International Law Review, Volume 40, Issue 71, Fall 2023/ pp. 223-251

International Arbitration Faced With the Challenge of Economic Sanctions*
(Original Research)

Moshkan Mashkour **

(DOI): 10.22066/CILAMAG.2023.707227

Date Received: 19 Sep.2022 Date Accepted: 16 Aug.2023

Abstract

The multiplication of economic sanctions has caused serious challenges for the users of international arbitration. Access to international arbitration and, more particularly, to institutional arbitration has been seriously affected by their ever-growing spread. Fundamental principles that should govern any sound arbitral process are adversely affected. In certain instances, sanctions have led to a denial of justice. After being tetanized for many years, arbitration institutions are taking steps to remedy this situation. Such steps are, however, still insufficient. Users and practitioners from sanctioned states continue to remain in an unfair position. They should take this situation into account when drafting arbitration agreements.

Keywords

Sanctions, Arbitral Institutions, Arbitration Costs, Confidentiality, Transparency, Denial of Justice, Accountability, Judicial Authority

Introduction

The multiplication of unilateral and multilateral economic sanctions in the last two decades has increasingly affected international trade. Imposing economic sanctions on other nations is not a new phenomenon in and of itself. Economic sanctions have indeed been used since antiquity in international relations to influence the policies of States and nations in

* The present article is an updated version of an article previously published in French language under the title "L'arbitrage international face au défi des sanctions économiques" in International Law in Motion, Some New Insights, A tribute to Professor François Rigaux, A. Mohebi, A. Pellet, V. Lowe, P. d'Argent, PUL, Presses Universitaires de Louvain.

** Lawyer, former director of Tehran Regional Arbitral Centre (TRAC), member of the Court of Arbitration of the Arbitration Centre of the Iran Chamber of Commerce, and member of the International Arbitration Board of TRAC.

specific areas.[1] They have been more or less successful. A fundamental difference between the sanctions that were put in place in the past and the so-called smart[2] ones that have been enacted recently lies in their effectiveness.

It has become increasingly difficult to evade new types of sanctions due to the deep integration of the global economy and the compliance mechanisms put in place within financial institutions as well as multinational corporations, mid-size companies, and even smaller enterprises. Compliance departments verify, often with the greatest zeal, the compliance of financial operations and economic transactions with various national, supranational, or international regulations that restrict trade and financial transfers to and from designated persons and entities, as well as those engaged in economic activities subject to such regulations, based on a zero-risk policy. To accomplish this, they utilize increasingly efficient software that automatically identifies and blocks financial transactions deemed, whether accurately or not, to be non-compliant with the predefined standards - effectively adhering to the United States designed moulds.

Beyond their declared objectives, the sanctions have side effects. Arbitration, as the main mode of settlement of international disputes, is actually severely affected as a collateral victim by the multiplication of sanctions regimes. Sanctions should in principle not affect arbitration, and to our knowledge, access to arbitration has not been expressly limited in any sanctions regulations. Nonetheless, one may easily witness that due to the increasing number of sanctions enacted in concert, but also unilaterally, and sometimes against international norms by certain States, and first and foremost by the United States, the targeted States, as well as their nationals, their residents, and persons engaged in trade with them, are faced with the greatest difficulties in their free access to arbitral justice.

Men of law and those fond of justice, like the late Professor Rigaux, in whose memory the earlier French version of this Article was written, would have certainly loved to take part in a debate on the challenge posed by sanctions to international arbitration. These lines, we do hope, will contribute to the identification of a number of the problems and obstacles posed by the sanctions (I) before putting forward ideas on potential solutions (II).

1. Barry E. Carter, "International Economic Sanctions: Improving The Haphazard U.S. Legal Regime" *California Law Review* 75. Issue 4, (1987): 1166.

2. Smart sanctions are defined as: Measures that are tailored to maximize the target regime's costs of noncompliance while minimizing the target population's suffering. See Daniel W. Drezner, 'How Smart Are Smart Sanctions?' *International Studies Review* 5 (2003): 107.

I. Difficulties in the implementation of the arbitration procedure and violation of fundamental principles

A first series of difficulties arises at the very beginning of the arbitration. Indeed, the initiation of the arbitration procedure by a person affected by sanctions as well as the subsequent steps in the normal course of the proceedings may prove at the outset to be extremely difficult, uncertain, or even impossible, due to difficulties in the payment of the costs of arbitration (A). Violations of fundamental principles applicable to international arbitration are also likely to compromise the viability of arbitration as a means for resolving disputes to which targeted persons and those affected by sanctions are parties (B).

A. Payment of the arbitration costs

The arbitration procedure begins with the submission of a request. Whether in the form of a summary or of an elaborate document, the request must be accompanied or swiftly followed by the payment of the costs related to the introduction of the arbitration proceedings. In the case of institutional arbitration, the secretariat of the institution will not allow the procedure to start effectively before having received this relatively modest sum of money.[3]

However, when the applicant is a person specifically designated by a sanctioning authority, or simply because they are a national or resident of a State designated by said authority, the payment request for arbitration costs may be declined. This is due to the sanction schemes that prevent financial institutions from executing transactions mandated by those persons. As a result, the arbitration institution cannot receive the registration fees, resulting in a deadlock in the process of arbitration.

To circumvent this difficulty, the claimant may always involve a third party to effect payment of the initial costs. This third party may be the law firm representing the claimant or a third-party funder. The latter solution can indeed make it possible, at least temporarily, to advance the arbitration process. However, when the law firm or the third-party funder is itself established in a State subject to the restrictions imposed for the monetary transfers affecting the sanctioned party, the payment that it could order on behalf of the claimant would likely suffer the same fate and fail to be credited to the account of the arbitration institution.

The risk of rejection is not ruled out, even when the third party is established outside a State subject to sanctions if the third party's name appears in the bank transfer documents or upon an inquiry by the banks, it is

3. The costs for registering the claim are USD 5,000 for arbitration administered by the International Court of Arbitration of the International Chamber of Commerce (ICC), GBP 1,750 for the London Court of International Arbitration (LCIA), 4,500 to 8,000 CHF, depending on the amount of the claim, for the Swiss Chambers of Commerce Arbitration Institution (SCAI), EUR 500 for TRAC.

revealed that the third party is acting on behalf of a person under sanctions.

An arbitration initiated by a person affected by sanctions thus risks being aborted before it has even started, even when the claimant attempts to pay the registration fees through a third party.

If the claimant nevertheless manages to overcome this first difficulty[4] it will very quickly be confronted again with the problem of further payments, since after having notified the claim and having received the defendant's response, possibly accompanied by a counterclaim, the arbitrator or the arbitration institution determines an advance on the costs and asks each party to pay its share thereof.

A concrete example can help in understanding more precisely the nature of the difficulties and the consequences that can result from obstacles in the payment of fees in the context of institutional arbitration. In November 2013, a Malaysian company, a subsidiary of a large Iranian trader of petrochemical products, submitted a claim to a reputable arbitration institution in Europe. The claim was directed against a Swiss company and related to the payment of the price of petrochemical products of Iranian origin sold to the Swiss company for delivery to India. The dispute was about a banal non-payment of the price of the thing sold in accordance with the common pattern in the international trade of petrochemical products. The transaction was perfectly legal under all potentially relevant laws, *i.e.*, those of Malaysia, Iran, India and Switzerland – as the law of the buyer and the place of arbitration.

The claimant was, however, on the list put in place by the US Treasury Department as part of the politically motivated sanctions against various Iranian economic sectors. By submitting the application, the claimant's counsel paid the registration fee on behalf of the claimant and the fees were properly credited to the institution's account. The rules of the arbitration institution required it to immediately notify the claim to the Swiss company, the defendant in that case. However, despite this obligation and repeated requests from the claimant, the arbitration institution remained silent for more than two months. The claimant then informed the arbitral institution that it was about to seize the judicial authority of the place of incorporation of the institution to compel it to perform the obligations arising from its arbitration rules. It was then, at the end of January 2014, that the institution finally notified the request for arbitration to the defendant, without providing a word of explanation concerning the delay that had occurred. It also determined the costs of the arbitration. The claimant then paid its share of the costs of the arbitration through counsel. However, a few weeks later, in early March 2014, the payment was returned to counsel by the bank of the arbitration institution. Counsel for the claimant promptly informed the

4. For example, by involving a law firm or a third-party funder established in a country not subject to sanctions. This is not an easy task, and in any event, as the law firm itself will find it difficult to get paid or reimbursed by the ill-fated claimant it will often simply refuse to act on its behalf.

institution. On the same day, the arbitration institution informed the claimant that the arbitrator appointed by the defendant has refused to accept his mission, because the claimant is a listed person, and set a deadline for the defendant to designate another arbitrator. On the other hand, the institution confirmed that their bank had refused the payment made on behalf of the claimant through counsel. The following day, the claimant arranged for a new transfer of its share in the costs of the arbitration. The payment was again rejected, and there was no move in the proceedings for several months. In mid-November 2014, counsel for the claimant, exasperated, again complained about the silence of the institution and requested the rapid appointment of an arbitrator for the defendant and the implementation of the arbitration procedure. In response, at the beginning of December 2014, the claimant received a letter from the institution's secretariat stating that "due to international sanctions, this case raises questions relating to compliance" and that the request has therefore been forwarded to certain people to its compliance department. The letter added that the adviser in charge of the case was not in a position to say when the arbitration could be set up, pending receipt of "instructions" from these latter persons. The letter ended with the affirmation that the institution would take all measures to "resolve the issues that have been raised, taking into consideration the legal requirements imposed by the regulatory authorities concerned". A few days later, the claimant wrote to the institution requesting it to decide quickly and definitively on the implementation of the arbitration procedure. Faced with the silence of the arbitration institution, the claimant proposed to the defendant to submit the dispute by mutual agreement to an *ad hoc* arbitration tribunal, but following the latter's refusal, and in view of the fruitless exchanges with the institution on the nebulous fate of the arbitration, it then found no other solution than to have recourse, in October 2015, to judicial authorities. Nevertheless, this time it seized the court of the place of the seat of the arbitration, instead of the judicial authority of the headquarters of the arbitration institution and requested that the arbitration agreement be declared null and void, inoperative or not likely to be implemented due to the inaction of the arbitral institution. Accordingly, it requested the court to declare itself competent to judge the merits of the case. But a new twist happened almost a month after the hearing before the Swiss judge. In June 2016, *i.e.,* two and a half years after the initiation of the arbitration, and before the Swiss court rendered its decision, the arbitration institution broke its long silence, probably informed by the defendant of the legal proceedings that were initiated, and invited the claimant to pay the costs of the arbitration, without however explaining – for the second time – on its two and a half years of inaction since its letter of December 2014. Faced with this letter, a copy of which was communicated by the defendant to the Swiss court, the latter decided to suspend the proceedings awaiting to see whether

this latest development would finally lead to the implementation of the arbitration agreement.[5] The Claimant paid the arbitration costs in the meantime through counsel. This time, the payment was credited to the institution's account, likely due to the lifting of US sanctions against Iran and Iranian companies following the Joint Comprehensive Plan of Action (JCPOA) taking effect.[6] The arbitration tribunal was constituted in September 2016, and the award was rendered in September 2018. It took almost five years to settle a dispute, whereas an award in a similar case could have been rendered in two years. In the meantime, the defendant had become insolvent. The claimant, who was successful on all counts before the arbitrators, was unable to proceed with the execution of the award and thus reap the fruits of its success.

This example, among others, highlights the setbacks of companies that have engaged in a perfectly legal trade and have seen fit to insert an arbitration clause in their contract to obtain justice, quickly and effectively. They could not imagine the difficulties they would encounter in this way, for the only wrong of being nationals of a State undergoing economic sanctions, implemented for political reasons which completely overflowed them. Indeed, claimants who are not nationals of these States can also suffer the same fate when the defendant is an entity named under sanctions or a national of a sanctioned State, or even when the product, object of the transaction, originates from that state. The fact that the product, subject of the dispute, is transported by a means of transport listed by an authority responsible for applying sanctions or having any other link with a sanctioned person or State can potentially generate the same difficulties.

This situation is obviously detrimental to international arbitration in general and the credibility of arbitration institutions in particular, insofar as economic sanctions, particularly unilateral ones, are multiplying and their scope of application is constantly expanding. Legal uncertainty is aggravated by the sometimes irrational and illegal political decisions of powerful States that can influence the behaviour of economic actors. Thus, with the unilateral denunciation of the JCPOA by the United States in May 2018, in clear contravention with UN Security Council Resolution 2231 (2015), Iranian companies, and those trading with them, found themselves once again faced with the difficulties they previously encountered in paying the costs of the arbitration, and therefore initiating proceedings to assert their rights. Procedures initiated previously are also *de facto* blocked in many

5. Cantonal Patrimonial Chamber of Lausanne, PCCI Ltd Co. v. Indani Global GmbH, July 5, 2016.

6. The Joint Comprehensive Plan of Action (JCPOA) was concluded on 14 July 2015 between Iran, the European Union, Germany, China, the United States, France, Great Britain and Russia for the establishment of certain restrictions concerning the peaceful use of nuclear energy by Iran in return for the lifting of the sanctions put in place by the UN, the United States and the European Union. The JCPOA was endorsed by UN Security Council Resolution 2231 on 20 July 2015. It was implemented on 16 January 2016. The United States unilaterally withdrew from JCPOA on 8 May 2018.

cases. The same is true for other States subject to sanctions, or their nationals, such as is the case, for example, for Russia pursuant to the large number of economic and other sanctions enacted before the war in Ukraine in 2022 but also thereafter.

B. Violation of fundamental principles

The December 2014 letter from the arbitration institution in the case referred to above, and other correspondence of this type which have unfortunately become commonplace in recent years, are undoubtedly a sad finding for a reputable arbitration institution, not only by what is said there but also for the unsaid. A number of principles which the arbitration institutions prided themselves on in order to boast of their merits have been undermined by the proliferation of sanctions and the attitude these institutions have adopted in this regard. Confidentiality, transparency, accountability and celerity have been easily put forward, among others, to justify the choice of arbitration as a means of settlement of international commercial disputes. However, it is clear from frequent letters similar to the one mentioned above, or other documents sent to the parties in the form of notes, that these principles are applied in a discriminatory way when the parties to the dispute, or one of them, is listed by a sanctioning authority or originates from a sanctioned State, or the subject matter of the dispute relates to that State or there is a connection between the parties and that State.

It seems that these violations for a large part, result from the incorporation of a "compliance department", like in banks or other large companies, in the organization of arbitration institutions. Arbitration institutions were traditionally structured around an authority, notably called a court or council, composed of independent persons responsible for implementing the arbitration rules and a secretariat which assisted them in the exercise of their role. The parties were in contact with counsels working under the direction of the secretary general. However, the establishment in recent years by certain arbitration institutions of a compliance department, the exact role of which not being defined either in their rules or in the various notes sent by these institutions to the parties, has affected the necessary trust relationship between these institutions and the parties, at least those that are in one way or another subject to sanctions.[7] It is clear from the personal experience of many arbitrators and counsel that such units operate autonomously, without any effective hierarchical link to the secretariat and even to the arbitration court. In addition, various communications from arbitration institutions with the parties show that the people in the

7. See, for example, ICC, "Note to Parties and Arbitral Tribunals on ICC Compliance", 29 September 2017, https://iccwbo.org/publication/note-parties-arbitral-tribunals-icc-compliance/; LCIA, "The potential impact of the EU sanctions against Russia on international arbitration administered by EU-based institutions", 20 August 2015, www.lcia.org/News/the-potential-impact-of-the-eu-sanctions-against-russia -on-inter.aspx.

compliance department have decision-making power as to the acceptance of a case or, at the very least, over the terms and conditions for the implementation of the arbitration procedure. Furthermore, arbitration professionals readily admit that the management of files, from the receipt of a request for or against a person listed or suspected of having had transactions with a person listed or having traded with a State under sanction takes place in a more or less opaque way.

(a) Confidentiality abused

Although national arbitration laws are generally silent on the obligation of confidentiality in arbitral proceedings,[8] the existence of an implicit obligation of confidentiality is not disputable according to most authors.[9] In France, the existence of this obligation is recognized by case law.[10] It is also recognized that this obligation extends not only to parties and arbitrators but also to arbitration institutions and their staff.[11] Confidentiality has always been cited as one of the advantages of arbitration over litigation.[12] In fact, the rules of practically all arbitration institutions include one or more provisions establishing an obligation of confidentiality. This applies not only to the parties[13] but also to arbitrators,[14] experts, and all those who participate in the arbitral proceedings.[15] It is easily accepted that neither the arbitration institution nor its agents can be discharged of the obligation put in place in its rules for the parties and the arbitrators.[16] To be clear in this respect, many arbitration institutions specify in their rules that this obligation also applies to the staff of the secretariat and the members of the arbitration court – or the

8. Gary B. Born, *International Commercial Arbitration Vol. II* (The Netherlands: Wolters Kluwer, 2009), 2254.

9. In this respect, see in particular, *Ibid.*, 2258-2262; and Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (London: Thomson, Sweet & Maxwell, Second Edition, 2007), 317.

10. CA Paris, 28 février 1986, Aita c/ Ojjeh, Rev. arb., 1986, 583.

11. See in this sense, in particular, Poudret et al., *Comparative Law of International Arbitration*, 320; and Elza Raymond-Eniaeva, *Towards a Uniform Approach to Confidentiality of International Arbitration* (Switzerland: Springer Nature, 2019), 71.

12. Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (United Kingdom: Cambridge University Press, 2008), 49.

13. See, for example, Article 3 of the Arbitration Rules (2017) of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Article 44-1 of the Arbitration Rules of the Arbitration Institute of the Swiss Chambers of Commerce (SCAI), Article 30 of the Arbitration Rules (2014) of the London Court of International Arbitration (LCIA), Article 41 of the Arbitration Rules (2018) of the Tehran Regional Arbitration Centre (TRAC).

14. Julian DM. Lew, Loukas A. Mistelis and Stefen Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 12-20.

15. *Ibid.*, 1-26 where it is stated that "parties to the arbitration, their legal representatives and those who are specifically authorised by each party, can attend the arbitration hearing. Each of those individuals is considered to be subject to the duty of confidentiality on behalf of the party they are representing."

16. See Born, *International Commercial Arbitration Vol. II*, 2254.

equivalent authorities.[17] The scope of the confidentiality obligation in arbitration is therefore general, *ratione personae*, and applies to all persons involved in the procedure, *i.e*. in particular to the parties and counsel, the arbitrators, the secretaries of the arbitral tribunals, experts intervening for or at the request of the parties or the tribunal, the arbitration institution, its administrators, the members of its decision-making bodies and its employees. Its scope is also very wide. It becomes clear from the various arbitration rules that this obligation concerns any element of the file which is not in the public domain.[18]

One can therefore only be surprised at the content of the 2014 letter from the arbitration institution in the case mentioned above and many similar letters in other cases, but also that of the notes communicated to the parties by certain institutions when submitting the request for arbitration. For example, in accordance with point 12 of the Note to Parties and Arbitral Tribunals on ICC Compliance (ICC Note to Parties):

In the event that the administration of a case, including any payment, was to trigger an obligation to inform the French authorities and/or the authorities of the United States in accordance with the regulations on international sanctions, the ICC will transmit to them the required information. Although confidentiality is considered by the ICC to be an essential principle of the ICC arbitration procedure, the ICC may be required to comply with the obligations imposed by the French authorities and the authorities of the United States, if these require information. In such a situation, the ICC will communicate the information to them in accordance with its obligations.

There is no doubt that an arbitration institution must comply with the mandatory laws applicable at its seat and, as such, communicate to the competent regulatory authorities the information that it would be legally required to provide or that it would be required to provide on its own initiative, without an express request to this effect being addressed to it. However, it also remains bound, at the same time, by the obligation of confidentiality that it has contracted towards the parties. Thus, it is obvious that it cannot, on its own initiative, breach its obligation of confidentiality on the basis of its own interpretation of the law or the sole fact of having received a request from a governmental authority or a third party, for example, a bank. When it receives a request for communication of information from the competent authorities or any other third party, or if it considers that it is required by law to provide such or such information to a third party, without having received an express request to this effect, it must inform the parties of this situation without delay, indicating the legal basis of its obligation to communicate the information in question and forward the

17. See, for example, Article 6 of the Statutes of the ICC International Court of Arbitration, Article 44-1 of the SCAI Arbitration Rules, and Article 4 of the TRAC Rules of Procedure.

18. See, by way of example, the references cited under notes 10 and 12.

request addressed to it to the parties in order to allow them to assess and, if necessary, to challenge – by administrative or judicial appeal – the interpretation or understanding of the arbitration institution, or that of the authority concerned, of the provision invoked and its effects. There is no doubt that the institution cannot unilaterally release itself from its contractual obligations towards the parties by sending a simple note to them. Any action on the side of the institution in this regard cannot be discretionary and even less arbitrary. The parties must be put in a position to efficiently contest any communication of documents and information to a third party before it takes effect if they consider that it lacks a legal basis. The institution must also, insofar as the communication of documents or information is legally justified, obtain the agreement of the parties as to the exact information or the part of the file which is to be communicated to the authority concerned. Indeed, the institution is required to provide the information that would be validly needed to be communicated, but it cannot under any circumstances, without incurring liability, communicate information beyond what is legally incumbent on it. This is an additional reason to warn the parties before any communication of information, in order to allow them to contest, if necessary, the obligation of communication in its principle or its scope. The obligation of the arbitration institution vis-à-vis the administrative authorities of its seat must prevail over its obligation of confidentiality towards the parties only within the strict limits of what the law orders.[19] Confidentiality is an essential element of the choice of the arbitration institution at the time of the conclusion of the arbitration agreement; the arbitration institution cannot and must therefore not release itself from its obligation of confidentiality lightly and without legitimate resistance. As the parties have placed their trust in the arbitration institution, it must be loyal and extremely concerned in this respect and not allow an employee to easily get rid of this obligation or to be or, even less, to appear as a zealous substitute for sanctioning authorities.

The obligation to consult the parties before any communication of information or documents results also from the fact that the parties must have, in all cases, the possibility of refusing the transmission of information or documents to third parties, at the risk, where appropriate, to see the institution refusing to implement the procedure, to suspend or even terminate it. But these choices belong to the parties, the institution cannot replace them and communicate on its own initiative information and documents relating to a procedure to third parties.

The breach of the obligation of confidentiality may result in the arbitration agreement being considered null and void or inoperable. In this

19. In fact, there is a strong public policy in favour of arbitration in many jurisdictions, see for example Mitch Zamoff, 'Safeguarding Confidential Arbitration Awards in Uncontested Confirmation Actions.' *American Business Law Journal* 59 (2022): 525.

respect, it has been decided by Chamber 12 of the Tehran General Court dated 15 March 2016 that the reservation made by the ICC secretariat to communicate information related to the case to French and US government authorities amounted to the inoperability of the arbitration agreement because the confidentiality was a fundamental element of the agreement in the eyes of the parties.[20]

A possible breach of the obligation of confidentiality becomes even more serious when the arbitral institution, as is the case in the ICC Note to the parties, refers to the possibility of disclosing information from the file to authorities, other than that of its headquarters, in this case to the United States authorities. The Note and other similar texts do not mention any legal basis for such communication. It may be argued that the parties having agreed to submit their dispute to a certain arbitration institution, have thereby implicitly accepted that the latter may be required to communicate certain information to the administrative authorities of its headquarters, it would be however difficult to contend by any means that the parties have also given their consent to the communication of the information on the record to third-party governments, in this case to the government of the United States. One also wonders why one would then limit itself only to United States authorities. Why not also communicate the information of the record to the authorities of Zimbabwe, China, Russia, Iran, Saudi Arabia or Denmark? No explanation is given as to the legal basis or legality of such disclosures. Moreover, the obligation for a European arbitration institution to comply with the obligations imposed by the authorities of the United States can be at the very least doubtful, with regard to Iran, and this, since the update on 8 July 2018 of Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, as well as actions based thereon or resulting therefrom (the Blocking Act),[21] which added US laws sanctioning Iran, Iranian companies and third parties doing business with them to the list of extraterritorial laws that European operators must not give effect to.[22] In its relevant part, the Blocking Act provides:

Article 4

No decision of a court or of an administrative authority outside the Community which gives effect, directly or indirectly, to the laws cited in the

20. Tehran General Court, judgment No. 94097970227201292 dated 15 March 2016.

21. Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, as well as actions based thereon or resulting therefrom, JOCE, 1996R2271, 20 February 2014, 002.001.

22. The relevant extraterritorial legislations which were added on 7 August 2018 to the annex of the blocking law are: "Iran Sanctions Act of 1996", "Iran Freedom and Counter-Proliferation Act of 2012", "National Defense Authorization Act for Fiscal Year 2012", "Iran Threat Reduction and Syria Human Rights Act of 2012", and "Iranian Transactions and Sanctions Regulations".

annex or to actions based thereon or arising therefrom shall be recognized or rendered enforceable in any way whatsoever.

Article 5

No person referred to in Article 11 shall comply, directly or through a subsidiary or intermediary, actively or by deliberate omission, with the prescriptions or prohibitions, including summonses from foreign jurisdictions, based directly or indirectly on the laws cited in the appendix or on actions based on or resulting from them.

In the Guidance Note from the European Commission which followed the update of the Blocking Act,[23] one may read:

The blocking law cancels the effect in the Union of any foreign decision, including court decisions and arbitral awards, based on the extraterritorial legislation concerned or on the acts and provisions adopted pursuant to it (Article 4).

This means that no decision, whether administrative, judicial, arbitral or of any other nature whatsoever, taken by an authority of a third country and based on the provisions set out in Annex of the blocking law or on acts which develop or implement these provisions. Similarly, no decision requiring, for example, the seizure of assets or the execution of economic sanctions against a Union operator on the basis of the aforementioned acts will be enforced in the Union. Union operators are thus protected from the effects of such decisions in the Union.

National authorities, including national courts and national arbitrators, apply and implement the blocking law, and in particular, ensure full compliance with the aforementioned obligation arising directly from it. Under these conditions, the possibility for European arbitration institutions to legally comply with United States laws, at least with their provisions sanctioning Iranian companies or those doing business with Iran remains doubtful, without further explanation.

(b) Lack of transparency

Transparency is of course an essential requirement of any fair arbitration proceedings.[24] Thus, the arbitration rules compel the arbitrators to disclose, simultaneously with the acceptance of their appointment, any circumstance that could be considered in the eyes of the adversary as a source of a potential conflict of interest. The arbitrator and the arbitration institution must also avoid conflicts of interest during the course of the procedure and

23. Guidance note from the European Commission, Questions and answers: adoption of the updating of the blocking law (2018/C 277 I/03), JOCE, C 277 I/4, 7 August 2018.

24. For the growing trend towards transparency in international commercial arbitration see Catherine A Rogers, "Transparency in International Commercial Arbitration," *University of Kansas Law Review* 54 (2006): 1312-25.

cannot indeed meet with a party, maintain *ex parte* communications or have any other relationship with one party in the course of the proceedings, in the absence of the other party, or at least without the latter being given the opportunity to participate in the meeting or to make observations in advance. Any *ex parte* relationship may validly call into question the independence of the arbitrator or the institution in the eyes of the absent party, with the serious consequences that this may entail, *i.e.*, disqualification and challenge of the arbitrator, or even the annulment of the award.

The obligation of transparency applies not only to the relations between the institution and the parties but also with the third parties. It has been pointed out above that any communication by the arbitrator or the institution with a third party may lead to a breach of their obligation of confidentiality, unless this obligation is dictated by the law applicable to the seat of the arbitration or that of the arbitration institution, and further to the strict extent of what that is dictated by law. But, even in this case, the fact remains that by virtue of the obligation of transparency which weighs on the arbitrator and the arbitration institution, the content of any communication with a third party, bank, regulatory authority or other, although previously authorized by the parties, must be known by them. In other words, the arbitrator or the institution must communicate to the parties, without delay, a copy of any communication – or minutes of conversation or meetings – concerning the case with any third party. Concealment by the arbitrator or the arbitration institution of communications with third parties therefore constitutes a violation of the obligation of transparency and, therefore, may constitute, in view of the degree of gravity of the breach of this obligation, an objective cause for challenge, or even the ineffectiveness of the arbitration agreement.

It is therefore quite obvious that behaviour such as that encountered in the case concerning the sale of petrochemical products, cited above, or any other similar past or current case, constitutes a serious violation of the transparency obligation of the arbitration institution towards the parties. They affect the credibility of arbitration institutions and their independence in the eyes of the parties, and more seriously, they can call into question the fair administration of the proceedings.

(c) Accountability

The arbitrator and the arbitral institution must be accountable, in particular by respecting the deadlines prescribed in the arbitration agreement or the rules of the institution. They must also react diligently to legitimate requests from the parties to clarify the reasons for inaction. Arbitration professionals, however, note from experience that this obligation is far from being respected, with regard to proceedings involving parties affected by the sanctions. The example cited above is a good illustration of this failure. This is not limited to European arbitration institutions but is encountered also in

cases pending before major Asian arbitration centres. Thus, a well-known Asian arbitration institution, failed to put the arbitration initiated by an Iranian company in motion, while the claimant was not a listed person. Following several follow-ups and protests, several months after the filing of the request for arbitration the institution began inquiring about the shareholding structure of the company. No explanation was ever given to the claimant about the very extraordinary long delay in setting the proceedings in motion. The lack of responsiveness, silence or unusually long delays in acknowledging receipt of the request for arbitration from a party under sanction, delays or unexplained delays in notifying the defendant is indeed commonplace. Requests for explanations from the parties very often remain unanswered. When, after many reminders, the institution deigns to react, its response remains evasive and ambiguous. It often raises more questions than it answers. Everything happens as if the arbitration institutions were paralyzed by the sanctions and that they could not find credible explanations to give to the parties, nor the courage to say clearly that they are incapable of fulfilling the obligations they have contracted for towards the parties or to justify their reasons that would justify their inaction.

However, some arbitration institutions have recently attempted to remedy this deficiency. They are indeed more reactive in justifying the reasons for the delay in the implementation of the arbitration agreement. Nonetheless, they are often reluctant to clearly acknowledge their inability to effectively administer the arbitration proceedings. While a clear acknowledgment of their failure by arbitration institutions would allow the party prejudiced by the delay to take steps to defend its rights before State fora.

(d) Delay and denial of justice

In addition to the delays mentioned above, there are much longer delays in the conduct of the arbitration due to difficulties in the payment of the arbitration costs. These delays are due to actions or inactions of the compliance departments of arbitration institutions, but also to those of banks. Thus, a procedure which must be closed in principle in two years lasts five years. Worse still, certain procedures cannot in fact be initiated. Under these conditions, it is quite obvious that the argument of "celerity" of arbitration loses all credibility when it comes to parties affected or potentially affected by sanctions. Arbitration is therefore not, for these people, a means to quickly obtain justice, but a risk of finding themselves faced with a denial of justice.

(e) Free choice of arbitrators, ostracism and discrimination

The sanctions also threaten the free choice of an arbitrator for parties affected by the sanctions. Indeed, many arbitrators, especially those working in large law firms, refuse to be appointed by parties listed by sanction

authorities even when the appointment is made by the other party, although the latter is not itself a sanctioned person. The reason given is often their bank's refusal to receive funds from a sanctioned party.

In addition, the potential payment difficulties have resulted, in many instances, in the blocking by certain arbitration institutions of the fees of arbitrators having the nationality of a State under sanction, invoking the refusal of the banks to process the monetary transfers to a national of a sanctioned State as the beneficiary. This situation was sometimes particularly ludicrous insofar as these arbitrators regularly exercised a legal profession in Europe, therefore had an operational bank account in Europe, also had the nationality of the country of establishment and had practically no connection with their country of origin. This problem seems to be resolved as far as arbitrators having professional activity outside the country under sanction are concerned. It remains complete with regard to those of the arbitrators who are established in a country under sanction.

Another consequence of the sanctions is therefore the *de facto* ostracism suffered by arbitrators having the nationality of the States targeted by sanctions. Thus, to our knowledge, arbitration institutions do not appoint nationals or residents of targeted States as arbitrators. The arbitration community is thus witnessing a *de facto* discrimination to the detriment of nationals or residents of targeted States who cannot be appointed as arbitrators.

II. Solutions

The multiple and endless difficulties faced by users of arbitration due to sanctions necessarily lead professionals to consider potential solutions. These are of several orders and depend on the action that would be taken by the arbitration institutions (A) or the curative or preventive measures that the parties will have to take (B).

A. Actions to be Taken by Arbitral Institutions

It is easy to agree that sanctions should not affect a person's right to access legal action or fair and non-discriminatory treatment. Indeed, a person under sanction is often so because of his State, his nationality, his domicile, his residence, the participation of such or such other person in the capital of the company, etc. and not necessarily for what that person personally did or failed to do. But even when a person is sanctioned for his own activities, this should not deprive him of access to justice or affect his obligation to answer for the breach of his contractual or other commitments before a state court or an arbitral tribunal. The worst criminals also have rights and, first and foremost, that of initiating legal action and defending themselves. It would be difficult to imagine that one could validly prevent an individual prosecuted for murder from defending himself and even less from

prohibiting him, even after a final conviction, from suing his tenant for an unpaid rent. Sanctions do not lead to the negation of civil rights, including the right to have free access to justice. There is no reason for a dispute brought before an arbitral tribunal to obey any other regime. Moreover, arbitration institutions affirm – with reason – that no provision of internal or international origin prohibits them from administering a dispute involving a person under sanction.[25]

The issue of access to justice was discussed recently in relation to the EU sanctions with respect to Russia. On 21 July 2022, the European Council adopted Decision (CFSP) 2022/1271 amending Decision 2014/512/CFSP and Council Regulation (EU) 2022/1269 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

That Council Regulation provides in particular that "[i]n order to ensure access to justice, Decision (CFSP) 2022/1271 […] allows an exemption from the prohibition to enter into any transactions with Russian public entities necessary to ensure access to judicial, administrative or arbitral proceedings. "This emphasis seems to have been made in view of the experience of arbitration institutions and members of legal professions in view of other sanctions regimes.[26]

Further to the above-mentioned Council Regulation, Article 5aa(3) of Regulation 833/2014, which lists transactions that are exempt from the prohibition set out in Article 5aa(1), now expressly stipulates that such prohibition shall not apply to "transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014" (Article 5aa(3)(g) of Regulation 833/2014, hereafter referred to as "New Article 5aa(3)(g)"). [27]

25. See in particular the Joint Note from the ICC, LCIA, SCC: "The potential impact of the EU sanctions against Russia on international arbitration administered by EU-based institutions, 20 August 2015".

26. The "prohibition to enter into any transactions with Russian public entities" is laid down in Article 5aa(1) of Regulation (EU) No 833/2014 ("Regulation 833/2014"). That Article provides that "[i]t shall be prohibited to directly or indirectly engage in any transaction with: (a) a legal person, entity or body established in Russia, which is publicly controlled or with over 50 % public ownership or in which Russia, its Government or Central Bank has the right to participate in profits or with which Russia, its Government or Central Bank has other substantial economic relationship, as listed in Annex XIX; (b) a legal person, entity or body established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by an entity listed in Annex XIX; or (c) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (a) or (b) of this paragraph" (hereafter jointly referred to as "Listed Entities").

27. In June 2022, before the adoption of Decision (CFSP) 2022/1271 and Council Regulation (EU) 2022/1269, the European Commission had clarified that "[w]ith regards to the provision of […] legal services, Article 5aa should be interpreted in light of the fundamental rights protected under the Charter, in particular the right of defence. This provision does not affect the provision of services that are strictly

Moreover, on 17 October 2022, the Office of Financial Sanctions Implementation of the United Kingdom issued the General Licence INT/2022/1552576, which among others, authorises designated persons under Russia and Belarus sanctions and companies owned or controlled by them to pay funds to London Court of International Arbitration (LCIA) to cover arbitration costs, LCIA to direct and receive any such funds to pay for arbitration costs and relevant financial institutions to process payments made in this respect.[28]

Furthermore, the question of whether or not a legal relationship is affected by the sanctions, and to what extent, may itself constitute a dispute to be settled by the judge or the arbitrator. Thus, in a case opposing a Russian company to an Iranian company, the sole arbitrator sitting in Geneva under the aegis of the SCAI initially focused on examining the potential impact of the various sanctions regimes and concluded that "the rights of the Parties arising from the Contract are in principle not affected by the UN sanctions taken against the Islamic Republic of Iran".

Then, looking at the impact of the Swiss sanctions, the arbitrator clearly stated that "the Tribunal notes and wishes to warn the Parties that it is not excluded that certain provisions of the regulations of the Swiss Federal Council introducing measures concerning the Islamic Republic of Iran… could potentially be applicable in the execution phase of this Arbitral Award, insofar as such execution could involve a transfer of property or economic resources to the Respondent, if this transfer takes place within the territorial and personal scope of the Regulations". The arbitrator continued however his reasoning by clearly affirming his jurisdiction to settle the dispute in the following terms:

Although in rendering this Award, the Arbitral Tribunal may allocate certain rights and benefits to an entity listed in Schedule 6 of the Rules, the Arbitral Tribunal considers that it does not "directly or indirectly place assets and resources economic, at its disposal". This is because the Arbitral Tribunal is only stating the law in this case.[29]

The approach adopted by the sole arbitrator sitting under the aegis of the SCAI, which is moreover the one generally adopted in awards rendered under the aegis of other international arbitration institutions, confirms that these institutions cannot refuse to hear a case because the legal relationship

necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy as mentioned in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights."); see also Da Silveira, Mercédeh Azeredo, Den Hartog Stephan, "The EU's Clarification on Access to Arbitration in its Seventh Package of Sanctions Against Russia: Trivial or Consequential?", Kluwer Arbitration Blog, at http://arbitrationblog.kluwerarbitration.com/author/mazeredodasilveira/.

28. General License – London Court of International Arbitration (LCIA) Arbitration Costs INT/2022/1552576, 17 October 2022.

29. Swiss Rules Case No. 300255-2013, *LTD «Techno 2000» v. HESA*, Final Award, paragraphs 345-352.

in question falls within the scope of a sanction.

Nevertheless, the harsh reality for those affected by the sanctions is that the proceedings they have been trying to initiate for some years are receiving discriminatory treatment, hitting a long, thick wall of silence, and are slowly but surely being directed towards a siding, and this, despite a significant deployment of energy and substantial costs, to ultimately come to nothing. After the embarrassment of the first days, characterized by a confused silence, the arbitration institutions timidly tried to attribute the problem to the banks and to make them take the blame for the current disastrous situation. Indeed, practically none of the main arbitration institutions is able to implement within a reasonable time a procedure involving a person under sanctions. Faced with a lack of transparency on the part of arbitration institutions, it is impossible to determine the split of liabilities between arbitration institutions and banks.

Arbitration institutions are well aware that this situation is intolerable. It seems that certain institutions have decided to become proactive and abandon their complacent behaviour of zealous substitutes for sanctions administrators.

The first action that the most well-known arbitration institutions could and should take in common is to request and obtain a general and express exemption for arbitration from the authorities in charge of setting up or administering penalties. This is not an impossible task, insofar as the laws and regulations enacting the sanctions almost always expressly provide exemptions for activities relating to health and food. Justice in general, and arbitration in particular, should benefit from the same preferential treatment. This exemption – if well-defined – should give the necessary comfort to the bankers of the arbitration institutions to accept – without fear of reprisals from the authorities in charge of applying the sanctions – the funds of all those who initiate an arbitration procedure. Arbitration, or their representatives, regardless of whether they might otherwise be affected by sanctions. The funds received would only be used to finance the arbitration proceedings, in other words, to pay the costs of the administration of the case by the arbitration institution and the fees of the arbitrators.[30] Joint, concerted, well-prepared action accompanied by adequate communication from the main arbitration institutions to the US Treasury and the European Commission would certainly have a good chance of success. Indeed, the general exemption is perfectly legitimate and justified, in the same way as that recognized by the authorities in charge of sanctions for health and food. In fact, it is only a matter of expressly admitting the existence of the judicial or arbitral exemption – the existence of which, moreover, everyone recognizes implicitly – and not of creating a new exemption, since, as it has

30. Of course, a broader exemption that could encompass all participants in the arbitral proceedings, including experts and counsel, would be desirable.

been noted above, the sanctions regulations do not prohibit access to justice or arbitration. On the contrary, they provide procedures to release the frozen funds of a person under sanctions to allow them to pay legal costs and defend themselves appropriately. Currently, a person affected by sanctions, before initiating arbitration, would have to initiate an administrative procedure before the authorities in charge of the sanctions. However, we know perfectly well that these administrative procedures are likely to drag on and would lead most probably to nowhere. The establishment of a general exemption for arbitration thus constitutes the only reasonable possibility of saving the settlement of disputes by means of arbitration, involving the persons subject to sanctions.

Another imperative for arbitration institutions, independent of their advocacy for a general exemption for arbitration, is to significantly raise the level of transparency in the handling of cases affected by sanctions. This could be done by direct publicity on the role and place of compliance departments and their relations with the authorities responsible for managing sanctions. Also in the same vein, the arbitration institution should communicate to the parties the requests for information from the authorities concerned or from third parties by consulting the parties before responding to them. It must always be borne in mind that the obligation of confidentiality regarding the parties takes precedence over any other consideration and such obligation can only be discarded in view of a strict necessity resulting from a clear provision of the law applicable at the arbitration institution's registered headquarters.

All of this, however, is probably just wishful thinking and illusions. Indeed, anyone who knows even a little about the governance structure of major arbitration institutions is not kidding themselves about what can reasonably be expected of them. These are above all machines to generate money. For this, each institution must fight against its rival to know more cases, and, in this fight, one cannot alienate the States and their powerful administrations. On the contrary, one must be cooperative and complacent, even zealous.

Taken between the heavy criticisms they are facing with respect to the proper performance of their role as providers of access to justice and their fear of hurting States and sanctions authorities, arbitration institutions have engaged in timid attempts to find halfway solutions. Based on communications from arbitration institutions, it seems that sanction and banking authorities of the headquarters have been contacted in particular to open a special bank account enabling the institutions to receive the arbitration deposit. In some cases, these have been revealed to be apparently successful, allowing proceedings to proceed; in other cases, in particular in Europe, these efforts seem to have been not fully efficient. They have also considered waiving the filing fee and the deposit or reducing the scope of

their action to that of an appointing authority. One solution offered to the parties has been for the parties to take care directly of the payment of the fees, or to have the arbitrators open an account in Europe, which is however a wishful suggestion in view of the difficulties a non-resident who has to open a bank account in Europe and thus making such a solution inefficient to respond to the issue of discrimination between the parties with regard to the free choice of arbitrators. Ultimately arbitration institutions have resigned themselves to state that the arbitration cannot proceed.

Thus, the situation is improving with several institutions but unless something extraordinary happens, those affected by the sanctions are unlikely to see any hope of salvation from some of the major arbitration institutions.

B. Curative and preventive actions of the Parties

The action of arbitration institutions to obtain a general exemption could only bear fruit, at best, in the medium or long term. What can the parties do during this time? It will of course be necessary to distinguish between existing arbitration agreements (a) and those to be concluded (b).

(a) Existing arbitration agreements

When a claimant is bound by an existing arbitration agreement and it is impossible for it to actually initiate the arbitration proceedings because of payment difficulties or the refusal of the institution to implement arbitration agreement, it will have no choice but to resort to the judicial authority. This remedy can have two distinct legal bases and the choice that will be made depends on the objective sought. Thus, the claimant may act before the judicial authority of the seat of the institution to obtain the forced execution of the arbitration agreement or address the authority of the seat of the arbitration to have the arbitration agreement declared null and void and therefore have the case decided on the merits by that authority. The Russian Parliament has taken a more comprehensive approach through legislative measures that extend beyond conventional remedies. This legislation introduces a unique form of safeguarding for sanctioned entities and individuals, affording them the prerogative to set aside arbitration agreements and instead instigate legal proceedings within the jurisdiction of Russian courts.

i. Recourse to the judicial authority of the seat of the institution

The arbitration agreement obviously obeys the rules of law relating to the formation, performance, non-performance or termination of contracts. By publishing its rules, arbitration institutions issue a general offer that the parties accept with the insertion of the arbitration clause in the contract. When the dispute arises, each of the parties can rely on that offer to ask the

institution to implement arbitration.[31] The refusal of the latter to execute may give rise to an action for specific performance. The competent court is in principle that of the seat of the institution, both as the court of the domicile of the defendant, in this case, the arbitration institution, and of the place of performance of the agreement. The legal basis of the action is thus clear, and it is not difficult to determine the competent court. The claimant could also act in summary proceedings to obtain an early implementation of the arbitration agreement. However, the claimant's success is far from assured. Indeed, the institution can always, in good faith or not, argue that the difficulties encountered in initiating the procedure are not attributable to it, but rather result from the claimant's own inability to pay the arbitration costs. In support of this argument, the arbitration institution may submit notices of rejection of payments or plead the efforts it would have made to have the payment orders of the persons under sanctions executed by smaller banks that are able to manage the restrictions with more flexibility. The claimant thus risks engaging itself in long proceedings and endless exchanges of arguments, at the end of which its action may be dismissed for having been unable to provide proof of a breach attributable to the arbitration institution. Moreover, even if the claimant wins the case, this does not necessarily resolve the issue, since even in that case, the claimant risks having to engage in a showdown with the institution at each stage of the procedure, until the notification of the award. Obtaining a judgment against the institution as a penalty for delay in the implementation of its obligation can lead to greater cooperation from the institution but is not an ironclad guarantee either.

ii. Recourse to the authority of the seat of arbitration

Faced with the problem of sanctions, the claimant will therefore have every difficulty in forcing the institution to run the arbitration, unless the latter is reckless in committing a manifest fault, which would all the same be quite extraordinary. Faced with the impasse, it remains for the claimant to seek the agreement of its co-contractor for an alternative solution, an institutional arbitration which could go ahead, an *ad hoc* arbitration or a state forum. However, one should not reasonably expect cooperation from the defendant, who in principle has no interest in making life easy for the claimant. Therefore, in the absence of an agreement, the claimant must submit to the judicial authority of the seat of the arbitration, to have the arbitration agreement declared null and void, inoperative or unlikely to be executed. Most national laws provide for the possibility for the judicial authority to make up for the shortcomings of the arbitration institution. The judicial authority intervenes here not to assist arbitration, but to avoid the denial of

31. Notably, Article 8 of the 1997 International Commercial Arbitration Act of Iran; Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (2006); Article 7, b, of the 1987 Swiss Federal Act on Private International Law; Article 1448 of the French Code of Civil Procedure.

justice. The fact that the payment problems are not attributable to the institution does not constitute an obstacle to the success of the action brought by the claimant, since the impossibility of execution of the arbitration clause must not necessarily result from the fault of the institution or any other person. The judicial authority will only have to note the objective impossibility of the implementation of the arbitration agreement independently of any fault and ensure that the difficulty is not likely to be resolved in the near future and in a foreseeable manner. If such is its conclusion, the judicial authority will have to assert its competence to judge on the merits. The claimant will thus be able to get rid of a failing arbitration agreement and seek justice before the state authority. The arbitral institution can assist the claimant affected by the sanctions in this way and quickly admit that the arbitration cannot succeed. Unfortunately, one would usually find that arbitration institutions do not do this; the example cited above illustrates well the relentless inaction and culpable silence of the arbitration institution which dragged out a procedure for more than three years at the risk of causing the claimant to lose all real possibility of obtaining compensation for its damages, due to the bankruptcy of the defendant. The obstruction of the institution to the rights of the claimant can undoubtedly engage its liability. When the institution knows that it is unable to implement the arbitration quickly due to the policies of its bank, the rules and regulations applicable in the jurisdiction in which is located its headquarters or for any other reason, it has the obligation to make the parties aware of the same without delay. Any delay in this regard will be culpable.

iii. Exclusive jurisdiction of the State over disputes involving sanctioned individuals and entities

Enacted on 8 June 2020, the Russian Federal Law No. 171-FZ, known as the "Lugovoy Law," represents a significant departure in the landscape of international arbitration and dispute resolution. Prompted by the aftermath of Russia's annexation of Crimea and subsequent events, which led to economic sanctions and perceived inequities faced by Russian individuals and entities in foreign arbitration and litigation proceedings, this legislation aims to rectify these imbalances. Effective from 19 June 2020, the law grants exclusive jurisdiction to Russian state commercial courts (referred to as "arbitrazh" courts), addressing concerns that sanctions may prejudice the position of Russian parties in foreign forums. The law essentially enables sanctioned entities to disregard foreign jurisdiction or arbitration agreements and seek resolution through Russian state commercial courts.[32] Notably, a bill proposing amendments to Law No. 171-FZ was introduced in November

32. Russian Federal Law No. 171-FZ, Art. 248-1 paras. 1, 4. (A free translation of the Law is accessible on the website of Aceris Law Firm: https://www.acerislaw.com/wp-content/uploads/2020/07/Anti-Russian-Sanctions-Law-English.pdf.)

2021, seeking to expand its application. This bill, however, encountered a roadblock, potentially influenced by a significant judgment rendered by the Russian Supreme Court in December 2021.

The proposed amendments aimed to enhance the law's scope and extend its application to offer Russian persons a judicial remedy against the adverse effects of restrictive measures. These changes sought to provide a higher level of protection for citizens and legal entities affected by sanctions. The amendments envisaged granting Russian arbitrazh courts exclusive jurisdiction over disputes involving foreign parties who directly or indirectly contributed to the imposition of sanctions. Despite the bill's introduction, its progress appears to have stalled, possibly influenced by the far-reaching decision of the Russian Supreme Court on 9 December 2021.[33] This judgment upheld the interpretation that the mere imposition of sanctions was sufficient to render foreign jurisdiction or arbitration agreements unenforceable, thereby exerting a profound impact on the way the Lugovoy is perceived and implemented.[34] As a result, upon application by a party affected by sanctions, disputes may find resolution through the Russian arbitrazh courts, raising questions about the recognition of such judgments beyond Russia's borders.

Very recently, a Moscow Court rejected a request by a sanctioned Russian state-owned entity, GTLK, to transfer a Eurobond debt litigation to LCIA. GTLK, a vehicle lessor owned by the Russian government, attempted to move the case to LCIA arbitration, citing a general license exempting LCIA from UK sanctions. However, the court deemed the move an abuse of process, asserting that Russian courts had jurisdiction over the dispute. This development follows a previous lawsuit filed by JSC Management Company First against GTLK, where the Arbitrazh Court ruled that LCIA's sanctions exemption did not ensure enforceability. The legislative backdrop includes Russia's 2020 law giving its courts jurisdiction over disputes involving parties under international sanctions. The US, UK, and EU have sanctioned GTLK.[35]

Although the stated objective of the Lugovoy Law is to rectify what Russia perceives as a fundamental lack of procedural fairness for its sanctioned individuals and entities in international arbitration and foreign litigation, some are of the opinion that Law 171-FZ aims to prevent the

33. JSC Uraltransmash v PESA [2021] A60-36897/2020, full text of the ruling in Russian can be retrieved from: https://kad.arbitr.ru/Document/Pdf/99ce7aa2-7f06-4615-baa5-94473b980771/1f0d228b-cefb-435f-a5f1-8950060144da/A60-36897-2020_20211209_Opredelenie.pdf?isAddStamp=True

34. Mark J, 'Sanctions against Russia - How to Ensure Due Process of Sanctioned Parties in Court or Arbitral Proceedings While at the Same Time Enforce the Sanctions Regime' (Lexology14 December 2022) <https://www.lexology.com/library/detail.aspx?g=1469bcb6-288a-41b0-a292-aa2968bdd59e> Accessed on 7 August 2023.

35. Toby, Fisher, "Russian State Entity Seeks LCIA Arbitration" *Global arbitration review*. August 3, 2023. https://globalarbitrationreview.com/article/russian-state-entity-seeks-lcia-arbitration/, Last accessed 7 August 2023.

application of the substantive provisions of the sanction's regime. This perspective stems from recent developments, including the elucidation provided by the European Commission. The Commission has established exemptions from sanctions for transactions deemed essential to ensure access to judicial, administrative, or arbitral proceedings within a Member State, as well as for transactions related to the recognition or enforcement of judgments and arbitral awards issued within the same jurisdiction.[36] Similarly, the UK's Office of Financial Sanctions Implementation introduced General Licence INT/2022/1552576. This general license enables sanctioned individuals and entities, as well as entities under their control, to remit payments to the LCIA to cover arbitration expenses. Furthermore, the General Licence authorises the LCIA to receive and allocate these payments for the purpose of covering arbitration costs.[37] Such developments are stated to undermine the concerns of the Russian Federation that sanctioned persons or entities do not have access to justice and are not treated fairly and equitable in the EU or the UK.[38]

For sanctioned entities, the benefits of this legislation are multifaceted. The law serves as a potent tool to safeguard their rights and interests, addressing power imbalances that often arise due to economic sanctions. It offers a strategic means to challenge and potentially shift disputes to a forum where they perceive a higher likelihood of receiving an impartial and fair resolution. By allowing them to circumvent foreign jurisdiction or arbitration agreements, the law enables sanctioned entities to secure their access to a forum that they believe will provide the desired level of justice and protection. Additionally, if such a sanctioned party is facing a lawsuit, imminent legal action, or ongoing arbitration proceedings, the legislation empowers them to seek an injunction from the arbitrazh courts. This injunction can instruct the opposing party to abstain from initiating actions in foreign courts or arbitration or even terminate proceedings that are already underway. In cases where such an injunction is ignored, the arbitrazh court possesses the authority to impose penalties equal to the amount claimed by the other party in the foreign court or arbitration, further reinforcing the protective measures of the law.[39]

However, the advent of this legislation has sparked a series of challenges, particularly in the realm of international arbitration and access to arbitral justice. Proponents of the Lugovoy Law contend that it rectifies historical imbalances, enhancing the sanctity of party autonomy while also fortifying

36. Tehran General Court, judgment No. 94097970227201292 dated 15 March 2016.

37. Da Silveira, et al., *The EU's Clarification on Access to Arbitration in its Seventh Package of Sanctions Against Russia: Trivial or Consequential?*, para. 6.

38. General License – London Court of International Arbitration (LCIA) Arbitration Costs INT/2022/1552576, 17 October 2022.

39. The Russian Federal Law No. 171-FZ Art. 248-2 para. 1 and Art. 248-2, para. 7.

the role of Russian courts in addressing grievances involving sanctioned entities. This perspective emphasises the need to protect the rights and interests of these entities, asserting their right to challenge what they perceive as unfair treatment on account of sanctions.

Conversely, critics voice concerns about the potential ramifications of the law. Foremost among these concerns is the law's potential to disrupt the established principles of international arbitration, particularly the autonomy of parties to choose their preferred dispute resolution mechanism. By enabling sanctioned entities to disregard arbitration clauses, the law introduces an element of unpredictability and uncertainty into international commercial transactions. It also creates the possibility of parallel litigation, leading to complex and potentially contradictory outcomes across different jurisdictions. This is however a by-product of the multiplication of indiscriminate sanctions affecting the free access of nationals of sanctioned countries to institutional arbitration and the respect of fundamental principles such as confidentiality, transparency and accountability which have been continuously violated for years by several arbitration institutions.

Looking ahead, the future trajectory of laws like the Lugovoy Law is uncertain. While it addresses specific concerns, it also raises broader questions about the international legal framework for dispute resolution. As countries continue to grapple with the interplay between sanctions, access to justice, and arbitration, it is conceivable that similar legislative measures could emerge in other jurisdictions. The result could be a mosaic of divergent laws that reshape the dynamics of international dispute resolution, necessitating a careful balance between safeguarding party rights and maintaining the efficacy and predictability of arbitration.

In conclusion, Russian Federal Law No. 171-FZ, or the "Lugovoy Law," represents a notable attempt to redress perceived injustices in the treatment of sanctioned entities in foreign arbitration and litigation proceedings. While it seeks to restore fairness and access to justice, it also poses significant challenges to the established norms of international arbitration. The ongoing evolution of this legislation underscores the dynamic and complex nature of international dispute resolution, highlighting the need for a nuanced approach that balances the interests of all parties involved.

(b) Future agreements

Actors in international trade, and more particularly those affected by sanctions, have been able to measure, especially since 2010, the harmful effects of the action of banks and arbitration institutions on the settlement of their disputes with their partners. Those who have had the unfortunate experience of having to battle with arbitration institutions have understood that arbitration is not, contrary to popular belief, a means of obtaining justice quickly and at a lower cost, but rather a headache, a money pit and the surest

way to suffer certain damage for the injured party and the royal road for dishonest parties who want to avoid their obligations by playing on the flaws in the system.

Those affected by sanctions should therefore draw lessons from these experiences in their future contracts. The first lesson would probably be to avoid resorting to institutional arbitration as a means of resolving disputes. Indeed, key institutions are known to have failed and there is little hope for significant change in the foreseeable future or any assurance that those that have rectified their behaviour in one way, or another will not become non-responsive or uncooperative in the future. So better not tempt the devil again.

The first alternative would be to resort to judicial institutions. The advantage is that it would be unlikely that a judicial authority would refuse to hear the case brought before it by a person under sanction. Recourse to State courts can nevertheless have its shortcomings, for example, regarding the execution of judgments, which is generally less easy than that of arbitration awards, high legal costs in certain States such as Switzerland, Germany or Austria, the language barrier and the obligation to translate documents with the associated costs, the possibility of having to file a *cautio judicatum solvi*, etc. It is of course up to the counsel for the interested parties to analyse in detail the potential advantages and disadvantages of choosing a State forum in each specific case and to submit the most suitable solution to its client.

If the choice of State fora proves to be inappropriate in a particular case, recourse may be made to institutional arbitration, avoiding however the institutions which, by experience, have shown themselves to be particularly disappointing. *Ad hoc* arbitration remains however a better choice. Indeed, the parties may have less difficulty in paying the fees of the arbitrators in an *ad hoc* procedure. In addition, one should in principle not encounter in an *ad hoc* arbitration the breaches of confidentiality, the inertia linked to the action of the compliance department and other obstacles and shortcomings that the parties face with institutional arbitrations. Experience also shows that these arbitrations generally take place without major difficulty. It can also be noted, moreover, that the Permanent Court of Arbitration (CPA) readily agrees to administer *ad hoc* arbitrations, particularly regarding financial matters, and therefore the payment of arbitrators' fees. The international statute of the PCA therefore makes it possible to implement *ad hoc* arbitrations under its aegis. This constitutes a reliable solution for the settlement of disputes involving the parties under sanctions.

Finally, another solution would be to provide for a settlement clause with two or more tiers. The parties would agree on institutional or *ad hoc* arbitration. But in the event of difficulties in initiating arbitration, the dispute would be brought before a state court. The solution has the advantage of not

excluding arbitration from the outset – although institutional arbitration even in this case should be considered with the greatest suspicion – but also of providing for an emergency exit in the event that the arbitration would be deadlocked. The difficulty in this type of clause would however be to precisely define the triggering event, in other words, the moment from which the arbitration solution should be considered to have failed and that the parties must submit to the State forum. It is quite obvious that we must avoid vague formulas which, far from solving the problem, would be likely to cause a prior dispute on jurisdiction. For example, one can define a period of time for the constitution of the arbitral tribunal or a deadline for the first procedural order setting the timetable for the procedure. If these events do not occur within the agreed timeframe, the most diligent party may take advantage of them to trigger the second stage of the mechanism and go to the State forum.

Conclusions

Whatever solution is devised by the practitioners to circumvent or minimize the effects of the sanctions, there is no doubt that the sanctions have caused a severe blow to the viability of arbitration as a normal mode of resolution of international disputes. The trust of good faith actors in arbitration has been seriously damaged. Arbitration agreements should now be drafted with circumspection and caution.

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