative to the case, the court fully agreed with the claimant that the exercise by the respondent of his illegitimate unilateral “right” to terminate the contract brought the inability for the claimant to plan and operate the high-cost equipment, and, as result forced him to bear significant financial losses.

The case with Russian Railways is very illustrative by indicating the opportunity for the aggrieved party to redress its violated rights by the judicial injunction applied to the assets of the liable party in Russia. Thus, the same Moscow City Commercial Court judged Siemens affiliates in Russia to pay the *daily* penalty of approx. 16 088 952 rubles to Russian Railways, if Siemens keeps on non-performing technical maintenance contract after the exercise of their right to unilaterally terminate (which was established by the court unlawful too)[[95]](#footnote-95). There are monetary resources in this case to enforce such security: as said, Siemens has a number of affiliate legal entities in Russia, incorporated under Russian law and owning high-value assets. Unfortunately, this algorithm does not work world-wide: the enforcement of the anti-sanction judgements of Russian courts in the western jurisdictions will probably never take place.

**Conclusion:** taking all the above cases into consideration, let me propose the wording for the sanction’s legal mechanic, the discriminative transformative right: “*a fundamental breach of international contract law authorized and directed (to a party in an international contract) by the public law of the party’s native State, exercised in the form of unilateral declaration of unconditional contract termination, in order to discriminate and impair the public order of another State, native for the other party of the international contract*”.

The distinctive feature of discriminative transformative right is always a bad-faith causa / motive for exercise: punishment, unfair competition advantage and unfair cancellation of ongoing synallagmatic obligations in private law. I would point out therefore, this represents a quasi-right for the civil circulation, because the motives for exercise of this right lie in the moral agency areas, which have nothing in common with the good-faith principle of civil law at all.

However, the exercise of this quasi-right completely terminates ongoing obligation between the parties of the civil legal relationship, aiming at the innocent party (opposite to the quasi-right holder) to suffer from loss and damage, without opportunity for a fair trial (judicial review). The only public institutes that breathe life into ‘legitimacy’ and applicability of this quasi-right in the sphere of civil and contract law are the state authority’s powers of intervention, coercion and supervision, under the pains and penalties for failure to follow.

For the affected party of an international commercial contract (which reasonably anticipated the counter-party to duly perform its part of mutual obligations), the exercise of the discriminative transformative right by the *willing* counter-party means literally, a unharmonious transformation of the pair of firm synallagmatic obligations of a valid civil contract into **imperfect obligations**, i.e., such obligations, which creditors and debtors shall not be protected by virtue of civil law provisions, and non-performance of which shall not bring any legal aftermaths for the infringing party. Meanwhile, the infringing party by the exercise of such discriminative transformative right will in most cases benefit from unlawful and unfair legal behaviour (e.g., on a quasi-legitimate ground to refuse paying off the goods it received[[96]](#footnote-96)).

**Chapter 3. Legal consequences following a party’s unilateral decision to refuse to perform its obligation in an international commercial contract due to restrictions (sanctions) imposed on the other party to the contract.**

As it was discovered in chapter one of this review, the world’s jurisdictions consider null and void any unilateral termination of obligation unless it is directly provided by law, under concrete legal conditions (for exercise by the innocent, suffering party in an obligation), and for good-faith causa (motive) only. This cornerstone principle of international private law has until recent been effective in both the countries of civil law and common law (powered with another principle of presumption of good-faith behaviour of the participants of any civil relationship[[97]](#footnote-97)). But it is not so nowadays.

Now that the national public law in plenty of the western countries considers as authorized and legitimate such an essential violation of international public law, as unforeseen and unjustified termination of obligation, encouraged to exercise under sole and concrete legal condition: it is against a targeted Russian individual or entity, let us discover which consequences this stirs up in the doctrinal base of law:

1. Violation of **ius cogens**[[98]](#footnote-98) norms (world’s legal norms to never be violated). In respect with the current work, these are the norms which stand out of the private law domain, and must be applicable everywhere, no matter public law or private law they adhere to.

1.1. Violation of **Pacta Sunt Servanda** principle. What is agreed, obliges. In respect with private international contracts, it means that a party cannot surreptitiously terminate a contract to the detriment of the other party. Each party to a contract is obliged to do X in exchange for the other party doing Y. This is called a pair of tied mutual obligations, or synallagma. This is the foundation for contract enforcement: quid pro quo. “*You rely on your counter-party doing X in exchange for you doing Y. So, if you do Y, relying on that promise, the counter-party cannot then say "No, we have cancelled the contract, therefore we shall not proceed with X" (they might try, but then in court you will win, as rely on equitable and promissory estoppel, because you've been "harmed" by performing when they won't perform in turn)*” – this is a citation from internal instruction of a western legal councilor for a western corporation’s supervision and negotiation on their contracts performed. This foundation nowadays appears demolished, as soon as synallagmatic obligations are broken by the virtue of public law provisions.

1.2. Breach of **Inviolability of property (ownership)** principle. This refers to the established fact that current western legislation makes it technically impossible for the parties to amicably settle *restitutio in integrum* (full return to the initial status of the parties prior to contract conclusion), or to claim damages out of the legalized fundamental breach of a contract introduced by one of them. From my own practice in the role of international procurement contracts adviser, I can count up to tens of known cases within last year when the goods shipped abroad remain unpaid but being duly used, or vice versa, when money was paid and received (or “frozen” half-way) but no satisfaction was provided in return. It does not matter if the party which unilaterally declared groundless termination of contract “because of sanctions” was forced to do so *but* not willing to do, or if such a party did it *willingly*, in order to get advantage from own bad-faith conduct, using the discriminative termination of the contract as tool “to get but never pay”, for example. There are known cases when property cannot be returned to its owner, though the parties of a certain int’l contract have amicably agreed to mutually discharge their contractual obligations on the basis of impossibility of performance (frustration of the contract, or impracticability[[99]](#footnote-99) of the contract, in common law), to return all that was provided, but unpaid, and pay damages to the innocent party – they are still unable to commit! The signed agreements let them settle down almost all their legal problems arising from the obligations broken by public intervention. The western law however, prohibits fair restoration of the parties’ balance of payments equilibrium, by simple forbidding financial transactions to and from Russia.

As for the unconscientious participants of the civil circulation, they can now fearlessly benefit from their bad-faith conduct, as it is fully protected with legally pervert interpretation of the **presumption of good-faith behaviour in civil circulation**, simply by executing sanction laws in their native western countries. Thus, the problem of illegitimate transfer of title of ownership persists: without any ground other than provided by a national public law, in the course of performance of some private international contracts millions of euros and dollars fell in the hands (i.e., on the accounts) of the western entities which *possess, use and dispose* of them knowing perfectly well this money does not belong to them, because they never provided the promised goods or services in return to their Russian counter-parties (see chapter 2 for details). But this is nowadays quite acceptable for the law of the western “unfriendly countries”[[100]](#footnote-100).

1.3. Violation of **Right to a fair and impartial trial**. The best way to illustrate this world-wide norm of ius cogens is to cite Articles 6 and 13 of the European Convention on human rights, a fundamental European legal act prescribing the direction to any legislative initiative in every country of the EU: “*Article 6.* *Right to a fair trial. In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly …*”. “*Article 13. Right to an effective remedy. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*”. Those Russian parties to international private law contracts, who are targeted by the sanction laws and affected by the unilateral decisions of their counter-parties to terminate such contracts, are deprived nowadays of both the rights in the western countries: no fair trial and no effective remedies before European authorities. By the virtue of the latest European public legislation, no claims are allowed in the courts from the sanctioned individuals and entities (see chapter two for details). Thus, the transformative discriminative right, once being exercised in a civil relationship, leave the affected party without any opportunity for judicial review in the majority of the western jurisdiction. The way out of a bad situation could be in the standard application to international commercial arbitration (which is independent at least, formally, from the national jurisdictions). But, the awards of its arbitrators, although recovering the rights of the aggrieved party, will scarcely be enforced in the EU or US for the same reason. This makes unfair termination of international commercial contracts with Russian parties to be indefinitely ongoing in the future, without proper protection of powers of public law in all the western countries. Until the very last of such contracts is terminated. It is worth noticing here, this is exactly the goal of the sanction laws[[101]](#footnote-101).

2. Violation of the cornerstone principles of civil law and contract law:

2.1. Violation of the **Principle of equality of parties to a civil relationship.** One party to a contract is provided with unprecedently powerful legal tool to use at own will when it is convenient for such party and completely change the legal landscape of obligation with the other party. The enforcement of this legal tool represents not any civil remedy, but administrative coercion, and is based on the alien principle of power-subordinate authoritarian relationship and is directed by third party having public coercion power.

2.2. Violation of the **Principle of prohibition of benefit arising out of unlawful or unfair conduct**. The party to a contract, which exercises the discriminative transformative right, always obtains certain financial benefit on the ground contradictory to the meaning of civil law. This happens independently from whether the party wishes such benefit or not. This, in turn, gives green light for abuse of law by the *willing,* unconscientious party.

2.3. Violation of the **Principle of the autonomy’s of the parties** in a civil legal relationship. Intervention of the sanctioning public law in the private law domain makes it difficult for a contracting party to express it autonomous will in the case it does not want to implement sanctions on its own ongoing contracts. The reported dissatisfaction of the European authorities with the steadily big number of private European companies which try to bypass sanction requirements to terminate their Russian contracts and keep the mutually beneficial economic relationship, nowadays forces the authorities in the EU to criminalize violation of EU sanctions. In the case this comes true, the autonomy of the European parties in such international contracts with Russians will lead them to criminal prosecution[[102]](#footnote-102). What is noticeable, is that the Russian state authorities officially consider this trend as “legal arbitrariness further ruining EU’s reputation”[[103]](#footnote-103).

2.4. Violation of the **Principle of freedom of contract**. The private and public entities from US, EU and some other jurisdictions have nowadays no freedom at all of concluding new, or prolonging the active contracts with the individuals and entities targeted by anti-Russian sanctions. This appears a more significant violation in conjunction with item 2.3.

2.5. Violation of the **Principle of inadmissibility of arbitrary intervention in a private (civil) relationship**. Please see chapter two for details.

2.6. Violation of the **Principle of inadmissibility of using civil rights with aim to inflict damage to the others**. Please see chapter two for details.

2.7. Violation of the **Principle of timely and proper performance of contractual obligations.** Please see chapter two for details.

2.8. Violation of the **Principle of maintaining stability of civil circulation**. First of all, this violation relates to inadmissibility of the supervisory arbitrary intervention of state powers in the sphere of private (civil) law with the tools, which may lead to unfair cancellation of ongoing performance of obligations between private parties. In this case it is turned upside down and hypocritically declared fair.

2.9. Violation of the **Principle of rationality and proportionality**. This fundamental principle of civil law means differentiation of liability imposed by law on the faulty party in relation to the magnitude of the breached obligation, size and nature of losses introduced by the violation of obligation etc. With sanction laws, this principle appears completely perverted in its enforcement on practice: many innocent parties to international contracts suffer from unfair regulations by state.

3. Unlike other transformative rights originating purely from civil law, the discriminative transformative right to unilaterally and unconditionally terminate a private contract refers to **legal relationship of social or administrative dependence (autocratic-subordinate conduct rules)**.

Taking all these facts into consideration, it becomes quite clear for a researcher that such discriminative transformative rights should be declared null and void on a state legislation level, because they threaten the existence of civil relationship system. But instead, they originate from the state legislation level in the western countries. In other words, we deal with juridical hostilities on a world-wide level.

**Weighing the Risks of the Consequences**

As for the procedural and economy rights of the affected Russian parties to a civil relationship with western counter-parties, from the examples discussed in chapter two we may propose three various scenarios, depending on **range of the loss and damage**:

1) International contract is under execution. The Russian entity is in the sanction list. The counter-party exercises its discriminative right to terminate the contract by means of unilateral declaration. The chances of the Russian party for a legal redress of violated rights in the western jurisdiction, and return what is unperformed by the other party to the contract (specific performance or payment restitution) are close to zero. Losses are extremely high. **The risk is ultimate.**

2) International contract is under execution. The Russian entity is **not** in the sanction list. The counter-party exercises its discriminative right to terminate the contract by means of unilateral declaration. The chances of the Russian party for a legal redress of violated rights in the western jurisdiction, and get reimbursement (return satisfaction + damages) are considerably good. **The risk is moderate.**

3) International contract is under execution. The Russian entity is in the sanction list. The counter-party exercises its discriminative right to terminate the contract by means of unilateral declaration. The counter-party owns assets in the jurisdiction of Russian Federation, proportional to size of loss and damage imposed by exercise of discriminative transformative right. The chances of the Russian party for a legal redress of violated right in a national commercial court of justice, and get reimbursement by securing injunction are high. **The risk is low.**

**The Legal Measures Taken by the Injured Parties**

If we now turn to analysis of how exactly the affected Russian entities challenge the unilateral decisions of their commercial partners to quit the ongoing contracts, we may observe the following:

* Attempt to redress the violated rights in the courts of western jurisdiction by challenging **not the sanctions themselves**, but rather by challenging the lawfulness (appropriateness) of including the person’s or legal entity’s name in the sanctions laws blacklists. There is known at least one case on the level of higher European court, when such attempt was successful [[104]](#footnote-104);
* Attempt to apply directly to the EU public institution, which issued the sanctions, again, in order to lift the sanctions’ steel curtain for the applicant only. For example, there is known an application of Russian Railways[[105]](#footnote-105) to the Council of Europe (worded to my mind, rather as cry for help). It was arrogantly left unnoticed by the addressee;
* Forbearance (temporary?) from judicial review of the applied discriminative measures [[106]](#footnote-106);
* Attempt to challenge the substance and spirit of sanctions by applying to the Highest Courts in the western jurisdictions[[107]](#footnote-107). All such attempts, as we know from public sources, have so far been not successful. It is understood, why.

Overall, the prognosis from the legal and economy point of a view is negative. The international business liaisons of Russian Federation with the West are dead nowadays, these will scarcely be ever reanimated in the forthcoming years. They are dead, because the sphere of international legal regulation of commerce is affected by new-growth transformative rights, resulting with consequences similar to cancer for civil relationships.

**Proposed Problem-Solving Methods**

**Finally**, I would like to recommend for those Russian entities, which faced significant financial and reputational losses due to abrupt and sudden termination of ongoing deals with their western counter-parties, consider challenging the spirit of illegitimate sanction laws (but not their names or surnames in the sanction blacklists) by means of two remaining international authority bodies, still active as arbitrators in the sphere of fundamental questions of justice. These are: the European Court of Human Rights, for the EU-wide region, and the World Trade Organization, for the global applications.

The anti-Russian sanctions claim to the EctHR against the authorities of the EU countries might, to my understanding, consist of complaints under **Article 1 of Protocol 1** to the Convention for the Protection of Human Rights and Fundamental Freedoms (*Prohibition of unlawful deprivation of property*) **in conjunction with** **Article 14** of the Convention (*Prohibition of discrimination for national origin*) in the form of unlawful termination of ongoing international contracts on the basis of Russian origin of the affected by EU law party, resulting in unjust loss and damage for the latter[[108]](#footnote-108). Additionally, there should be another complaint on violation by the EU authorities of **Article 6** of the Convention (*Right for a fair trial*) again, **in conjunction with Article 14** of the Convention (*Prohibition of discrimination for national origin)* – in the form of meaningful obstacles in the exercise of right to access to the courts in the western jurisdictions for the blacklisted Russian individuals and entities. Finally, I consider it is worth adding complaint on violation of **Article 13** of the Convention (*Right to an effective remedy before a national authority*) – in the form of absence of any legal procedural rights in the courts of EU for those Russian parties, who faced contractual discrimination from their former EU partners.

As for WTO dispute settlement gateway between the countries, since 2019 it has been kept paralyzed[[109]](#footnote-109) by the USA blocking appointments of judges to its highest dispute resolution instance, the WTO Appellate Body. Hence, the perspectives that once established, a dispute settlement panel will come to a final decision in the nearest future tend to zero[[110]](#footnote-110). But, to my understanding, these steps with WTO must be taken anyway, in order to leave legally significant traces of the fair attempt to delegitimate the sanctions laws. Because the discriminative actions of EU, US and some other unfriendly countries (all being the firm signatories to WTO), which are listed here, surely fall under violation of the following provisions of WTO’s General Agreement on Tariffs and Trade (GATT 1994)[[111]](#footnote-111) and General Agreement on Trade in Services (GATS)[[112]](#footnote-112):

* + - * Article I:1 of GATT, because both the EU and the USA are not according immediately and unconditionally to the like product originating in or destined for the territory of Russian Federation with respect to all rules and formalities in connection with importation and exportation, the advantages, favours, privileges or immunities granted by the EU and US to any product originating in or destined for any other country;
      * Article X:3(a) of GATT, because both the EU and the USA administer their laws, regulations, decisions and rulings toward Russian Federation’s entities and individuals in a manner that is not uniform, impartial and reasonable;
      * Article XI:1 of GATT, because both the EU and the USA have instituted and are maintaining prohibitions or restrictions other than duties, taxes or other charges on the importation of products from the territory of the Russian Federation and on the exportation or sale for export of products destined for the territory of the Russian Federation;
      * Article XVII of GATT, because state trading enterprises of the EU, as well as those of the USA, have not acted in conformity with the principle of non-discriminatory treatment in their purchases or sales involving either imports from or exports to the territory of the Russian Federation;
      * Article XI:1 of GATS, because both the EU and the USA have applied restrictions on international transfers and payments for current transactions relating to its specific commitments;

So far, it is not known that any of such claims has been file to the European Court of Human Rights, or any dispute settlement consultations were initiated by the Russian Federation. To my mind, the international law still has all the tools and remedies to establish the fact who exactly started the great legal war of modern times, and how to eliminate its consequences. But I also understand that with current biased attitude of the even the highest international bodies, such like UN, the perspectives for fair solving the highlighted international problems are vague.

Once the aggrieved party to an international commercial contract choses to try rescuing its assets, which have been illegitimately held by its counterparty from the list of the countries, unfriendly to Russia, it should definitely try then **judicial foreclosure** of the assets of this breaching counterparty in any of those countries of the world, which are friendly to Russia. Such security seems to be fully legitimate, from the point of view of international law. Also, it will surely work well in the forthcoming long course of the worldwide juridical hostilities.

**Conclusion**.

To reiterate, the goal of this work was taking to pieces the legal mechanic of:

* Legitimate transformative right to change or terminate an obligation;
* Unlawful refusal to perform an obligation (creating no legal consequences).

In chapter one, I compared these two and found out the differences between them:

**1**. The legal definition of a transformative right runs as follows: “*Transformative right is an individually applicable legal power to transform the concrete legal relationship by means of unilateral declaration. This action aims at creation, alteration, or termination of a legal relationship between the legitimate right holder and another person*”.

**2**. The transformative right to change or terminate an obligation is different from the unlawful refusal to perform an obligation, only when it bears the following features in aggregate:

**2.1.** Lawfulness (explicit legal scenario as directed by civil / contract law).

**2.2.** Reasonability (exercised in reply to undue contractual conduct).

**2.3.** Expedience (exercised by the innocent party with a concrete economical goal).

**2.4.** Conscientiousness (always pursues a good-faith goal).

**2.5.** Proportionality (exercised in balanced manner against undue conduct).

**2.6.** Prior legal notification must be forwarded to the other party.

**3**. Otherwise, it represents an unlawful refusal to perform a contractual obligation.

Then, in chapter two I set the goal to compare the distinctive features of the transformative right with the features, which are characteristic to the enforcement of sanctions by the western parties of some international private law contracts. For this purpose, I extrapolated the above-mentioned findings on the legal mechanic of the new-growth unilateral right to terminate an international commercial contract “due to sanctions”. Here is the summary of the research:

**4**. The new-growth sanctioning transformative right bears the following legally distinctive features:

**4.1.** It is deemed lawful under the quasi-legal scenario of discrimination by national origin, as directed by public law in a certain group of countries.

**4.2.** It is exercised in the sphere of private law by means of rude intervention.

**4.3.** This intervention makes the affected provisions of private law mutually exclusive with the overwhelming provisions of public law.

**4.4.** It is exercised with the bad-faith motive and anticipated result: discrimination and unlawful deprivation of property as a chosen vehicle of punishment in the pseudo power-subordinate relationship.

**4.5.** Once exercised, it disbalances civil circulation in favor of the bad-faith right-holder *and* at the account of the innocent party.

**4.6.** It is always unproportional; it requires no conditions precedent, except nationality of the victim (entity or individual).

**4.7.** It always ruins synallagmatic contractual obligations.

**4.8.** It is mandatory for the western participants of civil circulation.

**4.9.** The western jurisdictions do not accept the claims from the aggrieved parties (suffering losses from the exercise of the discriminative transformative right).

**5**. Thus, the proposed wording and definition for the new-growth transformative right is: “*The discriminative transformative right is a fundamental breach of international contract law authorized and directed to a party in an international contract by the public law of the party’s native State, exercised in the form of unilateral declaration of unconditional contract termination, in order to discriminate and impair the public order of another State, native for the other party of the international contract*”.

You can now clearly see why exactly this specific right is unlawful: by its nature and by the consequences it creates. Hence, it is now possible to state that the party to an international commercial contract, which terminated it in such a way, *may not* justify its actions by applying to their ‘legitimacy’ – they are not. The understanding of this legal mechanic might be useful in pre-trial procedures regarding the ‘broken’ international contracts, once you need to unveil, deplore and condemn your partners’ wrongful actions, urging the breaching party to think of the consequences.

From the point of a view of public international law, the word “sanctions” is applicable only to enforcement of the specific decisions of the United Nations Security Council taken in accordance with Article 41 of the UN Charter: “*The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations*”. It is worth mentioning that such decisions of the Security Council are always the result of the international consensus, that is, they are agreed by *every* member of the international community in the strictest legal procedure.

The new-growth anti-Russian ‘sanctions’, written and implemented by a specific group of unfriendly countries (the USA, the EU and G7) therefore do not possess any international legitimacy, from the point of a view of international law. But they clearly fall under the notion elaborated by the above-mentioned group of the countries, known as “Rule-Based World Order”, fighting at outrance the cornerstone principles of international law nowadays. “The gentlemen stick to the rules, but the rules may be changed by the gentlemen, should the gentlemen need”. This is contradictory to the letter and spirit of right and law, of course.

**6**. Taking the above into account, it is possible to state that the right of a party of an international commercial contract to unilaterally terminate it “due to ‘sanctions’ bears all the characteristic features of a **fundamental breach of a civil law contract, bad-faith committed**.

**7**. Therefore, it is null and void, as it breaches the cornerstone principles of public and private law (in details it is rendered in chapter three of this work).

**8**. As long as it is null and void, it cannot raise any legally meaningful consequences.

**9**. However, some countries of the world intentionally act so that they admit and encourage all the legal consequences following an exercise of the discriminative transformative right, like those from the exercise of other *transformative rights in civil law*, provided with the following excuses:

**9.1.** The breach has the same legal mechanic as these specific civil rights.

**9.2.** The breach is deemed lawful by virtue of public law of the sanctioning countries.

**9.3.** Being “lawful” to exercise, the breach badly affects the civil rights of the other party to the international commercial contract (a victimized party).

**9.4.** This ruinous result is the main meaning of the existence of discriminative transformative right, as set by the sanction lawmakers.

**9.5.** The admissibility of exercise of this right has not been contested globally.

I would like to reiterate here the most important thing unveiling the international sanctions mechanic: the legal consequences arising out of an exercise of the discriminative transformative right look fully similar to those in a fantastic scenario, when we consider it legitimate, for example, taking an ownership over another person’s thing without paying for it.

**10**. The prognosis is negative. In most cases, there is no opportunity for an aggrieved party to redress its violated rights in the courts of those jurisdictions, which issued the sanctioning public laws. With this, the fundamental provisions of civil law and contract law will be further undermined in the future. A method to fully solve the ill-bred legal situation with the international contacts, terminated without consequences for the violators, lies *outside* the area of legal remedies, but rather in the area of geopolitics, and some other.

**11**. However, it is worth trying to challenge the sanction laws themselves (but not their discriminative consequences imposed on certain individual or entities) in the European Court on Human Rights, in the World Trade Organization. What is most important from the point of economy, the lost assets may be saved by securing judicial foreclosures on the assets of the sanction-enforcing companies of the West in those countries of the world, which are friendly to the Russian Federation.

**Legal Sources Used:**

1. The Civil Code of Russian Federation
2. European Convention on Human Rights.   
   URL: <https://www.echr.coe.int/documents/convention_eng.pdf>
3. United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)  
   URL: <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg>

GATT 1947. URL: <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>

1. GATS. URL: <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf>
2. The Civil Code of Germany  
   URL: <https://www.gesetze-im-internet.de/englisch_bgb/index.html>
3. The Commercial Code of Germany  
   URL: <https://www.gesetze-im-internet.de/englisch_hgb/index.html>
4. The USA’s Uniform Commercial Code  
   URL: <https://www.law.cornell.edu/ucc>
5. The Civil Code of France (translated into the English language)  
   URL: <https://www.trans-lex.org/601101/_/french-civil-code-2016/>
6. The Resolution of the Plenum of the Supreme Court of the Russian Federation № 54 dated back November 22, 2016. URL: <http://vsrf.ru/documents/own/8524/>
7. English Law: Termination of Contract. Essential Precedent Cases Encyclopedia  
   URL: <https://lawi.org.uk/termination-of-contract/>
8. Dr. Emil Seckel. Die Gestaltungsrechte des burgerlichen Rechts. Translation into Russian. “Vestnik grazhdanskogo prava”, 2007. #2. Vol.7. Page 210.
9. Tim Lassen. Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) under German Law. Translation into Russian. “Vestnik grazhdanskogo prava”, 2018. #5.
10. “Grazhdanskoye pravo: aktualnyie problemy teorii i praktiki” / Under the general editorship of V.A. Belov. M. Urait-Izdat.2007. Pages 759-806
11. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243.
12. A.B. Babaev. “Problema sekundarnukh prav v rossiyskoy tsivilistike” Moscow, 2006
13. S.V. Tretyakov. Formirovanie kontseptsii sekundarnykh prav v germanskoy tsivilisticheskoy doktrine. Kommentariy k statie Emil Seckel.
14. Andrej O. Rybalov. Potestativnyie prava. “Vestnik grazhdanskogo prava”, 2008.
15. Terminating Contracts under English Law. Legal Terminology Guide of Ashurst Law Firm, London, 2022.  
    URL: <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---terminating-contracts-under-english-law/>
16. M.A. Gurvich. K voprosu o predmete nauki sovetskogo grazhdanskogo protsessa // Uchenyie zapiski Vsesoyuznogo Instituta Yuridicheskikh Nauk. Issue IV. 1955. Page 46.
17. Breach of contract and force majeure: What remedies are available. Legal Terminology Guide of Ashurst Law Firm, London, 2022.  
    URL: <https://www.ashurst.com/en/news-and-insights/legal-updates/breach-of-contract-and-force-majeure---what-remedies-are-available/>
18. Actual Working International Commercial Contracts for Manufacture and Supply of Equipment, Raw Materials, Serial Goods (Undisclosed).
19. Peter Suykens, EY LAW firm, on Conditions Precedent in Belgium Civil Law. URL: <https://www.eylaw.be/2019/09/12/conditions-precedent-necessary-deal-breakers/>
20. Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, in its current consolidated version of February 8, 2023  
    URL: <http://data.europa.eu/eli/reg/2014/269/oj>
21. Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, in its current consolidated version of February 2, 2023  
    URL: <http://data.europa.eu/eli/reg/2014/833/oj>
22. Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, in its consolidated version of October 6, 2022  
    URL: <http://data.europa.eu/eli/reg/2014/692/oj>
23. Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the illegal recognition, occupation or annexation by the Russian Federation of certain non-government controlled areas of Ukraine  
    URL: <http://data.europa.eu/eli/reg/2022/263/2022-10-07>
24. The EU Commission Guidance Note on the Implementation of Certain Provisions of Regulation (EU) No 833/2014.   
    URL: <https://finance.ec.europa.eu/system/files/2020-01/170825-guidance-implementation-regulation-833-2014_en.pdf>
25. EU Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014  
    URL: <https://finance.ec.europa.eu/publications/consolidated-version_en>
26. EU Commission Official Sanctions Whistleblower Tool. “Get your anonymous benefit from the penalties imposed on violators who keep on undermining sanctions”.   
    URL: <https://eusanctions.integrityline.com/frontpage>
27. EU Commission proposes to criminalise the violation of EU sanctions.   
    URL: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7371>
28. ODK-Aviadvigatel v EASA. Delo А50-23541/2022 v Arbitrazhnom Sude Permskogo Kraya. URL: <https://kad.arbitr.ru/Card/176a685e-10b9-4208-982f-be41365dc39e>
29. Tamas Szabados. Economic Sanctions in EU Private Int’l Law. Page 52. //Hart Publishing, 2019. Oxford, UK.
30. US Sanctions against Russia official update notice, April 2023, Section “Constraining Rosatom”.   
    URL: <https://www.state.gov/further-curbing-russias-efforts-to-evade-sanctions-and-perpetuate-its-war-against-ukraine-2/>
31. Arthur Linton Corbin. “Corbin on Contracts vol.6”, section 1325 // St. Paul, Minn.: West Publishing Co., USA
32. The EU Commission official press release: Violating EU sanctions is a serious criminal offence.  
    URL: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7371>

1. Shepherd v. Kain (1821) 5 B & Ald 240, URL: <https://vlex.co.uk/vid/shepherd-against-kain-805009009>

   A ship was contracted to be sold as “copper fastened vessel” to be taken with all faults, without any allowance for any defects whatsoever. The ship turned to be only partially copper fastened. The court held that the seller had not the right to unilaterally change the subject of the contract, and that the buyer was entitled to reject the goods. [↑](#footnote-ref-1)
2. Terminating Contracts under English Law. Legal Terminology Guide of Ashurst Law Firm, London, 2022.

   URL: <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---terminating-contracts-under-english-law/> [↑](#footnote-ref-2)
3. Andrej O. Rybalov. Potestativnyie prava. “Vestnik grazhdanskogo prava”, 2008. [↑](#footnote-ref-3)
4. Dr. Emil Seckel. Die Gestaltungsrechte des burgerlichen Rechts. Translation into Russian. “Vestnik grazhdanskogo prava”, 2007. #2. Vol.7. Page 210. [↑](#footnote-ref-4)
5. “Grazhdanskoye pravo: aktualnyie problemy teorii i praktiki” / Under the general editorship of V.A. Belov. M. Urait-Izdat.2007. Pages 759-806 [↑](#footnote-ref-5)
6. The same as #4 [↑](#footnote-ref-6)
7. M.A. Gurvich. K voprosu o predmete nauki sovetskogo grazhdanskogo protsessa // Uchenyie zapiski Vsesoyuznogo Instituta Yuridicheskikh Nauk. Issue IV. 1955. Page 46. [↑](#footnote-ref-7)
8. Dr. Emil Seckel. Die Gestaltungsrechte des burgerlichen Rechts. Translation into Russian. “Vestnik grazhdanskogo prava”, 2007. #2. Vol.7. Page 210. [↑](#footnote-ref-8)
9. The same as #8. [↑](#footnote-ref-9)
10. Tim Lassen. Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) under German Law. Translation into Russian. “Vestnik grazhdanskogo prava”, 2018. #5. [↑](#footnote-ref-10)
11. M.A. Gurvich. K voprosu o predmete nauki sovetskogo grazhdanskogo protsessa // Uchenyie zapiski Vsesoyuznogo Instituta Yuridicheskikh Nauk. Issue IV. 1955. Page 46. [↑](#footnote-ref-11)
12. Andrej O. Rybalov. Potestativnyie prava. “Vestnik grazhdanskogo prava”, 2008. [↑](#footnote-ref-12)
13. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-13)
14. E.g., Article 437 of the Civil Code of Germany (BGB) as compared with Article 475 of the Civil Code of Russian Federation in respect with the redress for a right violated by supply of the goods of undue quality. [↑](#footnote-ref-14)
15. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-15)
16. The same as #15. As well, in the research work of A.B. Babaev, a follower of V.A. Below: “Problema sekundarnukh prav v rossiyskoy tsivilistike” Mow, 2006. [↑](#footnote-ref-16)
17. S.V. Tretyakov. Formirovanie kontseptsii sekundarnykh prav v germanskoy tsivilisticheskoy doktrine. Kommentariy k statie Emil Seckel. [↑](#footnote-ref-17)
18. The same as #15. [↑](#footnote-ref-18)
19. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-19)
20. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-20)
21. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-21)
22. Peter Suykens, EY LAW firm, on Conditions Precedent in Belgium Civil Law.

    URL: <https://www.eylaw.be/2019/09/12/conditions-precedent-necessary-deal-breakers/> [↑](#footnote-ref-22)
23. Parts 1 & 2 of Article 10 of the Civil Code of Russian Federation [↑](#footnote-ref-23)
24. Tim Lassen. Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) under German Law. Translation into Russian. “Vestnik grazhdanskogo prava”, 2018. #5. [↑](#footnote-ref-24)
25. Andrej O. Rybalov. Potestativnyie prava. “Vestnik grazhdanskogo prava”, 2008. [↑](#footnote-ref-25)
26. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-26)
27. The same as #26 [↑](#footnote-ref-27)
28. Terminating Contracts under English Law. Legal Terminology Guide of Ashurst Law Firm, London, 2022. URL: <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---terminating-contracts-under-english-law/> [↑](#footnote-ref-28)
29. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-29)
30. Parts 2 and 3 of Article 453 of the Civil Code of Russian Federation. And also, in: Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-30)
31. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-31)
32. Section 376 of the German Commercial Code; Articles 1221 & 1222 of the French Civil Code; Article 2-712 of the USA’s Uniform Commercial Code. [↑](#footnote-ref-32)
33. Grazhdanskoye pravo. Volume 4. Book 2. Osobennaya chast. Otnositelnyie grazhdansko-pravovye formy / V.A. Belov. Mow, Urait-Izdat 2016. Pages 183-243. [↑](#footnote-ref-33)
34. The official UN definition of aggressor.   
    URL: <https://www.bbc.co.uk/ethics/war/overview/aggressor.shtml> [↑](#footnote-ref-34)
35. The US Congressional Research on Russia’s Nuke Doctrine upd. April 21, 2022. Pages 7, 8.  
    URL: <https://sgp.fas.org/crs/nuke/R45861.pdf> [↑](#footnote-ref-35)
36. Andrej O. Rybalov. Potestativnyie prava. “Vestnik grazhdanskogo prava”, 2008. [↑](#footnote-ref-36)
37. E.g., Parts 1 and 5 of Article 10 of the Civil Code of Russian Federation [↑](#footnote-ref-37)
38. Misuse of civil rights. Part 1 of Article 10 of the Civil Code of Russian Federation [↑](#footnote-ref-38)
39. Tim Lassen. Rights to Change a Legal Relationship by Unilateral Declaration (Gestaltungsrechte) under German Law. Translation into Russian. “Vestnik grazhdanskogo prava”, 2018. #5. [↑](#footnote-ref-39)
40. For example, the Civil Code of Russian Federation prohibits, by force of part 7 of Article 358, any unilateral legal actions of the pledgee setting him in a preferential position over the pledgor, and falling outside the limits set by this very article. Even if a pledgee and a pledgor mutually agreed in the contract to restrict the pledgor's rights as compared with the rights conferred by the Civil Code of the Russian Federation, the law treats such agreement null and void. [↑](#footnote-ref-40)
41. E.g., Parts 2 and 3 of Article 348 of the Civil Code of Russian Federation. [↑](#footnote-ref-41)
42. E.g., Parts 2 and 3 of Article 348 of the Civil Code of Russian Federation. [↑](#footnote-ref-42)
43. Para 12 of the Resolution of the Plenum of the Supreme Court of the Russian Federation № 54 dated back November 22, 2016.

    URL: <http://vsrf.ru/documents/own/8524/> [↑](#footnote-ref-43)
44. EU Council Regulation (EU) No 269/2014 of 17 March 2014. Financial Sanctions.  
    URL: <http://data.europa.eu/eli/reg/2014/269/oj> [↑](#footnote-ref-44)
45. EU Council Regulation (EU) No 833/2014  of 31 July 2014. Goods and Technologies. Entities.  
    URL: [http://data.europa.eu/eli/reg/2014/833/oj](http://data.europa.eu/eli/reg/2014/833/oj" \o "Gives access to this document through its ELI URI.) [↑](#footnote-ref-45)
46. EU Council Regulation (EU) No 692/2014 of 23 June 2014. Regional Sanctions.  
    URL: <http://data.europa.eu/eli/reg/2014/692/oj> [↑](#footnote-ref-46)
47. EU Council Regulation (EU) 2022/263 of 23 February 2022. Technologies.  
    URL: <http://data.europa.eu/eli/reg/2022/263/2022-10-07> [↑](#footnote-ref-47)
48. EU Commission Notice of 25.8.2017.  
    URL: <https://finance.ec.europa.eu/system/files/2020-01/170825-guidance-implementation-regulation-833-2014_en.pdf> [↑](#footnote-ref-48)
49. EU Commission Consolidated Official Rules on Implementation of Sanctions against Russia. Updated Monthly. URL: <https://finance.ec.europa.eu/publications/consolidated-version_en> [↑](#footnote-ref-49)
50. EU Commission Sectoral Sanctions Presentation dated February 2023.  
    URL: <https://ec.europa.eu/commission/presscorner/detail/en/fs_22_1402> [↑](#footnote-ref-50)
51. The same as #49. [↑](#footnote-ref-51)
52. Annex II to EU Regulation No 263/2022.

    URL: <https://eur-lex.europa.eu/eli/reg/2022/263> [↑](#footnote-ref-52)
53. Annex II to EU Regulation No 833/2014.

    URL: <https://eur-lex.europa.eu/eli/reg/2014/833/oj> [↑](#footnote-ref-53)
54. Russia on EU Official Sanctions Map.  
    <https://www.sanctionsmap.eu/api/v1/pdf/regime?id%5B%5D=26&include%5B%5D=lists&lang=en> [↑](#footnote-ref-54)
55. Article 11 of Council Regulation (EU) No 833/2014 of 31 July 2014.  
    URL: <https://eur-lex.europa.eu/eli/reg/2014/833/oj> [↑](#footnote-ref-55)
56. Article 5 (1) of Council Regulation (EU) No 833/2014 of 31 July 2014 *and* EU Commission Opinion of 17.10.2019. Official interpretation.  
    URL: <https://finance.ec.europa.eu/system/files/2020-01/191017-opinion-regulation-2014-833-article-5-1_en.pdf> [↑](#footnote-ref-56)
57. Article 2 of Council Regulation (EU) No 269/2014 of 17 March 2014.  
    URL: <http://data.europa.eu/eli/reg/2014/269/oj> [↑](#footnote-ref-57)
58. Articles 2, 4 of Council Regulation (EU) No 833/2014 of 31 July 2014; Articles 2-4, 5 of Council Regulation (EU) 2022/263 of 23 February 2022.   
    URL 1: <http://data.europa.eu/eli/reg/2014/833/oj>

    URL 2: <http://data.europa.eu/eli/reg/2022/263/2022-10-07> [↑](#footnote-ref-58)
59. The same as # 57. [↑](#footnote-ref-59)
60. EU Commission consolidated rules on implementation of sanctions against Russia, Questions 9 & 10, page 18 of March 2023 Updated version. Note: Sanction implementation rules are updated monthly. URL: <https://finance.ec.europa.eu/publications/consolidated-version_en> [↑](#footnote-ref-60)
61. The same as # 54. [↑](#footnote-ref-61)
62. EU Commission consolidated rules on implementation of sanctions against Russia, Question 7, page 17 [↑](#footnote-ref-62)
63. URL: <https://finance.ec.europa.eu/system/files/2020-01/170825-guidance-implementation-regulation-833-2014_en.pdf> [↑](#footnote-ref-63)
64. URL: <https://finance.ec.europa.eu/publications/consolidated-version_en> [↑](#footnote-ref-64)
65. URL: <http://data.europa.eu/eli/reg/2014/833/oj> [↑](#footnote-ref-65)
66. URL: <https://finance.ec.europa.eu/publications/consolidated-version_en> [↑](#footnote-ref-66)
67. For example, Article 1124 of the Civil Code of Spain (“tacit termination condition”). Or, case-law Lombard North Central plc v Butterworth [1987] QB 527 in the English Law. [↑](#footnote-ref-67)
68. URL: <https://finance.ec.europa.eu/publications/consolidated-version_en> [↑](#footnote-ref-68)
69. EU Commission Official Sanctions Whistleblower Tool. “Get your anonymous benefit from the penalties imposed on violators who keep on undermining sanctions”.

    URL: <https://eusanctions.integrityline.com/frontpage> [↑](#footnote-ref-69)
70. EU Commission proposes to criminalise the violation of EU sanctions.

    URL: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7371> [↑](#footnote-ref-70)
71. URL: <https://www.interfax.ru/russia/885456> [↑](#footnote-ref-71)
72. Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

    Annex “Entities”, # 62 in the list.   
    URL: [http://data.europa.eu/eli/reg\_impl/2022/427/oj](http://data.europa.eu/eli/reg_impl/2022/427/oj" \o "Gives access to this document through its ELI URI.) [↑](#footnote-ref-72)
73. Ongoing in the Commercial Court of Perm Krai of the Russian Federation, Case А50-23541/2022. URL: <https://kad.arbitr.ru/Card/176a685e-10b9-4208-982f-be41365dc39e> [↑](#footnote-ref-73)
74. Notification of “Suspense” of Type Certificates. URL: <https://www.easa.europa.eu/en/certification-information> [↑](#footnote-ref-74)
75. The Civil Code of Germany (BGB), unofficial translation into English.   
    URL: <https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html> [↑](#footnote-ref-75)
76. Tamas Szabados. Economic Sanctions in EU Private Int’l Law. Page 52. //Hart Publishing, 2019. Oxford, UK. [↑](#footnote-ref-76)
77. Finland’s unilateral termination of contract with Russian state nuclear corporation.   
    URL: <https://sputnikglobe.com/20220720/russia-to-challenge-finlands-breach-of-hanhikivi-1-npp-deal-in-arbitration-1097606477.html?ysclid=lfuvdgp3sy552249508> [↑](#footnote-ref-77)
78. Engineering, Procurement, Construction type of contract is the contract for sophisticated scope of works starting with research and development, and ending with commissioning of certain industrial enterprise. [↑](#footnote-ref-78)
79. URL: <https://world-nuclear-news.org/Articles/Hanhikivi-contract-repeal-unlawful,-rules-Dispute> [↑](#footnote-ref-79)
80. “The war in Ukraine has worsened the risks for the project. RAOS has been unable to mitigate any of the risks”. URL: <https://english.almayadeen.net/news/economics/finland-company-terminates-russian-nuclear-power-plant-const> [↑](#footnote-ref-80)
81. “The decision was made due to operational and workforce risks because of Moscow's military offensive in Ukraine”. URL: <https://www.thenationalnews.com/business/energy/2022/05/02/finnish-consortium-fennovoima-terminates-nuclear-plant-contract-of-russias-rosatom/> [↑](#footnote-ref-81)
82. Rosatom’s official announcement citing the customer’s earlier assessment. URL: <https://www.rosatom.ru/en/press-centre/news/official-statement-from-rosatom-regarding-the-dispute-review-board-decision-regarding-the-terminatio/> [↑](#footnote-ref-82)
83. The same as # 78. [↑](#footnote-ref-83)
84. US Sanctions against Russia official update notice, April 2023, Section “Constraining Rosatom”.   
    URL: <https://www.state.gov/further-curbing-russias-efforts-to-evade-sanctions-and-perpetuate-its-war-against-ukraine-2/> [↑](#footnote-ref-84)
85. Paris ICC DRB decision in the news. URL: <https://interfax.com/newsroom/top-stories/86188/> [↑](#footnote-ref-85)
86. URL: <https://www.vedomosti.ru/business/articles/2022/12/15/955524-ekspertiza-priznala-nepravomernim> [↑](#footnote-ref-86)
87. Rusatom Overseas becomes sanctioned by US.   
    URL: <https://www.kommersant.ru/doc/5927862> [↑](#footnote-ref-87)
88. EU Council Regulation No. 833. URL: <https://eur-lex.europa.eu/eli/reg/2014/833/oj> [↑](#footnote-ref-88)
89. EU Council Regulation No. 269. URL: <http://data.europa.eu/eli/reg/2014/269/oj> [↑](#footnote-ref-89)
90. E.g., Article 729 of the Civil Code of Russian Federation [↑](#footnote-ref-90)
91. Moscow City Commercial Court obliges Siemens to supply 13 high-speed trains despite its unilateral declaration on termination of the contract with Russian Railways.

    URL: <https://tass.ru/ekonomika/17161909> [↑](#footnote-ref-91)
92. February 26, 2022. URL: <https://ria.ru/20220226/sanktsii-1775199240.html> , also, <https://railmarket.com/news/business/31-russian-railways-on-eu-and-us-sanctions-list> [↑](#footnote-ref-92)
93. Moscow City Commercial Court Judgement №А40-264063/22-141-2007, para 3 on page 4, paras 3 and 7 on page 5. URL: <https://kad.arbitr.ru/Document/Pdf/7a560436-641a-452a-8df3-06dce624dc29/d8db2336-1ba6-43fd-a83c-6345f8f071f8/A40-264063-2022_20230221_Reshenija_i_postanovlenija.pdf?isAddStamp=True> [↑](#footnote-ref-93)
94. Moscow City Commercial Court Judgement № А40-98870/22-68-644, paras 8 and 9 on page 2.

    URL: <https://kad.arbitr.ru/Document/Pdf/67a7282e-4f6c-4ac9-bbae-87d1628da510/0118818f-eb6c-4363-8ebe-a396ede2eb3c/A40-98870-2022_20221108_Opredelenie.pdf?isAddStamp=True> [↑](#footnote-ref-94)
95. Moscow City Commercial Court Judgement № А40-257889/22-107-1790 dated February 16, 2023.   
    URL: <https://kad.arbitr.ru/Document/Pdf/0ea693d3-3fbf-4b66-ad1c-bdd02d0f68fb/3412a724-3828-4481-bf17-15d76baaf61a/A40-257889-2022_20230216_Reshenija_i_postanovlenija.pdf?isAddStamp=True> [↑](#footnote-ref-95)
96. E.g., see EU Commission Consolidated Answers on the Implementation of Anti-Russian Sanctions. March 2023. Answer No 10. Page 18.

    URL: <https://finance.ec.europa.eu/publications/consolidated-version_en> [↑](#footnote-ref-96)
97. E.g., as set by part 5 of Article 10 of the Civil Code of Russian Federation [↑](#footnote-ref-97)
98. A principle of international law that is based on values taken to be fundamental to the international community and that cannot be set aside (as by treaty) – Encyclopedia Britannica’s Webster Dictionary. [↑](#footnote-ref-98)
99. Arthur Linton Corbin. “Corbin on Contracts vol.6”. section 1325, page 338: "A performance may be so difficult and expensive that it is described as 'impracticable,' and enforcement may be denied on the ground of impossibility." (See City of Vernon v. City of Los Angeles, 45 Cal. 2d 710, 719 [290 P.2d 841]; 12 Cal.Jur.2d, Contracts, § 238, pp. 461-462.) // St. Paul, Minn.: West Publishing Co., USA [↑](#footnote-ref-99)
100. The Russian Government expands the list of unfriendly countries.

     URL: <http://government.ru/en/dep_news/46080/> [↑](#footnote-ref-100)
101. E.g., “What the EU is doing and why”. Official Notice of the European Commission. The last sentence of the 1st paragraph.  
     URL: [https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine\_en#what-the-eu-is-doing-and-why](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en" \l "what-the-eu-is-doing-and-why) [↑](#footnote-ref-101)
102. The EU Commission official press release: Violating EU sanctions is a serious criminal offence.  
     URL: <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7371> [↑](#footnote-ref-102)
103. URL: <https://ria.ru/20221130/mid-1835337777.html> [↑](#footnote-ref-103)
104. [Judgement](https://curia.europa.eu/juris/document/document.jsf?text=&docid=269100&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=416120) of the General Court of EU dated back October 26, 2022, Case T-714/20, Ovsyannikov v. Council of the European Union.   
     URL for info in Russian: [https://zakon.ru/blog/2022/10/28/snyatie\_sankcij\_po\_eks-chinovnichi\_\_vyvody\_suda\_es\_v\_dele\_dmitriya\_ovsyannikova#\_ftn4](https://zakon.ru/blog/2022/10/28/snyatie_sankcij_po_eks-chinovnichi__vyvody_suda_es_v_dele_dmitriya_ovsyannikova" \l "_ftn4) [↑](#footnote-ref-104)
105. Russian Railways again appeals to EU Council to lift sanctions imposed on the Company.   
     URL: <https://eng.rzd.ru/en/9517/page/104070?id=4790> [↑](#footnote-ref-105)
106. “Cудиться по шведскому праву в Швейцарии, как это прописано в контракте, Газпром не намерен, потому что никакой объективности от недружественных стран не ждет”.  
     URL: <https://vz.ru/economy/2022/10/2/1180159.html?ysclid=lf6razkuuf995217162> [↑](#footnote-ref-106)
107. “Верховный суд США отклонил апелляцию российского бизнесмена Олега Дерипаски на санкции”.  
     URL: <https://tass.ru/mezhdunarodnaya-panorama/15944731?ysclid=lf6r8fz4g0805895253> [↑](#footnote-ref-107)
108. European Convention on Human Rights.

     URL: <https://www.echr.coe.int/documents/convention_eng.pdf> [↑](#footnote-ref-108)
109. URL: <https://rg.ru/2019/12/10/ssha-lishili-vto-vozmozhnosti-razbirat-torgovye-spory.html> [↑](#footnote-ref-109)
110. WTO Appellate Body crisis.   
     URL: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690521/EPRS_BRI(2021)690521_EN.pdf> [↑](#footnote-ref-110)
111. GATT 1947. URL: <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> [↑](#footnote-ref-111)
112. GATS. URL: <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf> [↑](#footnote-ref-112)