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| **Introduction** |

In the context of the history and development of law in Russia, “economic sanctions” as a term became known to a wide range of people in 2014 in connection with the entry of Crimea and the city of Sevastopol into the Russian Federation. In response the United States of America and the countries of the European Union adopted a package of “sanctions” against Russia. As a result, over the past few years, the term “economic sanctions” has become one of the most frequently used in both public and private discussions of Russian international affairs[[1]](#footnote-1).

“Economic sanctions” are a set of measures of a political, diplomatic, economic, informational, and propaganda nature that are used both at the level of international organizations and by individual states unilaterally in order to change the state’s foreign policy course and achieve its isolation on the world stage[[2]](#footnote-2).

Currently we are living in a period of change in the political balance of power in the international arena, when “economic sanctions” are becoming the main institution for manipulating the behavior of the governments of various countries. It is in modern times that these concepts are even more developed and arouse great interest among a wide range of people.

Economic sanctions are unavoidably going to have an impact on corporate interests, both Russian and foreign, and will also likely make it more challenging for targeted persons and organizations to realize their legal rights and legitimate interests[[3]](#footnote-3). This in practice leads to the following negative consequences:

1. Impossibility or difficulty in fulfilling contractual obligations in kind[[4]](#footnote-4);
2. Inability to settle obligations due to limitations of the banking activity or due to limitations of the interaction with a certain counterparty[[5]](#footnote-5);
3. Losses, including in the form of disproportionate and unplanned expenses for obligation performance[[6]](#footnote-6).

The so-called “sanctions clause” in civil law contracts is one of the tools being actively discussed today in the legal and commercial communities for defending the rights of parties to contractual relationships. It is reasonable (for its theoretical justification) to compare this preventive measure with the idea of a higher level – “reservation in law” – since it is still a relatively new protective measure for contract law and has not yet gained widespread acceptance[[7]](#footnote-7).

These circumstances make it necessary to conduct a scientific analysis of the theory, practice, and characteristics of conducting business under sanctions, as well as to justify such an analysis in the civil law relationships between Russian entrepreneurs and foreign partners[[8]](#footnote-8).

In the framework of this thesis, the following aspects will be considered:

1. The concept of introduced “economic sanctions”, the analysis of their legal nature, and proovide an overview of the potential consequences that the international business may suffer;
2. The concept of the “contractual sanctions clause”, its necessity and practical applicability, as well as several individual cases where the contractual sanctions clauses were implemented;
3. The analysis in order to develop a universal contractual sanctions clause, that can be modeled for any area of activity and the interests of specific parties.

I would also like to note that within the framework of this thesis, the term “economic sanctions” will be considered in a way that many will find doctrinally incorrect and replacing the content of the analyzed measures. However, I am convinced that it is necessary to use precisely the term “economic sanctions” for a number of reasons including: (1) we should not forget that this is term is the one that is currently actively used, and (2) the use of this term simplifies the perception process.

However, I do concur with certain academics[[9]](#footnote-9) who expound on the replacement of ideas implied by the usage of the terms “economic sanctions” and “economic coercion measures”. While it is true that these terms are misused in 99% of instances, the replacement of these concepts has already taken place. Rather than contest this development, I believe that we should instead adapt to the trends in the growth of international legal and economic relations. Therefore, unless otherwise stated, the term “economic sanctions” shall be used to refer to “economic coercion measures” in the context of this thesis.

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| **Chapter 1. Economic sanctions in international public law** |

## **§ 1. Theoretical concept of “economic sanctions” and its legal nature**

In order to begin the analysis of the chosen topic, it is deemed necessary, firstly, to define the term “economic sanctions” and explain its use. At present, due to changes in international politics, the term “economic sanctions” has become known to most citizens of the Russian Federation, but most of them do not seem to fully grasp its true definition.

It seems that in revealing the essence of unilateral economic sanctions, the key, oddly enough, is the terminological problem: **can unilateral coercive economic measures be called economic sanctions?[[10]](#footnote-10)**

The lack of a unified terminology developed in regard to unilateral economic sanctions in either the wording of international agreements or the scientific literature makes consideration of the subject extremely difficult[[11]](#footnote-11). To designate such measures, the following terms are used:

* “Economic measures”;
* “Retaliatory measures”;
* “Countermeasures”;
* “Economic coercive measures”;
* “Coercive measures”;
* “Unilateral sanctions” ;
* “Individual international legal sanctions”, etc.

Basically, there is a terminological confusion. At the same time, specialists addressing this topic, of course not always, invest the same meaning in the mentioned terms[[12]](#footnote-12). The lack of a unified terminology developed in regard to unilateral economic sanctions in either the wording of international agreements or the scientific literature makes consideration of the subject extremely difficult[[13]](#footnote-13).

As was already noted, the term “economic sanctions” as we know it is typically applied in an unreasonable manner. Only those actions approved by a specific mechanism and established by the UN Security Council in accordance with Chapter VII of the UN Charter[[14]](#footnote-14) are considered sanctions as they cannot be taken in pursuing personal gain. The activities we refer to as “economic sanctions” actually refer to “unilateral coercive measures” in international law. Such actions are taken solely to exert political or financial pressure on the government of another nation, undermine its sovereignty, or reap financial benefits. Such actions interfere with the global trading system, infringe human rights, and are contrary to fundamental international law principles[[15]](#footnote-15).

The main **difference** between the terms “economic sanctions” and “unilateral coercive measures” is the question of the existence of guarantees that prevent the implementation of measures solely in the interests of the implementing party in violation of the interests of the recipient. Such guarantees are absent when unilateral coercive measures are applied, but they are present with respect to sanctions[[16]](#footnote-16).

Now that we have briefly overviewed the terms “unilateral coercive economic measures” and “economic sanctions”, we need to determine whether mentioned terminological confusion have been used deliberately to mask the real reason behind the introduction of economic sanctions.

With regard to economic sanctions, it is commonly believed that such euphemisms have been used (a) to hide the mechanism by which such measures are expected to achieve their declared purposes; (b) to imply that these measures target wrongdoers; and (c) to imply that such measures are compatible with humanitarian principles. Regardless whether such terminological mix-up is deliberate, represents a “blind spot”, or results from the lack of intellectual rigor, the effects of such abuse of language are not innocent. One of the first tasks of those who study economic sanctions is to bring order into the use of terminology[[17]](#footnote-17).

In the Soviet and Russian doctrine of international law, “economic sanctions” became the subject of special consideration quite rarely and for the most part in the study of the issue of non-discrimination in international economic relations. In addition, the sanctions were seen through the lens of coercive measures imposed by the UN Security Council’s decision. It was acknowledged that unilateral extraterritorial coercive measures used by individual states without a relevant UN Security Council decision were illegal, violated international law and the UN Charter[[18]](#footnote-18), and did not qualify as “sanction measures”[[19]](#footnote-19).

At first, representatives of Western and American legal doctrine adhered to a similar terminological distinction[[20]](#footnote-20).

However, Western and American international law publications between 1960 and 1985 referred to unilateral economic actions as “economic coercion”. Unilateral economic coercion became to be referred to as “sanctions” at some point due to a terminological change[[21]](#footnote-21). Thus, the first version of Economic Sanctions Revisited[[22]](#footnote-22) was released in 1985 under the auspices of the Peterson Institute of World Economics, where the term “sanctions” denoted “unilateral coercive economic measures”.

Such trend in Western literature that started the 20th century[[23]](#footnote-23) is still prominent today, which is one of the main reasons why the term “economic sanctions” is so widely used today, albeit not quite correctly. Meanwhile, the term “sanctions” is not used in the text of the UN Charter. In Chapter VII[[24]](#footnote-24), instead of it, the concepts of “measures not related to the use of armed forces” (Article 41), “provisional measures” (Article 40), “preventive or coercive measures” (Article 50) are used.

The term “sanctions” was not used in the text of the Statute of the League of the United Nations[[25]](#footnote-25) either. At the same time, as was mentioned by V.A. Vasilenko[[26]](#footnote-26), in the reports and resolutions of the League of Nations, the coercive measures provided for in Article 16 of its Statute and applied by member states in relation to the state that committed an armed attack, were called sanctions. However, later in the resolutions and documents of various bodies and specialized agencies of the UN, the term “sanctions” was used only to refer to coercive measures under Chapter VII of the UN Charter[[27]](#footnote-27)[[28]](#footnote-28).

At the same time, there was a clear lexical error at some point, and unilateral economic coercive actions started to be referred to as sanctions. E.T. Usenko and V.A. Vasilenko stated that the situation altered when the USSR’s involvement in the Afghanistan war prompted the US to impose a variety of trade sanctions on the USSR in 1980. E.T. Usenko and V.A. Vasilenko claim that the term “sanctions” in reference to these actions has gained popularity because of the Western media[[29]](#footnote-29).

Thus, in my opinion the term “sanctions” can be best described as the intentional withdrawal of a government from a commercial or financial relationship in order to achieve foreign policy objectives, or as the refusal of one or more states to engage in any relationship designed to influence the behavior of another state on non-economic issues or to limit its military capabilities[[30]](#footnote-30). There are different types of sanctions that can be used by states:

1. Trade sanctions;
2. Prohibition of entry;
3. Sectoral sanctions.

We are currently experiencing the heyday of sectoral sanctions. Such a phenomenon as sectoral sanctions is only possible in an era of globalism and international trade interdependence. Such sanctions do not affect a single country’s economy as a whole, but its individual industries, which are the most vulnerable to this kind of impact[[31]](#footnote-31).

If we divide sanctions according to the entity imposing them, three main *de facto* entities can be distinguished in international law:

1. The United Nations Security Council;
2. Other international organizations with the right to establish a sanctions regime in accordance with established procedure;
3. States.

The issue of state sanctions in international law is the most uncertain, since there is no single international agreement on the rules for imposing sanctions. If for many centuries of war the states came to understand that even war needs its own rules, and thus a branch of international humanitarian law appeared, sanctions are a rather new type of influence and coercion. It was not until the end of the XX century that states reached such a level of economic co-dependence that stopping the supply of a resource or service from one market to another could really have serious consequences[[32]](#footnote-32).

Also, an important factor in the development of economic sanctions is the modern doctrine of military deterrence. Due to the fact that war is no longer a valid mode of threat. And there are deterrence factors, economic sanctions are becoming more important. Thus, sanctions are becoming a not so strong threat but can still cause quite a lot of harm to an entire nation as well as to an individual. Idriss Jazairy, the special rapporteur on the negative impact of unilateral economic measures on human rights, devoted his statement to this topic. In his statement, he said that while sanctions have typically resulted in countries or groups of countries refusing to trade with the target state, the imposition of a blockade has the added blow of preventing trade with other willing trading partners[[33]](#footnote-33).

All things considered, the fundamental purpose of sanctions in interstate relations is to force the target state to refrain from doing what the sanctioning state does not want to do and to make it so economically not beneficial that it would be easier to refuse to do so. This simple definition offers two categories that can help us establish a framework for understanding the sanctions regime and its impact on the economy. Each can be understood differently in terms of international law. The first depends on the range of sanctions, from mild to coercive, that the sanctioning state can impose. The second concerns what actions the sanctioning state wants to prevent through these economic restrictions. Either these are actions that the sanctioning state benefits from, but has no legal right to demand, or they are actions that violate international law, in which case economic sanctions will be aimed at preventing the wrongful act in question[[34]](#footnote-34).

## **§ 2. The issue of legality of the application of the unilateral economic sanctions**

Let us now turn to the legal aspect of the sanctions’ regimes according to the possible actors as they are identified in paragraph 1 of this chapter.

1. **United Nations Security Council**

The legal basis for sanctions from a UN perspective can be found in the United Nations Charter. Chapter VII, Article 39[[35]](#footnote-35) states the following: “*The Security Council shall determine the existence of any threat to the peace, any breach of the peace, or any act of aggression, and shall make recommendations or decide what measures shall be taken in accordance with Articles 41, 42 to maintain or restore international peace and security*”[[36]](#footnote-36). As can be seen from the article itself, there is no specific mention of economic sanctions, but Article 41[[37]](#footnote-37) indicates the possibility of severing economic relations, if it is necessary to maintain peace and security. Article 39[[38]](#footnote-38) does not specify in which situations sanctions may be applied, but simply provides guidelines as to the types of measures that may be implemented, while the decision-making power rests entirely with the Security Council itself.

So far, there have been several instances in which the Security Council has imposed sanctions. The first instance of economic sanctions was in 1966 against Rhodesia. Since then, the Security Council has imposed sanctions 26 times: in Southern Rhodesia, South Africa, the former Yugoslavia, Haiti, Iraq, Angola, Sierra Leone, Somalia, Eritrea, Liberia, the Democratic Republic of the Congo, Côte d'Ivoire, Sudan and the United States of America. Ivoire, Sudan, Lebanon, the Democratic People's Republic of Korea, Iran, Libya, Guinea-Bissau, the Central African Republic, Yemen, South Sudan and Mali[[39]](#footnote-39), as well as against ISIS (DA’ESH), al-Qaida and the Taliban[[40]](#footnote-40). We can say that these were exceptional legitimate sanctions because they were imposed in compliance with all legal norms of international law and UN law. Now it is worth examining whether other types of sanctions imposed not by the UN Security Council but by other international organizations are legitimate and justified.

1. **Other international organizations entitled to establish a sanctions regime in accordance with established procedure**

Due to the new era of integration process, regional integration coalitions and alliances may also impose sanctions. The most illustrative example is the European Union and the African Union. According to the UN Sanctions Report[[41]](#footnote-41), such sanctions or restrictive measures have been imposed by the European Union in 48 cases and by the African Union in 11 cases. Under the Maastricht Treaty of 1993[[42]](#footnote-42), and the new Treaty on the Functioning of the European Union[[43]](#footnote-43) that succeeded it, member states of the European Union gave the EU Council the right to impose sanctions or restrictive measures. The EU defines its understanding of sanctions in detail in three key documents:

* + Guidelines for the Implementation and Evaluation of Restrictive Measures (Sanctions) under the EU Common Foreign Security Policy[[44]](#footnote-44);
  + Basic Principles on the Use of Restrictive Measures (Sanctions)[[45]](#footnote-45);
  + EU best practices on the effective use of restrictive measures[[46]](#footnote-46).

Sometimes these sanctions may be in line with UN Security Council measures, but they may also differ from them, so that they can lead to very different results. The primary treaties of the European Union give the EU Council the ability to impose sanctions. These kinds of sanctions may be acceptable in international politics and law because they have to be agreed upon by many members of the Union, and this leads to a profound and reasonable decision. Moreover, imposing sanctions on Union members is also a very serious measure to insist on compulsory compliance with Union law. Thus, we can conclude that international organizations and unions are allowed to impose sanctions because of the complex system of collective, deliberative decision-making.

1. **The states**

An important question of this study is the question: can states impose economic sanctions themselves? There are different views on this issue, and the author will consider the main ones.

Some argue that states have such authority under customary international law. This idea stems from the fact that all states are sovereign and equal entities and have the right to determine any manner of their foreign policy, so as long as there is no treaty establishing rules of trade between countries, there is no obligation to provide any regime limiting the rights to unilateral sanctions[[47]](#footnote-47).

The International Court of Justice took exactly this position in Nicaragua v. United States[[48]](#footnote-48). Here we see the use of the principle of non-interference in state affairs, whereby the U.S. can impose an embargo as long as it does not violate a binding treaty. At the end of the last century, many scholars hoped for globalization as a cure for the negative effects of unilateral sanctions. For example, Professor Sass, who was actually a psychiatrist but also had an active social position and worked on sociological problems late in his life, also argued, “*It may thus be concluded that, as the 20th century draws to a close, at least de lege ferenda, no state can anymore claim a general legal right to impose economic sanctions against other states, except perhaps in situations where coercion is in the interest of the international community*”[[49]](#footnote-49).

However, there is another view which the author supports: sanctions are unlawful coercive measures. This theory is based on the contradiction with the principle of non-interference in the internal affairs of the state, which is a universally recognized principle of international law. It finds its confirmation in the 1970 Declaration on Friendly Relations[[50]](#footnote-50) and, in particular, in article 32 of the 1974 Charter of Economic Rights[[51]](#footnote-51)[[52]](#footnote-52).

The obligations of States, which state the following: “*No State may use or encourage the use of economic, political or any other means to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights*” [[53]](#footnote-53). This approach is based on the great inconsistency between unilateral sanctions and human rights. While human rights are a core issue of public international law, sanctions are in fact in conflict with them. If sanctions are unreasonable and affect society as a whole indiscriminately, this is not exactly a reasonable way to act from a public law perspective. Also, we see no boundaries or limits to this sanctions’ regime, and even if the goal of sanctions is achieved, sanctions can still remain in place, which can lead to truly terrible consequences, such as starvation, lack of medication, etc. This is why the UN General Assembly has passed a huge number of resolutions on strict measures to combat unilateral economic sanctions. As an example, we can see the negative impact of such sanctions on countries in the Middle East. We can conclude that unilateral sanctions are more contrary to international public law than any other type of sanctions[[54]](#footnote-54).

In the absence of sufficient legal grounds in practice, economic sanctions are usually presented as measures to protect human rights, democracy, or the rule of law. At the same time, as was previously mentioned, within the framework of modern international law, the majority of coercive measures should be authorized by the UN Security Council. This means that it, in most cases, is the Council that determines which violations of the values ​​and principles, in accordance with the provisions of Article 39 of the United Nations Charter[[55]](#footnote-55) are a threat to peace.

Particularly in the desire of the major players in the international political arena to maintain the ability to project their power around the world, for which neither international obligations nor the sovereignty of other states should be an obstacle, ideological reasons have quite frequently served in recent years as a cover for economic or strategic interests.

The laws that impose unilateral economic sanctions serve the purpose of projecting one country’s sovereignty on a global scale, for which there are no legal grounds. They are not just a violation of the sovereignty of other states. In the complete absence of any procedural control, they also give a free hand to the most influential member state of the UN and at the same time cause serious damage to the system of international law on which the United Nations is based. The adoption of such laws demonstrates the twofold impact of the lack of a balance of power in international law. Provisions on so-called secondary sanctions in the introduced regimes provide for unilateral sanctions, as a result any country reserves the right to take action against any foreign government or company that does business with the sanctioned state, or a company or individual in the territory of that state if they do business in the named country or conduct financial transactions through their banks.

Unlawful “secondary sanctions” which are sometimes even stronger than the “main ones” interfere in the internal affairs of other states, which is a serious violation of state sovereignty. They also worsen the situation, pose a threat to international security, and may even push the conflict toward armed conflict. The state applying sanctions violates the concept of the sovereignty of the UN Security Council in such situations by claiming unique authority through extraterritorial sanctions[[56]](#footnote-56).

However, there are no efficient legal processes for impartial investigation and examination of legal transgressions when applying unilateral sanctions in the current UN regulatory framework. Only cases where the parties acknowledge the International Court of Justice’s authority, are referred to it, or are mandated by an international agreement may be heard by the Court and decided upon.

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| **Chapter 2. Economic sanctions and international business relations** |

## **§ 1. Potential consequences of the application of sanctions**

In reality, a number of UN publications posited that one of the main tenets of international law was the inadmissibility of using economic pressure to sway other states. Coercive economic measures are regarded as having violated all of international law’s fundamental principles in this case, particularly the Declaration on the Principles of International Law’s interpretation of the norm of non-intervention[[57]](#footnote-57).

The topic of whether coercive economic measures are permissible was also primarily examined in light of the particular concerns of emerging countries, whose economies are well recognized to be fragile. The reconstruction of international commercial and economic relations on the basis of equality and mutual respect of interests was a concern for the UN during this time. At the same time, it was believed that the fundamental tenets of international law could be explained in reference to particular sectors of state interaction, such as global trade[[58]](#footnote-58).

At the Conference on Trade and Development, convened in 1964 at the initiative of the UN, a document was adopted in which the UN member states attempted to codify the general principles that determine international trade relations and trade policy. In particular, it was fixed[[59]](#footnote-59): “*International trade should be mutually beneficial and carried out on the basis of the most favored nation treatment; within the framework of this trade, actions should not be taken that damage the trade interests of other countries*”[[60]](#footnote-60) (general principle eighth). In essence, this was a clarification of the principles of the sovereign equality of states and non-interference in internal affairs in relation to the sphere of trade relations[[61]](#footnote-61).

The need for further development of this principle arose due to the fact that Western countries, having lost the levers of political influence on developing states, began to widely use economic influence. Considering this circumstance, the United Nations Conference on Trade and Development (the UNCTAD) adopted in 1983 a special Resolution “On the Renunciation of Coercive Economic Measures”[[62]](#footnote-62). It is noteworthy that in the title of the Resolution the phrase “coercive economic measures” was used, and in its text (apparently due to a misunderstanding) the term “economic sanctions” was used**[[63]](#footnote-63)**.

Along the way, a more general discussion on the legality of unilateral economic actions also arose. They were considered to be in conflict with the fundamental tenets of the multilateral trading system, among other reasons. It is no accident that the General Agreement on Tariffs and Trade, the organization that served as the WTO’s immediate precursor at the time, began to give special regard to unilateral economic actions. In 1982, at the session of this organization, a Ministerial Declaration was adopted, which emphasized that the member states of the General Agreement on Tariffs and Trade of 10/30/1947 “*undertake individually and jointly to refrain from taking restrictive trade measures for non-economic reasons that are not consistent with General Agreement*” [[64]](#footnote-64).

The forms of implementation of international economic sanctions are being modified simultaneously with the development of the very concept of sanctions coercion, which reflects changes in the nature of international threats, a factor in the global deepening of the economic interdependence of states, and also considers the practical results of the implementation of previously implemented measures. So, speaking about the consequences of the introduction of economic sanctions, one cannot belittle their importance, the range of possible consequences can be considered unlimited: from the economic isolation of some countries to the decline in the general welfare of the population of countries. Economic sanctions can be strikingly successful in disrupting a particular government’s political system when used in conjunction with other measures (such as those of a military-political bent).

Economic penalties are frequently justified as means to defend human rights, democracy, or the rule of law when there are insufficient legal justifications. The bulk of coercive measures should, as was stated before, be approved by the UN Security Council under the guidelines of contemporary international law. This indicates that, in most situations, the Council, in accordance with the terms of Article 39 of the United Nations Charter[[65]](#footnote-65), decides which transgressions of the values and principles pose a threat to peace.

In recent years, ideological reasons have quite often served as a cover for economic or strategic interests, especially in the desire of the leading players in the international political arena to maintain the ability to project their power around the world, for which neither international obligations nor the sovereignty of other states should be an obstacle.

The totality of restrictive measures form a special legal regime, within the framework of which not only domestic business, but also foreign companies doing business in the country on which the sanctions were imposed or with its counterparties are forced to operate. A. A. Mokhov[[66]](#footnote-66) defines the sanctions regime as a special legal regime of economic activity, because it is characterized by the same features as special legal regimes of economic activity: “*is introduced in a special manner, is of urgent nature, is expressed in certain restrictions and prohibitions on economic activity, establishment of additional requirements to the subjects, transactions, transactions, etc.*”[[67]](#footnote-67). He also draws attention to the problem of insufficient elaboration of the legal regime of sanctions and their impact on the national economy and its individual sectors and segments. Legislators do not see the need for business to adapt to sharply changing conditions, requiring certain mechanisms aimed at protecting the rights and interests of business entities, which first of all suffer from the negative consequences of economic sanctions, expressed in in trade restrictions.

## **§ 2. How can the government aid international business work under the imposed economic sanctions?**

To begin with, it should be noted that in international practice there is no single approach to defining actions that help avoid the negative consequences of the imposition of economic sanctions. Moreover, the author would argue that there is no similar set of measures that could ensure the smooth operation of international business under sanctions. As has been noted more than once in this thesis, sanctions are a measure of pressure, of countries influencing the behavior of others, imposed solely to suppress “unwanted” behavior, as modern practice shows, sometimes sanctions are imposed even under the threat of a crisis or reduction of the quality of life in the imposing country.

Nevertheless, of course, the government of sanctioned countries can introduce a number of measures that could protect the interests of national business[[68]](#footnote-68). In practice, in the author’s opinion, these kinds of measures are introduced not so much to help domestic business, as to hinder the activities of foreign business in the hope that foreign business will cede the leading position to domestic business in a competitive environment.

Therefore, in order to analyze possible actions/state initiatives that help to minimize the negative consequences for the economy of the country on which sanctions are imposed, it is necessary to analyze the mechanisms for protecting Russian individuals and their counterparties from Western and American[[69]](#footnote-69) sanctions used in Russia between 2014 and 2023.

In the years 2022-2023, the Russian government has introduced many anti-crisis measures (countersanctions), which are aimed at stabilizing Russian business and aiding it. Despite the interest and innovativeness of such measures, the author will not analyze them within the framework of this thesis, for the reason that their effect has not yet had time to show on Russian business, which would be sufficient to draw the necessary conclusions.

Since the imposition of economic sanctions in 2014, the Russian authorities began to develop a mechanism to counteract the restrictive measures of foreign states and minimize their harmful effects. In 2014, in order to protect Russian individuals, Federal Law No. 607554-677, better known in the media as the “Rotenberg Law”, was proposed due to the arrest of Arkady Rotenberg’s property shortly before the initiative was passed for consideration in the State Duma due to the application of European Union sanctions against him.

This draft law proposed a mechanism for the compensation of losses incurred by Russian persons from decisions of foreign courts on matters within the jurisdiction of Russian courts[[70]](#footnote-70). It was proposed to use the federal budget as the source of funds for compensation and then, by way of recourse to claim from the foreign state whose court rendered the “unlawful” decision (Article 5.5). The draft law supposed a possibility of execution of the decision on satisfaction of the recourse claim including at the expense of the property of that foreign state located on the territory of Russia, including the property to which in accordance with the international treaties of Russia the immunity of that state applies (accordingly, violating the provisions of those international treaties, including the provisions of article 22 of the Vienna Convention on Diplomatic Relations of 1961[[71]](#footnote-71) in case of foreclosure on the property used by the diplomatic services).

The initiative was not appreciated in the legislature, and despite the passage of the first reading it was pointed out that significant revisions are needed. In the opinion of the Russian Government the draft law did not fully solve the tasks of protection of rights and lawful interests of Russian citizens and legal entities. The State Construction and Legislation Committee noted that the proposed mechanism for protecting the rights of persons whose rights had been adjudicated in violation of the jurisdiction of Russian courts was already contained in current procedural legislation, while the proposal for new compensation would incur additional federal budget expenses. During the second reading the draft law was recommended for rejection and was eventually withdrawn from further consideration[[72]](#footnote-72).

Later, already in 2018, two draft laws were submitted to the State Duma, the purpose of which was also to establish mechanisms to counteract the sanctions regime imposed by foreign states. The first – a draft federal law on measures of influence (counteraction) on unfriendly actions of the United States and other foreign states, successfully passed all stages of consideration, was adopted and entered into legal force on June 14, 2018[[73]](#footnote-73).

Initially, the draft assumed sixteen counteraction measures, among which were the following:

1. The ban or restriction of the import into the territory of the Russian Federation of agricultural products, raw materials and food, alcohol and tobacco products;
2. Termination or suspension of international cooperation in the nuclear, missile and propulsion, and aircraft construction industry;
3. A ban on entry of foreign nationals on the list determined by the Russian Ministry of Foreign Affairs, as well as a ban or restriction on employment of foreign nationals;
4. A ban or the prohibition or restriction on the admission of technological equipment and software;
5. Exhaustion of the exclusive rights of foreign nationals in the aviation industry software;
6. Exhaustion of the exclusive right to trademarks in respect of goods whose right holders are foreign citizens in accordance with the list established by the Government of the Russian Federation and other equally stringent measures indicating an intention to completely sever economic ties with the United States and some other foreign States (which are not explicitly mentioned, but judging by the meaning of the draft law, we are referring to the EU and other similar organizations)[[74]](#footnote-74).

According to the explanatory note to the draft law, it is a response to unfriendly actions of the United States in the form of sanctions. In this situation, the proposed law’s basic intent was to promote the growth of the domestic industrial sector and to highlight the necessity for developing mechanisms to replace goods, works, and services of American origin in the Russian market[[75]](#footnote-75).

At the same time the sectors of prohibitions and restrictions are defined by the President of the Russian Federation, while the lists of products or raw materials subject to import or export which are to be banned or restricted, as well as the lists of works and services subject to restrictions, are determined by the Government of the Russian Federation. These measures are introduced and abolished by the Government of the Russian Federation by decision of the President of the Russian Federation. Other measures not listed in the law on countermeasures may be established by the decision of the President of the Russian Federation[[76]](#footnote-76)[[77]](#footnote-77).

Thus, the main function of this federal law was establishing a mechanism for the introduction of counter-sanctions measures. The list of measures is quite familiar and does not contain any new types of measures which have not been taken before previously.

On the basis of this federal law were adopted, in particular, the Decree of the Government of the Russian Federation from 29.12.2018 No. 1716-83[[78]](#footnote-78), establishing bans and restrictions on the import of certain Ukrainian-made products and exports from Russia to Ukraine.

It is worth noting that the most common means of countering foreign economic sanctions in international practice is the adoption of regulations establishing a mechanism for blocking their application in the territory of one’s own country[[79]](#footnote-79). Moreover, the very existence of such a mechanism, even in the absence of broad practice of its application, is a political instrument through which one demonstrates “rejection of such violation of national sovereignty by a foreign state”[[80]](#footnote-80).

M. Doraev[[81]](#footnote-81), in his analysis of mechanisms for countering the extraterritorial application of economic sanctions, notes that “*the presence in Russian legislation of an official ban on The presence in Russian law of an official ban on the implementation of prescriptions of a foreign state in terms of compliance with unilateral restrictive measures imposed by a foreign state, and prosecution for their violation may be of importance for the subsequent legal protection of persons doing business in Russia in the In the case of investigations and prosecutions by state authorities of such foreign states. According to the doctrine of foreign state compulsion, a state may not demand that an act prohibited by law be carried out on the territory of an act prohibited under the laws of another country. The State may not, under the doctrine of foreign state compulsion, request a State to perform in the territory of another country*”[[82]](#footnote-82).

At the same time, however, U.S. courts very rarely agree on a position based on this doctrine[[83]](#footnote-83). It follows that in theory this mechanism can be useful for business entities, in theory, but in practice it is unlikely and this opinion is shared by the representatives of business. Obviously, this mechanism needs to be improved and in the current form is not quite suitable for today’s realities. In the future, judging by the statements of V. V. Volodin, Chairman of the State Duma, the legislators decided to abandon this approach, eliminating criminal liability for compliance with sanctions or establishing administrative liability, while retaining criminal prosecution for calling for sanctions against the Russian Federation[[84]](#footnote-84).

Later in 2019, the State Duma of the Russian Federation received another draft law to amend the Russian Criminal Code to criminalize the promotion of anti-Russian sanctions and the dissemination of information about sanctioned individuals[[85]](#footnote-85).

The idea is obviously borrowed from a previous draft, but implemented in a slightly different way. This time, the *corpus delicti* of facilitating the imposition of anti-Russian sanctions was made a separate article, while specifying the means of committing the act, namely the distribution of information, its collection, transfer, theft or storage for the purpose of transmission for distribution to the media or through information and telecommunications networks, or other similar means as a result of which a foreign state or state association (union) imposed restrictive measures on a Russian person. It is also proposed to criminalize the transfer, theft or storage of information for the purpose of transfer to organizations under the jurisdiction of “unfriendly” foreign states, as a result of which restrictive measures were introduced[[86]](#footnote-86).

All things considered, the mechanisms invented to counter Western sanctions had a harmful potential and exposed Russian business, first and foremost, to various kinds of risks primarily to Russian businesses as well as to divisions of foreign companies operating on the territory of the Russian Federation. In addition, they negatively affected the business climate, created an atmosphere of uncertainty in which it is quite difficult to attract investments in the Russian economy, necessary for its modernization[[87]](#footnote-87).

Thus, if international business is aimed at developing even in the face of economic sanctions, it must adapt and use the tools introduced not at the state level, but at the private level between counterparties at their discretion.

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| **Chapter 3. Contractual sanctions clause. Theoretical aspects** |

## **§ 1. Theoretical concept of “contractual sanctions clause”**

The concept of “economic sanctions” was examined, along with the method and legality of their application, as well as how the states against which sanctions are imposed level out the state-level sanctions by enacting specific measures. The author came to the conclusion that the implementation of anti-sanctions measures at the state level does not always lead to the elimination of sanctions at the federal level. The failure to achieve such goals can be explained by many factors, in the author’s opinion these are primarily:

1. It is impossible to fully regulate international trade between private parties; and
2. The timing of the adopted restrictions is irrelevant.

Anti-sanction measures are frequently implemented immediately upon entering into foreign trade relations, forcing the parties to resolve any issues that have developed (such as delivery or payment issues, for example), which undoubtedly affects the likelihood that foreign trade obligations will be fulfilled *post* *factum*. Thus, the business relations between the parties and as a whole desire of both Russian and foreign contractor to continue cooperation in the future irrespective of profitability of such relations has already put a jeopardy. In other words, the difficulties encountered by the parties outweigh the profitability of such relations and the parties decide to terminate the existing business relations between them.

While the above factors certainly play a huge role in foreign economic relations, they describe the most preferable outcome of the parties’ interaction under sanctions, when the parties simply withdraw from contractual agreements. It is important not to forget that sanctions imposed by the state are a retaliatory measure for the country’s behavior. In this case, the relationship of the parties is most likely burdened with moral and ethical business aspects. For example, the sanctions imposed against the Russian Federation are conditioned by a number of actions of the Russian Federation against Ukraine. One can argue as much as one wants about the legality of the actions of the Russian Federation, but the fact remains undeniable that many Russian counterparties have decided to break off business relations with the Russian Federation due to the fact that they are not ready, on a human and moral level, to continue doing business with Russia. This and many other aspects form the basis of lawsuits in international commercial courts, forcing courts to analyze contractual agreements, which categorically do not provide for the conduct of the parties under sanctions (or any relevant circumstances in general), and the parties are forced to bear the court costs and execution of the decisions rendered.

That is why the author believes that the most helpful and admissible in practice way to level the risks of doing business under sanctions is the introduction of a contractual sanctions clause formulated at the parties’ discretion. This chapter is devoted to the concept and analysis of the term “sanctions clause”. The author will analyze the following aspects:

1. The concept of a sanction clause and its meaning;
2. Types of contractual clauses;
3. The role that a sanctions clause plays in international business and
4. The risks that it can minimize in practice.

A sanction provision under civil law It seems acceptable to compare contracts with the idea of a higher level – “reservation in law” – for its theoretical explanation since contracts is a relatively new measure for contract law and has not yet received widespread recognition[[88]](#footnote-88).

First of all, it should be emphasized that domestic and international law have distinct definitions of the institution of a legal reservation. A “reservation” is a unilateral declaration made by a State when it signs, ratifies, accepts, approves, or accedes to a treaty that seeks to exclude or modify the legal effect of specific treaty provisions in their application to that State, according to the Vienna Convention on the Law of Treaties (art. 2(1)(d)). The content of reservations as they are envisioned by national law is not covered by this interpretation, which exclusively addresses international law. The Vienna Convention’s Articles 1, 2(1) makes this conclusion abundantly evident[[89]](#footnote-89): “*The provisions of paragraph 1, concerning the use of terms in this Convention, are without prejudice to the use of those terms or to the meanings that may be given to them in the domestic law of any State*” [[90]](#footnote-90).

A “reservation” is, generally speaking, a clause in civil law transactions that regulates the parties' relations in the event of the potential occurrence of a circumstance or future changes to circumstances that were present at the time of the transaction. I. D. Shutak provides a comprehensive and insightful legal definition of reservations in his doctoral paper. This scientist claims that the diversity of legally significant behavior, which is reflected in reservations, serves as a legal foundation for an empowered subject’s acceptable activity. Additionally, the universality of legal norms implies the use of dispositive methods, whose application enables subjects of law to independently regulate relationships with one another within the parameters established by current legislation, in addition to imperative methods, through which the state establishes a specific socio-legal program and determines the options of proper and impermissible behavior[[91]](#footnote-91).

Therefore, reservations included in a civil law contract by mutual consent and the autonomous will of the contracting parties reflect the principle of contract freedom and contain voluntary commitments by the contracting parties as to how they may behave in the event of any future events that may not be favorable for the outcome of the transaction[[92]](#footnote-92).

A sizable list of reservations in law – at least a dozen different varieties – has been generated over the course of many years of legal practice. In this regard, the author will categorize legal reservations on several grounds in order to clarify the substance of the legal phenomena under study. In the field of legal science, classification is defined as the division of entities into groups (classes) based on a characteristic or quality that has multiple manifestations but is shared by all. At that point, each distinct class creates phenomena that represent a particular attribute used for classification[[93]](#footnote-93).

Regarding their affiliation with a particular legal system, reservations in international law are distinguished from reservations in national (domestic) law. As we’ve seen above, from this perspective, the meaning and content of the concept of “reservation” are very different[[94]](#footnote-94).

From the point of view of their purposive and functional purpose, the entire set of reservations contained in domestic intrastate law can be divided into three large groups:

1. Clauses specifying how disputes and disagreements between the parties shall be resolved in the event that they arise during the performance of the parties’ obligations under the contract (such clauses include arbitration, arbitration, and mediation clauses);
2. Clauses that limit the parties’ respective authority or impose new obligations on them (such clauses include anti-corruption, tax, and patent clauses);
3. Provisions in an agreement’s provisions that safeguard contractors against any risks associated with its execution.

The latter clauses are often referred to as insurance clauses in the literature because they are often included in contracts to protect against the possibility of any adverse events, and because these events themselves are a type of insurance event. They function as a kind of insurance protection against the negative effects of any circumstances. Currency, inflation, and force majeure clauses are included in this category of clauses. The sanctions clause that is the focus of this study, which protects contracting parties’ rights in the case of international economic penalties, can also be categorized as a collection of protective (insurance) clauses.[[95]](#footnote-95).

To summarize, in general terms the system of legal reservations used in legal practice can be presented as follows (see table “*System of reservations used in civil law contracts*”).

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| |  |  | | --- | --- | | **Name of reservation** | **Name of reservation Content of reservation** | | 1. **Clauses specifying how disputes and disagreements between the parties shall be resolved in the event that they arise during the performance of the parties’:** | | | **Arbitration clause**  (arbitration clauses can be of two natures) | is a decision by the parties to arbitrate all or specific disagreements that have arisen or may emerge between them regarding a specific legal relationship, regardless of whether those disagreements were contractual in origin or not.  An arbitration agreement may take the form of a separate agreement or an arbitration clause in a contract. | | **Mediation clause** | is a written agreement signed before a dispute or conflicts arises to use the mediation process, i.e., to resolve conflicts with the help of a mediator based on the parties’ voluntary cooperation in order to find a mutually acceptable solution. | | 1. **Clauses that limit the parties’ respective authority or impose new obligations on them** | | | **Tax clause** | is a clause in a trade agreement, service agreement, loan agreement, etc. that states each party is responsible for paying all taxes and fees that are necessary for the performance of this agreement in their home country. | | **Patent clause** | is a clause in an export agreement that requires the seller to deliver patentable goods (at the time of the contract) and the buyer to notify the seller of any rights and claims of third parties. | | **Anticorruption clause** | is the acknowledgement by the contract’s signatories that they are aware of, comprehend, and agree to abide by the anti-corruption law’s terms.  The clause outlines the potential for an audit of contract-related paperwork as well as the counterparty’s willingness to produce all required paperwork in the event of a suspect of a corruption offense. The provision allows for the contract to be terminated unilaterally if anti-corruption standards are broken. | | 1. **Provisions in an agreement’s provisions that safeguard contractors against any risks associated with its execution** | | | **Currency clause** | is a clause that is included to international credit, payment, overseas commerce, and other contracts to protect the creditor and exporter from the danger of a decline in the payment currency between the contract’s inception and the payment’s due date.  There are typically two sorts of currency clauses: Using a stable currency as the transaction currency; including a provision that states that the product price will change in proportion to changes in the exchange rates of the payment and transaction currencies. | | **Inflationary clause** | is a clause in the contract that specifies how the amount of a payment may fluctuate depending on whether inflation is rising or falling. | | **Force majeure clause** | are the clauses in the contract that specify the method for the parties and their immunity from liability for failure to fulfill a contract due to force majeure, which are extraordinary and unforeseen events that occur under the specified criteria. | | **Sanctions clause** | are the contracts’ clauses defining the parties’ course of action in the event that international economic sanctions and possible retaliatory measures application has a negative impact on the terms of its performance, allowing for the possibility of contract termination, and relieving the parties of responsibility for the failure to perform or improper performance of their obligations under the contract. |   *Table: “System of reservations used in civil law contracts”[[96]](#footnote-96)* |

As the concept of “sanctions clause” is further examined, it should be emphasized that its practical implementation certainly outpaces its theoretical basis. This contacting provision is being utilized more frequently in business transactions between Russian and foreign counterparties. In some situations, foreign partners, mainly from nations that have implemented sanctions against Russia, take the initiative to include a sanctions clause in a contract. A sanctions clause has also started to appear in standard sample contracts for loans, sureties, etc. from some banks with foreign participation[[97]](#footnote-97). In other instances, the Russian side decides to incorporate sanctions clauses in contracts. Russian law does not conflict with the insertion of such elements in contracts because it permits business entities to decide for themselves whether contracts should be changed or terminated. Therefore, with the introduction of sanctions, clauses stating that modifications to the law, including the imposition of punishment, constitute reasons for modifying the terms of the agreement or for its termination, started to appear in contracts more frequently[[98]](#footnote-98).

As an illustration, consider the agreement reached between LLC “Gazprom Pererabotka Blagoveshensk” and general contractor JVC NIPI “Gazpererabotka” for the construction of the Amur gas processing plant. The agreement states that neither the general contractor nor the subcontractors it has employed are subject to penalty. The general contractor agrees to incorporate a sanctions clause allowing for the termination of these contracts in the event that sanctions are applied to the subcontractor in all contracts with subcontractors. The clause there states that: “*any party shall be exempt from liability for any partial or full non-performance of its obligations if such non-performance is caused by the sanctions taken during the term of the contract*”[[99]](#footnote-99).

So, we analyzed the concept of contractual clauses and its types, including sanctions clause. A conscientious reader, when studying this paragraph, would ask the following questions:

1. “What is the difference between a force majeure clause and a sanction clause?”,
2. “Is it necessary to provide for both clauses in the contract?”
3. “Why can’t one type of clause be enough? Aren’t they overlapping in meaning?”.

Indeed, at first glance, the sanctions clause and the force majeure clause are very similar, but in practice disputes often arise regarding their relationship. A comparison of two such reservations will be the subject of the next paragraph of this work, in which the author will answer the questions raised.

## **§ 2. Contractual sanctions clause v. Force majeure. Why economic sanctions are not a force majeure circumstance?**

In order to answer the questions raised in paragraph 1 of this chapter, it is, firs,t necessary to return to the definition of the disputed concepts “sanctions clause” and “force majeure clause”:

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| **Force majeure clause** | **V.** | **Sanctions clause** |
| *is a contractual provision defining the procedure for the parties and their exemption from liability for improper performance of contractual obligations due to force majeure, i.e. extraordinary and unavoidable circumstances under the given conditions.* |  | *is a contractual provision defining the procedure for the parties in the event of an adverse effect of international economic sanctions and retaliatory measures of the Russian Federation on the conditions of performance of the contract, providing for the possibility of termination of the contract and release of the parties from liability for non-performance or improper performance of obligations under the contract.* |

Interpretation of the definitions allows us to establish the following differences and similarities between the two concepts, which can be represented in the form of a table (see table 2: “*Force majeure and sanctions clauses: similarities and differences*”).

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  |  | | --- | --- | --- | |  | **Force majeure clause** | **Sanctions clause** | | **Where to find?** | In a contract | In a contract | | **How often is it introduced?** | Almost always | Fairy rarely | | **Why is it introduced?** | In the event of a force majeure, i.e. extraordinary and unavoidable circumstances under the given conditions | In the event of an adverse effect of international economic sanctions and retaliatory measures of the Russian Federation on the conditions of performance of the contract | | **What is the result of its use?** | Exemption from liability for improper performance of contractual obligations due to force majeure | Possibility of termination of the contract and release of the parties from liability for non-performance or improper performance of obligations under the contract |   *Table 2:* “*Force majeure and sanctions clauses: similarities and differences*”[[100]](#footnote-100). |

Visually from the contents of the table above it is obvious that the analyzed concepts have many more differences than might seem at first glance. Once we have resolved the misleading first impression of the concepts analyzed, let us delve further into their study.

It was indicated in this chapter’s first paragraph that there are various opinions in scholarly literature regarding whether or not sanction clauses are appropriate to include in civil law contracts. One school of thought holds that the list of conditions that qualify as force majeure cannot be arbitrarily chosen by the contract’s parties, and that the parties’ subjective will cannot be used to grant force majeure status to events that must be of an objective nature.

Another viewpoint holds that any event designated as a “force majeure” by the parties to the contract will have the force majeure effect[[101]](#footnote-101).

The third point of view, which falls somewhere in the middle of the two previously mentioned ones, contends that the term “sanctions” is entirely covered by the term “force majeure” (or “irresistible force”), so it is not necessary to specifically mention sanctions in the contract as a circumstance that may result in the contract being changed or terminated and relieving the parties of liability for failure to fulfill their obligations[[102]](#footnote-102).

In this case, supporters of this approach often refer to the Model force majeure clause of the International Chamber of Commerce[[103]](#footnote-103), in which the actions of the authorities, legal or illegal, are attributed to the circumstances in which a party to the contract is not recognized as liable for failure to perform any of its obligations (Article (1)(e)(2)).

The author will attempt to explain her own viewpoint on the topic at hand, which is somewhat different from the ones described before, without entirely disputing the points of view mentioned above because each of them has a specific justification.

Its significance is that, in my opinion, a sanctions clause in the system of legal clauses has a pronounced independence and represents those provisions of a civil-law contract that specify the course of action of the parties in the event that economic sanctions and other restrictive measures have a negative impact on the terms of the contract and offer the possibility of the release of the parties from liability for breach of contract or improper performance, as well as the possibility of termination of such a contract[[104]](#footnote-104). A sanctions clause belongs to the group of protective (insurance) clauses (see table 1 above).

The possibility of qualifying a sanctions clause as a relatively independent type of reservation in law is due to at least three circumstances:

1. Firstly, the legal institute of sanctions is not fully covered by the concept of “action by the authorities” as used in the Model Force Majeure Clause of the International Chamber of Commerce[[105]](#footnote-105), since, as practice shows, decisions on sanctions are taken not only by public authorities, but also by international organizations (the UN, NATO, the European Union, the Organization for Economic Cooperation and Development, the European Bank for Reconstruction and Development, etc.)[[106]](#footnote-106);
2. Second, the current legal framework clearly distinguishes between legitimate economic sanctions and the retaliatory actions taken by the Russian government in reaction to them. Retaliatory actions, which are aimed at the nations who imposed sanctions on Russia, also have an indirect negative impact on the interests of domestic business owners. As a result, in addition to the actual restrictions, the sanctions clause also addresses the Russian Federation’s retaliatory restrictive actions[[107]](#footnote-107);
3. Thirdly, using only a general force majeure clause in a contract without mentioning the concept of “sanctions” creates significant difficulties in judicial review of disputes involving the termination of contracts and relieving counterparties of liability in connection with the application of sanctions, as demonstrated by law enforcement, including judicial practice[[108]](#footnote-108).

Thus, the inclusion in civil-law contracts, along with the force majeure clause, also a sanction clause is not only necessary, but also quite legitimate. Clause 3 of Article 401 of the Civil Code of Russian Federation[[109]](#footnote-109) contains a dispositive rule under which liability for non-performance or improper performance of obligations in the field of entrepreneurial activity is excluded by force majeure circumstances, unless other grounds for liability or exemption from it are provided by law or contract. As a result, this rule offers the parties the freedom to specify alternative defenses to responsibility in addition to force majeure. The terms of release from responsibility other than force majeure (force majeure circumstances) should be referred to as a “limitation clause”, according to O.N. Zakharova. This includes other, extra grounds for release from liability that are unrelated to force majeure (force majeure circumstances). According to the cited source, the introduction of the concept of a restricted clause will eliminate a confusing and occasionally inaccurate interpretation of Clause 3 of Article 401 of the Russian Federation’s Civil Code[[110]](#footnote-110) at the execution of contracts by Russian businesspeople[[111]](#footnote-111).

All things considered, it appears that the judgments listed above support the assertion that sanctions clauses are necessary and may be applied in domestic contract law as a relatively independent component of agreements reached by Russian subjects of entrepreneurial activity with foreign counterparties.

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| **Chapter 4. Contractual sanctions clause: from theory to actions. A step-by-step plan on how to draft an appropriate contractual sanctions clause** |

Having analyzed the theoretical aspects of the sanction clause and determined its “value” in the framework of foreign economic contractual relations, the author considers it logical to proceed to the issue of the possibility of implementing a sanction clause in the text of the contract. As part of this chapter, the author will analyze the following range of issues:

1. Is a contractual sanction clause always necessary?
2. Can a sanctions clause be included in the text of a contract after it has been concluded?
3. In what part of the contract should a sanctions clause be implemented?
4. How can a sanctions clause be incorporated into the text of a contract as effectively as possible?

In order to answer the above questions we will analyze several sanctions clauses and evaluate their comprehensiveness, effectiveness and reflect on their possible contestability in the event of a court dispute between the parties over the interpretation of the sanctions clause used[[112]](#footnote-112).

However, before we proceed with analyzing examples of sanctions clauses, let us define the order in which parties implement contractual sanctions clauses:

**Step 1: Determining whether a contractual sanctions clause is necessary**

When entering into any civil-law relationship, regardless of whether the parties to the agreement are foreign or Russian, the first step is to conduct an initial due diligence and determine the basic risks. When determining whether a sanctions clause is necessary, the procedure does not change; common practice applies in this part.

In spite of the fact that the initial verification is not a stage legally established in the Russian legal order, the vast majority of foreign economic relations begin with it. At this stage, independent contractors engaged by the parties to the potential agreement, or in-house lawyers of such persons/legal entities verify documents not only in relation to the subject of the transaction (which may be virtually anything: shares or equities in a company, real estate, etc.), but also in relation to the potential counterparty with the main purpose – to determine the range of potential risks associated with such an agreement. In other words, determine what risks may arise, assess their possible consequences and make a decision to enter or refuse a transaction, if the risks and their consequences are too high.

For the purposes of this work, let’s take the following inputs as an example and solve the case that arose between imaginary parties (the “**Case**”)[[113]](#footnote-113):

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| * Limited Liability Company Green (the “**Buyer**”) and Limited Liability Company Orange (the “**Seller**”) plan to enter into a contract of sale and purchase of a share in the share capital of Limited Liability Company Red (the “**Target**”) (the “**Agreement**”); * The Buyer is a company incorporated under the laws of France; * The Seller is a company incorporated under the laws of the Russian Federation; * Target is a company incorporated under the laws of the Russian Federation. The Seller owns 100% of the shares in the share capital of the Target, which are subject to a potential agreement between the parties (the “**Planned Transaction**”). |

In today’s reality, the first step for a foreign counterparty thinking of buying a stake in a Russian company/concluding a transaction with a Russian person/legal entity is to determine the following factors:

1. Whether a Russian person has the right to sell an interest in a Russian business to a foreign person;
2. Whether a foreign person can buy an interest in a Russian business from a Russian person; and
3. Whether the respective companies will comply with the provisions of the law applicable to them.

These questions are due to objective reasons – bans/restrictions imposed on this type of transactions both by Russian law and by the laws of countries that have imposed sanctions on the Russian Federation.

Since the subject of this work is the analysis of the sanctions clause, we will take it for granted that the restrictions imposed by the legislation of the Seller and the Buyer, do not apply to the Planned transaction and the parties have the right to enter into a contractual relationship under specified material aspects. Thus, it is only the third risen question that is of most interest to us.

From the content of the case, it is obvious that the Planned Transaction has a sanction element on both the Buyer’s and the Seller’s side. Thus, there is no question as to whether a sanctions clause is necessary in the agreement for the Planned Transaction.

In this case, let us slightly amend the terms of the Case and assume that neither party is established under the laws of the countries that have imposed sanctions against the Russian Federation or with the laws of the Russian Federation. For example:

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| * The Seller, the Buyer and the Target are entities incorporated under the laws of France; * The Buyer’s beneficiary is a company incorporated under the laws of the Russian Federation; * The Buyer plans to pay the price under the Planned Transaction with borrowed funds from a Russian bank. |

Despite the fact that none of the parties to the Planned Transaction are established under the laws of the Russian Federation or the country which imposed sanctions against the Russian Federation, the Planned Transaction still contains a sanctions element and the need to introduce a sanctions clause is obvious. The Buyer’s beneficiary is a Russian company; moreover, the Russian bank’s funds will be borrowed in order to pay the price under the Planned Transaction.

It is this kind of circumstances[[114]](#footnote-114), which may not be known to the parties without conducting a proper due diligence and those that may substantially increase the potential risks associated with the transaction and affect the decision of the parties to enter into such an agreement.

**Step 2: Determine how to mitigate potential risks**

1. **Sanctions warranties**

At the moment such a tool as “sanctions warranties” is used regularly; they are assurances that at the time of the transaction the parties are not sanctioned persons, i.e. the parties are not included in the sectoral or blocking lists of the Western countries and the USA. It is important to understand that such assurances may be of a different legal nature. They can be either constituent or non-constituent, if in the first case, the violation of assurances entails the invalidity of the entire agreement with subsequent application; in the second case, the transaction will be valid but for the party in breach of assurances, there will be negative consequences in terms of prosecution in accordance with the provisions of the agreement.

Such a guarantee can be very simply formulated, for example, in this way:

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| **“Sanctioned Person”** means, at any time, (a) (i) a person subject to restrictive measures or sanctions (EU blocked person) under European Union (EU) Council Regulation No. 208/2014, 269/2014[[115]](#footnote-115), as amended, or other law of the EU or any of its member states; or (ii) a person subject to any restrictive measures or sanctions in the European Union, the United Kingdom, or any EU member state; (b) any person organized or resident in a sanctioned territory; or (c) any person owned or controlled by, or acting on behalf or at the direction of, any such person or persons described in the foregoing paragraphs (a) or (b); **Each of the parties warrants to the other parties that as at the Date of this agreement it is not a Sanctioned Person, nor are any of its affiliates, beneficiaries, directors or other related parties.** |

The use of such a guarantee is a convenient and useful tool when it comes to formalizing relations burdened by potential sanctioned elements. Of course, the use of such a guarantee by itself will not “save” the parties to the transaction from any negative consequences in the event that the status of the parties changes. Nevertheless, such guarantees are a gesture of goodwill between the parties and a marker that the parties evaluated potential sanctions risks when entering into the transaction.

In the most preferred scenario, the party who gave such guarantees is required to inform the other of a change in facts that would invalidate such a guarantee and initiate negotiations to terminate the agreement. Therefore, sanctions warranties can be a very useful tool even if they are no longer true, they can serve as an incentive for subsequent negotiations.

1. **Sanctions clause**

The sanctions clause is the most effective method of managing sanctions risks currently available. Nevertheless, drafting a sanctions clause is not simple and has many nuances that must be kept in mind. A poorly drafted clause can not only fail to avoid risks, but also open the parties up to other unforeseen risks. Therefore, when drafting a sanctions clause, it is necessary to proceed both from generally accepted rules of contract drafting and from special provisions.

Let’s start with the general principles. Firstly, great attention should be paid to the punctuation and grammar used, because any mistake in a, for example, comma can completely change the meaning of the clause.

Secondly, it is necessary to introduce abbreviations when using terms related to the compliance. Often in practice, there are cases where the parties omit parts of the definitions of the terms used without thinking about the fact that thereby the meaning of the provision as a whole is lost. The best way would be to include sanctions terms in the list of other basic terms of the agreement, as is common in practice, and not to separate such terms into a separate paragraph. In this case, it is necessary to use the terms consistently and to control the meaning of the full, expanded term when using its abbreviation.

Finally, don’t expect a sanctions clause to be one sentence to put in the contract. Because of the specificity and complexity of the sanctions topic as a whole, it is not possible to describe all of its multifaceted nature in one sentence. Such short clauses do not cover the totality of the risks and cannot adequately present the risks and their consequences to the parties.

The author proposes to examine the specific features of sanctions clauses with the help of several examples below.

Example No. 1:

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| “Circumstances, the occurrence of which releases the parties from liability for breach of obligations under this contract and entails its modification or termination, are the adoption by foreign states and international organizations of restrictive measures (sanctions) against the Russian Federation and Russian legal entities and individuals, as well as the adoption by the competent state bodies of the Russian Federation of retaliatory measures and sanctions against foreign states and their legal entities and individuals, if such restrictive.” |

We have before us an example of a short sanctions clause. Let’s look at its shortcomings.

The main disadvantage of this clause is its vagueness. It does not contain clear provisions on which sanctions are subject to it and, most importantly, on the procedure to be followed by the parties in order for the reservation to be enforceable. Nevertheless, it is a good and universal basis that can be taken as a ground when drafting a sanctions clause with the parties’ interests in mind.

Example No. 2:

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| **Sanctions Authority** means:   * 1. the government of the Russian Federation;   2. the government of the United States of America;   3. the European Union or any of its member states;   4. the government of the United Kingdom;   5. the respective governmental institutions and agencies of any of the foregoing, including OFAC, the United States Department of State, the United States Department of Commerce and Her Majesty’s Treasury; or   6. any other Governmental Authority which exercises jurisdiction over any Party or any of its Affiliates;  1. Sanctions Laws means any economic, financial or trade sanctions laws, regulations, embargoes or restrictive measures administered, enacted or enforced by any Sanctions Authority; 2. Conditions to Closing    1. Closing shall be conditional on the following Conditions having been fulfilled or waived in accordance with this Agreement:        1. no enactment of any new or revised Sanctions Laws or the designation or listing of any person pursuant to any Sanctions Laws having occurred following the date of this Agreement which would result in the Proposed Transaction or the participation of any of the Purchasers or their nominees in the financing or management of or any distribution by the Company (i) becoming in respect of any Party or any of its Affiliates a violation of any Sanctions Laws or (ii) triggering material risk of any Party or any of its Affiliates itself becoming a designated person or otherwise becoming a sanctions target or not in compliance with any Sanctions Laws (where such Party or such Affiliate of a Party is obliged to comply with them or complies as a matter of policy). |

In contrast to the first clause, this example is much more detailed, listing the authorities whose sanctions are subject to the reservation; there is also an indication of the validity and applicability of the reservation at a time related to the validity of the agreement as a whole. Nevertheless, the definition of the term “Sanctions Laws” gives rise to various interpretations. For example, the use of punctuation, namely commas, does not seem to the author to be entirely successful. The author suggests the following wording:

“Sanctions Laws *means any economic, financial****, and*** *trade sanctions laws, regulations, embargoes****, and*** *restrictive measures administered that is enacted* ***and/or*** *enforced by or collectively by any of the Sanctions Authorities*”.

Example No. 3[[116]](#footnote-116):

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| **“Sanctioned Person”** means, at any time, (a) (i) a person subject to restrictive measures or sanctions (EU blocked person) under European Union (EU) Council Regulation No. 208/2014, 269/2014, as amended, or other law of the EU or any of its member states; or (ii) a person subject to any restrictive measures or sanctions in the European Union, the United Kingdom, or any EU member state; (b) any person organized or resident in a Sanctioned Territory; or (c) any person owned or controlled by, or acting on behalf or at the direction of, any such person or persons described in the foregoing paragraphs (a) or (b);  **“Sanctioned Territory”** means, at any time, a country, region or area which as a territory is the subject or target of any comprehensive trade embargoes according to Sanctions Laws and Regulations;  **“Sanctions Affected Shareholder”** has the meaning given to it in clause 1.5;  **“Sanctions Laws and Regulations”** means any law, regulation, decree, ordinance, order, demand, request (that, if not complied with, may be followed by a legally binding order), rule or requirement of the United Nations Security Council, the European Union, the Kingdom of Spain, or the United Kingdom relating to trade, economic, commercial or financial sanctions; trade embargoes and other foreign trade controls; export controls; non-proliferation; anti-terrorism; and similar matters, as in force from time to time; ***Sanctions – General***Each of the parties warrants to the other parties that as at the Date of this agreement it is not a Sanctioned Person, nor are any of its affiliates, beneficiaries, directors or other related parties.Each of the Shareholders undertakes to the other Shareholder that it shall (and that it shall procure that its Affiliates, directors, officers, employees, and any Managing Directors or Executives nominated by it will) exercise its respective voting rights and other powers of control in relation to the JV Group Companies to procure, to the extent they are able to do so, that each of the JV Group Companies will, at all times, comply with applicable Sanctions Laws and Regulations and will not engage in or conspire to engage in any transaction, activity or conduct that (i) would not be in compliance with, or otherwise have the purpose of evading or circumventing, the Sanctions Laws and Regulations; or (ii) could cause the other Shareholder or any of its Affiliates or their respective directors, officers, or employees (at the level of senior manager (or equivalent) and above but excluding all persons employed at a lower level) to not be in compliance with any applicable Sanctions Laws and Regulations; or (iii) could reasonably be expected to result in its or any JV Group Company or the other Shareholder being designated as a Sanctioned Person.Each of the Shareholders undertakes to the other Shareholder to procure that no person nominated by it from time to time as a Managing Director or Executive will at the time of nomination and appointment be a Sanctioned Person. If a Managing Director or Executive becomes a Sanctioned Person or is prevented in whole or in part from attending or voting at a meeting of the Board of Managing Directors or from performing his/her other professional duties due to applicable Sanctions Laws and Regulations, the Shareholders shall use the powers available to them to promptly remove from office such person and the Shareholder which nominated such person shall, to the extent not prohibited by applicable Sanctions Laws and Regulations, nominate another person as Managing Director or Executive within ten (10) Business Days for appointment in place of the person so removed, and the parties shall use the powers available to them respectively to procure the prompt appointment of such Managing Director or Executive.Where either Shareholder (acting reasonably) considers that it (or any of its Affiliates) requires a license or approval pursuant to any Sanctions Laws and Regulations in order to perform any of its obligations or exercise any of its rights under this agreement, then such Shareholder shall (or, as applicable, shall procure that its relevant Affiliate(s) will) use all reasonable efforts to prepare and submit an application to obtain such license or approval as soon as practicable, provided that the submitting Shareholder shall consult with the other Shareholder, and take into account the other Shareholder’s reasonable suggestions, as to the form, content and timing of such application. The other Shareholder shall, upon the written request of the Shareholder seeking such license or approval, cooperate in good faith and use reasonable endeavors to assist such Shareholder in obtaining such license or approval as soon as practicable. Without prejudice to the generality of the foregoing, the other Shareholder shall (and shall exercise its voting rights and other powers of control in relation to the JV Group Companies to procure that the relevant JV Group Companies shall) provide the submitting Shareholder with all information in relation to the JV Group Companies that it reasonably requires or that is requested by any competent authority in connection with the application for such license or approval.***Suspension of Obligations***Subject to giving the notice set out in clause 1.6, if and to the extent that as a result of any change in Sanctions Laws and Regulations (including any change in the application or interpretation thereof by any competent authority):any restriction under any Sanctions Laws and Regulations:is applicable or becomes applicable to a Shareholder or any of its Affiliates and prohibits or prevents such Shareholder from performing an obligation under this agreement or, in the opinion of the relevant Shareholder, otherwise creates a substantial risk of such Shareholder or its Affiliates’ non-compliance with such Sanctions Laws and Regulations in connection with this agreement; oridentifies conduct which exposes a Shareholder or any of its Affiliates to punitive or restrictive measures as a result of such Shareholder’s performance of an obligation under this agreement on the basis that performance of such obligation constitutes such conduct; orthe performance of an obligation under this agreement by a Shareholder would not be in compliance with the applicable Sanctions Laws and Regulations or is otherwise prevented by a restriction under any Sanctions Laws and Regulations affecting or causing exposure to punitive or restrictive measures for banks or other third parties through which such obligation is performed,(such restriction, the “**Applicable Sanctions Restriction”** and, the obligation so affected, the “**Affected Obligation”**), then the Shareholder so affected (the “**Sanctions** **Affected Shareholder”**) shall be excused from performing the Affected Obligation for so long as such Applicable Sanctions Restriction continues to affect performance by such Shareholder or its relevant Affiliate of the Affected Obligation.The Sanctions Affected Shareholder shall, as soon as practicable after becoming aware of an Applicable Sanctions Restriction (and in any case within five (5) Business Days after it suspends performance of the Affected Obligation or otherwise), notify the other Shareholder of such Applicable Sanctions Restriction and, to the extent then reasonably possible, provide to the other Shareholder a *bona fide* non-binding estimate of the extent and expected duration of any inability by it to perform.The Sanctions Affected Shareholder shall, to the extent permissible under any Applicable Sanctions Restriction and applicable law, use reasonable endeavors to mitigate and overcome the effects of any Applicable Sanctions Restriction.The senior representatives of the Shareholders shall, to the extent not prohibited by Sanctions Laws and Regulations, meet as soon as reasonably practicable (including by way of videoconference, in person or telephone conference) after the date of delivery of the notice (or the date when such notice was required to have been delivered), or procure that their representatives shall so meet, to discuss the Applicable Sanctions Restriction and its potential consequences and they shall use their respective reasonable endeavors to agree on the course of actions to be taken in connection with such Applicable Sanctions Restriction (including amendment to the terms of the undertakings and/or transactions contemplated by this agreement, application for formal guidance or authorization/license, or the method of exit from the JV Company of the Sanctions Affected Shareholder), in a manner that endeavors to preserve the balance of the commercial agreement, such as the economic benefits, risk allocation, costs and liabilities, existing under this agreement immediately prior to the onset of the Applicable Sanctions Restriction.***Transfer upon Restrictions***In the event any Shareholder or its respective Affiliate proposes to, directly or indirectly, Transfer any Shares held by the Transferor to a Third Party Purchaser which is a Sanctioned Person or a person designated as a Specially Designed National (SDN) by the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury, the Transferor shall procure, that such Third Party Purchaser offers (or, in case the Shares held by the Continuing Shareholder cannot be lawfully transferred to such Third Party Purchaser, the Transferring Shareholder shall offer) to purchase the Shares held by the Continuing Shareholder on the same terms (including price per Share which must be cash) as apply to the proposed direct or indirect Transfer of the Shares held by the Transferor.***Operation of Business upon Restrictions***Notwithstanding any other provision of this agreement, if, because of an Applicable Sanctions Restriction, a necessary quorum is not formed or unanimous agreement is not reached on a particular Reserved Matter at a General Meeting or a meeting of the Board of Managing Directors (as applicable), the parties agree that, during the entire period while such Applicable Sanctions Restriction impedes formation of the necessary quorum or the reaching of unanimous agreement on the relevant Reserved Matter:an Impasse shall not be deemed to have occurred by reason of such Applicable Sanctions Restriction or such consequences thereof;the JV Subsidiaries shall be managed by [*party*] in the ordinary course;the Business shall be operated, and the JV Subsidiaries shall be managed, by [*party*] without it having to seek any approval from the Shareholders or the Managing Directors with respect to any Reserved Matters (except for the Reserved Matters set out in clauses XXX and YYY); andthe Annual Budget in force at the time of the notice delivered (or the date when such notice was required to have been delivered), shall remain in force and continue to apply, with a ten per cent (10%) uplift in relation to all items in it.**Default** The parties agree that a Sanctions Affected Shareholder shall not be deemed to have committed a breach of this agreement in respect of any actions (or omissions) relating to an Affected Obligation and such actions (or omissions) shall not constitute a Default or Material Default. |

This is an example of a sanctions clause, which corresponds to all the mentioned above drafting qualities and it does not repeat the issues risen in prior cases. Moreover, this sanctions clause details and clearly describes the actions applicable for use in business when the most severe risks take place. This approach chose a solution to solve the parties’ issues.

I would also like to note that the sanctions clause, as well as any other provisions of the agreement, can be changed by the parties at their discretion at any time, even after it has been signed. The parties should understand that even if, when signing the agreement, the parties did not foresee any sanctions risks; in any case during the period of the agreement such risks appeared or the parties had a desire or a need to introduce a sanctions clause to the text of an already concluded agreement, they have the right to do so by signing an additional agreement to the contract.

Thus, we can conclude that the above analysis of the mechanics and approaches to drafting a sanctions clause will help in the subsequent drafting of such clauses in practice and will help avoid unforeseen risks.

It should be remembered that drafting of any contractual provision is a painstaking work that requires great attention to detail and elaboration of all aspects of the legal relations between the parties to the agreement. As any sanctions risk is associated with a highly variable legal environment of various countries and is also associated with high-level risks; therefore, the sanctions clause is not an exception to the general rule and should not be neglected when doing international business.

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| **Conclusion** |

In 2022, the Russian Federation faced a large number of economic sanctions. The result of their imposition by entire blocs of foreign states was not only the deterioration of Russia’s economic situation, but also the destruction of the entire system of international civil turnover, of which our country was a part.

The author began the study of the topic by exploring the concept of “economic sanctions”, their legal nature, and determining the legality of the implementation of economic sanctions at the international level. As economic sanctions are a priority way of influencing political processes, they cause enormous damage to private legal relations. In this situation it becomes obvious that there is a need to develop legislative measures aimed at protecting the private legal interests of subjects of economic activity.

Then the author provided an overview of the potential consequences that the international business may suffer. As a result of this analysis, the author came to the conclusion that it is impossible to fully minimize the negative effects of economic sanctions on international business relations on a public level. Accordingly, a conclusion was made about the need for participation of the parties of private legal relations in the regulation of the negative consequences of the introduction of economic sanctions.

Having come to this conclusion, the author has provided a comprehensive study of the concept of “contractual sanctions clause”. In particular, examination of its legal nature, comparison to other more familiar contractual clauses, and, most importantly, comparison of the “sanctions clause” and “force majeure” concepts.

A sanction clause is a provision providing for the right to unilaterally withdraw from the contract in case of imposition of sanctions against one of the parties. The said provision will lead to the reduction of risks, if the cancellation of the contract is related to the application of restrictive measures.

After studying the concept of “sanctions clause”, the author moved on to the practical drafting of sanctions clauses and developed a mechanism that would help any participants in private international legal relations to develop a sanctions clause, depending on the specifics of business relations. Several practical examples of sanctions clauses were also analyzed to identify “vulnerable” provisions.

The inclusion of sanctions clauses in contracts is becoming a standard business practice followed in international transactions. By including such a clause, the parties can coordinate their actions in advance in case a ban is imposed on the delivery of any goods or performance of certain financial transactions. In addition, a well-formulated sanctions clause will not allow the counterparty to unilaterally withdraw from the contract due to the potential impact of sanctions or a significant change in circumstances. [[117]](#footnote-117)

To avoid such unforeseen situations, a sanctions clause should describe in detail the following:

1. Exactly what the parties imply sanctions to mean;
2. How the negative impact of the sanctions on the legal relations of the parties should be confirmed;
3. What actions should be taken by the parties in order to resolve the situation as efficiently as possible and with minimal negative consequences.

A competent definition of the term “sanctions” is crucial to the enforceability and applicability of the sanctions clause as a whole. Thus, the parties must agree on which states’ sanctions they will define in the agreement as a reason to revise the relationship. If it is not possible to determine a specific list of sanctions restrictions, the parties can define sanctions in the most general way[[118]](#footnote-118).

The inability of a party to fulfill its obligations due to sanctions restrictions must be supported by some evidence. Otherwise, the party potentially affected by sanctions may be able to withdraw from the agreement, based only on its concerns about the sanctions risks. In order to eliminate such uncertainty, the parties must agree on a procedure for confirming that further performance of obligations will lead to sanctions risks or is practically impossible due to introduction of sanctions[[119]](#footnote-119).

All things considered, the study has shown that the inclusion of sanctions clauses in the contracts will help maintain certainty in the legal relations of the parties in the event of the imposition of sanctions, as well as the stability of civil turnover, which is a necessary component for improving the investment climate in the Russian Federation.

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113. This case is devised solely to illustrate the process for determining whether a sanctions clause is necessary in a contract and excludes the assessment of underlying risks and the applicability of any other provisions of any law. [↑](#footnote-ref-113)
114. In no way does the author state that the following examples provide an exhaustive list of circumstances subject to due diligence. These are simply the examples of circumstances which the author has most commonly dealt with in her practice. [↑](#footnote-ref-114)
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