ECONOMIC SANCTIONS AND HOW TO DEAL WITH THEM: THE ARBITRATOR'S PERSPECTIVE

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Abstract

In the 21st century, economic sanctions have become an increasingly common feature in the realm of world politics. Albeit striving for political, trade-related, and humanitarian goals, the imposition of economic sanctions tends to produce far-reaching effects on dispute resolution processes, including, more specifically, arbitration. This note explores the procedural and substantive challenges that arbitrators face when confronted with disputes involving sanctions and/or sanctioned parties. As sanctions regimes spread across the world, arbitrators stand to enhance their own experience and likely develop a routine understanding of how to deal with such disputes without jeopardising the procedural efficiency of the proceedings.

I. Introduction

Economic sanctions are a powerful tool (as a welcome alternative to war) to achieve political, trade-related, and humanitarian goals, by placing recalcitrant states under coercive economic pressure. By way of example, the United Nations ["**UN**"],[1] the European Union ["**EU**"],[2] and the United States of America ["**US**"],[3] presently have in place some of the most comprehensive sanctions regimes worldwide. That said, apart from affecting the trading relationship and volume as well as quality of commercial transactions between the relevant parties, economic sanctions may also produce tangible effects on the provision of dispute resolution services, including arbitration.[4]

From the arbitrator's perspective, economic sanctions may produce effects at various stages of the arbitration process. These include:

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[1] *U. N. Security-Council Consolidated List*, UNITED NATIONS SECURITY COUNCIL (June 29, 2023), *available at* https://www.un.org/securitycouncil/content/un-sc-consolidated-list.

[2] European Commission Service for Foreign Policy Instruments, Restrictive measures (sanctions) in force, July 07. 2016, *available at* http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

[3] US Office of Foreign Assets Control (OFAC), Sanctions Programs and Country Information, U.S. DEPARTMENT OF THE TREASURY, *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

[4] *See, e.g.,* Florian Kremslehner, Sophie Aulitzky & Philipp Stadtegger, *Chapter II: The Arbitrator and the Arbitration Procedure, Economic Sanctions in International Commercial Arbitration: A guide for practitioners, by practitioners, in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 79–119 (Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Irene Welser, Gerold Zeiler eds., 2022); Steve Ngo and Steven Walker, *Impact and Effects of International Economic Sanctions on International Arbitration*, 88(3) INT'L J. ARB., MED. & DISP. MGMT. 338, 338-403 (2022); Tamás Szabados, *EU Economic Sanctions in Arbitration*, 35(4) J. INTL'. ARB. 439, 439-462 (2018).

- Effects on logistics and procedure, including the appointment of arbitrators or the formation of the arbitral tribunal;
- Jurisdictional effects with respect to the proper personal scope of a tribunal's jurisdiction;
- Substantive effects on the merits of the proceedings; and

Effects post-award, including, in particular, the enforceability of a prospective award.

Each of these requires consideration early in the process, in order to ensure the responsible and efficient conduct of the arbitral proceedings. This, in turn, requires the arbitrator, *inter alia*, to heed —again, early on in the process —factors that might jeopardise the enforceability of a prospective award.

Against this background, this note seeks to explore the effects that economic sanctions may produce on the arbitration process, and to identify the powers that are readily available to arbitrators to deal with such effects responsibly – i.e., in a way that will minimise any disruption to the arbitration process. More specifically, following this Introduction, Section 2 of this note deals with the effect that sanctions may have on the logistical and procedural aspects of arbitral proceedings. Section 3 examines the jurisdictional challenges that may arise, such as arbitrability, public policy considerations, amongst others. Section 4 discusses the potential substantive effects of sanctions regimes on the merits of the proceedings. Finally, following an examination of the effects of sanctions regimes on post-award procedures in Section 5, Section 6 concludes.

II. Logistics and Procedure

Starting with logistics and procedure, these may be severely impacted by economic sanctions. More specifically, this section addresses the implications economic sanctions may have on arbitral appointments, arbitration costs, party representation, hearing witnesses and third-party funding.

A. Arbitral appointments

Economic sanctions can produce far-reaching consequences on the appointment of arbitrators. To start, an arbitrator nominated for appointment might be precluded from accepting appointment by a sanctioned party, for example, to serve as that party's arbitrator on a three-member tribunal, or to serve as a sole arbitrator or chair. This will inevitably be the case in any one of the following circumstances:

- **The arbitrator's nationality** – Where the arbitrator shares the nationality of the sanctioned party and the sanction concerned bears on the country of that nationality, the arbitrator is likely to be directly affected by the scope of that sanction purely by dint of his or her nationality.
- **The arbitrator's country of residence** – Where the arbitrator is a resident of the sanctioned country, again, the arbitrator is likely to fall directly within the scope of the concerned sanction.

A variation of the theme are circumstances in which the arbitrator's law firm or chambers are either located in a sanctioned country or are sanctioned directly. A good example of the latter are the sanctions imposed on Essex Court Chambers by China in 2021 in response to a legal opinion produced by a number of Essex Court barristers with respect to the treatment of Uighur Muslims.[5]

Importantly, in any of the aforementioned circumstances, the arbitrator might be at risk of being challenged for reasons of personal disqualification or undue process (or unfitness to serve) under the governing arbitration law or the applicable institutional rules. By way of example, it has been reported that in an International Chamber of Commerce ["**ICC**"] reference, an arbitrator of Essex Court appointed by a Chinese party was successfully challenged.[6]

For the avoidance of doubt, the arbitrator is under an obligation to disclose any potential conflict caused by a sanctioning legislation, whether at the outset of the arbitration process upon his or her nomination, or as the arbitral process unfolds in accordance with his or her standing disclosure obligation under the applicable arbitration rules and laws. As a word of caution, in the event that the question of an arbitrator's potential substitution arises after a hearing (whether jurisdictional or on merits) has been held, whether that hearing has to be re-run following the appointment of the substitute arbitrator must be considered. This might be a cause for significant procedural and financial concern.

B. Payment of registration fees, administrative costs and arbitrator fees

The payment of administrative fees and arbitration costs, generally, might equally pose a challenge. This includes payment of any registration fees to commence the arbitration and/or to introduce a counterclaim as well as the payment of arbitrator fees. To the extent that payment is made by a sanctioned party or from a sanctioned country, the relevant arbitral institution and/or the arbitrators will be precluded from accepting any such payment. In a worst-case scenario, a sanctioned party might even be precluded from registering a case/claims or counterclaims (in the event that the sanctioned party is a respondent).

Evidently, precluding a sanctioned party from bringing a claim in arbitration or filing a counterclaim in an ongoing arbitral process raises questions of access to justice and, more specifically, to the right to a legal remedy or the right to go to court. In order to mitigate the impact that any such preclusion might have on the sanctioned party, the stakeholders involved[7] may apply for a license to the relevant authorities in the sanctioning country for the limited release of the sanctioned party's frozen funds. This is particularly the case where the imposed sanctions regime provides for exemptions that cover the provision of legal services to the sanctioned party. Such exemptions, however, tend to be limited to contentious forms of dispute resolution, such as court proceedings, i.e., litigation, and arbitration, to the exclusion of general advisory work. That said, to obtain a license is usually time-consuming and will, as such, inevitably impact the duration of the arbitral procedure. Examples at hand are: (i) EU Council Reg. 2022/1269,[8] providing an exemption

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5 Jack Ballantyne, *Arbitration in the era of sanctions*, GLOBAL ARBITRATION REVIEW (May 12, 2022), *available at* https://globalarbitrationreview.com/article/arbitration-in-the-era-of-sanctions [*hereinafter* "Ballantyne"].

6 *Id.*

7 Which will usually include the arbitrators, arbitral institutions and the sanctioned party itself.

8 Council Regulation (EU) 2022/1269 of July 21, 2022, amending Regulation 833/2014, concerning restrictive measure in view of Russia's actions destabilising the situation in Ukraine, 2022 O.J. (L 193) 1 (EU).

for transactions required to "*ensure access to judicial, administrative or arbitral proceedings in a member state, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a member state*;"[9] and (ii) the general license granted by the Office of Financial Sanctions Implementation of the United Kingdom ["**UK**"] to the London Court of International Arbitration, allowing it to process funds from sanctioned parties in the light of the UK's sanctions regime against Russia,[10] and Belarus,[11] following the invasion of Ukraine in 2022.[12]

It is also worth bearing in mind that some sanctions regimes (mostly those originating in the US) are of extraterritorial application. This means that they produce their effects beyond the US domestic market and apply to the operations of a sanctioned person even outside the US. In order to safeguard against the reach of sanctions regimes that apply extraterritorially in an arbitration context, it is advisable to use a currency other than that of the sanctioning country in the arbitration process. In arbitrations under the ICC Rules of Arbitration, for example, provision is made for the use of Euro rather than the US Dollar,[13] in order to mitigate any exposure to interventions by the US banking system in USD-denominated money transfers (whether for payment of the arbitration or compliance with the payment terms of a resultant award).

In the present context, it is also worth contemplating the application of a blocking statute and the extent to which such a statute might prohibit compliance with sanctions regimes that purport to apply extraterritorially.[14]

C. Party representation

Sanctions may also impose limitations on party representation and, as such, limit a party's otherwise free choice to appoint counsel and, hence, a party's right to legal representation. Thus, a sanctioned party may be precluded from appointing counsel from a sanctioned country. One way of dealing with this situation is for arbitrators to suspend the proceedings until the sanctions have been lifted. Albeit that this might be the safest way to preserve a sanctioned party's right to a counsel of its own free choice, depending on the duration of the sanctions, it might create severe procedural delays and inefficiencies.

An alternative solution would be for the sanctioned party to consider a change of counsel. This again might cause undesirable procedural delays in addition to jeopardising the sanctioned party's continuity of counsel, which, in turn, might provoke an unwanted change in case strategy and an undesirable increase in costs (with new counsel having to read up on and familiarise itself with the

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9 Council Regulation (EU) 2022/1269 of July 21, 2022, amending Regulation 833/2014, concerning restrictive measure in view of Russia's actions destabilising the situation in Ukraine, art. 10(g), 2022 O.J. (L 193) 1 (EU); *see also* the guidance provided by the EU in June, 2020 stating that Art. 5(aa) of Council Regulation 833/2014 of Jul. 31, 2014 concerning restrictive measure in view of Russia's actions destabilising the situation in Ukraine O.J. (L 2291 (EU) had to be read in the light of the fundamental right to an *"effective legal remedy"* within the meaning of Art. 6 of the European Convention of Human Rights and did not limit the provision of legal services required for an effective legal defence. For context, *see also* Ballantyne, *supra* note 5.

10 The Russia (Sanctions) (EU Exit) Regulations 2019, S.I. 2019/855 (Eng.).

11 The Republic of Belarus (Sanctions) (EU Exit) Regulations 2019, S.I. 2019/600 (Eng.).

12 Sebastian Perry, *LCIA gets exemption from Russia and Belarus sanctions*, GLOBAL ARBITRATION REVIEW (Oct. 17, 2022), *available at* https://globalarbitrationreview.com/article/lcia-gets-exemption-russia-and-belarus-sanctions.

13 International Court of Arbitration*, Note to the Parties and Arbitral Tribunals on ICC Compliance* (Sept. 29, 2017), 2, 3.

14 Council Regulation (EC) 2271/96 of Nov. 22, 1996, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, 1996 O.J. (L 309) 1 (EU).

case in order to "*get up to speed*"). Depending on the stage which the arbitral process has reached by the time the sanction hits, this might be more or less challenging.

Finally, a sanctioned party's first-choice or incumbent counsel might contemplate securing an exemption to the extent allowed under the applicable sanctions regime. This, however, might be time-consuming and require the interim suspension of the arbitral process pending the application for an exemption.

D. Hearing witnesses

Hearing oral testimony may pose a further challenge where a travel ban might be imposed on witnesses of a sanctioned nationality or from a sanctioned country. Where a party has relied on the concerned witness throughout the arbitral process and the sanctions were only adopted at an advanced stage of the proceedings, the affected party might be severely disadvantaged in the presentation of its evidence. By way of example, the sanctioned witness might not be able to travel cross-border to the venue of the evidentiary hearing and, thus, not be able to testify in person. This might limit a party's right to access to justice and its right to a fair hearing, preventing it from having a full or reasonable opportunity to present its case. To name but one example, in *JSC Tsargrad Media* v. *Google*,[15] the Moscow City Arbitrazh Court found that following the imposition of a travel ban upon the petitioner, there was overwhelming evidence to confirm that the petitioner was unable to obtain access to justice and protect its rights in the jurisdictions that had applied the sanctions, i.e., the EU and the US.[16]

In order to limit the risk of a witness being prohibited from travel and, thus, prevented from testifying in person, the affected party might be well-advised to contemplate applying for an exemption to the relevant sanctioning authorities. Given the time involved, any such application should be filed as soon as practically possible following the adoption of the sanction in order to ensure that the desired exemption will be obtained in good time before the commencement of the hearing. In the alternative, a sanctioned witness might testify remotely – for example, through video-conference. This process will arguably be facilitated by both the many soft law instruments and the amendments to arbitral legislation and rules adopted during the COVID-19 pandemic, which would allow for remote hearings in both domestic and international arbitration.[17]

E. Third-party funding

Third-party funding has gained increasing importance in arbitration in the 21st century. This is because it enhances disputing parties' access to justice in circumstances in which legal services become increasingly expensive and as such unaffordable for smaller, less well-resourced players in the market.

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15 JSC Tsargrad Media v. Google, SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] Case No A40-155367/2020.

16 For further discussion, *see* Prerona Banerjee, *Arbitration or Sanctions: Who Survives the Battlefield?*, THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION BLOG (Apr. 28, 2023), *available at* https://aria.law.columbia.edu/arbitration-or-sanctions-who-survives-the-battlefield/.

17 *For e.g.,* ICC Arbitration Rules 2021, art. 26(1); LCIA Arbitration Rules 2020, art. 19.2. As regards arbitration laws, *see* UAE Federal Arbitration Law, art. 33(3) (2018).

Concerns of unequal treatment might arise from the fact that third-party funding may not be available to sanctioned parties. Likewise, third-party funding may not be available from a funder located in a sanctioned country. To address these issues, the relevant stakeholders may, again, wish to explore the availability of licenses and exemptions granted by the sanctioning authority.

III. Jurisdiction

Sanctions may affect the proper personal or subject-matter jurisdiction of an arbitral tribunal. The main question that arises in this context is whether disputes involving a sanctioned party, or a sanctioned subject-matter are properly arbitrable under the relevant law, i.e., the law governing the arbitration agreement, the curial law (the law of the seat) or the governing law on the merits. This, in turn, is closely linked to the question of public policy, i.e., whether the involvement of a sanctioned party or a sanctioned subject-matter constitutes a violation of public policy under any of those laws.

It should be noted from the outset that *ratione personae*, to the extent that a sanctioned party is privy to the underlying arbitration agreement, economic sanctions will not necessarily prevent that party from participating in the arbitration process *per se*. The nature of such sanctions will usually be such that they weigh only on the *practicality* of a sanctioned party's participation in the process, with such party being subject to travel bans and exposed to economic restrictions (its assets usually being frozen accompanied by a prohibition to enter into economic transactions with parties from the sanctioning country). The core of the problem, therefore, remains the challenges faced by the sanctioned party to make payments to the arbitral institution and the arbitrators for their involvement in the process,[18] the sanctioned party's physical (in-person) attendance of hearings,[19] and compliance with the payment terms of a resultant award (requiring the cross-border transfer of monetary funds).[20]

A. Arbitrability

In order to ensure that the sanctions concerned do not affect the arbitrability of the underlying dispute under the law of the seat, the law governing the arbitration agreement, or the governing law of the merits, it is important for a tribunal to deal with the question of its proper jurisdiction over the sanctioned party or a sanctioned subject-matter, in the first instance. This may require the bifurcation of the arbitral proceedings to allow the tribunal to investigate the subjective and objective arbitrability of the underlying dispute during an initial phase on jurisdiction. In doing so, the tribunal will be able to rely on the application of the principle of separability, which prevails under all leading arbitration laws. As a result, the potential invalidation of a contract in dispute does not extend to the arbitration agreement. In other words, the tribunal's *kompetenz-kompetenz* powers to determine its own jurisdiction remain unaffected by the application of a particular sanctions regime to the arbitral process.[21] However, while exercising such powers, the tribunal

18 On which see section II.B above.

19 On which see section II.D above.

20 On which see section V.B.i below.

21 By analogy to the treatment, e.g., of antitrust issues in arbitration. *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); and Case C-126/97, Eco Swiss China Ltd v. Benetton International NV, 1999, E.C.R. 1999 I-03055, which have affirmed the arbitrability of antitrust law despite its qualification as a matter of public policy in both the US and the EU.

must, of course, take care not to become privy to a public policy infringement and, in turn, place itself in breach of the underlying sanctions (exposing itself to potential prosecution under the applicable sanctions regime).

Useful guidance on how to deal with the question of arbitrability in this context can be garnered from a brief review of how some of the world's leading courts have approached this question in the past. Generally speaking, the trend with the Swiss, US and Canadian courts would appear to be in favour of arbitrability, with only the Italian courts being an outlier. By way of example, in *Fincantieri-Cantieri Navali Italiani SpA (Italy)* v. *Ministry of Defense, Armament and Supply Directorate of Iraq, Republic of Iraq*,[22] the Genoa Court of Appeal ["**the Court**"] considered the effect produced by EU and US sanctions imposed on Iraqi parties on the ability to arbitrate a dispute relating to contracts for the supply of corvettes to the Iraqi Navy. The Court held that in the light of attendant public policy considerations, the dispute was not arbitrable and should instead be referred to the Italian courts. The Italian party then sought the recognition of the Genoa Court of Appeal decision under the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ["**Brussels Convention**"],[23] in order to obtain a stay of ICC arbitral proceedings pending in parallel in Paris. The Paris Court of Appeal found in favour of arbitrability, holding that matters of arbitration fell outside the scope of the Brussels Convention. By contrast, in *Air France* v. *Libyan Arab Airlines*,[24] the Court of Appeal of Quebec found that the UN sanctions regime against Libya did not affect the arbitrability of the underlying dispute and that, as a consequence, the Tribunal's affirmation of its own jurisdiction did not breach international public policy. Finally, *Belship Navigation, Inc.* v. *Sealift, Inc.*[25] is an example of a case where the US District Court for the Southern District of New York compelled to arbitrate a dispute that had arisen from a charterparty involving the Cuban Assets Control Regulation.[26]

B. Public policy

As stated above, for the tribunal to affirm its proper jurisdiction, it must ensure that it does not deal with sanctions in violation of prevailing public policy. The tribunal must, therefore, ascertain whether the sanctions concerned qualify as public policy under the governing law of the seat/the law governing the arbitration agreement; and, whether, public policy issues are arbitrable under that law. It is important to note in this context that, at the risk of becoming complicit in a public policy violation, arbitrators must not entertain parties that seek recourse to arbitration to avoid the application and/or effects of a sanctions regime that qualifies as public policy under the relevant law.

Some initial guidance may again be gained from instructive case law precedent from jurisdictions that have dealt with this issue. By way of example, in *Société Française d'Etudes et de Réalisation*

22 Corte di Appello of Genoa, 7 May, 1994, Fincantieri-Cantieri Navali Italiani SpA (Italy) v. Ministry of Defense, Armament and Supply Directorate of Iraq, Republic of Iraq, 21 Y.B. Comm. Arb. 594 (1996).

23 EC Convention 41968A0927(01) of Dec. 31, 1972, on jurisdiction and the enforcement of foreign judgments in civil and commercial matters, 1968 O.J. (L. 299), 32–42 (1972). Council Regulation (EU) 1215/2012 of Dec. 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L. 351), 1–32 (2012).

24 Air France v. Libyan Arab Airlines, [2000] R.J.Q. 717 (Can.).

25 United States District Court, Belship Navigation, Inc. v. Sealift, Inc, 1995 WL 447656 (U.S.).

26 Cuban Assets Control Regulations, 31 CFR 515 (July 09, 1963) (U.S.).

d'Equipements Gaziers (Sofregaz) v. *Natural Gas Storage Company (NGSC)*,[27] the Paris Court of Appeal refused to set aside an ICC award, which was found in favour of the Iranian Natural Gas Storage Company ["**INGSC**"]. This was in circumstances where INGSC had terminated a contract under Iranian law with Sofregas, a French company, which had refused to issue bank guarantees required under the contract owing to international sanctions imposed on Iran. According to the Paris Court, the sanctions concerned arose from the US sanctions regime, which, as opposed to the UN sanctions regime, did not qualify as French international public policy (*ordre public international*). By contrast, in *Ministry of Defense of Iran* v. *Cubic International Sales* ,[28] the US Court of Appeal refused to set aside an ICC award on the basis that it violated the US sanctions regime imposed on Iran and, hence, the US public policy. The US Court of Appeal held that the US sanctions regime did not, as such, prohibit the payment that the award debtor had been ordered to make to the Iranian Ministry of Defence in the terms of the award; and stated that the award debtor was eligible for obtaining a license from the US Treasury Office of Foreign Asset Controls ["**OFAC**"], to pay the ICC award. As a result, there was no breach of the US sanctions regime, nor of US public policy.

Importantly, as is evident from this case law precedent, domestic courts tend to distinguish between domestic and international public policy in their application to international sanctions regimes, treating only sanctions of UN origin as falling within the ambit of international public policy. This allows leading arbitration jurisdictions to protect their own arbitral regimes from undue extraterritorial interference, and provides some comfort to arbitrators serving in arbitrations seated there.

C. Exclusive jurisdiction

In an attempt to restrain the effect of sanctions on their nationals, sanctioned countries have been seen to arrogate to their domestic courts' exclusive jurisdiction, over disputes involving their nationals. In this sense, sanctions might give rise to exclusive jurisdiction of the state courts in the sanctioned country, to the extent that an arbitration agreement has become ineffective by sanctions, or where a sanctioned party's representation is limited in the pending arbitration proceedings.

A good example of this approach are the 2020 amendments to the Russian Arbitrazh Procedure Code.[29] These empower the Russian Arbitrazh Court to adopt anti-arbitration injunctions against pending proceedings in which Russian nationals – both legal and natural persons – have been affected by the sanctions regime of a foreign state.[30]

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27 Cour d'appel [CA] [regional court of appeal] Paris, 50-16, June 03, 2020, No. 19-07261, Société Française d'Etudes et de Réalisation d'Equipements Gaziers v. Natural Gas Storage Company.

28 Ninth Circuit of Appeals, Ministry of Defense of Iran v. Cubic International Sales, 665 F.3d 1091 (Jan. 3, 2013) (U.S.) [*hereinafter* "Cubic International"].

29 Federal Law No. 171-FZ of June 8, 2020, "On Amending the Arbitrazh Procedure Code of the Russian Federation in Order to Protect the Rights of Individuals and Legal Entities in Connection with the Restrictive Measures Introduced by a Foreign State, State Association and (or) Union and (or) State (Inter-State) Institution of a Foreign State or State Association and (or) Union."

30 For comment in context, *see* E. Rubinina, *Russian Sanctions Law Bares Its Teeth: The Russian Supreme Court Allows Sanctioned Russian Parties To Walk Away From Arbitration Agreements*, KLUWER ARBITRATION BLOG (Jan. 22, 2022), *available at* https://arbitrationblog.kluwerarbitration.com/2022/01/22/russian-sanctions-law-bares-its-teeth-the-russian-supreme-court-allows-sanctioned-russian-parties-to-walk-away-from-arbitration-agreements/.

IV. Merits

Sanctions might also impact the substantive determination of the underlying dispute. For the avoidance of doubt, issues arising with respect to the merits will evidently depend on the law governing the merits. Having affirmed their proper jurisdiction, tribunals may, therefore, have to determine any merits issues arising with respect to the sanctions under the law governing the substance of the dispute.

Common issues include the termination of the underlying contract due to impossibility of performance, illegality, or frustration as a result of the sanctions. To assist in the determination of these questions, it might be relevant to consider whether the relevant sanctions regime has been imposed after conclusion of the contract, to meet requirements of lack of foreseeability under the applicable law.

In the alternative, the tribunal may have to ascertain, by reference to the governing law on the merits and/or the terms of the contract, whether the imposition of the sanction may qualify as an event of *force majeure*, which prevents the performance of the contract. Depending on the terms of the contract, this, in turn, might invite the suspension of the contract pending the force majeure event, or the termination of the contract, should the performance of the contract become entirely impossible. For the avoidance of doubt, the successful invocation of a *force majeure* defence will depend on the language of the contract and/or statutory law provisions under the governing law on the merits.

In a further alternative, the law of a number of civil law jurisdictions may consider the doctrine of unforeseen circumstances,[31] which, albeit not impossible, make performance of the parties' obligations under the underlying contract excessively burdensome and allow the tribunal to adjust the terms of the contract accordingly. In doing so, at the risk of becoming complicit in the sanctioned conduct, a tribunal must beware not to change the contractual terms in a way that would allow the sanctioned party from escaping the effect of the sanctions.

V. Post-Award

Issues that arise with respect to the enforcement of arbitral awards within the context of sanctions are two-fold:

- *Legal*, which includes the resistance to the enforcement of awards involving sanctions on the basis of: (i) non-arbitrability; (ii) public policy; or (iii) the irregular constitution of the tribunal; and

- *Practical*, which comprises questions of: (i) the enforcement of awards against a sanctioned award debtor whose assets are frozen; and (ii) the recoverability of pre- and post-award interest.

[31] *See* Bashayer Al Majed and Abdulaziz Al Majed, *Frustration v Imprévision, Why Frustration is so 'Frustrating': The Lack of Flexibility in the English Doctrine's Legal Consequence*, LIVERPOOL L. REV. (2023), *available at* https://link.springer.com/article/10.1007/s10991-023-09327-9, who state "*the majority of civil law countries accept a similar but rather different principle, the theory of imprévision, or 'unforeseeable circumstances'.*"

These will be discussed in some detail below.

A. Legal Issues

The legal issues that typically arise at the enforcement stage of an award involving sanctions coincide with some of the topics already discussed elsewhere in this note. In order to avoid repetition, cross-reference will be made as appropriate.

i. Non-arbitrability

The question of arbitrability has been discussed in relevant part at Section 3.1 above. Suffice to say that the potential non-arbitrability of a dispute qualifies as a ground for setting aside under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[32] ["**New York Convention**"], as it does under other international and domestic enforcement regimes. More specifically, pursuant to Article V(2)(a) of the New York Convention, "*[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.*"[33]

There is a tangible risk that domestic courts might hold disputes involving sanctions non-arbitral and, hence, proceed to the setting aside of the underlying award. Importantly, this is irrespective of the views taken by the tribunal on the subject-matter. That being said, judging by international court practices to date, most courts have taken a favourable approach to the arbitrability of disputes involving sanctions.[34] In addition, it might be relevant to contemplate the exclusive jurisdiction of some courts, e.g., Russian Arbitrazh Court under the Russian Arbitrazh (Commercial) Procedure Code as amended,[35] to the extent that this might hold relevance on a case-by-case basis.

ii. Public policy

The question of public policy has been addressed in relevant part at Section 3.2 above. Suffice it to say that the public policy exception qualifies as a ground for setting aside under Article V(2)(b) of the New York Convention, which provides that "*[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*"

It is important in this context to distinguish between domestic/international public policy of a domestic state v. transnational public policy given that different sanction regimes might attract

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32 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "New York Convention"].

33 New York Convention, art. V(2)(a).

34 *Compare, e.g.,* the Italian courts (against) with the Swiss, Canadian and New York courts (in favour); *See, e.g., supra* note 24.; *See also*, *supra* note 25.

35 On which see section 3.3 above.

different levels of protection – for example, UN sanctions regimes tend to qualify as transnational public policy and are, therefore, of universal application.[36]

iii. Irregular constitution of the tribunal

Finally, an arbitral award resulting from a dispute involving sanctions might become subject to an application for setting aside on the ground that the constitution of the tribunal was irregular. This would arguably be the case where one (or more than one) of (the) arbitrator(s) originated from a sanctioned country if captured by the scope of the sanctions regime at the seat of the arbitration. This finds support in Article V(1)(d) of the New York Convention, which provides that "*[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.*"[37]

For completeness, it is arguable that the irregular constitution of a tribunal, comprising a sanctioned arbitrator, might, in addition or in the alternative, constitute a public policy violation within the meaning of Article V(2)(b) of the New York Convention in the country of enforcement.[38]

B. Practical Issues

Apart from the legal issues outlined at the preceding section, the enforcement of arbitral awards dealing with disputes involving sanctions may raise certain practical issues.

i. Award debtor's frozen assets

One of the main practical issues facing an award creditor arises when the assets of a sanctioned award debtor or of an award debtor having assets in a sanctioned country are frozen and as such not available for enforcement purposes. Where an award debtor's assets are frozen as a result of the sanctions, it might be possible for the award debtor to obtain a license from the sanctioning authority to permit them, to make the requisite payment to the award creditor. In addition, to ensure authorised receipt of payment by the award creditor, they may also have to obtain a license from the sanctioning authority for permission to accept payment from a sanctioned award debtor. Importantly, similar considerations apply while entering into a settlement with a sanctioned award debtor, or for securing an attachment over assets of a sanctioned award debtor.

Taking guidance from case law precedent on the subject, it is somewhat encouraging to see the constructive approach taken by leading courts to the matter. In *Crystallex Int'l Corp.* v. *PDV Holding Inc.*,[39] the US District Court for Delaware stayed enforcement proceedings in order to allow the

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36 *See, e.g., supra* note 27, U.S. sanctions (as opposed to UN sanctions) not forming part of French ordre public international; *See also*, Cubic International, *supra* note 28, Enforcement of ICC award not contrary to US public policy – award debtor required to obtain OFAC license to pay award debt.

37 New York Convention, art. V(1)(d).

38 Which provides verbatim as follows: *"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country."*

39 Crystallex Int'l Corp. v. PDV Holding Inc., 2019 WL, 6785504 (Dec. 12, 2019) (U.S.).

Claimant to obtain a specific license from the OFAC, to enable enforcement against assets located in the US and owned by US-sanctioned Venezuelan state-owned entities. In *ConocoPhilips* v. *Venezuela*,[40] an International Centre for Settlement of Investment Disputes (ICSID) Ad Hoc Committee decided to lift the stay of enforcement of an USD nine billion award against Venezuela, in circumstances in which Conoco Philips, the award creditor, could obtain a specific license from the OFAC to enforce the award against sanctioned Venezuelan State assets. Finally, in *Mohamed Abdulmohsen Al-Kharafi & Sons Co.* v. *Libya and others* ,[41] the French Supreme Court did not grant enforcement by Al-Kharafi, a Kuwaiti company, against attached assets of a Libyan sovereign wealth fund subject to an EU sanctions regime, as, Al-Kharafi had not sought authorisation to do so from the French Treasury.

ii. Recoverability of pre- and post-award interest

An equally challenging issue is the recoverability of pre-award and post-award interest. These will usually be limited to the period over which the sanctioned award debtor has been found to be allowed to make payments under the award.

By way of example, in *Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran* v. *International Military Services*,[42] the English court held that the Iranian Ministry of Defense was precluded from enforcing the interest element of an award in respect of the period that the Ministry was subject to sanctions, on the basis that the EU sanctions regime in place prohibited the payment of such interest. Further, as regards pre-award interest, in *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*,[43] the US District Court for Southern California affirmed the availability of pre-judgment interest on amounts awarded in favour of the Iranian Ministry of Defense for the period between when the underlying ICC award was rendered and the commencement of the enforcement action before the courts. This is where there exists no exemption in the US sanctions regime in favour of the award debtor from paying the Ministry.

VI. Conclusion

Economic sanctions may produce unsettling effects throughout the arbitration process. This, however, does not mean that such effects cannot be managed responsibly by both the arbitrators and the parties. In doing so, it is of paramount importance to safeguard a sanctioned party's right to a fair hearing, including its freedom to appoint counsel of its own choice. At the same time, arbitrators need to conduct the arbitration process efficiently without losing sight of the tenets of procedural economy to the extent necessary.

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40 International Centre for Settlement of Investment Disputes, ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID No. ARB/07/30, Order on the Applicant's Request for Reconsideration (Nov. 02, 2020).

41 Cour de Cassation [Cass.] [supreme court for judicial matters], Sept. 07, 2022, No. 19-25.108 and 19-21.964, Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and Others (Fr.).

42 Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran v. International Military Services, [2019] EWHC 1994 (Comm.) (appeal taken from Eng.).

43 United States District Court, S.D. California, Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems, Inc., Case No. 98-CV-1165-B (Jan. 03, 2013) (U.S.).

As sanctions regimes appear to become an increasingly common feature across the world, arbitrators will enhance their experience and likely develop a routine understanding of how to deal with disputes involving sanctions and/or sanctioned parties, without jeopardising the procedural efficiency of the proceedings.