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# Sanctions and International Arbitration

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## SANCTIONS AND INTERNATIONAL ARBITRATION

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### I Introduction

The sanctions enacted by the European Union (EU), the United States of America (US) and various other States in 2014 against several Russian individuals have sparked a debate amongst scholars and practitioners concerning the arbitration of disputes involving Russian parties or transactions targeted by the sanctions.<sup>1</sup> Europe-based arbitration institutions have likewise reacted to the imposition of sanctions against Russia and Russian individuals by publishing information sheets on the impact of the sanctions on arbitrations concerning such disputes.<sup>2</sup>

The issues arising, however, are not completely novel. The impact of sanctions on international arbitration has been studied and discussed for many years, notably in relation to the sanctions against Iraq,<sup>3</sup> Libya<sup>4</sup> and Iran<sup>5</sup>.

Sanctions, of course, are a diverse and incoherent set of economic measures. History has shown that these can emanate from a State, a group of States, and international organizations (including regional organizations). The types of measures taken have also proven to be very diverse, ranging from general trade embargos to sanctions targeting specific individuals, groups of individuals and/or specific transactions. While this book’s general focus lies on United Nations (UN) sanctions, we will not limit this chapter to UN enacted sanctions only. The practice of courts and tribunals has to date mainly revolved around sanctions imposed by individual States or regional organizations, rather than the UN. There appears to be no notable distinction, as a matter of principle, between UN and other sanctions in the arbitration context. The wording of the sanctions regime is often decisive and there has been much cross-fertilization between the drafting of the UN and other sanction regimes. Accordingly this chapter will discuss the impact of sanctions generally on arbitration, pointing to specific differences which may arise from the origin of the sanctions regime, where necessary and relevant.

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<sup>1</sup> See for example Irina Moutaye and Elena Billebro, ‘Choice of Arbitration Venue in Light of Sanctions Against Russia’, in Anton V. Asoskov, Alexander I. Muranov, Roman M. Khodyki (eds.), *New Horizons of International Arbitration [Novie gorizonti mejdunarodnogo arbitraja]* (2015)49-70, English translation <<http://www.sccinstitute.com/media/76670/choice-of-arbitration-venue-in-light-of-the-sanctions-against-russia.pdf>> accessed 2 September 2015.

<sup>2</sup> See for example Arbitration Institute of the Stockholm Chamber of Commerce, ‘General information for parties covered by the EU Sanctions’ (18 June 2015)<[http://www.sccinstitute.com/media/72852/general-information-to-listed-parties\\_eng.pdf](http://www.sccinstitute.com/media/72852/general-information-to-listed-parties_eng.pdf)> accessed 2 September 2015; Arbitration Institute of the Stockholm Chamber of Commerce, ‘Q&A on the EU sanctions against Russia’ (18 June 2015) <[http://www.sccinstitute.com/media/72851/sanctions-q-and-a\\_eng.pdf](http://www.sccinstitute.com/media/72851/sanctions-q-and-a_eng.pdf)> accessed 2 September 2015.

<sup>3</sup> See for example. Geneviève Burdeau, ‘Les embargos multilatéraux et unilatéraux et leur incidence sur l’arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral’ (2003) *Revue de l’Arbitrage* 753.

<sup>4</sup> Ibid; Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, ‘Les conséquences des sanctions économiques sur les obligations contractuelles et l’arbitrage’ (2012) *Int'l Bus LJ* 405, 405-437.

<sup>5</sup> Ibid.

This chapter focuses on the impact of sanctions on international arbitration which can be provided for in contracts which have been targeted by the sanctions, or in international investment agreements. There are indeed many aspects to this interaction, both legal and practical. On a general jurisprudential level, economic sanctions highlight various complexities within the arbitral process, viz. the operation and interaction of various laws and legal systems (the *lex arbitri* and law governing the arbitration agreement, the substantive law of the contract and the law of the enforcing jurisdiction as well as overriding international law principles). These various laws may be in play throughout the process, to be applied not only by tribunals themselves during the course of proceedings, but also potentially by courts deciding or reviewing questions of jurisdiction and public policy (whether at the seat or in the enforcing jurisdiction). On a more practical level the increase in relatively recent sanctions regimes has led to growing discussion about the implications of these regimes for arbitrators and arbitral institutions.

This chapter will discuss these two questions in two separate sections. The first section discusses the arbitrability of the dispute, the impact of sanctions on the jurisdiction of an arbitral tribunal, and the impact of sanctions on the enforcement of the arbitral award. The second section tackles the influence of sanctions on the conduct of arbitration proceedings.

This chapter covers international arbitration in general, making no distinction between international commercial arbitration and international investment arbitration, the questions arising in both areas being of a similar nature, unless otherwise mentioned. This chapter however does not engage with the question of the effect of sanctions on the performance of contractual or other obligations which may have been affected by the imposed sanctions which is discussed elsewhere in this volume. Similarly, this chapter does not engage with the conformity of sanctions with international economic and trade law, notably in the context of the World Trade Organization, which is covered by Andrew Mitchell in his chapter in this volume.

## **II Sanctions, Arbitrability of the Dispute, and Enforcement of the Award**

### **2.1. Arbitrability of the dispute**

The jurisdiction and competence of an arbitral tribunal are, as is widely known, principally determined by the agreement of the parties contained in the agreement to arbitrate. The laws of the seat of the arbitration play an important role as well, in that the mandatory provisions of these laws may, despite the agreement to arbitrate, in effect prevent or hinder the arbitral tribunal from exercising its competence in certain circumstances. The problem in respect of sanctions lies in essence in the question of whether, because of the public order character of international sanctions, disputes which involve, as matter of applicable law, the application of sanctions, thus become inarbitrable. Arbitrability is a question that relates to the validity of the arbitration clause, and hence touches directly on the jurisdiction of the arbitral tribunal.

Arbitrability is a public policy limitation upon the scope of arbitration as a dispute resolution method which determines whether a dispute may be arbitrated, and is usually divided into arbitrability *ratione materiae* or objective arbitrability, and

arbitrability *ratione personae* or subjective arbitrability.<sup>6</sup> Arbitrability *ratione materiae* relates to the types of disputes that may validly be submitted to arbitration, while arbitrability *ratione personae* targets the capacity of the parties to the dispute to be parties to an arbitration agreement.<sup>7</sup>

Before engaging in a discussion of the impact of sanctions on the arbitrability of a dispute, two points must be emphasized. First, because of the autonomy of the arbitration clause, the validity of the arbitration clause remains unaffected even where the agreement as such may be invalid in view of the existence of sanctions, or where the contract may be denounced because of sanctions.<sup>8</sup> Secondly, while the principle of arbitrability undoubtedly applies in international commercial arbitration and investment arbitration based on contracts, the principles relating to arbitrability do not *mutatis mutandis* apply to investment treaty arbitration.<sup>9</sup> Indeed, investment treaty arbitration is not an alternative to dispute settlement in national courts, but rather an alternative to interstate judicial dispute settlement.<sup>10</sup> As a consequence, States’ consent to settle investment disputes through arbitration, expressed in an investment treaty, cannot be limited by application of the principle of arbitrability.<sup>11</sup>

### 2.1.1. Arbitrability *Ratione Materiae*

There is generally agreement both in scholarship and the practice of arbitral tribunals that the application of a sanctions regime to the dispute does not in and of itself affect the arbitrability *ratione materiae* of the dispute.<sup>12</sup> Although it is generally agreed that international sanctions have a public policy character and that disputes contrary to public policy<sup>13</sup> are inarbitrable, such a character has not generally lead to finding that disputes in which sanctions are involved are *ipso facto* inarbitrable. Practice indeed shows that arbitral tribunals and domestic courts have accepted that the existence of a sanctions regime does not render a dispute inarbitrable, but rather that the public policy character of a sanctions regime should be taken into account by the tribunal in rendering its decision. This has moreover been the case irrespective of the origin of the sanctions regime.

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<sup>6</sup> See L. Yves Fortier, ‘Arbitrability’ in Gerald Aksen, Karl-Heinz Bockstiegel, Michael J. Mustill, Paolo Michele Patocchi and Anne Marie Whitesell (eds.), *Global reflections on international law, commerce and dispute resolution: liber amicorum in honour of Robert Briner* (ICC Publishing 2005) 269-284.

<sup>7</sup> L. Yves Fortier, ‘Arbitrability’ in Gerald Aksen, Karl-Heinz Bockstiegel, Michael J. Mustill, Paolo Michele Patocchi and Anne Marie Whitesell (eds.), *Global reflections on international law, commerce and dispute resolution: liber amicorum in honour of Robert Briner* (ICC Publishing 2005) 270.

<sup>8</sup> Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, ‘Les conséquences des sanctions économiques sur les obligations contractuelles et l’arbitrage’ (2012) *Int’l Bus LJ* 405, 426.

<sup>9</sup> See however, Ruth Teitelbaum, ‘A Look at the Public Interest in Investment Arbitration: is it Unique? What should we do about it?’ (2010) 5 *Berkeley Journal of International Law Publicist* 54, 56.

<sup>10</sup> See *in extenso*: Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014) 150 ff.

<sup>11</sup> *Ibid.*

<sup>12</sup> For a discussion, see Geneviève Burdeau, ‘Les embargos multilatéraux et unilatéraux et leur incidence sur l’arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral’ (2003) 3 *Revue de l’Arbitrage* 753, 757 ; Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, ‘Les conséquences des sanctions économiques sur les obligations contractuelles et l’arbitrage’ (2012) *Int’l Bus LJ* 405, 405-437.

<sup>13</sup> The various meanings attributed to the term will be discussed in section [2.2] below.

In the ICC Arbitration *Fincantieri v. Ministry of Defense of Iraq*,<sup>14</sup> two Italian shipbuilding companies had each concluded an agency contract with a Syrian national in view of the sale of military goods to Iraq. Iraq however had fallen subject to UN sanctions following the adoption of a UN Security Council Resolution in August 1990.<sup>15</sup> The Syrian agent brought arbitration proceedings against the two Italian companies to obtain payment of the commissions due to him by the two companies. The two Italian companies however invoked the inarbitrability of the dispute in view of the sanctions imposed by the Security Council on Iraq, which in effect prohibited any commercial transactions with Iraq. The arbitral tribunal, in an interim decision, distinguished the application of the sanctions regime as a matter of mandatory law to the merits of the dispute from the arbitrability of the dispute, and confirmed that the occurrence of the former does not result in the inarbitrability of the dispute and that the application of the sanctions regime does not affect the competence of the arbitral tribunal, which in this case had its seat in Switzerland.<sup>16</sup> The two Italian companies sought nullification of the interim decision before the Swiss courts. The Swiss Federal Tribunal supported the arbitral tribunal's interim decision to confirm jurisdiction by considering the case arbitrable, basing its decision on Art. 177 of the Swiss Private International Law Act (PILA), which contains a broad definition of arbitrability, which allows parties to arbitrate 'toute cause de nature patrimoniale'.<sup>17</sup> The Swiss Federal Tribunal noted that, as a consequence, in principle, the dispute may be arbitrated. However, it also enquired whether the arbitrability of the dispute may nonetheless be contrary to the international public order of Switzerland. In this respect, the Tribunal opined that public order considerations do not render the dispute inarbitrable since such considerations would have this effect only to the extent that a dispute could only be submitted to domestic courts, as a result of such considerations. In this case, in line with its earlier findings, the Swiss Federal Tribunal considered that the existence of a sanctions regime only operates at the level of the contractual commitments of the parties, and does not affect the arbitrability of the dispute.<sup>18</sup>

The Italian shipbuilders in the *Fincantieri* case had in parallel referred the case directly to the Italian courts in order to obtain a declaratory judgement to the effect that the arbitration clause was invalid. Although the court of first instance supported the arbitrability of the dispute, the Court of Appeal of Genoa reversed this decision.<sup>19</sup> It decided that Italian mandatory law –including legislation relating to international sanctions- was applicable to the case. Because of the 'unavailability' of the rights in question ('la indisponibilità dell' "obbligo"<sup>20</sup>), which under Italian Law determines the arbitrability of the dispute (a narrower definition than the one applied by the Swiss

<sup>14</sup> *Fincantieri Cantieri Navali Italiani SpA and OTO Melara Spa v ATF* (25 November 1991) ICC Award Nr 6719 (Interim Award) *Journal du droit international* (1994) 1071; Gary B. Born, *International Commercial Arbitration (Second Edition)* (Kluwer Law International 2014) 993.

<sup>15</sup> UNSC Res 661 (6 August 1990) UN Doc S/RES/661.

<sup>16</sup> *Fincantieri Cantieri Navali Italiani SpA and OTO Melara Spa v ATF* (25 November 1991) ICC Award Nr 6719 (Interim Award) *Journal du droit international* (1994) 1074.

<sup>17</sup> *Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v M et Tribunal Arbitral* (23 June 1992) ATF 118 II 353 (Tribunal Fédéral Suisse) 355.

<sup>18</sup> *Ibid.*, 357.

<sup>19</sup> *Fincantieri-Cantieri Navali Italiani SpA v Iraq* (1994) Riv. Dell'arb 4 (1994) (Corte di Appello di Genova/Genoa Court of Appeal, Italy) 505; see for a discussion: Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 361.

<sup>20</sup> *Fincantieri-Cantieri Navali Italiani SpA v Iraq* (1994) Riv. Dell'arb 4 (1994) (Corte di Appello di Genova/Genoa Court of Appeal, Italy) 510.

Federal Tribunal), the dispute was, according to the Court, indeed inarbitrable.<sup>21</sup> The decision however was highly criticized by the French Cour d'appel de Paris, which refused to enforce the Italian Court decision in France.<sup>22</sup>

A somewhat different situation occurred in *La Compagnie Nationale Air France v. Libyan Arab Airlines*, an unpublished case, yet widely reported in scholarship.<sup>23</sup> Air France had a supply and maintenance contract with Libyan Arab Airlines which, because of the international embargo imposed by the UN Security Council, could no longer be performed by Air France. The difference with the former case lies in the fact that Security Council Resolution 883 of 11 November 1993 which imposed further international sanctions on Libya, specifically stated:

[T]hat all States, and the Government of Libya, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government or public authorities of Libya, or of any Libyan national, or of any Libyan undertaking as defined in paragraph 3 of this resolution, or of any person claiming through or for the benefit of any such person or undertaking, in connection with any contract or other transaction or commercial operation where its performance was affected by reason of the measures imposed by or pursuant to this resolution or related resolutions.<sup>24</sup>

The specific reference in Resolution 833 to *claims* related to the impossibility of performing contracts or any commercial transaction because of the sanctions presents a somewhat different scenario than the one in *Fincantieri*. Air France thus argued that the dispute was inarbitrable. The UNCITRAL arbitral tribunal, with its seat in Montreal, rejected this argument in its first interim award of 10 July 1998 and confirmed jurisdiction.<sup>25</sup> The Montréal Cour supérieure rejected an appeal by France to have this decision annulled, noting that the decision on arbitrability lay within the arbitral tribunal's exclusive competence. The Québec Court of Appeal rejected an appeal by France against that decision in 2003, and in doing so provided interesting insights on the link between a sanctions regime and the arbitrability of a dispute.<sup>26</sup> The Québec Court of Appeal first confirmed that only the arbitral tribunal is competent to decide on the arbitrability of the dispute, and that neither the UNCITRAL Arbitration Rules, nor the Code of Civil Procedure applicable in Québec allow domestic courts to intervene in the arbitral proceedings.<sup>27</sup> Such is only the case in relation to claims for annulment of the final award, or in respect of proceedings seeking the recognition and enforcement of the final award.<sup>28</sup> Article 34 of the

<sup>21</sup> Ibid, 505.

<sup>22</sup> *Legal Department of the Ministry of Justice of the Republic of Iraq v Fincantieri-Cantieri Navali Italiani* (15 June 2006) Rev Arb (2007) (Cour d'Appel de Paris/ Paris Court of Appeal, France) 87.

<sup>23</sup> See, amongst others: Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 *Revue de l'Arbitrage* 753, 762 ff.

<sup>24</sup> UNSC Res 883 (11 November 1993) UN Doc S/RES/883, para 8.

<sup>25</sup> See the discussions in *La Compagnie Nationale Air France v Libyan Arab Airlines* (31 March 2003) CanLII 35834 (2003) (Cour d'Appel du Québec) paras. 19 ff; Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 *Revue de l'Arbitrage* 753, 764.

<sup>26</sup> *La Compagnie Nationale Air France v Libyan Arab Airlines* (31 March 2003) CanLII 35834 (2003) (Cour d'Appel du Québec).

<sup>27</sup> Ibid [44].

<sup>28</sup> Ibid [56]-[86].

UNCITRAL Model Law,<sup>29</sup> which deals with applications for setting aside awards, provides in this respect that

(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) The party making the application furnishes proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State, or
  - (...)
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matter submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside’.

The Québec Court of Appeal then moved to consider that the applicable Security Council Resolutions did not in and of themselves result in the inability of the parties to launch arbitration proceedings.<sup>30</sup> After having noted that Security Council Resolutions establishing a sanctions regime apply to arbitral tribunals, the Court of Appeal further considered that the question whether the sanctions regime applies to claims presented before the Resolution -or even thereafter, provided that they are not related to the sanctions regime- is a question that needs to be debated before and thus answered by the arbitral tribunal; the arbitral tribunal therefore did not violate transnational public order, nor mandatory rules of public international law, in reaching its decision.<sup>31</sup> In its third interim award, the arbitral tribunal decided that only claims relating to contracts entered into before 1 March 1992 were admissible, thus recognizing the temporal scope of the sanctions.<sup>32</sup>

The language of paragraph 8 of Security Council Resolution 883 has been repeated in many subsequent sanction regimes,<sup>33</sup> including most recently in the EU sanctions

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<sup>29</sup> UNCITRAL, ‘Model Law on International Commercial Arbitration’ (1985 with amendments as adopted in 2006) <[https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)> accessed 2 September 2015.

<sup>30</sup> *La Compagnie Nationale Air France v Libyan Arab Airlines* (31 March 2003) CanLII 35834 (2003) (Cour d’Appel du Québec) [47].

<sup>31</sup> *Ibid* [91]-[96].

<sup>32</sup> Geneviève Burdeau, ‘Les embargos multilatéraux et unilatéraux et leur incidence sur l’arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral’ (2003) 3 *Revue de l’Arbitrage* 753, 764.

<sup>33</sup> UNSC Res 687 (3 April 1991) UN Doc S/RES/687 regarding Iraq; UNSC Res 757 (30 May 1992) UN Doc S/RES/757, art 9 regarding Yugoslavia; UNSC Res 917 (6 May 1994) UN Doc S/RES/917, art 11 regarding Haiti. Whereas the English text has remained identical in the different Resolutions, the French text has changed slightly. Geneviève Burdeau, ‘Les embargos multilatéraux et unilatéraux et leur incidence sur l’arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral’ (2003) 3 *Revue de l’Arbitrage* 753, 766.

regime imposed on Russia. Article 11(1) of Council Regulation (EU) No 833/2014 of 31 July 2014<sup>34</sup> indeed contains similar language:

No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

- (a) entities referred to in points (b) or (c) of Article 5, or listed in Annex III;
- (b) any other Russian person, entity or body;
- (c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) or (b) of this paragraph.

In line with the case-law mentioned above, it is thus likely that arbitral tribunals and courts confronted with the question whether claims which relate to sanctions are arbitrable will confirm that the presence of a sanctions regime, including one which prohibits that ‘claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed [...] shall be satisfied’, does not render the dispute inarbitrable. The use of the term ‘satisfied’ indeed does not hint at the impossibility of submitting such a claim to arbitration, but rather at the inadmissibility of such claims, or the lack of merits of such claims from a substantive perspective. This moreover is in line with the rationale behind the inclusion of such provisions, which can be traced back to the UN sanctions imposed on Iraq in the 1990s, which resulted in the adoption in Iraq of legislation declaring that Iraqi parties bear no responsibility for damages caused by the impossibility of performance under contracts with foreign parties because of the sanctions regime, and, on the contrary, that the foreign parties to such contracts bear responsibility for non-performance.<sup>35</sup> The provision mentioned above was intended to counter such legislation.

Yet, some caution is necessary. Indeed, in view of the decision of the Court of Appeal of Genoa, it seems nonetheless that the arbitrability of disputes falling under international sanctions largely depends on the law of the seat of the arbitration and the law governing the arbitration clause<sup>36</sup> and on the interpretation of the particular wording of sanction regimes.<sup>37</sup>

As far as investment treaty arbitration is concerned, we have explained earlier that the concept of arbitrability as such does not apply in treaty-based investment arbitration.

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<sup>34</sup> Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1.

<sup>35</sup> Geneviève Burdeau, ‘Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral’ (2003) 3 *Revue de l'Arbitrage* 753, 765.

<sup>36</sup> Yaraslau Kryvoi, ‘Russia’s Mistral Deal under International Sanctions – will the Dispute be Arbitrable?’ (*CIS Arbitration Forum* 3 October 2014) <<http://www.cisarbitration.com/2014/10/03/russias-mistral-deal-under-international-sanctions-will-the-dispute-be-arbitrable/>> accessed 2 September 2015.

<sup>37</sup> Geneviève Burdeau, ‘Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral’ (2003) 3 *Revue de l'Arbitrage* 753, 768.

Yet it seems necessary to briefly mention the few cases which have dealt with the application of countermeasures in the context of international investment law. Although different from UN sanctions, these cases may provide guidance in relation to sanctions in that same context. The arbitral tribunals in the two reported cases have, within the limits imposed by the applicable investment treaty –Chapter 11 of the NAFTA-, not considered the claim to be ‘inadmissible’ merely because such countermeasures were at stake.<sup>38</sup> In fact, they have generally accepted that they could, as a matter of principle, assess whether the conditions for the invocation of countermeasures as a circumstance precluding wrongfulness in relation to the breach of the applicable investment agreement were met. The questions raised by these cases are more concerned with whether countermeasures can preclude the wrongfulness of the breach of investor rights under the treaty than the question of whether an arbitral tribunal can exercise jurisdiction over the dispute because it concerns countermeasures, which in turn depends on whether one views rights conferred under investment treaties as ‘direct’ rights of foreign investors or ‘derivative’ rights owed to the host State of the foreign investor.<sup>39</sup> The question will thus be whether, in view of the sanctions imposed on the Respondent State in application of an international sanctions regime, the Respondent State will be able to successfully counter a possible violation of an investment treaty by invoking the sanctions regime, either (i) as a circumstances precluding wrongfulness, in light of a non-precluded measures clause which one regularly finds in North-American investment agreements;<sup>40</sup> or (ii) in the case of UN sanctions, based on the application of Article 103 of the UN Charter, which provides that ‘in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ In that respect, it seems indeed clear that an arbitral tribunal, competent to decide on the dispute, will not be barred from assessing the applicability of the sanctions regime.<sup>41</sup>

### **2.1.2. Arbitrability *Ratione Personae***

As far as the arbitrability *ratione personae* in the context of sanctions is concerned, little if any case-law exists. It should be noted however that the recent tendency of sanctions to target specific individuals or corporations may pose a problem of arbitrability *ratione personae* in the event that one of the parties to the dispute precisely is an individual or corporation targeted by the sanctions. Such a scenario however has not yet occurred in practice, at least there are neither arbitral awards nor judicial decisions in the public domain in this respect. *Mutatis mutandis* however, one could apply the same principles in respect of arbitrability *ratione materiae*. Based on the existing case-law, one can conclude that disputes in which international sanctions

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<sup>38</sup> See for example *Archer Daniels Midland Co v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, [110] ff and *Corn Products International Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on responsibility, 15 January 2008, [74]-[75] and [180]-[192].

<sup>39</sup> See Martins Paporinskas, ‘Investment Treaty Arbitration and the (New) Law of State Responsibility’ (2013) 24 *European Journal of International Law* (2013) 617 and Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014) 60-67.

<sup>40</sup> Such as the one found in the US Model Bilateral Investment Treaty (2012), which provides, in its Article 18 ‘Essential Security’: ‘Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. (<[www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf](http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf)> accessed 21 January 2016).

<sup>41</sup> See for a discussion: Farshad Ghodoosi, ‘Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility, a Case Study of Iran’ (2014) 37 *Fordham International Law Journal* 1731, 1782.

targeting specific individuals or corporations are part of the applicable law are in principle arbitrable. Here again however, some caution is necessary in view of the decision of the Court of Appeal of Genoa.

Here also, in the specific context of investment treaty arbitration, the involvement of investors which are individually targeted by sanctions does not seem to pose any problems in terms of jurisdiction of arbitral tribunals, and what we have explained in relation to arbitrability *ratione materiae* will apply here also.

## **2.2. Enforcement of the Award**

While the fact that sanctions are at stake in a particular dispute does not in and of itself imply that the dispute is inarbitrable, the impact of a sanctions regime on the enforcement of the award presents a different question. It may well be indeed that a validly rendered award will in effect be unenforceable in certain States because such enforcement would be in breach of a sanctions regime.

For the purposes of this section, two grounds which parties may invoke to resist enforcement of an arbitral award under the New York Convention (NYC)<sup>42</sup> are pertinent

Art. V(2): "[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.
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

These two grounds will be discussed separately.

### **2.2.1. Article V(2)(a) NYC**

Under article V(2)(a) a court or tribunal in the State where enforcement is sought may refuse enforcement if and to the extent that, under the law of that State, the dispute is inarbitrable.<sup>43</sup> The discussion mentioned above in the *Fincantieri* case illustrates well such a scenario, although these disputes were not brought at the recognition and enforcement stage. Yet the different national legislation on the issue of arbitrability mentioned there clearly shows that a dispute which has been considered arbitrable by the arbitral tribunal may nonetheless subsequently be refused recognition and enforcement in another State because under the laws of that State the dispute is inarbitrable. Such a decision will depend on the specific legal regime in the State where enforcement is sought, notably in relation to the appreciation by courts and tribunals in that State of whether international sanctions indeed hinder the arbitrability and hence enforcement of the award in that State.

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<sup>42</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

<sup>43</sup> Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, 'Les conséquences des sanctions économiques sur les obligations contractuelles et l'arbitrage' (2012) *Int'l Bus LJ* 405, 428.

In this respect, it has been considered that arbitrators have a duty to take into account the enforceability of their award, and render a valid award capable of being recognized and enforced.<sup>44</sup> However, as has been noted in the second section of this chapter, such a view may be problematic since, first, recognition and enforcement may differ substantially from State to State, and secondly, a preventive application of the possible non-recognition and non-enforcement of a to-be-rendered award would run counter to the fact that the arbitrator needs to decide on the arbitrability of the dispute based on its own findings to that effect and the legislation applicable to such a decision.<sup>45</sup> Also, parties may voluntarily pay the award, and an award may be enforced in several States which may have different legislation regarding the arbitrability of the dispute.<sup>46</sup>

### 2.2.2. Article V(2)(b) NYC

The second ground on which recognition and enforcement may be refused is the public policy ground found in article V(2)(b), which has attracted more attention. Such a possibility again depends very much on the presence or not of public policy considerations inherent to each State. It is therefore difficult to provide general and firm answers to the question whether sanctions, as part of the public policy of certain States, would render a decision unenforceable. Indeed, it should be pointed out that there are different conceptions of public policy.<sup>47</sup> The different conceptions in essence revolve around the question of whether the public policy exception is viewed as one linked to the public policy of the State where recognition or enforcement is sought (domestic public policy or international public policy *of the state concerned*), or whether it is viewed as a public policy transcending one specific legal order (truly international public policy or transnational public policy), representing an 'international consensus as to universal standards and accepted norms of conduct that must always apply'.<sup>48</sup> The concept of public policy varies very much from State to State<sup>49</sup> and hence it is impossible to make any final determination as to the possibility that a State will refuse recognition or enforcement on that ground in case such recognition or enforcement would be considered contrary to international sanctions.

It is however relatively clear that an international sanctions regime put in place by Security Council Resolutions would form part of a truly international public policy or transnational public policy. Sanctions regimes imposed by individual States or

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<sup>44</sup> See Louis Kossuth, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 258, 272.

<sup>45</sup> Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, 'Les conséquences des sanctions économiques sur les obligations contractuelles et l'arbitrage' (2012) *Int'l Bus LJ* 405, 428.

<sup>46</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 68.

<sup>47</sup> See in extenso Louis Kossuth, 'Transnational (or Truly International) Public Policy and International Arbitration', in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law International 1987) 258 – 318.

<sup>48</sup> Committee on International Commercial Arbitration, 'Interim Report On Public Policy As A Bar To Enforcement Of International Arbitral Awards' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (Interim Report) 2.

<sup>49</sup> *Ibid.*

regional international organizations of the EU would, however, be considered as domestic public policy or international public policy of the State(s) concerned.<sup>50</sup>

Several cases have discussed the matter, notably in the United States. In the landmark case of *Parsons & Whittemore Overseas Co. v Société Générale de l'Industrie du Papier (RAKTA)*,<sup>51</sup> the US Court of Appeal decided that the public policy defence 'should be construed narrowly' and that enforcement of a validly obtained foreign arbitral award should be denied 'only where enforcement would violate the forum state's most basic notions of morality and justice'.<sup>52</sup> Because in this case the claimant had alleged in essence that US national policy rather than international or national sanctions opposed enforcement of the award, the Court had no difficulty in dismissing the claim, noting that

In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.<sup>53</sup>

This principle has been applied subsequently in various other decisions, and most notably in *Ministry of Defense of the Islamic Republic of Iran v Gould, Inc.*<sup>54</sup> which involved US imposed sanctions on Iran. The case concerned the enforcement of an Iran-US Claims Tribunal award. The award was rendered in a dispute relating to the performance of a contract by a US party regarding certain military equipment for the Ministry of War of the Iranian Imperial Government. The arbitral tribunal ordered, inter alia, that the US company return certain equipment to Iran. Such equipment however was listed on the US Munitions List and thus subject to US export restrictions. The US District Court in California refused to authorize enforcement of the part of the award which ordered the *restitutio in integrum*, since this would be in violation of US legislation.

In *MGM Productions Group v. Aeroflot Russian Airlines*<sup>55</sup>, the US District Court for the Southern District of New York, quoting the *Parson's* case, dismissed the request by Aeroflot to deny enforcement of an arbitral award based on the public policy defense. In that case, MGM was the assignee of an arbitral award obtained by Russo International Ventures, Inc., a New York corporation, against Aeroflot. Russo had a consultancy contract with Aeroflot to provide consulting services in relation to

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<sup>50</sup> See for a discussion: Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 *Revue de l'Arbitrage* 753, 755 ff.

<sup>51</sup> *Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier (RAKTA)* (1974) 508 F.2d 969 (US Court of Appeals, Second Circuit).

<sup>52</sup> *Ibid* [9]. See also *Belship Navigation Inc v Sealift Inc* (1995) 95 Civ. 2748 (RPP) (US District Court, Southern District of New York) 14.

<sup>53</sup> *Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier (RAKTA)* (1974) 508 F.2d 969 (US Court of Appeals, Second Circuit) [10].

<sup>54</sup> David J. Bederman, 'Ministry of Defense of the Islamic Republic of Iran v Gould Inc 887 F.2d 1357; certiorari denied, 110 S Ct 1319' (1990) 84(2) *American Journal of International Law* 556, 556-560.

<sup>55</sup> *MGM Productions Group v Aeroflot Russian Airlines* (2003) 573 F Supp 2d 772 (SDNY).

various activities relating to the leasing of aircraft and parts by Aeroflot to Iran Air, and had initiated arbitration proceedings against Aeroflot for withholding commissions due to Russo. Aeroflot in turn argued that the contract was null and void, being contrary to US imposed sanctions in Iran. The tribunal considered that since the contract concerned services provided to Aeroflot and not to an Iranian entity, the contract was not in breach of US sanctions. Aeroflot however challenged the enforcement of the award, basing its challenge on the public policy exception in the New York Convention, and argued that enforcement would violate US sanctions against Iran. Since the contract was not in fact in breach of US sanctions, the US District Court had no difficulty in concluding that enforcement would also, therefore, not be contrary to the US’ ‘most basic notions of morality and justice’. The judgment was later affirmed by the US Court of Appeals on the same considerations.<sup>56</sup>

Another case worthy of mention is *Ministry of Defence of Iran (“MoD”) v. Cubic Defence Systems Inc.* Cubic, a US company, and the Ministry of Defence of Iran had agreed on the sale and servicing by the former to the latter of an Air Combat Manoeuvring Range. After the Iranian revolution, Cubic sold the equipment to Canada since the contract with Iran could not be performed because of the US sanctions against Iran then in force, however it was agreed that Cubic would reimburse Iran for the amounts it had already paid. The Ministry of Defence of Iran brought the case before an ICC Arbitral Tribunal which issued an award in favour of the Ministry of Defence of Iran. In the meantime, the US and other States and international organizations had imposed or further expanded various financial and trade sanctions on Iran. Cubic refused to pay the amounts due to the Ministry of Defence of Iran, invoking only the very broad US sanctions regime - probably because the US sanctions regime more clearly covered the payment that was due to the Ministry of Defence of Iran than the UN sanctions regime, which targeted more specifically Iran’s nuclear activities.<sup>57</sup> In a 2011 decision, the US Court of Appeals denied the claim by Cubic that the recognition or enforcement of the award would be contrary to the public policy of the US because of the sanctions the US had imposed on Iran.<sup>58</sup> The sanctions regime however required Cubic to obtain from the US Department of Treasury’s Office of Foreign Assets Control a specific license to pay the ICC award. The Court, backed by an *amicus curiae* from the US Department of Treasury and US Department of State, considered that the sanctions regime does not in fact prohibit payments, since such a license can be obtained, and that as a consequence recognition (‘confirmation’) of the arbitral award was not contrary to the sanctions regime, nor to the public policy of the US.<sup>59</sup>

In a decision of 2013, the US District Court for the Southern District of California<sup>60</sup> was asked by the Ministry of Defence of Iran to award prejudgment interest from the date of the final arbitration award (5 May 1997) to the date the US District Court for the Southern District of California had confirmed the ICC award, i.e. 10 August

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<sup>56</sup>*MGM Productions Group v Aeroflot Russian Airlines*, Summary Order (9 February 2004) WL037561 ( US Court of Appeals for the Second Circuit).

<sup>57</sup> See on the scope of the sanctions: Farshad Ghodoosi, ‘Combating Economic Sanctions: Investment Disputes in Times of Political Hostility, a Case Study of Iran’ (2014) 37 *Fordham International Law Journal* 1731, 1770 ff.

<sup>58</sup>*Ministry of Defense and Support for the Armed Forces of the Islamic v Cubic Defence Systems* (2011) Case Nr. 99–56380, 99–56444 (US Court of Appeals for the Ninth Circuit).

<sup>59</sup> *Ibid.*, 21004 ff.

<sup>60</sup>*Ministry of Defence of Iran (“MoD”) v Cubic Defence Systems Inc* (3 January 2013) Case 98-CV-1165-B (SD Cal).

1999<sup>61</sup>. Cubic considered, inter alia, that 'it should not be "punished" because Iran is a "rogue" state and a sponsor of terrorism'.<sup>62</sup> Using the same considerations as the US Court of Appeals, the US District Court for the Southern District of California considered that the sanctions regime in force and US regulations did not excuse Cubic's retention of the amounts due to the Ministry of Defense of Iran. It thus awarded prejudgment interest.

Finally, in the more recent case of *Iranian Co. Z v. Swiss Co. X*<sup>63</sup> in 2014, the Swiss Federal Tribunal upheld a decision by a Geneva Court to grant enforcement of a foreign arbitral award in which an arbitral tribunal had ordered a Swiss company and three Israeli companies to pay an Iranian company amounts due for shipments of crude oil delivered by the Iranian company. The Swiss company opposed recognition and enforcement of the arbitral award before the courts in Geneva, based on the fact that payment to the Iranian company would be in breach of Swiss public policy, and the prohibition by 'the international community ... for the economic players to provide the Islamic Republic of Iran with financial means of whatever form'.<sup>64</sup> In this case, although the judgment of the Swiss Federal Tribunal does not make any mention of the specific regime invoked, the UN sanctions regime in place seems to have been the main component of the claim by the Swiss company, considering the explicit mention of 'the international community'. The Swiss Federal Tribunal however confirmed the decision of the Geneva Court, and noted that it could not understand why such 'abstract considerations' would lead to a finding that payments to an Iranian company of amounts awarded to it for unpaid invoices would 'be incompatible with Swiss public policy'.<sup>65</sup>

Here again, as with the cases discussed in relation to arbitrability, which similarly revolve around the question of States' interpretation of what constitutes public policy, it is difficult to draw any definite conclusions as to the possibility of a refusal of recognition and enforcement of an arbitral award on the basis of the public policy exception in the New York Convention. Such a decision will depend on the specific features of the award, the impact of the enforcement and the performance required by the award on the sanctions regime in place, the question of whether the sanctions regime has been imposed by the UN, an individual State or a regional organization, the specific sanctions imposed, and of course the interpretation of the public policy exception, which as noted earlier, and in view of the case-law mentioned, has no uniform definition. However, it seems safe to conclude that in any case, a refusal to authorize enforcement will likely occur if and to the extent that the effective enforcement of the award results in a clear and direct breach of the sanctions regime in place.

As will also be discussed in the next section, it should be pointed out that recent sanction regimes contain carve out provisions for payments following an arbitral award or judicial decision rendered prior to the sanctions regime. UN Security Council Resolution 1970 imposing sanctions on Libya for instance, provides that the

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<sup>61</sup> *Ministry of Defence of Iran ("MoD") v. Cubic Defence Systems Inc* (7 December 1998) 29 F.Supp.2d 1168, 1172-74 (SD Cal).

<sup>62</sup> *Ministry of Defence of Iran ("MoD") v Cubic Defence Systems Inc* (3 January 2013) Case 98-CV-1165-B (SD Cal).

<sup>63</sup> *Iranian Co Z v Swiss Co X* (21 January 2014) Case 4A\_250/2013 (Tribunal Fédéral Suisse).

<sup>64</sup> *Ibid.*, 5.

<sup>65</sup> *Ibid.*, 5.

asset freeze does not apply to ‘funds, other financial assets or economic resources [...] subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution’.<sup>66</sup> Such exemption however, does not apply in the event that the payment is for the benefit of an individual or entity which has been specifically targeted by the sanctions regime.<sup>67</sup>

### **III Procedural Issues for Arbitrators and Institutions**

On a more practical level the increase in relatively recent sanctions regimes (Iran, Syria, North Korea, Libya, Russia) has led to growing discussion about the implications of these regimes for arbitrators and arbitral institutions. Arbitrators as individuals will be naturally keen to avoid breaching applicable sanctions. Arbitrators need guidance not only on the legal complexities involved in deciding a sanctions-related dispute, but also on compliance procedures which need to be followed relating to their own involvement in such a dispute. The position of international arbitral institutions is perhaps more interesting, particularly in the context of regional, as opposed to international, sanctions. Despite providing services relating to international rather than domestic dispute resolution, arbitral institutions enjoy a reputation which has a traditionally strong connection to their host city or country (London Court of International Arbitration (LCIA), the International Court of Arbitration of the International Chamber of Commerce (ICC – Paris), Arbitration Institute of the Stockholm Chamber of Commerce (SCC)) and / or its legal system. As the legal regimes in those jurisdictions have changed with the implementation of sanctions regimes, the institutions have strived to emphasise their neutrality. Neutrality (and the perception of neutrality) is extremely important in the provision of arbitral services, never more so than in relation to parties from countries subject to sanctions measures. In an increasingly competitive market for arbitration services, any perceived weakness or lack of neutrality on the part of an arbitration institution is likely to be seen as an opportunity for rival institutions in other jurisdictions (such as the Middle East and East Asia). This section will seek to consider the impact of sanctions on arbitral institutions against that context.

#### **3.1. Do Sanctions Apply to an Individual Arbitrator or Tribunal?**

Sanctions include trade embargoes, import and export restrictions, travel and visa restrictions and financial restrictions. These can be directed against targeted named individuals, specific industries, governments or more widely against all trade involving particular States. Whilst any of these types of measures can be of importance to a given dispute, sanctions in the form of financial restrictions are likely to be of key importance in terms of an arbitrator’s personal involvement in a case.

The language of such measures is frequently drawn widely to include:

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<sup>66</sup> UNSC Res 1970 (26 February 2011), UN Doc. S/RES/1970, para. 19(c).

<sup>67</sup> *Ibid.*

- (i) Asset freezes – measures which would prohibit accepting payments from persons or companies of a certain nationality, or from certain listed individuals.<sup>68</sup>
- (ii) Measures which prohibit provision of services from persons or companies of a certain nationality, or from certain listed individuals.<sup>69</sup>

These types of measures may well prima facie be wide enough in scope to cover the activities of an arbitrator, and may prima facie preclude an arbitrator from acting, or accepting payment when the parties to a dispute, or one of the parties, falls within the scope of a measure.

Within the EU a territorial approach to the applicability of sanctions is observed.<sup>70</sup> This means that sanctions will apply where a connection exists between the measure and the EU, such as the involvement of an EU company or citizen. In practical terms, it is submitted that arbitrators will be personally bound by the provisions of sanctions imposed by EU Regulations where they are EU nationals or where the seat of arbitration is within the EU. EU measures may include not only EU imposed sanctions (such as those imposed on Russian entities)<sup>71</sup> but also sanctions imposed by UN Security Council Resolutions, which are implemented within the EU by regulation.<sup>72</sup>

Similarly under UK law sanctions will be applicable to any individual working within UK territory. UK citizens and UK established companies or organisations operating outside the UK are also bound by UK (and EU) sanctions regimes.<sup>73</sup> This will effectively mean that an arbitrator who is a UK citizen will be personally bound by provisions of UK and EU sanctions wherever the seat of arbitration. Non UK citizens will be bound by the UK and EU sanctions regimes when sitting as arbitrators in the UK.

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<sup>68</sup> Executive Order No 13660, 'Blocking Property of Certain Persons Contributing to the Situation in Ukraine' (6 March 2014) 79 Fed Reg 46; Council Decision (EU) 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/16.

<sup>69</sup> Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1; US Department of Treasury, 'Announcement of Expanded Treasury Sanctions within the Russian Financial Services, Energy and Defense or Related Material Sectors' (12 September 2014) <<http://www.treasury.gov/press-center/press-releases/Pages/j12629.aspx>> accessed 15 October 2015.

<sup>70</sup> See Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' (15 June 2012) para. 51, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011205%202012%20INIT>>. See also Dominic Pellew, 'The Effect of the EU Russia Related Sanctions on Arbitrators and Arbitral Institutions' (2015) (3) *Les Cahiers de l'arbitrage* / *The Paris Journal of International Arbitration* 471, 472.

<sup>71</sup> See for example Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1.

<sup>72</sup> See Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy' (15 June 2012) para. 43 ff, <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011205%202012%20INIT>> accessed 15 October 2015.

<sup>73</sup> HM Treasury, 'Financial Sanctions: Frequently Asked Questions' (August 2013) p 24 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/302397/August\\_2013\\_version\\_-\\_amended.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302397/August_2013_version_-_amended.pdf)> accessed 15 October 2015.

US sanctions are often drafted very widely and can be applicable not only to US persons, but their subsidiaries and where transactions relate to US goods.<sup>74</sup> Perhaps more tricky for arbitrators is the applicability of sanctions which purport to apply extraterritorially such as many US measures targeting trade with Cuba, Iran and Syria.<sup>75</sup> Whilst extraterritorial trade measures remain a controversial issue in international law<sup>76</sup>, these cannot be ignored by the individual arbitrator, who should ideally ensure personal compliance with:

- (i) Sanctions regimes applicable by virtue the law of their home jurisdiction (e.g. UK and EU law for a UK citizen, US law for a US citizen); AND
- (ii) The sanctions regimes applicable at the seat of the arbitration; AND
- (iii) Any sanctions regimes potentially applicable by virtue of extraterritorial application of laws.

One of the first practical issues presented by this is actually being aware of the specifics of the many sanctions regimes in place. This is especially difficult in relation to extraterritorial measures from third countries.<sup>77</sup> Apart from the need for greater general awareness on the part of arbitrators, recourse should be made to the official government information sources in the relevant jurisdictions from the outset of any dispute.<sup>78</sup>

The situation is less straightforward in relation to UN sanctions which have not been transposed to national and / or regional legislation. Most importantly, recent UN sanctions have been directed at States primarily, in that the obligations are imposed on States only. Paragraph 17 of Security Council Resolution 1970, which imposed sanctions on Libya<sup>79</sup> for instance directs the assets freeze to the UN Member States: ‘Decides that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories ...’. The same is true for the travel ban.<sup>80</sup> The wording thus excludes, *prima facie*, a direct obligation for arbitrators to comply with a UN enacted sanctions regime. Secondly, in any event, as will be explained in section 3.3, recent UN sanctions regimes contain carve out provisions which exempt legal services and payment of legal fees from the imposed travel bans and / or asset freezes.

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<sup>74</sup> Rathbone, Jeydel and Lentz, ‘Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws’ (2013) 44 *Georgetown Journal of International Law* 1055; Executive Order No 13660, ‘Blocking Property of Certain Persons Contributing to the Situation in Ukraine’ (6 March 2014) 79 *Fed Reg* 46, sections 1(a) and 6(c).

<sup>75</sup> See Rathbone, Jeydel and Lentz, ‘Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws’ (2013) 44 *Georgetown Journal of International Law* 1055, see in particular the discussion of extraterritorial “secondary” sanctions measures against Iran discussed at 1112 ff.

<sup>76</sup> Council Regulation (EC) 2271/96 of 22 November 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] OJ L309.

<sup>77</sup> See Rathbone, Jeydel and Lentz, ‘Sanctions, Sanctions Everywhere: Forging a Path Through Complex Transnational Sanctions Laws’ (2013) 44 *Georgetown Journal of International Law* 1055, 1112.

<sup>78</sup> For an overview of the sanctions imposed by the US, EU and UK, see US Department of Treasury, ‘Sanctions Programs and Country Information’ <<http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>>; US Department of Treasury, ‘Code of Federal Regulations’ <<http://www.treasury.gov/resource-center/sanctions/Pages/CFR-links.aspx>>; European Union EEAS, ‘Sanctions Policy’ <[http://eeas.europa.eu/cfsp/sanctions/index\\_en.htm](http://eeas.europa.eu/cfsp/sanctions/index_en.htm)>; UK Government Business and Enterprise Guidance, ‘Sanctions, Embargoes and Restrictions’ <<https://www.gov.uk/guidance/sanctions-embargoes-and-restrictions#types-of-sanctions-and-embargoes>> accessed 15 October 2015.

<sup>79</sup> Security Council Resolution 1970, UN Doc. S/RES/1970 (2011).

<sup>80</sup> *Ibid.*, para. 15. See also, in relation to UN sanctions against North Korea: Security Council Resolution 1718, S/RES/1718 (2006), paras. 8 and 9.

### 3.2. Compliance by Arbitrators

Given that most sanctions regimes provide for potential criminal liability and stiff financial penalties for any breach (not to mention the potential reputational damage) arbitrators will be keen to ensure strict compliance with applicable measures.<sup>81</sup>

A preliminary question is how thorough an arbitrator must be in detecting the applicability of a sanctions measure. If the parties to an arbitration do not obviously appear to be from an affected jurisdiction should the enquiry end there, or should the arbitrator perform some more detailed preliminary checks to ensure that the sanctions regimes are not triggered by virtue of the connections of one or more of the parties to a proscribed individual or regime?

The regimes vary on their approaches to this. From the EU perspective, arbitrators will not be liable if they ‘did not know and has no reasonable cause to suspect’ that their action constituted a violation.<sup>82</sup> The UK sanctions regime follows the EU approach: an arbitrator will not be liable if (s)he did not know and could not have known of the breach.<sup>83</sup> From the US perspective many measures provide that a person will not be criminally liable if (s)he did not know and could not reasonably have known. However, the Secretary of the Treasury may impose a civil penalty for which knowledge of a violation is not a requirement.<sup>84</sup>

It may be straightforward for an arbitrator to see or ascertain from the outset whether a party:

- (i) is from a jurisdiction affected by economic sanctions imposed by a relevant authority;<sup>85</sup> or
- (ii) is listed as a person or organization proscribed on the various lists published by a relevant authority.<sup>86</sup>

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<sup>81</sup> For US sanctions regimes enacted under the Trading with the Enemy Act (TWEA), maximum penalties which can be imposed for a wilful violation are a fine of \$100,000 or imprisonment of 10 years or both for an individual and a fine of \$1,000,000 for a legal person. Apart from those penalties, transaction-based civil penalties can be imposed, see US 31 CFR 501.701. The maximum penalties imposed under the UK sanctions regime concerning Russia, Crimea and Sevastopol range from imprisonment for 6 months up to 10 years and / or a fine of £5,000 (depending on the offence), see UK Customs 2014 No 2357, *The Export Control (Russia, Crimea and Sevastopol Sanctions) Order 2014*. The EU sanctions regime leaves freedom to its Member States to lay down the rules on applicable penalties, see Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1, art 8.

<sup>82</sup> Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/1, arts 10 and 12.

<sup>83</sup> HM Treasury, ‘Financial Sanctions: Frequently Asked Questions’ (August 2013) p 26. See also Dominic Pellew, ‘The Effect of the EU Russia Related Sanctions on Arbitrators and Arbitral Institutions’ (2015) (3) *Les Cahiers de l'arbitrage / The Paris Journal of International Arbitration* 471, 480.

<sup>84</sup> US 31 CFR 501.701.

<sup>85</sup> US Department of Treasury, ‘Sanctions Programs and Country Information’ <<http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>>; US Department of Treasury, ‘Code of Federal Regulations’ <<http://www.treasury.gov/resource-center/sanctions/Pages/CFR-links.aspx>>; European Union EEAS, ‘Consolidated list of persons, groups and entities subject to EU financial sanctions’ <[http://eeas.europa.eu/cfsp/sanctions/consol-list/index\\_en.htm](http://eeas.europa.eu/cfsp/sanctions/consol-list/index_en.htm)>; UK Government Business and enterprise guidance, ‘Sanctions, Embargoes and Restrictions’ <<https://www.gov.uk/guidance/sanctions-embargoes-and-restrictions#types-of-sanctions-and-embargoes>> accessed 15 October 2015.

<sup>86</sup> US Department of Treasury, ‘Sanctions Programs and Country Information’ <<http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>>; US Department of Treasury, ‘Code of Federal Regulations’ <<http://www.treasury.gov/resource-center/sanctions/Pages/CFR-links.aspx>>; European Union EEAS, ‘Consolidated list of persons, groups and entities subject to EU financial sanctions’

It is submitted that an international arbitrator would be expected to do such basic due diligence and would not be excused for any breach on the basis that (s)he had not been aware of information made publically available by the relevant authorities. Individual arbitrators may wish to develop flagging systems of their own, while those working in large law firms may well have sophisticated systems to draw upon.

The level of checks required may also vary depending on the arbitrator. A Belgian arbitrator working as a law professor in Belgium and appointed to decide an LCIA arbitration seated in London may need to check the parties against applicable UK and EU sanctions. A Belgian arbitrator who is a partner in a US law firm appointed in the same case may well have to consider the implications of US sanctions both for himself / herself and his / her partners and firm.

It will certainly be less straightforward for arbitrators to judge from the outset whether parties or transactions are ‘controlled by’ or ‘acting on behalf of’ proscribed individuals, industries or jurisdictions as provided in some sanctions instruments.<sup>87</sup> There are no clear cut rules to follow in these situations, which are inevitably somewhat questions of degree and judgment. It is submitted that arbitrators should not be required to conduct detailed investigations of the business dealings of parties at the outset of a dispute. Ignorance of the relevant connections may, however, not be a defence to any breach of a sanctions provision.<sup>88</sup> In that regard arbitrators are well advised to conduct as much due diligence as possible and to follow reasonable lines of enquiry, reporting and discussing any questions with the authorities in question.

### 3.3. Exemptions from Sanctions Regimes, Reporting and Licensing

In the EU, many sanctions regimes provide for an exemption or ‘carve out’ specifically for the provision of legal services or the payment of legal fees.<sup>89</sup> The payment of arbitrator’s fees and the provision of services as arbitrator may well come within the ambit of such exemptions in principle, but it is important to note that in most cases the exemption is not available as of right, nor is it available in all cases. It

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<[http://eeas.europa.eu/cfsp/sanctions/consol-list/index\\_en.htm](http://eeas.europa.eu/cfsp/sanctions/consol-list/index_en.htm)>; UK Government Business and enterprise guidance, ‘Sanctions, Embargoes and Restrictions’ <<https://www.gov.uk/guidance/sanctions-embargoes-and-restrictions#types-of-sanctions-and-embargoes>> accessed 15 October 2015.

<sup>87</sup> See the US position in for example 31 CFR 501 ff <<http://www.treasury.gov/resource-center/sanctions/Pages/CFR-links.aspx>> accessed 15 October 2015.

<sup>88</sup> See [n72](#) and [73](#) above.

<sup>89</sup> See Council of the European Union, ‘Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy’ (15 June 2012) para. 25 ff <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011205%202012%20INIT>> accessed 15 October 2015; Council Regulation (EC) 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People’s Republic of Korea [2007] OJ L88/1, art 6 provides exemptions for funds ‘intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services’. US Department of the Treasury, ‘Treasury and Commerce Announce Further Amendments to the Cuba Sanctions Regulations’ (18 September 2015) <<http://www.treasury.gov/press-center/press-releases/Pages/jl0169.aspx>> accessed 15 October 2015; ‘OFAC’s existing general license authorizing the provision of certain legal services to Cuba and Cuban nationals will be expanded to allow the receipt of payment for such services’. Regarding the US sanctions regime for Russia, see OFAC, ‘Guidance on the Release of Limited Amounts of Blocked Funds for Payment of Legal Fees and Costs Incurred in Challenging the Blocking of US Persons in Administrative or Civil Proceedings’ <[http://www.treasury.gov/resource-center/sanctions/Documents/legal\\_fee\\_guide.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/legal_fee_guide.pdf)> accessed 15 October 2015.

may be subject to the approval of State authorities.<sup>90</sup> Sometimes the State itself must itself obtain higher authorization (from the UN) to grant an exemption.<sup>91</sup>

Recent UN sanctions also contain carve out provisions for legal services or the payment of legal fees. Resolution 1970 imposing sanctions on Libya for instance provides that the travel ban imposed under paragraph 15 does not apply ‘where entry or transit is necessary for the fulfilment of a judicial process’.<sup>92</sup> In relation to the asset freeze, the Resolution also carves out ‘funds, other financial assets or economic resources [...] necessary for [...] payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws.’<sup>93</sup>

The US system is one of specific authorisations, general and specific licences. US sanctions instruments often provide more detailed carve outs for legal services and legal representation than their EU counterparts. The US Libyan sanctions regime, for example, provides for certain activities to be exempted from the general prohibitions contained in the regulation.<sup>94</sup> These exemptions include the representation of Libyan parties before proceedings in the US or advising such parties on US law as counsel. It is not clear whether acting as arbitrator in a dispute (especially in international proceedings located outside the US) would fall within the exemptions referred to above. Such conduct would therefore require to be specifically licensed by the authorities.

The US Iran sanction regime has a somewhat broader carve out as pertains to international proceedings covering:<sup>95</sup>

(5) Initiation and conduct of legal proceedings, in the United States or abroad, including administrative, judicial, and arbitral proceedings and proceedings before international tribunals (including the Iran-United States Claims Tribunal in The Hague and the International Court of Justice):

- (i) To resolve disputes between the Government of Iran or an Iranian national and the United States or a United States national; or
- (ii) Where the proceeding is contemplated under an international agreement;

This latter provision may well authorise acting as an arbitrator in an international case. As will be seen from the above, the position is complicated given the sheer numbers of measures in place. Where sanctions are prima facie applicable, the arbitrator should apply to the competent authorities for an exemption in order to accept the appointment unless there is a clear authorization in place permitting arbitral appointments.

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<sup>90</sup> Council Regulation (EC) 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People’s Republic of Korea [2007] OJ L88/1.

<sup>91</sup> Council Regulation (EU) 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya [2011] OJ L58/1 provides in article 7 a similar carve out for legal services/fees, however, requiring that any such exemption be approved by the UN Sanctions Committee.

<sup>92</sup> UNSC Res 1970 (26 February 2011), UN Doc. S/RES/1970, para. 16(b). See also, in relation to UN sanctions against North Korea: UNSC Res 1718 (14 October 2006), S/RES/1718, para. 9(a).

<sup>93</sup> UNSC Res 1970 (26 February 2011), UN Doc. S/RES/1970, para. 19(a). See also, in relation to UN sanctions against North Korea: UNSC Res 1718 (14 October 2006), S/RES/1718, para. 9(b).

<sup>94</sup> See US 31 CFR 570.506.

<sup>95</sup> See US 31 CFR 560.525.

Many sanctions provide for reporting mechanisms, whereby the authorities in question can give guidance as to the applicability of sanctions. The prudent course of action for an arbitrator is naturally to report any concerns arising from an appointment through the appropriate channels.<sup>96</sup> The duties are ongoing, so if initial due diligence were not to raise any questions as to the applicability of a sanctions measure, but it were to become obvious in the course of proceedings that the dispute did in fact fall within the scope of such a measure, an arbitrator would generally be required to declare his/her (albeit inadvertent) breach of the measure to the authorities and to seek authorization for further conduct of the case.<sup>97</sup>

A final point on the issue of the arbitrator’s personal responsibility for compliance with economic sanctions relates to the immunity of arbitrators. Whilst most national laws grant arbitrators wide ranging immunity in relation to their conduct of proceedings,<sup>98</sup> it is submitted that this principle would not exempt arbitrators from any breaches of sanctions regimes or obviate the need for due diligence or compliance with the measures. As noted elsewhere sanctions measures will form part of the regulatory framework and criminal law in the relevant jurisdictions as well as being part of national (if not international) public policy.

### **3.4. The effect of Sanctions in the Course of Proceedings**

Treatment of each of the many issues of law arising in arbitrations involving sanctions is beyond the scope of this chapter. Much has been written elsewhere in this book about the impact of sanctions on international contracts<sup>99</sup> and elsewhere in this chapter about the impact of sanctions on arbitral jurisdiction and arbitrability. One salient question relating to the discussion of the arbitrator’s personal responsibility under sanctions regimes is the extent to which arbitrators should be alive to sanctions issues, regardless of whether these have been raised by the parties. Should the arbitrator investigate the potential applicability of sanctions, even when this has not been raised by the parties? What is the arbitrator to do when a transaction has been structured to avoid the applicability of sanctions (for example by virtue of a choice of law clause which excludes EU / US or any other relevant law)?

It is submitted that the answer to the first question is yes for a number of reasons. First, as discussed in the first part of this chapter, the nature of sanctions measures deems them to be of a mandatory character, such that in an arbitration seated within the EU, an attempt to exclude the operation of EU sanctions would be impermissible as a result of EU public policy. Further and as described above, arbitrators themselves may be liable for breaches of sanctions regimes, where the effect of their conduct of the proceedings has been to fail to apply sanctions, to facilitate the movement of prohibited monies or the transfer of property, to uphold transactions with proscribed

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<sup>96</sup> EU EEAS, ‘Frequently Asked Questions on EU Restrictive Measures’ (September 2014) p 4  
[http://eeas.europa.eu/cfsp/sanctions/docs/frequently\\_asked\\_questions\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/frequently_asked_questions_en.pdf) accessed 15 October 2015.

<sup>97</sup> See, for example in relation to the United Kingdom: HM Treasury, ‘Financial Sanctions: Frequently Asked Questions’ (August 2013) p 26.

<sup>98</sup> In the UK and the US, immunity for arbitrators has mainly been developed in jurisprudence. In analogy with judges, this immunity has generally been interpreted widely. The legislation in civil law countries varies, but all countries seem to grant arbitrators immunity to some degree. See Anastasia Tsakatoura, ‘The Immunity of Arbitrators’ (*Inter-Lawyer*, 2002) <<http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm>> accessed 15 October 2015.

<sup>99</sup> See the Chapter by Mercédeh Azeredo da Silveira in this volume.

organisations etc. This provides both a legal and practical incentive for arbitrators to investigate the issue from the outset.

A final word here relates to the obligation of arbitrators to ensure that an award is enforceable, which has been touched upon in the previous section. The authors here reiterate their agreement with the position stated by Geisinger and others,<sup>100</sup> that this does not oblige the arbitrators to ensure their award complies with every conceivable national law under which the award might be enforced. Rather the obligation ought to be to render an award which is not susceptible to challenge in the courts of the seat of arbitration on public policy grounds. In this regard arbitrators should be alert to devices which may be used to circumvent sanctions, such as the choice of law clauses mentioned above, or surprising consent agreements whose purpose is to affect payments which would be prohibited under relevant sanctions provisions. When a consent award is permissible on its face at the seat of arbitration, but unenforceable on public policy grounds in a third country, an arbitrator’s approach ought to be determined by his / her own interpretation of the measures themselves and their applicability to the dispute and to the arbitrator personally.

Of course there may be cases where there is no connection whatsoever between the arbitration, its curial or substantive law, the arbitrators and a given sanctions regime. Even in these cases it will have done no harm for the arbitrators to have investigated compliance with their own national law, the law of the seat, the law of the parties and of any relevant third party state as mentioned at the outset of this section. This issue should not arise frequently in proceedings if proper due diligence is exercised at the outset.

### **3.5. Issues relating to Arbitration Institutions**

In a broad sense the position of institutions does not differ greatly from that of arbitrators in relation to the practical matters referred to above. Although institutions are not individuals they are ‘entities’ organized under the laws of certain jurisdictions and doing business there.<sup>101</sup> In the case of the ICC, LCIA and SCC among others, the position is that they are bound by the sanctions regimes in place within the EU (and the various home jurisdictions) and must therefore perform similar acts of due diligence, compliance and reporting as do arbitrators before accepting cases onto their books or accepting monies (such as advances on fees and costs) from disputing parties.<sup>102</sup>

In addition to performing due diligence as to the identity of the parties and the subject matter of the dispute, institutions may well need to consider compliance implications when performing their role as appointing authorities or in confirming the appointment of the arbitrators. The appointment of arbitrators (either by virtue of delegated authority by the parties or, increasingly, under default provisions of the rules of the institutions)<sup>103</sup> is a difficult area of practice. Whilst arbitrators are of course

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<sup>100</sup> Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, ‘Les conséquences des sanctions économiques sur les obligations contractuelles et l’arbitrage’, (2012) *Int’l Bus LJ* 405, 428.

<sup>101</sup> The LCIA for instance is a not-for-profit company limited by guarantee under UK law.

<sup>102</sup> See footnotes 1, 2 and 94 giving some information on the compliance mechanisms in place. [To confirm cross refs]

<sup>103</sup> See the International Court of Arbitration, ‘ICC Rules of Arbitration’ (1 January 2012) (ICC Rules 2012) arts 12 and 13 and London Court of International Arbitration, ‘LCIA Arbitration Rules’ (1 October 2014) (LCIA Rules

responsible personally for compliance with applicable regimes, there is a question arising as to whether the institutions should be alive to sanctions issues during the process of appointing or confirming the appointment of arbitrators and how these issues should be dealt with. Should an arbitrator who is an EU / US national be excluded from appointments by an arbitral institution in disputes which are the subject of EU / US sanctions? Should the institution perform due diligence as to the arbitrator's potential exposure to sanctions regimes prior to their appointment / confirmation? Should they alert potential candidates to the issue (for example giving them the opportunity to apply for authorisation for the appointment by the authorities) or should they simply leave this issue for the arbitrators to decide for themselves? Anecdotal evidence in what can only be described as an opaque area of arbitral practice suggests that there is a distinct lack of uniformity as to how this issue is being approached within the institutions. The issue is obviously one of great political and commercial sensitivity. It is submitted that even institutions which are not located in countries with applicable sanctions regimes (such as many outside the EU and US) should be developing compliance mechanisms as a matter of good practice (avoiding unnecessary delay and expense) if not strict legal obligation.

Obviously the involvement in the conduct and administration of cases varies from institution to institution so whilst many of the sanctions related questions facing arbitrators in the course of proceedings will not be relevant to institutions, they must also be aware that activities such as confirming arbitral awards (e.g. consent awards) may raise questions (similar to those faced by arbitrators) in the course of proceedings. Additionally whilst many institutions exclude in their own rules liability for their conduct of proceedings, these are normally interpreted by national authorities as something akin to contractual exclusion clauses whose purpose is to prevent re-litigation of arbitral disputes by the parties. They are also generally subject to limits imposed by the applicable law.<sup>104</sup> In our submission such provisions could not afford the institutions with a defence to any breach of otherwise applicable sanctions regimes or obviate them from the requirements of compliance and reporting under such measures.

Arbitral institutions within the EU (such as the ICC, LCIA and SCIA) have long enjoyed a position of trust with Russian companies as hosts for neutral resolution of international disputes.<sup>105</sup> Since the imposition of EU sanctions targeting Russia this has been called into question in some quarters, with some Russian parties expressing less willingness to use European arbitral institutions as a result of the EU sanctions.<sup>106</sup> European institutions have been quick to stress that the effects of the EU / Russia

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2014) art 5. Both the LCIA and the ICC have powers to appoint or "confirm" the appointment of the Tribunal notwithstanding that candidates have been chosen by the parties.

<sup>104</sup> ICC Rules 2012 art 40; LCIA Rules 2014 art 31; Stockholm Chamber of Commerce, 'Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce' (1 January 2010) article 48.

<sup>105</sup> Yaraslau Kryvoi, 'Russian Arbitration Users in Europe: Growth and Misunderstandings' (*CIS Arbitration Forum*, 20 January 2011) <<http://www.cisarbitration.com/2011/01/20/russian-arbitration-users-in-europe-growth-and-misunderstandings/>>; Vladimir Khvalei, 'B2B: No Country for Russian Disputes?' *The Moscow Times* (23 April 2015) <<http://www.themoscowtimes.com/article.php?id=519651>> accessed 15 October 2015.

<sup>106</sup> Olga Boltenko, 'Hong Kong Emerges as Russia's Refuge while the EU's Sanctions Cripple Major Russian Businesses' (*Kluwer Arbitration Blog*, 24 November 2014) <<http://kluwerarbitrationblog.com/2014/11/24/hong-kong-emerges-as-russias-refuge-while-the-eus-sanctions-cripple-major-russian-businesses/>> accessed 15 October 2015; Justin D'Agostino, Brenda Horrigan and Rebecca Soquier, 'When the East Meets the Far East: the Impact of Russian Sanctions on Commercial Arbitration in Asia' (*Kluwer Arbitration Blog*, 30 April 2015) <<http://kluwerarbitrationblog.com/2015/04/30/when-the-east-meets-the-far-east-the-impact-of-russian-sanctions-on-commercial-arbitration-in-asia/>> accessed 15 October 2015.

sanctions are very limited in scope and to confirm their continued neutrality.<sup>107</sup> The debate has not been lost on jurisdictions and arbitral institutions seeking to attract arbitral business from Russian clients.<sup>108</sup> Yet, beyond the practical, the imposition of economic sanctions (particularly by the EU) and the position of several European governments, particularly vis à vis Russia, have caused considerable debate within the arbitral community and specifically relating to the role of arbitral institutions. The debate above is illustrative of two interconnected points. The first point concerns economics. International arbitration is in one sense a sophisticated global marketplace for services. One aspect of this market is the competition between arbitral institutions and jurisdictions (as well as lawyers, law firms and arbitrators) for business. Economic sanctions appear to have had effects, or at least perceived effects, upon the operation of this market. The second point relates to politics. Economic sanctions are a direct consequence of wider geopolitical disputes and conflicts. The question arising from the discussion above is an important one, namely whether arbitral institutions and arbitrators can remain neutral and also be perceived as neutral in the context of such conflicts.<sup>109</sup> This is of course more than simply an economic question for the individuals and institutions concerned but a core question for the institution of arbitration itself and its legitimacy.

#### IV Conclusion

This chapter has sought to examine how international economic sanctions interact with and impact upon the process of international arbitration. As shown, there are indeed many aspects to this interaction.

We have considered some of the legal issues which flow from the applicability of sanctions regimes in arbitration, such as whether the applicability of economic sanctions can render disputes inarbitrable or deprive tribunals of jurisdiction. We have concluded that it is likely that arbitral tribunals will find that the presence of a sanctions regime will not render the dispute inarbitrable. Yet we have exercised caution, since the arbitrability of disputes falling under international sanctions largely depends on the law of the seat of the arbitration and the law governing the arbitration clause and on the interpretation of the particular wording of sanction regimes. The chapter has also considered the debate on whether particular sanctions may constitute rules of national or transnational public policy<sup>110</sup> and accordingly the circumstances where the application of economic sanctions could render arbitral awards

<sup>107</sup> ICC, LCIA and SCC, 'The Potential Impact of the EU Sanctions Against Russia on International Arbitration Administered by EU-based Institutions' (17 June 2015) <[http://www.sccinstitute.com/media/80988/legal-insight-icc\\_lcia\\_scc-on-sanctions\\_17-june-2015.pdf](http://www.sccinstitute.com/media/80988/legal-insight-icc_lcia_scc-on-sanctions_17-june-2015.pdf)> accessed 15 October 2015.

<sup>108</sup> Olga Boltenko, 'Hong Kong Emerges as Russia's Refuge while the EU's Sanctions Cripple Major Russian Businesses' (*Kluwer Arbitration Blog*, 24 November 2014) <<http://kluwerarbitrationblog.com/2014/11/24/hong-kong-emerges-as-russias-refuge-while-the-eus-sanctions-cripple-major-russian-businesses/>> accessed 15 October 2015; Justin D'Agostino, Brenda Horrigan and Rebecca Soquier, 'When the East Meets the Far East: the Impact of Russian Sanctions on Commercial Arbitration in Asia' (*Kluwer Arbitration Blog*, 30 April 2015) <<http://kluwerarbitrationblog.com/2015/04/30/when-the-east-meets-the-far-east-the-impact-of-russian-sanctions-on-commercial-arbitration-in-asia/>> accessed 15 October 2015.

<sup>109</sup> ICC, LCIA and SCC, 'The Potential Impact of the EU Sanctions Against Russia on International Arbitration Administered by EU-based Institutions' (17 June 2015) <[http://www.sccinstitute.com/media/80988/legal-insight-icc\\_lcia\\_scc-on-sanctions\\_17-june-2015.pdf](http://www.sccinstitute.com/media/80988/legal-insight-icc_lcia_scc-on-sanctions_17-june-2015.pdf)> accessed 15 October 2015; ICC, 'The merchants of peace' <<http://www.iccwbo.org/about-icc/history/>> accessed 15 October 2015.

<sup>110</sup> Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, 'Les conséquences des sanctions économiques sur les obligations contractuelles et l'arbitrage', (2012) *Int'l Bus LJ* 405, 424; Geneviève Burdeau, 'Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international - Les états dans le contentieux économique international, I. Le contentieux arbitral' (2003) 3 *Revue de l'Arbitrage* 753, 764.

unenforceable on public policy grounds.<sup>111</sup> It is difficult to draw any definite conclusions as to the possibility of refusing recognition and enforcement of an arbitral award based on the public policy or non arbitrability grounds of the New York Convention. The specific features of the award, the nature of the sanctions regime in place, and of course the interpretation of the public policy / non arbitrability exceptions by the enforcing jurisdiction will need to be considered in any given case. Based on the available case-law, a refusal to enforce is likely only where clear and direct breach of the sanctions regime in place in the enforcing jurisdiction has been established. This has not occurred much in practice.

From a more practical perspective, this chapter has analysed the growing discussion about the implications of sanctions regimes on arbitrators and arbitral institutions. We have noted that arbitrators will be personally bound by the provisions of sanctions imposed, and will need to give consideration to regimes in place in their home States and at the seat of arbitration as well as, more controversially, potentially applicable third state regimes. In this respect, international arbitrators would be expected to do basic due diligence to ensure compliance with applicable measures and should not assume they would be excused for any breach on the basis that they had not been aware of information made publically available by the relevant authorities. While carve-out provisions may well authorize individuals acting as an arbitrator in an international case, the arbitrators are often required to apply to the competent authorities for an exemption in order to accept appointments and should do so unless there is a clear authorization in place permitting arbitral appointments. Similar considerations apply to arbitration institutions. As ‘entities’ organized under the laws of certain jurisdictions and doing business there, they are bound by the sanctions regimes in place in their home jurisdictions and must therefore perform similar acts of due diligence, compliance and reporting as do arbitrators before accepting cases onto their books or accepting monies (such as advances on fees and costs) from disputing parties. The sensitive area of arbitral appointments by institutions has been further complicated by sanctions issues and this is an area in which institutions may well wish to work to develop and improve compliance procedures.

In summary the impact of economic sanctions upon arbitration is marked. The legal issues presented by sanctions highlight many of the complexities inherent in international dispute resolution (perhaps more accentuated in international arbitration) following the complex interaction between domestic, regional and international legal norms. On a more practical level economic sanctions have given rise to issues of compliance by international arbitrators with a range of regulatory measures of a national, regional and international nature. There is little, if any, regulatory and professional guidance available to the nascent professional community of international arbitrators on these issues. Finally, sanctions have highlighted some issues concerning the role of arbitral institutions, specifically the competition among institutions for arbitral business, the extent of institutions’ obligations to comply with sanctions regimes and perhaps the lack of public guidance as to their compliance procedures.

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<sup>111</sup> Elliott Geisinger, Philippe Bartsch, Julie Raneda and Solomon Ebere, ‘Les conséquences des sanctions économiques sur les obligations contractuelles et l’arbitrage’, (2012) *Int’l Bus LJ* 405, 424.