Legal challenges to Iran's commerce amid US-Israeli war of aggression

From sanctions to force majeure, insurance, and redesign of foreign trade contracts

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OPINION EXCLUSIVE

The impact of war on the trade of Middle Eastern merchants manifests itself in foreign trade contracts before it becomes discernible in customs statistics. A vessel that does not sail, a bank that refuses to accept documents, an insurer that restricts war-risk coverage, or a port that is no longer accessible can disrupt a chain of contractual obligations extending from seller to buyer and from bank to insurer.

For this reason, one of the most consequential effects of the United States–Israeli war on Iran should not be sought exclusively in declining oil exports, difficulties in importing goods, or rising transportation costs; a more consequential dimension of the matter materializes where international law, contract law, sanctions, and maritime risks converge.

Developments in recent months have transformed this issue from a theoretical discussion into a significant challenge for Iranian commerce. A sharp decline in commercial maritime traffic along the region's routes, heightened security risks for vessels, and difficulties in obtaining insurance coverage have presented Iranian exporters and importers with a succession of legal and contractual questions.

Under such circumstances, the principal question is no longer merely, "Can Iran continue its exports or imports?" The more consequential question is this: if war, sanctions, the closure of a maritime route, increased insurance risk, or governmental intervention prevents the performance of an Iranian commercial contract, who bears responsibility and who must absorb the cost of such disruption? The answer is not straightforward; international law does not automatically equate every war with "force majeure," nor does it recognize every increase in costs as a legitimate ground for terminating a contract. The point of departure is the text of the contract and the law governing it.

War does not automatically extinguish a contract

One of the most prevalent misconceptions in international commerce is that, upon the outbreak of war, a contracting party is automatically exempted from its obligations. No such absolute rule exists. In international commercial law, "force majeure" is generally invoked when an event beyond the obligor's control renders performance impossible or, under the circumstances stipulated in the contract, incapable of being performed, and the obligor has been unable, by reasonable means, to prevent the event or overcome its effects. Where the impediment is temporary, the exemption is generally confined to the corresponding period.

Therefore, an important distinction exists between "the occurrence of war" and "the legal effect of war on a specific contract". Suppose that an Iranian company has undertaken to deliver goods to a Middle Eastern port on a specified date. If war causes the maritime route to close and no reasonable alternative route exists, a force majeure argument may be substantial. However, if the maritime route remains open and only transportation costs have increased, the matter does not readily fall within the scope of force majeure.

In the latter circumstance, "Hardship," or economic difficulty, may arise as an issue; that is, performance of the contract remains possible, but its conditions have become severely detached from the initial economic equilibrium. In international commercial law, force majeure and hardship are two distinct concepts. The former is principally employed to provide exemption from liability arising from non-performance, whereas the latter is more closely associated with renegotiation, adjustment, or contractual reconfiguration.

This distinction is of particular importance for Iranian commerce. In many export and import contracts, the principal difficulty is not "impossibility"; rather, it is a combination of increased costs, delays, route alterations, lack of banking access, higher insurance rates, and sanctions exposure. If all these circumstances are included, without differentiation, under the heading of force majeure, the likelihood of failure in contractual litigation increases.

Sanctions; force majeure or legal impediment?

The most intricate dimension of the matter emerges where war intersects with economic sanctions. Sanctions are not merely an economic impediment. In certain legal systems, compliance with sanctions constitutes a legal obligation. Consequently, a bank, shipping company, or insurer may be practically incapable of executing a transaction; not because it lacks a commercial inclination to do so, but because executing the transaction could expose it to legal liability. In this situation, the question must be whether non-performance arises from "sanctions" or from "the contractual party's commercial decision to avoid sanctions risk". These two circumstances are not legally equivalent.

If a contract was concluded at a time when the relevant sanctions already existed and the parties were aware of them, subsequent reliance on those same sanctions as an unforeseeable event will be more difficult. However, if new sanctions are imposed after the conclusion of the contract and genuinely render performance unlawful, the legal position will be different. Here, the issue of "foreseeability" assumes fundamental importance.

In commerce with Iran, sanctions are no longer an entirely alien and inconceivable phenomenon. This reality may acquire significance for a court or arbitral tribunal in the future. Could a professional merchant contracting with Iran have contemplated the possibility of intensified sanctions at the time of contract formation? This question is particularly significant with respect to long-term contracts. In such contracts, sanctions clauses should not merely state, "In the event of the imposition of sanctions, the parties shall bear no liability." It must be specified which sanctions, imposed by which country, with what effect, and to what extent, may suspend performance of the contract.

Strait of Hormuz; where the Law of the Sea and contract law converge

For Iran's foreign trade, the issue of the Strait of Hormuz is not merely a security issue; it is a contractual issue. Whenever the passage of a vessel encounters the risk of attack, seizure, route alteration, or a substantial escalation in insurance costs, a constellation of legal questions arises concerning delivery dates, transfer of risk, liability for losses, and the obligations of seller and buyer.

Under such circumstances, a common error is to assume that Incoterms alone resolve all the difficulties; they do not. Incoterms rules are principally designed to determine the place of delivery, costs, and transfer of risk in a transaction. However, these rules themselves do not determine issues concerning force majeure, sanctions, export and import prohibitions, or many of the consequences of contractual breach. These matters must be regulated in the contractual text and under the law

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