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## The edge of war: legal implications of the escalating Russia-Ukraine crisis for traders

This winter, with the world watching, Russia deployed around 100,000 troops together with tanks and heavy artillery along its border with Ukraine. Many of these are stationed in Donetsk and Luhansk where separatist forces have been fighting since Russia annexed Crimea in 2014 – a reminder that Russia has attacked Ukraine before.<sup>1</sup>

Last week, the U.S. formally rejected Moscow's security demands that NATO bar Ukraine from joining the military alliance and pull back forces from Eastern Europe, which increased the prospects of an incursion. The West has threatened that any invasion will be met with damaging sanctions against Russia.

Already, wheat futures are rising in anticipation of interruption to grain flows from the Black Sea region,<sup>2</sup> as Ukraine accounts for 10% of global wheat exports and is the world's fourth-largest corn exporter.<sup>3</sup> Oil and gas price rises are also predicted, with the U.S. looking to secure alternative fuel sources for the E.U., which currently depends on Russia for a third of its gas.<sup>4</sup>

Behind the headlines, traders in these markets should consider how they might be impacted.

### Sanctions

If sanctions are introduced, their severity will depend on the scale of any Russian offensive and there are likely to be adjustments as the situation develops.

Potential measures include targeting named Russian individuals and entities,<sup>5</sup> blocking the financial sector's access to international payment systems,<sup>6</sup> restrictions on specific ports, and hitting Russia's gas industry either by imposing short-term export bans or kerbing financing and technology transfers for new developments.<sup>7</sup>

Such restrictions can be imposed with little or no notice, so parties trading in the region are advised to assess now how best to mitigate their counterparty risk. When reviewing their customer due diligence, for example, parties should drill down into beneficial ownership structures and control to consider whether the shareholders or the directors of their trading partners could be sanctioned.

More generally, parties should ask what their overall exposure to Russia is if creditors are no longer able to deal in U.S. dollars, or selling parties are banned from exporting the goods they have contracted to deliver.

### Place of delivery

Buyers and sellers of commodities also need to assess the basis on which they trade, including the applicable Incoterm rules and the point at which risk in the goods passes to them thereunder. Under FOB (free on board) terms, the goods are delivered at the named place of loading, at which point risk passes to the buyer. Conversely, in a DAP (delivered at place) sale contract, it is the seller that bears these responsibilities all the way through to discharge at the named destination. Whether any fighting is land-

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<sup>1</sup> [How Russia's Military Is Positioned to Threaten Ukraine - The New York Times \(nytimes.com\)](#)

<sup>2</sup> [GRAINS-Wheat moves higher; corn, soy hold steady near recent highs | Reuters](#)

<sup>3</sup> [Oil markets nervous as US evacuates Ukraine staff on Russia invasion fear | S&P Global Platts \(spglobal.com\)](#)

<sup>4</sup> [Exclusive: U.S. talks to energy firms on EU gas supply in case of Russia-Ukraine conflict | Reuters](#)

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<sup>5</sup> [US plans sanctions against Vladimir Putin's inner circle if Russia moves on Ukraine | Financial Times \(ft.com\)](#)

<sup>6</sup> [ECB warns European lenders on Russia sanctions risk | Financial Times \(ft.com\)](#)

<sup>7</sup> [New Russian gas projects face sanctions if Ukraine attacked | Financial Times \(ft.com\)](#)

based or sea-based and the attendant disruption will therefore put pressure on different parties in the supply chain depending on their contractual arrangements.

The location of any disruption will also affect the flow of different commodities differently. The southwestern port of Yuzhny, which is the Black Sea's overall top export port for dry-bulk commodities,<sup>8</sup> is far from the frontlines but is within reach of Russia-controlled Crimea. Mariupol, the main port in the Sea of Azov, which sees a quarter of Ukraine's total exports in value terms in the form of pig iron and steel,<sup>9</sup> would be affected should vessels be prevented from transiting the Kerch strait, and is also only 30km from Russia (10km from the separatist Donbas region).

### Financing

Potential sanctions implications are not the only aspect of financial arrangements that will need to be reviewed; traders will also want to think about payment terms. For example, if their sale contract provides for payment under a documentary letter of credit then a disruption to air travel could prevent the documents required for presentation from reaching the bank.

With financiers potentially looking at accelerating loans to Ukrainian companies or protecting their Ukrainian-based assets through enforcement of security, there could be an increase in insolvencies along the supply chain. Both military escalation and the retaliatory imposition of sanctions could trigger terminating events under various financing arrangements by making it illegal for a party to perform their contractual obligations (e.g. providing financing under a loan agreement or the acquisition of commodities under a prepayment arrangement).

For those operating in these supply chains or relying on financing that might be vulnerable, we suggest that active engagement with lenders, in order to understand what degree of flexibility the lender has, could assist with forestalling defaults. For example, "Material Adverse Change" (MAC) clauses, which entitle the lender to terminate and declare funds immediately due and payable, are often subjective and forward-looking, allowing the lender to declare a MAC event where in their opinion the borrower's ability to repay is affected or simply could be affected. If possible, borrowers should seek written confirmation from the lender that impacted

provisions have not been breached or that any breaches are waived.



### Contract of carriage

Traders who have chartered or are looking to charter tonnage to service their sale contracts may wish to revisit/review the sanctions, war risk and safe port clauses. War risk clauses set out the circumstances in which shipowners can refuse to sail through "war" areas as well as allocating the responsibility for additional costs (e.g. war risk insurance premiums). The definition of "war" varies between different standard charterparty clauses, and owners' ability to rely on the clause itself will depend on the prevailing factors at the relevant time (e.g. the type of vessel, if tankers are being targeted rather than bulk carriers).

Safe port clauses allow shipowners to refuse to go to charterers' nominated port if it is deemed "unsafe", which extends to political unrest and the risk of war. Many charterparties contain an express warranty as to the safety of the loading or the discharging port, but in circumstances where they do not one may be implied depending on the construction of the charterparty in question. Traders/charterers should look at what trading areas are permitted under the charterparty and/or whether specific ports are named in the recap.

A tightening of the freight market as shipowners withdraw or restrict vessels from trading in the Black Sea region (if the tensions continue to escalate) or in particular cargoes (if they become sanctioned) will almost certainly lead to an increase in freight costs, contributing to price rises in the relevant commodities, and more sale and shipping contract defaults as a result.

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<sup>8</sup> [Ukraine conflict would destabilise Black Sea trade, sanctions 'inevitable', say lawyers | TradeWinds \(tradewindsnews.com\)](#)

<sup>9</sup> See Footnote 3.

## Force Majeure

Periods of political unrest, especially those that result in sanctions or embargoes, and the consequent risk of default frequently leads traders to ask whether they can rely on the force majeure (FM) clauses in their sale contracts in order to suspend, and ultimately cancel, these contracts. The answer to this question is almost never straight-forward and was the subject of an in-depth briefing we published earlier this year.<sup>10</sup>

There is no general doctrine of FM under English law, so the wording of each clause will need to be construed in the context of the particular facts. The party seeking to rely on the clause will need to show a causal connection between the triggering event and the prevention of performance, which in most cases encompasses showing that other methods of performance are not possible. For example, a seller who is unable to transport its supply to the loadport will have to show that it was physically or legally impossible to get the goods to the port (due to, e.g., disruption to transport infrastructure or blockades) and that there were no other sources of supply (e.g. port stockpiles or already loaded vessels).

It is also important to ensure that any notice requirements in the FM clauses are strictly complied with and, where there is a string of sale contracts, that the notice is passed on in accordance with the obligations under each sale contract.

## Conclusion

While some are concerned that the public nature of the battle currently being fought between Putin and the West will make it harder for him to back down, Moscow may yet step back from the brink.<sup>11</sup> Given the present state of flux and the pace of developments, we recommend that those with live trades (and, equally, those looking to do new business) in the Black Sea region and with Russian and/or Ukrainian counterparties carry out risk assessments now in case quick reactions are required.

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<sup>10</sup> [force-majeure-clauses-in-turbulent-times---august-2021f1198485045b6c60befc000023f0be.pdf \(shlegal.com\)](https://www.shlegal.com/force-majeure-clauses-in-turbulent-times---august-2021f1198485045b6c60befc000023f0be.pdf)

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<sup>11</sup> [How the west went public to stop a war in Ukraine | Financial Times \(ft.com\)](https://www.ft.com/content/2022-02-24/how-the-west-went-public-to-stop-a-war-in-ukraine)