Economic Sanctions and Arbitration: A Practical Guide for Parties, Counsel and Arbitrators

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Table of Contents

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I. Introduction: The Guide's Purpose and Scope

1. This Guide serves as an introduction to issues that users of international commercial arbitration may encounter when economic sanctions affect a person, place or asset involved in a matter. As a general rule, economic sanctions do not target arbitral proceedings, and, in turn, the rules that govern arbitral procedure do not directly refer to economic sanctions. Thus, in theory, economic sanctions should not impact the integrity of the arbitral process. Nonetheless, as this Guide illustrates, if economic sanctions are relevant to any aspect of arbitral proceedings, they can and do impact the individuals and entities involved and can affect arbitral proceedings significantly.

2. The Guide briefly summarizes the various types of sanctions in existence today (Chapter II). Throughout the Guide, we use the broad term "economic sanctions" to refer to the various types of sanctions that may be imposed by states or international organizations. Economic sanctions can target a state, an activity or a legal or natural person. A significant number of economic sanctions have already been issued and others may be issued in the future. Thus, as our brief introduction demonstrates, economic sanctions are an ever-evolving patchwork of regimes. Individuals and entities involved in the arbitral process should ensure that they have updated information regarding any relevant sanctions. This Guide can only provide a snapshot of the types of sanctions in effect at the time of publishing.

3. After introducing the types of sanctions, the Guide provides an overview of how economic sanctions may impact the different stages of arbitral proceedings (Chapter III). The following chapters then deal with the effects of economic sanctions on the different players involved in arbitral proceedings.

4. First, the Guide summarizes specific concerns that arise for a party that is the direct or indirect target of sanctions (Chapter IV). The Guide then provides pointers for counsel who are the target of sanctions or who are instructed by parties that are targeted by sanctions (Chapter V). This is followed by a

discussion of how the presence of sanctions may impact relationships of parties, counsel and arbitrators with arbitral institutions (Chapter VI). The Guide then addresses the concerns that arbitrators may face if they are the subject of sanctions or if proceedings in which they sit involve sanctions in some respect (Chapter VII). Issues affecting other participants in the arbitral process, such as witnesses, translators and experts, are also addressed (Chapter VIII). Finally, the impact of sanctions in effect at the seat of arbitration is examined (Chapter IX). The Guide also provides a list of national resources and legal authorities (Chapter X).

5. The presence of sanctions in the context of arbitral proceedings creates certain risks and complexities for everyone involved. For example, parties should be aware that the presence of sanctions may introduce lengthy delays in the proceedings. Arbitrators and counsel should keep in mind the risk of incurring sanctions, while at the same time balancing this risk with their interest in fulfilling their duties to the parties.

6. This Guide is not intended to provide a comprehensive explanation of each and every issue that may confront participants in arbitration proceedings. The myriad of economic sanction regimes that exist, the various individuals and entities that they impact, and their ever-evolving nature make it impossible to address the issues comprehensively in a short, practical guide. Rather, this Guide presents issues that these participants may face and suggests initial steps they may take and questions they should pose. The Guide also provides guidance on resources that may assist parties, counsel and arbitrators as they navigate the difficult issues that arise when sanctions affect the arbitral process.

7. The Guide addresses these issues primarily in the context of international commercial arbitration. However, it can also be of use for practitioners in domestic and investment arbitrations. In this regard, the Guide focuses on procedural and practical issues that may arise in the face of sanctions. It does not address the host of substantive issues that may also arise, including for example, a tribunal's jurisdiction over a sanctioned party, or the arbitrability of claims that relate to sanctions.

8. The Guide is aimed at international arbitration practitioners and other actors involved in an international arbitration. As counsel, arbitrators and institutions navigate the world of economic sanctions, they should not only keep in mind the risk that economic sanctions raise for them individually, but also for their duties to clients and disputing parties. While the presence of economic sanctions may create complications in an arbitration, they should not necessarily be seen as a bar to the process. Arbitrations are commenced and proceed to final awards in the shadow of sanctions every day.

II. A Brief Overview of Economic Sanctions

9. Economic sanctions are coercive measures applied against states, non-state entities or individuals that pose a threat to protected principles such as international peace or national security. Their purpose is to assert economic pressure in order to modify the behaviour of the relevant target by reducing its capacity for manoeuvre or weakening its economic power, ultimately altering its strategic decisions on a given matter.

10. Thus, the ultimate target of economic sanctions is the state or group whose behaviour the sanctioning party seeks to modify. However, the direct subjects of economic sanctions (those bound by the relevant measures) are the natural and legal persons under the jurisdiction of the sanctioning state or non-state organization.

1. Classification based on the nature of the economic sanctions

11. Broadly speaking, economic sanctions may be grouped in three categories: trade sanctions, financial sanctions and travel restrictions.

12. Trade sanctions are intended to limit trade relations with or within a designated state. The following are examples of trade sanctions:

    a) **Quotas**: Government-imposed trade restrictions that limit the number or monetary value of goods that can be imported from the relevant state or exported to that state during a particular time period.

    b) **Tariffs**: Barriers to trade between certain states or geographical areas, taking the form of high import (and occasionally export) taxes, levied by a government. Not all tariffs are considered to be economic sanctions, but rather only those which seek to alter policies and behaviour of the relevant target.

    c) **Embargoes**: Official bans on trade (and other commercial activity) with a particular state or region. An embargo may

be comprehensive, such as the US embargo on Cuba, or limited to certain products or services, such as embargoes on arms exports.

13. Financial sanctions limit a sanctioned party's ability to make use of its funds. The following are examples of financial sanctions:

    a) **Asset freezes**: Limitations on a sanctioned person's ability to dispose of its assets. These sanctions are generally aimed at the banks with which the assets are deposited or at the recipient bank, which is subject to the laws of a sanctioning state.

    b) **Limitations on transfers of funds**: Restrictions on payments from or to sanctioned persons. These sanctions normally target the banks through which funds are routed, which are subject to strict monitoring. A single transfer is generally routed through several banks (often in different jurisdictions), which may all be subject to different sanctions regimes.

    c) **Exclusion from cooperative financial organizations**, such as SWIFT: These sanctions forbid a sanctioned party from making use of specific financial systems.

    d) **Prohibition to invest** in a sanctioned state.

14. Finally, travel and visa restrictions limit a person's ability to travel to or from the sanctioned states.

2. Classification based on the source of the economic sanctions

(a) Economic sanctions imposed by international organizations

15. Economic sanctions may be imposed by groups of states and international organizations. This section focuses on sanctions imposed by the United Nations (**UN**) and the European Union (**EU**). However, other regional organizations, such as the African Union, the Arab League and the Association of Southeast Asian Nations, may, and on several occasions have, imposed sanctions on members or third states.

16. As regards the UN, the use of economic sanctions as a means of maintaining or restoring international peace and security is recognized by Article 41 of the UN Charter of June 1945. As a result, the UN Charter gives the Security Council the power to decide, in a manner binding on all UN members, the measures that must be adopted to maintain or restore international peace and security.

17. Economic sanctions are also used by the EU as a tool to promote the objectives of the Common Foreign and Security Policy (CFSP), [1] namely the promotion of peace, democracy and the respect for the rule of law, human rights and international law. EU economic sanctions (referred to as "restrictive measures") target states, entities or individuals.

18. The European Council reviews economic sanctions at regular intervals to decide whether they should be renewed, amended or lifted. All legal acts related to EU sanctions are published in the Official Journal of the European Union and are directly applicable in all EU Member States.

(b) Economic sanctions imposed unilaterally by states

19. Sanctions may also be imposed unilaterally by states. For instance, the United States (**US**) and the United Kingdom (**UK**) publish state sanctions lists[2]. Members of organizations such as the EU or the UN may impose individual sanctions, in addition to those imposed by the international organizations to which they belong.

1. See the European Council's guide to EU sanctions: How and when the EU adopts sanctions - Consilium, available at the following link: https://www.consilium.europa.eu/en/policies/sanctions/.

2. The UK Sanctions List is available at the following link: https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets/consolidated-list-of-targets; US sanctions lists are available at the following link: https://sanctionssearch.ofac.treas.gov/.

(c) Enforcement of multilateral and unilateral economic sanctions by regulatory bodies

20. While economic sanctions may be imposed by multilateral organizations, they are generally enforced by state bodies:[3]

    a) **United States.** In the US, the entity in charge of administering and enforcing economic sanctions is the Office of Foreign Assets Control (**OFAC**) of the US Department of the Treasury. OFAC acts under presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. According to OFAC, civil and criminal penalties for violating economic sanctions can, in many cases, exceed several million dollars.[4]

    b) **United Kingdom.** The Office of Financial Sanctions Implementation (**OFSI**) seeks to ensure that financial sanctions are properly understood, implemented and enforced in the UK. It is part of HM Treasury.[5]

    c) **European Union.** In the EU, each Member State is responsible for the implementation and enforcement of both EU and UN sanctions in their own territory. This involves both monitoring compliance with applicable sanctions regimes and the granting of licenses (see Section 4 in this Chapter). To this end, each Member State is required to designate an institution or authority in charge of the implementation of economic sanctions.[6] Some

3. For more information on the competent authorities in the jurisdictions where the main arbitral institutions are located, please refer to paragraph 79.

4. https://ofac.treasury.gov/faqs/topic/1501.

5. https://www.gov.uk/government/organisations/office-of-financial-sanctions-implementation/about.

6. The European Union publishes a consolidated list of competent authorities of the Member States and their contact details. This document may be downloaded in the following link: https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en#authorities.

Member States designate several authorities depending on the subject matter of the economic sanction.[7]

21. It is worth noting that not all states and organizations have designated regulatory bodies. This may become an obstacle to obtaining the necessary licenses to carry out specific activities (see Section 4 of this Chapter).

(d) Relevance of the source of economic sanctions

22. Multilateral and unilateral sanctions are equally binding on individuals who are subject to the jurisdiction of the relevant international organization or the sanctioning state. However, the source of the sanctions may have an impact on their recognition by third countries. Specifically, sanctions imposed by the UN are recognized by all Member States and are more likely to be considered a source of international public policy (see Chapter IX).

3. Classification based on the scope of the economic sanctions

(a) Comprehensive sanctions

23. Comprehensive sanctions prohibit all types of dealings involving a sanctioned state or region. They are commonly referred to as embargoes.

24. In the United States, there are five major comprehensive sanctions programs currently in effect. These programs regulate nearly all transactions with Iran, Syria, Cuba, North Korea and the regions of Crimea, Donetsk and Luhansk.

25. State-based economic sanctions often exempt certain types of activity, usually by implementing general licenses (see

7. For example, in Austria, the Oesterreichische Nationalbank (Austrian National Bank) is the competent authority in the area of financial sanctions, in particular in connection with the freezing or release of funds of sanctioned persons. In France, the Direction Générale Du Trésor (Minister of Economy) is empowered to deal with issues related to financial sanctions, whilst the Direction Générale des Douanes et des Droits Indirects (Minister of Budget) is responsible for trade sanctions.

Section 4 in this Chapter). Although many of the sanctions programs share similar exemptions, the general licenses differ across the various sanctions programs. General licenses typically refer to humanitarian aid and the provision of legal services, amongst others.

(b) List-based sanctions

26. List-based economic sanctions target particular persons, entities, and organizations, rather than an entire state or government. These types of sanctions have become the norm for law enforcement-based economic sanctions programs.

    a) In the **EU**, the European Commission publishes two consolidated lists of economic sanctions (or restrictive measures): one for financial sanctions and another one for travel bans.[8]

    b) In the **US**, OFAC prohibits transactions between US persons and any individuals, entities (e.g., corporations), and organizations listed on the Specially Designated Nationals and Blocked Persons List (**SDN List**). The SDN List, which is amended on an "as-needed" basis, targets persons found by OFAC to be involved with:
        (i) terrorism;
        (ii) narcotics trafficking;
        (iii) weapons proliferation (particularly WMDs);
        (iv) human rights abuses;
        (v) genocide; and
        (vi) transnational Organized Crime.[9]

27. It should be borne in mind that parties which are subject to (i.e. bound by) sanctions regimes can be prevented from transacting with a company even if it is not expressly listed. The reason is that sanctions regimes will often not only target the persons designated in their sanctions lists, but

8. Both of these consolidated lists may be accessed through the European Commission's tool EU Sanctions Map, available at the following link: https://sanctionsmap.eu/#/main/travel/ban.

9. https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists.

also entities which are owned or controlled by a designated sanctioned person. This may cause compliance issues when transactions are assessed merely by screening against relevant sanctions lists.

a) In the US, OFAC applies the *50 percent rule*. Pursuant to this rule, parties are subject to sanctions if they are directly or indirectly owned, in the aggregate, by one or more listed parties with an interest of 50 percent or greater in the company.

b) In the UK, list-based sanctions apply to all entities and assets *owned or controlled* by a designated person. A company is owned or controlled by another person where (i) the person holds (directly or indirectly) more than 50% of the shares or voting rights of the company; (ii) the person has the right (directly or indirectly) to appoint or remove a majority of the board of directors of the company; or (iii) it is reasonable to expect that the person would be able to ensure the affairs of the entity are conducted in accordance with the person's wishes.

c) Under EU regulations, companies which are owned (directly or indirectly) by a sanctioned party which is in possession of over 50 percent of its shares will be affected by the relevant sanctions. Asset freezes and prohibitions of making funds available are even extended to companies controlled by a sanctioned party.

(c) Sectoral sanctions

28. Sectoral sanctions are those which target specific activities instead of imposing blanket prohibitions. These sanctions, which may be comprehensive or list-based, target sectors of strategic importance for the state or entity whose conduct they seek to alter. Thus, parties are generally allowed to enter into transactions with sanctioned entities or persons, unless the transaction affects a sanctioned sector.

29. The US has recently begun to impose sector-based sanctions. OFAC introduced this category following Russia's deployment of military forces into the Ukraine and the Crimean peninsula, and has applied sectoral sanctions to both Russia and Venezuela.

Often, the wide range of sectoral sanctions imposed has resulted in broad comprehensive sanctions regimes.

30. The financial and energy sectors are frequently targeted by sectoral sanctions. Furthermore, sanctions regimes typically include provisions which apply only to the trade of specific goods, such as arms.

4. Licenses

31. Sanctions regimes impose either general limitations (comprehensive sanctions) or specific prohibitions (list-based sanctions) on transactions with individuals, entities, or organizations. However, most sanctions regimes also establish exemptions to these limitations. These exemptions are commonly referred to as *licenses*.

32. Sanctioning states or organizations may grant two types of licenses. General licenses are those provided for in the sanctions regime itself and apply to all transactions within their scope. General licenses typically allow transactions relating to the provision of humanitarian aid or legal services, amongst many others.

33. Specific licenses are those which are granted on a case-by-case basis. A party that believes itself to be exempt from an applicable sanctions regulation must apply to the authorities for the license before entering into a sanctioned transaction.

III. An Overview of the Impact of Sanctions on Arbitral Proceedings

34. This chapter provides a brief overview of the impact that sanctions regimes may have in arbitral proceedings as a whole. Its purpose is to provide guidance in identifying the issues that should be analyzed when any of the participants in arbitration proceedings is subject to sanctions. The remaining chapters will provide a more detailed analysis of these matters.

1. When will arbitral proceedings be impacted by economic sanctions?

35. Economic sanctions regimes may affect arbitral proceedings in the following situations:

(i) one or several parties are nationals or residents (or controlled by nationals or residents) of a sanctioned state;

(ii) one or several arbitrators are nationals or residents of a sanctioned state;

(iii) other actors involved in the arbitration, such as experts or witnesses, are nationals or residents of a sanctioned state;

(iv) the transaction underlying the dispute was conducted in a sanctioned state;

(v) the seat of the arbitration is located in a state that is subject to sanctions.

2. How can arbitral proceedings be impacted by economic sanctions?

(a) The seat of the arbitration

36. The seat of the arbitration determines the law applicable to set-aside proceedings and potential assistance by state courts. Therefore, both the arbitral proceedings and any subsequent set-aside proceedings may be affected where the seat of the arbitration is in a sanctioning state. This aspect will be further analyzed in Chapter IX.

(b) Choosing an arbitral institution

37. Information and payment requirements of sanctions regimes may affect different actors in the arbitration. Where the parties agree on ad hoc arbitration, they will have to evaluate the potential applicability of these requirements themselves.

38. On the other hand, most leading arbitral institutions have developed their own compliance policies and have specific tools and resources, as well as relevant contacts, which may facilitate the logistics for compliance with sanctions regimes. This is particularly useful in applying for any relevant licenses.

39. The role of arbitral institutions is further analyzed in Chapter VI.

(c) Engagement of counsel

40. Sanctions are relevant in making payments to counsel, selecting counsel with knowledge of the subject matter of the arbitration, allowing counsel to access evidence and travel restrictions on counsel. Nonetheless, some sanctions regimes include an exception for the purpose of providing legal services under a license. This subject is analyzed in Chapter V.

(d) Constitution of the arbitral tribunal

41. Arbitrators may be prevented from either acting or receiving payments in an arbitration which is affected by economic sanctions. As with counsel, the appointment of arbitrators is generally allowed under some sanctions regimes, whilst other sanctions regimes will require a license. This topic will be analyzed in Chapter VII.

(e) Interim measures and security for costs

42. A party may invoke economic sanctions as a justification to seek early interim measures, or to obtain security for costs in the event that the opposing party's assets are subject to a freezing order. Parties and arbitrators should be aware that these types of procedural applications may arise during the course of an arbitration where a party is subject to sanctions.

43. In addition, the right to request interim measures may itself be affected by sanctions. As stated in point (a) above, if the seat of the arbitration is located in a sanctioning state, court assistance may be restricted. However, requesting interim measures and security for costs may also be restricted by other applicable laws, such as those affecting payment (e.g. the nationality of the debtor or the location of a bank's registered office).

(f) Managing the case: selection of experts and witnesses, hearings and document production

44. Experts may also be prevented from receiving payments or acting in arbitration proceedings without a license. In addition, the various actors involved in an arbitration, such as party representatives, legal counsel, witnesses, experts, translators or arbitrators, may be subject to travel restrictions if the hearings take place in a sanctioned or sanctioning state. These restrictions may also limit access to evidence throughout the proceedings and a party's ability to comply with document production requests or orders. These issues will be analyzed in Chapter VIII.

(g) Enforcement of the award

45. The presence of sanctions may also impact the ability to enforce an award under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). Specifically, an arbitral award involving a sanctioned person may be considered contrary to public policy by the sanctioned country (where the award gives effect to a sanction) or by the sanctioning country (where the award does not give effect to a sanction). Paradoxically, this can happen not only when the creditor is a sanctioned party, but also when it is the debtor that is sanctioned, when the latter is precluded from paying with its frozen funds.

46. This subject will be further analyzed in Chapter IX.

IV. The Impact of Economic Sanctions where a Party to an Arbitration is the Direct or Indirect Target of the Sanction

47. This chapter addresses the potential impact when a party to arbitration proceedings is the target of economic sanctions. As discussed in the previous chapter, if a party is a target of economic sanctions, this can impact almost every choice the party makes in the arbitration (engagement of counsel, choice of arbitrators, venue, etc.). In addition, there are several administrative requirements that need to be satisfied to commence an arbitration.

48. This chapter covers situations in which a party is the direct or indirect target of sanctions. Consequently, any references to parties to arbitration proceedings will extend to both listed entities and any parties which are owned or controlled by a listed entity. Please refer to Chapter II, Section 3.b. for further detail.

1. Drafting the arbitration clause

49. Parties should pay particular attention to the drafting of an arbitration clause when one of the parties may be subject to sanctions. As discussed in Chapter III, certain sanctions-related issues may arise from the arbitration clause itself, particularly those relating to the seat of the arbitration and arbitral institutions and the venue of hearings. As regards the seat of the arbitration, it is recommended that parties agree on an arbitration-friendly and sanctions neutral seat (see Chapter IX).

2. Requirements for a claimant at the outset of the arbitration

50. A claimant that is the target of economic sanctions will need to consider several factors when seeking to commence arbitration proceedings. First, the claimant party will need to examine the type of arbitration specified in the contract, as this may impact the steps the claimant will take to commence

the arbitration. These steps may differ depending on whether the contract specifies ad hoc arbitration (including under the UNCITRAL Arbitration Rules) or administered arbitration (administered arbitrations are discussed in further detail in Chapter VI).

51. **Institutional arbitration.** Most major arbitral institutions have adopted measures to address situations in which a party is the target of sanctions. These measures, which are summarized below and discussed in further detail in Chapter VI, often arise from the institution's reporting requirements and its ability to administer the arbitration and accept funds from a sanctioned party.

    a) *Information requirements*. Claimant parties often need to provide an arbitral institution with information relating to the identity of the parties, as well as related entities and beneficial owners of the parties. To avoid delay, a claimant should have this information ready when seeking to commence an arbitration.

    b) *Payments to the arbitral institution*. A claimant that is the target of economic sanctions may need to seek a license from the relevant authorities in order to make payments to an arbitral institution, both for institutional and arbitrator fees. As discussed in further detail in Chapter VI, the leading arbitral institutions provide guidance on how to obtain the appropriate license.

    Claimant parties will need to keep in mind that the currency of payments, and the various banks through which transfers are made, can further complicate payments to an arbitral institution.

    In addition, parties will need to be cognizant of the fact that payments are often required at various stages of the arbitration, and therefore any necessary licenses should be kept up to date, renewed or re-obtained. This applies to payments for arbitrator fees, administrative costs, legal and expert fees, and other types of payments.

52. **Ad hoc arbitration.** At first glance, it may seem that ad hoc arbitration affords a claimant party the ability to avoid many of these institutional requirements when commencing an

arbitration. However, the same situations that institutional requirements are designed to address are likely to arise in ad hoc arbitrations.

a) *Information requirements.* Arbitrators themselves may be required to obtain licenses to accept arbitrator fees. This may be the case when the arbitrator is a national or resident in a state which has imposed sanctions affecting one of the parties.

   In some jurisdictions, such as the EU and the UK, acting as an arbitrator is often exempted from sanctions regimes and will therefore not require a license. However, under the sanctions regimes of other jurisdictions (notably the US), the general licenses which usually apply to the provision of legal services do not expressly cover the provision of arbitrator services. Specific licenses may therefore be required by an arbitrator before agreeing to sit in the arbitration.

   As a result, claimants may need to provide information to the arbitrators regarding related entities and beneficial owners (even before the tribunal is constituted), before the arbitrators can accept nominations.

b) *Payment requirements.* In addition, parties will need to make arrangements for payment of arbitrator fees and costs. These arrangements may also require a specific license.

   It is worth noting that, even where the provision of arbitration services is covered by a general license (as is the case in the EU and the UK), it is often unclear whether such a carve-out applies solely to the engagement of an arbitrator or also to the payment of arbitrator fees. Consequently, parties must closely examine this issue and apply for any relevant licenses prior to the appointment of the arbitrators.

   A useful resource when payments are affected by sanctions in ad hoc arbitrations are the fundholding services of arbitral institutions, such as those offered by the Permanent Court of Arbitration (**PCA**) (see Chapter VII., Section 2.c).

53. Consequently, a party that is the subject of sanctions should closely examine, with the assistance of counsel, the type of sanctions that apply, and whether choices can be made in the selection of arbitrators that may ease some of the difficulties raised by sanctions. Indeed, without the aid of an institution, individual arbitrators may need more time to apply for and receive a license, if one is required. In addition, some arbitrators may simply avoid accepting appointments where a license might be required, thereby limiting the arbitrator pool.

3. Potential impact of failing to satisfy requirements at the commencement of arbitration

54. A claimant's failure to satisfy any of these requirements at the outset of an arbitration could result in delays in the commencement of the arbitration, discontinuance of the arbitration, or even the claim to be deemed withdrawn.

a) **Information requirements.** In the context of institutional arbitration, if a claimant fails to provide the required information, an institution may refuse to register the claimant's request for arbitration and the arbitration may not proceed. Failure to provide the necessary information to arbitrator candidates in an ad hoc arbitration could result in a candidate's refusal to accept the nomination, thus delaying the constitution of the tribunal.

b) **Payment requirements.** Most arbitral institutions will discontinue claims or deem them withdrawn if an order for an advance on institutional and tribunal costs is not met in a timely manner. While a claimant party may be able to re-assert its claims later, the immediate impact is that the arbitration will not proceed.

c) **Limitation periods.** A claimant that is the target of sanctions will need to take into account the fact that these administrative requirements may cause delay in commencing the arbitration. Thus, the claimant will need to be mindful of the applicable limitation period and take the extra time into account in preparing and asserting its claims.

4. Factors to be considered if a respondent is the target of economic sanctions

55. The same requirements may apply where a respondent is subject to sanctions. A targeted respondent may also need to obtain a license to pay the advance on costs (if required) and provide information regarding its beneficial owner or related entities.

56. A recalcitrant respondent may attempt to use these additional requirements to avoid the arbitration altogether by refusing to provide the information required or to pay arbitrator fees and/or the advance on costs. In such cases, the claimant may choose to pay the respondent's portion of the advance on costs and provide available information regarding the respondent's beneficial owner or related entities.

V. The Impact of Economic Sanctions on the Selection and Engagement of Counsel

57. Economic sanctions can affect counsel's work on arbitration cases in ways ranging from the terms and conditions under which the lawyer is selected, and can accept the engagement, to access to evidence and the manner in which the substance of the case is argued. Accordingly, even for lawyers with a practice seldom involving international and foreign law, it is useful to be acquainted with the economic sanctions framework in effect at any point in time.

58. As for the selection and engagement of counsel, sanctions can be of relevance in two scenarios. In the first scenario, a client from a sanctioning state tries to engage counsel who is either based in a sanctioned state, or is the target of economic sanctions. In this scenario, counsel may, under the laws of their home jurisdiction, be free to accept or decline the representation; however, the client, by requesting the representation or making payments to the lawyer, may be breaching the laws imposing the sanctions and thus is potentially exposed to liability.

59. A difficulty with this scenario is that counsel may not be familiar with—and thus not able to warn the client about—the client's potential exposure to sanctions as a result of the engagement. In this scenario, the sanctions may be imposed under a law in relation to which the lawyer is not licensed to practice or does not have sufficient expertise. To the extent that the lawyer has knowledge of the existence of sanctions, the lawyer should recommend that the client discuss the engagement with a sanctions expert in the client's jurisdiction of origin.

60. In the second scenario, a client (whether bound by the laws or regulations establishing the economic sanctions, or not) attempts to engage counsel who is bound by laws or regulations providing for sanctions. This may occur, for instance, when a North Korean client attempts to engage counsel in England or when a Canadian corporation attempts to engage US counsel for a contractual dispute against a

Cuban entity. When this happens, the lawyer should consider at least three issues.

1. Is a license necessary?

61. Counsel should consider whether they can act in the case and if so, whether prior administrative or regulatory approval is necessary to do so.

62. As a general matter, a person's right to a legal defence and free choice of counsel does not disappear even if the person is the target of economic sanctions or is domiciled or incorporated or has significant business activities in a sanctioned state. In most cases, the person can still engage its counsel of choice. Counsel may, however, need approval from a regulatory body before accepting and acting in the representation of the relevant client. For instance, in most cases, US or UK based lawyers will need a license before acting for or against the government of North Korea in an arbitration case.

63. Lawyers residing in other jurisdictions should consider familiarizing themselves with the regulatory bodies, if any, to which they may need to apply for authorization to work on a case involving sanctions. Please refer to Chapter II., Section 2.c. for more information on regulatory bodies.

64. In addition, there are a number of considerations to keep in mind with respect to licensing requirements, including the following:

    a) Not all states and international organizations that have established economic sanctions have designated regulatory bodies to monitor compliance with the sanctions, nor do they necessarily require lawyers to obtain a license prior to accepting an engagement. In some cases involving sanctions, no license may be needed to act and/or there may be no regulatory body to issue one.

    b) It should not be assumed that states requiring the issuance of licenses do so only for lawyers based within their territory. For instance, attorneys who are licensed in a US jurisdiction or hold US citizenship, but do not practice

from the US should still verify whether they need an OFAC license to act in a case affected by US-issued economic sanctions.

c) Lawyers from multi-jurisdictional law firms should also consider what licensing requirements are binding upon them. Even if they are not based within the jurisdiction that issued the sanctions, a license might be necessary if their firm is headquartered, incorporated, or simply has significant activities in the sanctioning state.

d) It should not be assumed that the requirement to obtain a prior license applies only to cases where a party to the arbitration is a sanctioned entity or belongs to a sanctioned entity or state. The license might be necessary in a variety of circumstances, including when the seat of arbitration is in a sanctioned state (see Chapter IX), when an arbitrator is personally subject to sanctions or when the arbitrator resides in a sanctioned state (see Chapter VII).

e) While licensing requests tend to be analyzed by regulatory bodies on an expedited basis, these bodies sometimes require the applicant to submit extensive information. Counsel should carefully balance their competing obligations (towards their client and towards their regulators) so as to avoid divulging in the context of the application process client confidences or otherwise privileged and confidential information. Occasionally, it might be necessary to retain licensing specialist counsel to assist the lawyers engaged in the arbitration proceedings and/or their client during the licensing process.

f) In order to discharge their professional obligations fully and facilitate their mutual relationship, it is prudent for counsel to keep their clients informed of the need to apply for licenses, the status and cost of the application, the circumstances upon which the licenses can be granted or denied, the information that needs to be provided to obtain them, and the risks and benefits related to seeking a license. Counsel should refrain from accepting the case until the regulations of the relevant licensing body allow them to do so, and the corresponding license is issued

(and should advise their potential clients of the potential delay).

g) The scope of the license, if and when granted, should be analyzed to determine whether it allows the lawyer to act in one or more cases. If it is limited to one case and further engagements are forthcoming, additional licenses will be necessary. The term of the license should also be reviewed in order to request its renewal sufficiently in advance (if necessary).

2. What restrictions on payments will apply?

65. The payment of counsel's fees and costs can also be affected by economic sanctions.

66. Specifically, if the potential client is a sanctioned person or entity or resides in a sanctioned state, the sanctions may either bar or place restrictions on the payment of fees for professional services.[10] Most sanctions established by the EU and certain other sanctions (for instance, US sanctions against Libya) contain clauses specifically permitting payment of legal fees by sanctioned entities.

67. However, when the sanctions regime does not include such an express provision, lawyers should apply to the appropriate regulatory authority for permission to receive fees.

68. It is particularly important for counsel to examine at this stage the breadth and scope of the relevant sanctions in relation to all of the parties and entities that may have a beneficial interest in the case.

69. For example, US sanctions against Russia currently in force cover companies operating in the area of military or dual-use goods. If the client is a Russian company that does not operate in a sanctioned market, but is a subsidiary of a company

10. Again, a different problem arises when it is counsel (not the client) who is the target of sanctions or resides in a sanctioned state. Then the client, who resides in the sanctioning country, may be precluded from paying the attorney.

operating in a sanctioned market, payments of professional fees may be barred, absent approval from OFAC.

70. Counsel working at multi-jurisdictional law firms should be particularly careful in this regard. For instance, in most cases, the non-US offices of a US law firm may not receive fees or payments from sanctioned clients, such as the Cuban or the North Korean governments, without a prior OFAC license.

3. Are there additional administrative requirements?

71. Counsel should also consider other administrative and procedural difficulties that may arise out of the sanctions. A notable problem may be counsel's ability to travel to the place where hearings or inspections may be held. If those are expected to take place within a sanctioned state to which travel restrictions apply (as is the case for US-based lawyers with respect to Cuba or North Korea) counsel should promptly raise the situation with the relevant client and the Tribunal, explore alternatives (such as the feasibility of relocating hearings), and if none is availing, consider the possibility of withdrawal.

72. As with any other issue in this section, in addition to complying with the applicable laws and regulations, ensuring the ability to provide effective representation to the client is paramount. When sanctions limit or prevent a lawyer from fulfilling professional obligations, counsel may be well advised to refrain from accepting or continuing with the engagement. Clients should always be kept apprised of any difficulties or limitations that sanctions may impose on counsel's conduct.

VI. The Impact of Economic Sanctions on Party, Counsel or Arbitrator Relations with the Arbitral Institution

1. What is the role of arbitral institutions in the context of economic sanctions?

73. Arbitral institutions may face administrative, civil and potentially criminal penalties where applicable sanctions regimes are not complied with, and are often subject to regular audits and controls. As a result, arbitral institutions are increasingly a source of information and support for cases involving sanctions.

74. From a logistical standpoint, arbitral institutions often have close contacts with regulatory authorities and banks, and can help ensure that a party is complying with applicable sanctions regimes (for instance, where it is not clear whether a specific sanction may apply or whether a license may be required). In addition, arbitral institutions can facilitate the logistics of compliance, such as obtaining any relevant licenses.

75. Arbitral institutions can also serve as a source of information. Many arbitral institutions use sophisticated tools and resources capable of analyzing numerous financial flows and complex legislation on economic sanctions. The parties may therefore benefit from the fact that arbitral institutions often have the necessary information and resources to ensure that the parties comply with any applicable legislation.

2. What are the compliance policies of arbitral institutions?

76. Several arbitral institutions have made their compliance policies publicly available on their websites:

    a) The International Chamber of Commerce (ICC) has made available a Note to Parties and Arbitral Tribunals on ICC Compliance to accompany the general ICC Note to Parties

and Arbitral Tribunals on the Conduct of Arbitration Under the ICC Rules of Arbitration.[11]

b) The Stockholm Chamber of Commerce (SCC) devotes a webpage to the potential impact of sanctions.[12]

c) The London Court of International Arbitration's (LCIA) guidance on sanctions and restrictive measures can be found in its Notes for Parties.[13]

d) The Hong Kong International Arbitration Centre has also published its Policy on Proceedings Affected by Sanctions.[14]

77. These sanctions compliance policies contain information about the administrative measures taken by the relevant institution to ensure compliance with economic sanctions in the management of international arbitration cases.

3. What regulations apply to arbitral institutions?

78. The registered office of an arbitral institution will generally determine the laws that it must comply with, the regulatory authorities that it must report to and the necessary reports and relevant authorizations that need to be sought. Parties should bear in mind that arbitral institutions may or may not have a separate legal personality from, for example, a chamber of commerce and may or may not be registered or have subsidiaries or branches in different states. Some institutions, such as the PCA or the Cairo Regional Centre for International Commercial Arbitration (CRCICA), have the status of international organizations and are consequently exempt from national regulatory regimes, including sanctions.

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11. https://iccwbo.org/publication/note-parties-arbitral-tribunals-icc-compliance/.

12. https://sccarbitrationinstitute.se/en/resource-library/eu-sanctions.

13. https://www.lcia.org/adr-services/lcia-notes-for-parties.aspx#20.%20SANCTIONS,%20RESTRICTIVE%20MEASURES%20AND%20ABILITY%20TO%20PARTICIPATE.

14. https://www.hkiac.org/arbitration/sanctions-policy.

79. The following are the competent authorities in the states where the main arbitral institutions are located:

a) **France**: French General Directorate of the Treasury

b) **Sweden**: National Board of Trade and of the Social Insurance Agency

c) **Switzerland**: Secretariat for Economic Affairs

d) **Singapore**: Monetary Authority

e) **Hong Kong**: Police Force and Customs and Excise Department

f) **United Kingdom**: Office of Financial Sanctions Implementation

g) **United States**: Office of Foreign Assets Control of the US Department of the Treasury

80. However, the location of the arbitral institution's registered office is only one of the factors that may trigger the application of economic sanctions legislation to an arbitration. Many laws come into play, such as the law of the nationality or the residence of each party, their counsel, related entities, or members of the arbitral tribunal, the law applicable to the underlying contract, the procedural law, the law of the seat of arbitration, or the law of any place where enforcement of the arbitral award may be sought.

81. If in doubt or if more information is needed about the compliance process, parties, counsel and arbitrators are encouraged to liaise with the relevant arbitral institution before filing the request for arbitration or accepting an appointment. The ICC[15] and the SCC[16] maintain specific email addresses of contacts on their respective websites to which questions pertaining to compliance matters can be directed.

15. https://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0019.htm?l1=Practice%20Notes&l2.

16. https://sccarbitrationinstitute.se/sites/default/files/2022-11/general-information-to-listed-parties-11-march-2022.pdf.

4. What obligations do arbitral institutions impose on the parties, counsel and arbitrators?

82. As explained in Chapter VI, arbitral institutions impose information requirements and payment requirements, both at the start and during arbitration proceedings.

83. Information may be sought as to parties', counsel's and arbitrators' identities and, in the case of a company, its shareholders and ultimate beneficial ownership.[17] A good understanding of the corporate structure of the parties (where relevant) and the financial transactions underlying the case is essential for determining the type of clearance required and from which authorities it must be sought.

84. Other relevant information includes the location of the assets and of the banks where the assets are deposited, the banks through which payments will be routed and the currency used for payment.

85. As regards payment requirements, these are generally affected by two types of sanctions: sanctions on transfers of funds and asset freezes.

86. Sanctions on transfers of funds restrict payments to or from sanctioned parties. When sanctions on transfers may apply, parties, counsel and arbitrators should bear in mind the following issues:

    a) International transactions will often be routed through several correspondent banks before reaching the receiving bank, which may in turn have to seek advice or approval from other regional or multilateral authorities. Thus, numerous stakeholders are involved in each international transaction. This increases the possibility of rejection, holds and delays.

    b) Banks will often be reluctant to communicate the reasons for any restrictions or delays. Under these circumstances,

17. https://iccwbo.org/publication/note-parties-arbitral-tribunals-icc-compliance/ ; https://www.lcia.org/News/the-potential-impact-of-the-eu-sanctions-against-russia-on-inter.aspx.

parties should contact their respective banks and/or contact the arbitral institution, which will be able to liaise with its own bank to obtain information about the payment.

c) Broad economic sanctions (embargoes) will often be implemented by banks in a strict manner, and exemptions will be applied restrictively. In view of high fines imposed in the past, some EU banks may refuse to deal with any embargoed state while others may agree to process payments on a case by case basis. A US-based arbitral institution will most probably face significant practical issues if a US embargo applies as US banks will in all likelihood refuse to process such payments.

d) Similarly, banks may still refuse to process payments immediately after an embargo has recently been lifted. For example, after January 2016, both the EU and the US decided to lift sanctions against Iran. The scope of the lifting of those sanctions varied as the EU lifted most sanctions fully, whereas the US lifted them only to the extent that they had an extraterritorial effect. Although EU sanctions were legally lifted, several months passed before EU banks began trading again with Iran.

87. Asset freezes restrict a sanctioned entity's ability to make payments. They normally target the receiving bank in the country where the sanctions are imposed, which is obliged to suspend any suspect transaction. While the payment is suspended, the receiving bank will request all available information from the sending or correspondent bank and may have to transmit such information to the relevant authorities. The bank will have the obligation to freeze funds at the time and place where a suspicious transaction is identified, unless exemptions apply.

88. Both asset freezes and transfer of funds limitations are amongst the most common types of economic sanctions and they are constantly being reviewed and amended. Consequently, these limitations may vary while arbitration proceedings are in progress, and the requirements imposed on the parties will vary accordingly.

89. For instance, transactions concluded by a Venezuelan state-owned oil company became subject to US asset freezes in January 2019. As a result, arbitral proceedings initiated against this company prior to January 2019 were unexpectedly affected by US sanctions during the course of the proceedings.

90. If changes occur during the arbitration proceedings, arbitral institutions are well placed to guide parties, counsel and arbitrators and request exemptions or refer them to the relevant authorities to obtain an exemption, as appropriate.

91. For example, in 2022, the LCIA successfully obtained a general license from the UK's OFSI, allowing it to process payments requested to cover arbitration costs and coming from parties subject to the UK's financial sanctions against Russia and Belarus. Similarly, as regards investment arbitration, ICSID benefits from a general license from OFAC, which exempts it from most sanctions regimes imposed or implemented by the US.

5. How might the administrative role of the arbitral institution be affected by sanctions?

92. The administering institution's activities may be affected by the existence of sanctions potentially resulting in delays. Delays may be caused by the performance of compliance controls, as well as the time required for banks to process payments or obtain approval from authorities. In extreme cases, the activities of arbitral institutions may not be carried out, as a result of restrictions rendering it impossible to transfer funds from or to the bank of the arbitral institution.

93. Where the parties have selected a specific institution and the relevant institution refuses to provide its services due to existing sanctions restrictions the situation may lead to legal uncertainty, especially if the parties are unable to agree on a different institution. Questions may arise as to the validity of the arbitration clause, the ability to submit the dispute to a different institution or ad hoc arbitration or the power of domestic courts to refer the dispute to a specific institution. Thus, it is recommended that the arbitration clause provide for alternative or subsidiary institutions.

94. Nevertheless, arbitral institutions also play an important role in mitigating the effect of sanctions and any delays that their requirements may cause. First, arbitral institutions may be useful in liaising with banks and authorities in order to ensure the swift approval of transfers of funds and any other necessary licenses.

95. Secondly, arbitral institutions can (and often do) decide upon the currency applicable to the payment of arbitration costs. Transactions in USD may be deemed to be located in the US (and subject to US sanctions legislation) as they will involve a correspondent bank in the US, and the funds will transit through that bank account. Using a different currency in cases that would otherwise not be targeted by US sanctions is a compliance decision that may be taken by the relevant arbitral institution to facilitate payments.

VII. The Impact of Economic Sanctions on Arbitrators

1. When is an arbitrator affected by sanctions?

96. Arbitrators who consider accepting cases involving sanctions may be subject to restrictions similar to those that may affect counsel (see *supra* Chapter V). Specifically, arbitrators should consider whether any action should be taken to address the following scenarios:

    a) **Scenario 1**: The arbitrator is affected by sanctions. This may happen when the arbitrator is a national of a sanctioned state, is resident in or has an office in a sanctioned territory or is a designated person.

    b) **Scenario 2**: The arbitration itself is affected by sanctions, whether by virtue of the parties to the dispute, the arbitral institution or the place or seat of arbitration.

    c) **Scenario 3**: The resolution of the dispute requires a decision on the applicability or enforcement of economic sanctions.

97. In addition, arbitrators who also act as counsel may be subject to restrictions by virtue of the arbitrator's bar membership or activity as counsel. For instance, an arbitrator who is qualified to practice in a US state may be affected by US sanctions, even if not a national or resident in the US. Further, arbitrators belonging to multi-jurisdictional law firms may be affected by sanctions if the firm has offices or has significant activities in the sanctioning state.

2. What actions should be taken by an arbitrator who is affected by sanctions?

(a) Requesting a license

98. As with counsel (see Chapter V), under certain sanctions regimes, serving as an arbitrator may potentially be treated as a prohibited provision of services to a sanctioned party. Consequently, arbitrators may require a license to serve in an arbitration.

99. Whether an arbitrator requires a license or not will depend on the applicable sanctions regimes. As explained above (Chapter IV, Section 2), in some jurisdictions, such as the EU and the UK, acting as an arbitrator is generally exempted from sanctions regimes and arbitrators will therefore not require a license. However, payment of arbitrators' fees may require a license from the sanctioning state. Thus, where a license is required, it is generally recommended that arbitrators request the license prior to engaging in the arbitration.

100. In other jurisdictions, acting as an arbitrator is not necessarily exempt from sanctions regimes. For instance, in the US, OFAC has not issued formal guidance on the applicability of sanctions to arbitrators. It is therefore uncertain whether the general licenses on the provision of legal services extend to the services provided by an arbitrator. Any arbitrator who may be affected by a sanction, under Scenarios 1 and 2 above, should therefore request a license from OFAC to (i) engage in the arbitration and (ii) accept funds as a result of the arbitration.

101. Where a license is required, the term of the license must be kept in mind to ensure that renewal requests are made sufficiently in advance of the expiry date. In addition, arbitrators must take into consideration that license applications, although generally processed through expedited procedures, may take some time before a license is procured. This may prevent the parties or an institution from making early payments related to the conduct of the proceedings, such as the deposit for costs and advances on fees or payment of witness invoices or arbitrators fees.

(b) Liaising with the arbitral institution

102. It is recommended that the affected arbitrator contact the arbitral institution or the appointing authority (if any) prior to accepting its appointment. As explained in Chapter VI, many arbitral institutions such as ICSID, the ICC, the HKIAC and the AAA's ICDR have experience in dealing with these complex issues and are an essential 'first stop' for any arbitrator who has questions relating to sanctions in cases proceeding under their arbitration rules.

103. For example, the general license obtained by the LCIA in relation to sanctions imposed on the Republic of Belarus and Russia expressly provides that the LCIA is entitled to process payments from sanctioned parties to arbitrators. Similarly, in 2021 the ICC obtained a license from OFAC to process certain payments in relation to sanctions imposed on Iran.

(c) Determining the currency of the arbitration

104. In institutional arbitration, the currency in which such costs and fees will be paid is generally stipulated in the institutional rules. The arbitrator should therefore also liaise with the institution to discuss whether specific arrangements can be made in this respect.

105. In ad hoc arbitrations, the tribunal may have to determine the currency in which the arbitration costs and fees will be paid, and should consider any applicable sanctions in making this determination. Where sanctions are involved, a tribunal in ad hoc proceedings may wish to consider, after consultation with the parties, using the fundholding services of an arbitral institution. Many arbitral institutions offer fundholding services for ad hoc arbitrations and, in particular for arbitrations under the UNCITRAL Arbitration Rules, which can include holding the deposit for costs and making payments to tribunal members in respect of their fees and expenses. In approaching an institution about potential fundholding services, the tribunal would need to disclose the fact that sanctions are involved and provide any necessary information. An institution that agrees to provide such services would apply their own sanctions compliance procedures in receiving and paying out funds.

(d) Disclosure

106. The extent of the duty to disclose the fact that an arbitrator may be potentially affected by sanctions is beyond the scope of this Guide. Nonetheless, arbitrators in cases affected by sanctions must consider disclosing this circumstance, in order to inform the parties about potential delays and to avoid potential challenges on the basis of apparent bias or lack of availability.

3. What should an arbitrator take into account when the case involves applying or enforcing sanctions?

107. This Guide does not address substantive issues regarding sanctions. However, there are several issues that an arbitrator should take into account when deciding a case involving sanctions.

(a) Arbitrability

108. The rule of 'competence-competence' generally applies to a tribunal's determination of whether the dispute is arbitrable, including when some type of sanction is involved. However, state courts have reached different conclusions in reviewing arbitral awards that address this issue. For example, a Swiss Federal Court decision found that a dispute involving a contract for the sale of goods with Iraq, a sanctioned state, was arbitrable.[18] By contrast, an Italian court found that a dispute involving a contract for the sale of goods with Iraq was not arbitrable, on the ground that the sanctions rendered the arbitration clause null and void under Italian law.[19] Arbitrators should determine whether a dispute is arbitrable. If arbitrability is not raised by the parties, the tribunal should consider whether to request additional submissions from the parties on this issue.

(b) Enforceability

109. Issues such as the extent to which a tribunal must take into consideration overriding mandatory rules and whether there is a duty to render an enforceable award are beyond the scope of this Guide. However, arbitrators might also wish to consider issues relating to enforcement of the final award. As with admissibility matters, where there are concerns as to enforceability of an award in the context of economic sanctions, the tribunal may wish to request submissions from the parties if the issues affecting enforceability have not been

18. Fincantieri Cantieri Navali Italiani SpA et OTO Melara Spa v ATF, Tribunal Fédéral of Switzerland, 23 June 1992.

19. Fincantieri-Cantieri Navali Italiani SpA v Iraq, Corte di Appello di Genova, Italy, 7 May 1994.

debated. Chapter IX expands on the effects of sanctions on the enforcement of the award.

VIII. What are the Effects of Economic Sanctions on Other Persons Involved in an Arbitration?

110. In addition to parties (see Chapter IV), counsel (see Chapter V) and arbitrators (see Chapter VII), other persons, such as witnesses, experts, court reporters, interpreters and tribunal secretaries, are typically involved in arbitral proceedings. Economic sanctions may also impact any of these persons or their engagement. This is particularly the case where one of the parties, a witness, expert, tribunal secretary, interpreter or court reporter is subject to or targeted by sanctions, or where the place of the hearings is affected by sanctions.

111. Depending on the function of an individual or service provider, the questions that arise and the potential scenarios in which economic sanctions may become relevant are similar to the ones concerning arbitrators (for tribunal secretaries), counsel (for experts, interpreters as well as court reporters) or parties (for witnesses). To avoid repetition, reference is made to the relevant chapters of this Guide. This chapter focuses on the issues relevant to witnesses, experts, interpreters, court reporters and tribunal secretaries.

1. First scenario: one of the parties is targeted by economic sanctions

112. Similar to counsel and arbitrators involved in arbitral proceedings in which a party is targeted by sanctions, the main issue for other professionals (and witnesses, with regard to expenses) concerns the transfer of funds from a sanctioned party. It is worth noting that, depending on the person who is affected, payment may be received from one party (for instance, by experts and witnesses) or from both parties (for instance, by court reporters, interpreters and tribunal secretaries) and, in the latter case, will often be channelled through an arbitral institution. In order to receive payments from such a party or institution, an exemption or license from the competent authority may be necessary.

113. In Chapters V, VI and VII, it has been stated that payments for the provision of legal services are often exempt from

sanctions regimes, either through general or individual licenses. However, it is arguable whether these exceptions also cover fees or expenses for witnesses, experts, court reporters, interpreters or tribunal secretaries as activities which are "strictly necessary" for the provision of legal services, as required, for instance, by EU legislation.

114. In order to avoid these uncertainties, the person affected should consider contacting the competent national authorities before providing services to a party subject to sanctions (cf Chapter V, Sections 1 and 2).

2. Second scenario: a witness, expert, interpreter, court reporter or tribunal secretary is subject to sanctions

115. Although less frequent, there may also be circumstances where one of the professionals other than counsel or an arbitrator is subject to sanctions. Parties and the arbitral tribunal should particularly consider the following scenarios and take appropriate steps when a witness, expert, interpreter, court reporter or tribunal secretary is the target of sanctions:

(a) The person is subject to a travel ban and therefore has limited ability to attend a hearing

116. Practical difficulties may arise when a witness, expert, court reporter, interpreter, or tribunal secretary is subject to travel restrictions in the state where the hearing takes place. The person targeted by a travel ban may be denied entry at the external borders of the relevant state, or may be subject to sanctions from the state of its nationality or residency following entry into such a state. Further, where a visa is required, it may not be granted for persons subject to such restrictions.

117. There are several means to avoid these issues:

a) Agreeing on an alternative candidate not affected by sanctions, where possible (such as in the case of court reporters and interpreters);

b) Agreeing on hybrid hearings, using telecommunications and videoconference platforms;

c) Changing the venue of the hearing; or

d) Requesting a license.

118. Whichever the option chosen, the matter should be anticipated and addressed with ample time, in order to avoid additional costs or delays.

(b) The person is subject to sanctions targeting transfers of funds

119. It can also be the case that the person is the target of a sanction prohibiting the transfer of funds, and/or the paying party is subject to such a sanction. In such cases, issues arise in connection with the payment of fees for professionals or expenses for witnesses.

120. As with Scenario 1, formal clearances by the competent national authorities to make these payments may be appropriate, even in those cases where the provision of legal services is exempt from sanctions. In addition, arbitral institutions may request additional information from parties that wish to appoint an expert from a sanctioned country.

IX. Impact of Economic Sanctions on the Enforcement of the Award

121. It is beyond the scope of this Guide to address substantive issues as to the grounds for enforcement of an award. However, these issues must be taken into consideration by the parties when drafting an arbitration clause and when deciding to initiate arbitration proceedings, and potentially by the arbitrators when drafting an award. Consequently, this chapter will briefly discuss how economic sanctions can affect the enforcement of an award.

1. Are economic sanctions considered to be a matter of public policy?

122. There is no uniform answer as to whether economic sanctions are viewed as a matter of public policy. The concept and the content of "public policy" may vary widely from state to state, and this difference is especially evident in relation to sanctions.

123. Generally speaking, UN resolutions serving a purpose that the international community considers to be worthy of protection are part of the public policy of all UN member states and must be taken into account both by arbitral tribunals and courts. Given the almost universal membership of the UN, and therefore of their sanctions' recognition and application, UN sanctions are often considered to constitute international public policy.

124. The situation is different when sanctions are imposed by regional organizations or countries. These sanctions may be considered to be part of the public policy of the state(s) imposing them, but they might not be considered to be part of the public policy of other countries. Indeed, the public policy of different countries can be contradictory. A clear example is found in sanctions imposed by Russia against the EU in response to measures taken by the EU against Russia: compliance with EU sanctions will be considered contrary to public policy by Russian courts, whilst compliance with Russian sanctions may be considered contrary to public policy by EU domestic courts.

125. Even in cases where a court decides on sanctions imposed by their own country, decisions have varied across jurisdictions (and, indeed, within the same jurisdiction). For instance, US courts tend to interpret public policy in a restrictive manner, and there is authority in the US for the proposition that sanctions, other than those imposed by the UN, are not part of US public policy. In the European Union, however, the CJEU has found that an EU sanction regime is part of EU public policy.

2. How is public policy relevant to the annulment and enforcement of an arbitral award?

126. For non-ICSID awards, Article V of the New York Convention states that the recognition and enforcement of an award may be refused in the following circumstances (amongst others):

a) The award has been set aside or suspended by a competent authority of the country in which the award was made (Article V.I.e)

b) The subject matter of the difference is not capable of settlement by arbitration under the law of the country where enforcement is sought (Article V.II.a)

c) The recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought (Article V.II.b)

127. As regards the setting aside of an award at the seat of the arbitration (point a) above), Article 34(2)(b) of the UNCITRAL Model Law provides that the court of the seat of the arbitration can set aside an award if *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this state; or (ii) the award is in conflict with the public policy of this state*.

128. Thus, the enforcement of an award may generally be refused if its subject-matter is not arbitrable or if it is contrary to public policy, either under the law of the seat or under the law of the place where enforcement is sought. Consequently, a claimant should carefully analyze the law of both of these places prior to initiating a sanctions-related arbitration.

129. Given the almost universal membership of the UN, the choice of the seat of arbitration is unlikely to be affected by UN sanctions. However, the seat of arbitration will be of central importance when challenging awards on the basis of sanctions imposed by either national or regional authorities.

130. When negotiating a dispute resolution clause, parties should carefully consider the seat of arbitration and its potential impact on the arbitration proceedings. Relevant aspects to consider when determining the seat of the arbitration are (i) whether that jurisdiction has imposed sanctions against the parties and (ii) whether the courts of that jurisdiction have applied an expansive or restrictive interpretation of "public policy".

131. Similarly, the claimant should pay attention to the jurisdictions where the defendant has its assets before deciding to initiate an arbitration. In certain jurisdictions, such as the US and France, court decisions have stated that an award which has been set aside at the seat of arbitration may still be enforced in their jurisdictions. Conversely, a state court can also decide not to enforce an award even if its annulment has been refused at the seat.

132. In addition, even when enforcement is not refused under the New York Convention, there may still be practical issues preventing enforcement of the award in a sanctions-imposing country. A typical example would be the attachment of frozen assets or prohibited transfers of funds, which may require a license. This can be relevant to both commercial and investment arbitrations, including ICSID awards, where the execution is governed by national laws concerning execution of judgments (Article 54(3) of the ICSID Convention).

X. Annex: National Resources and Legal Authorities

Australia

(https://www.dfat.gov.au/international-relations/security/sanctions)

Austria

(https://www.bmeia.gv.at/en/european-foreign-policy/foreign-policy/europe/eu-sanctions-national-authorities/)

Belgium

(https://diplomatie.belgium.be/en/policy/policy_areas/peace_and_security/sanctions)

Bulgaria

(https://www.mfa.bg/en/EU-sanctions)

Canada

(https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/index.aspx?lang=eng)

Croatia

(https://mvep.gov.hr/services-for-citizens/treaties-forms-and-documents/international-restrictive-measures-sanctions/245126)

Cyprus

(https://mfa.gov.cy/themes/)

Czech Republic

(https://fau.gov.cz/en/international-sanctions)

Denmark

(http://um.dk/da/Udenrigspolitik/folkeretten/sanktioner/)

Estonia

(https://www.vm.ee/en/sanctions-arms-and-export-control/international-sanctions)

Finland

(https://um.fi/international-sanctions#legal)

France

(http://www.diplomatie.gouv.fr/fr/autorites-sanctions/)

Germany

(https://www.bmwi.de/Redaktion/DE/Artikel/Aussenwirtschaft/embargos-aussenwirtschaftsrecht.html)

Greece

(https://www.mfa.gr/en/foreign-policy/global-issues/international-sanctions.html)

Hungary

(https://www.mnb.hu/en/supervision/regulation/anti-money-laundering/economic-and-financial-sanctions)

Ireland

(https://www.dfa.ie/our-role-policies/ireland-in-the-eu/eu-restrictive-measures/)

Italy

(https://www.esteri.it/en/politica-estera-e-cooperazione-allo-sviluppo/politica_europea/misure_deroghe/)

Latvia

(https://www.mfa.gov.lv/en/sanctions)

Lithuania

(http://www.urm.lt/en/sanctions)

Luxembourg

(https://maee.gouvernement.lu/fr/directions-du-ministere/affaires-europeennes/organisations-economiques-int/mesures-restrictives.html)

Malta

(https://www.gov.mt/en/Government/Government%20of%20Malta/Ministries%20and%20Entities/Officially%20Appointed%20Bodies/Pages/Tribunals/Commercial-Sanctions-Tribunal.aspx)

Netherlands

(https://www.government.nl/topics/international-sanctions/policy-international-sanctions)

Poland

(https://www.gov.pl/web/diplomacy/international-sanctions)

Portugal

(https://www.bportugal.pt/en/page/restrictive-measures)

Romania

(http://www.mae.ro/en/node/2123)

Slovakia

(https://mzv.sk/web/en/diplomacy/international-sanctions)

Slovenia

(https://www.gov.si/en/topics/restrictive-measures/)

Spain

(https://www.exteriores.gob.es/en/PoliticaExterior/Paginas/SancionesInternacionales.aspx)

Singapore

(https://www.mas.gov.sg/regulation/anti-money-laundering/targeted-financial sanctions)

South Africa

(https://www.fic.gov.za/International/sanctions/SitePages/Home.aspx)

Sweden

(https://www.government.se/government-policy/foreign-and-security-policy/international-sanctions/)

United Arab Emirates

(https://www.uaeiec.gov.ae/en-us/un-page)

United Kingdom

(https://www.gov.uk/guidance/sanctions-embargoes-and-restrictions)

United States of America

(https://ofac.treasury.gov)

Ce guide existe également en français.
Vous pouvez l'obtenir à l'aide de ce code QR :

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