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Lextenso

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Éditorial | Editorial

At the time of writing this editorial, 2022 is coming to a close. Looking back at international arbitration in 2022, let's start with the glass half full. Like most of the world, the arbitration world has inched back towards normality after the Covid-19 pandemic. Your favourite *Journal* has resumed its pre-pandemic regularity. The huge success of many professional gatherings held all over the world, including the Paris Arbitration Week and the ICCA conference, offer testimony to the vitality and resilience of the international arbitration community. In-person merits hearings have thankfully returned to being the norm, much to the relief of most practitioners who felt constrained in their advocacy by the four corners of their screen. International arbitration continues to develop as the favoured means of dispute resolution for international commerce. And, as we look forward to celebrating in 2023 the 100th anniversary of the creation of the ICC International Court of Arbitration, at the initiative of the "merchants of peace" in the wake of the First World War, we can take legitimate pride in the role we all play in the operation and development of international arbitration as a means of peacefully resolving international commercial and investment disputes.

And now to the glass half-empty. The role in maintaining world peace of international commerce, and of international arbitration as its indispensable dispute-resolution companion, is a subject that the EU Commission and Court of Justice might want to meditate. We have had too many occasions this past year to lament in these columns the repeated blows levelled at international arbitration by the Court of Justice of the European Union. We have been compelled to do so in the editorials of four of the last five issues of this *Journal*. *Achmea*, *Komstroy*, *PL Holdings* have become infamous household names, to which can now be added the judgment of the Grand Chamber of the Court of 20 June 2022 in the case of *London Steam-Ship Owners' Mutual Insurance Association Limited v Kingdom of Spain*. The case is too complex to do it justice in this editorial and will be the subject of a detailed commentary in an upcoming issue. Suffice it to say that, as could be expected from its previous decisions, the Court has turned its attention – and apparent desire for increased control – from investment arbitration to commercial arbitration, by refusing to recognize the jurisdiction of an arbitrator in order to pave the way for the enforcement in the UK of two Spanish court decisions that were incompatible

with the arbitral award at issue, that had previously been enforced by the English courts. It is obvious that the Court's decision was a means to an end – ensuring that victims of a massive oil spill would receive the compensation ordered by the Spanish court decisions. Nevertheless, that arguably laudable objective has been achieved at the price of weakening a key pillar of the international commercial arbitration regime in the EU, namely the exclusion of arbitration from the scope of the Brussels I Regulation, and the consequent indirect subjection of arbitration to "*fundamental rules of that regulation*". Will this case remain an outlier, limited to its very peculiar circumstances, or will it spawn a following that risks to further undermine international arbitration in the EU?

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Ce dernier numéro de 2022 reflète bien l'année mouvementée et riche en actualité que nous avons vécue.

Les évènements de l'année ont en effet renouvelé et mis sur le devant de la scène le sujet ô combien complexe des sanctions, qui peuvent affecter à bien des égards les procédures d'arbitrage international impliquant des parties sujettes à sanctions. Nous inaugurons dans ce numéro, sous la signature de Charles Claypoole, le premier d'une série d'articles consacrés à ce sujet. L'article présente avec pédagogie les divers régimes de sanctions mis en place à l'encontre de la Russie suite à l'invasion de l'Ukraine, comment ces sanctions affectent le déroulement des arbitrages concernés, l'exécution des sentences contre un débiteur objet de sanctions, ainsi que les contre-mesures prises par la Fédération de Russie.

Nous sommes par ailleurs heureux de publier le texte du discours de Matthieu de Boisséson à l'occasion de la conférence annuelle de l'Association Française d'Arbitrage. Avec l'élégance et la finesse qu'on lui connaît, l'orateur explore les rapports entre la question morale et l'arbitrage, combinant avec bonheur les exemples et considérations les plus concrets et la prise de hauteur qu'impose le sujet, combinaison propre à susciter une réflexion profonde sur le rôle de la morale et ses possibles dévoiements.

Nos lecteurs intéressés par l'arbitrage d'investissement retrouveront ensuite la chronique annuelle consacrée à l'arbitrage d'investissement, publiée sous la direction de Laurie Achtouk-Spivak et des Professeurs Julien Cazala et Arnaud de Nanteuil, avec le concours de Claire Crepet Daigremont, Yasmine El Achkar, Mathilde Frappier, Arianna Rafiq et Benjamin Samson. Cette chronique est trop riche pour être présentée ici en détail mais signalons tout de même une fort utile présentation du nouveau règlement d'arbitrage du CIRDI et, en fin de chronique, une discussion lumineuse de la jurisprudence de l'Union européenne concernant l'arbitrage d'investissement.

La rubrique de commentaires de jurisprudence n'est pas en reste et présente trois décisions des plus intéressantes.

Marie Stoyanov, Ekaterina Oger Grivnova et Gary Smadja proposent une lecture informative et rigoureuse des arrêts rendus par la Cour de cassation et à sa suite, par la cour d'appel de Paris sur renvoi, dans l'affaire *Rusoro* qui posent de délicates questions sur la qualification des clauses de TBI qui imposent des délais à l'accès à l'arbitrage (prescriptions ou autres). Faut-il y voir une question de compétence, sujette au contrôle du juge du siège, ou un problème de recevabilité

qui y échappe ? La réponse dans l'affaire *Rusoro* va, en ce qui nous concerne, dans le bon sens, puisqu'elle confirme la tendance des tribunaux français à limiter le champ du contrôle des sentences, notamment celles rendues sous l'égide de traités de protection des investissements. L'arrêt tout récemment rendu par la Cour de cassation dans l'affaire *Oschadbank* est à rapprocher. Il fera sans doute l'objet d'une analyse dans l'un de nos prochains numéros.

Isabelle Michou nous offre ensuite un commentaire de deux ordonnances rendues par un conseiller de la mise en état de la cour d'appel de Paris le 12 juillet 2022. La première présente une approche originale de la notion de « lésion grave » au sens de l'alinéa 2 de l'article 1526 CPC (l'arrêt ou l'aménagement de l'exécution provisoire peut être demandé s'il est démontré que « *cette exécution est susceptible de léser gravement les droits de l'une des parties* »), mettant de côté l'analyse des conséquences économique de l'exécution provisoire au bénéfice d'une approche tout autre, tenant compte des considérations géopolitiques propres à l'espèce. L'avenir nous dira s'il s'agit d'une décision d'espèce – tant les faits de l'affaire sont particuliers –, ou s'il y a là l'amorce d'une approche plus holistique du concept de lésion grave, conforme à l'esprit de l'article 1526 alinéa 2 tel que rédigé en 2011. La seconde ordonnance rappelle que toute renonciation à la procédure de signification d'une sentence arbitrale en application de l'article 1519 CPC doit être non-équivoque, et qu'en particulier la notification électronique des sentences par l'institution arbitrale ne saurait manifester une telle renonciation. Un rappel utile au regard de la généralisation post-covidienne de la notification électronique des sentences.

Et ce dernier numéro de 2022 se termine par des panoramas de jurisprudence particulièrement fournis : Allemagne, Autriche, Angleterre, Brésil, France, Italie, Suède et Suisse. Les auteurs sont trop nombreux pour être nommément évoqués ici mais nous profitons de ce dernier éditorial de l'année pour les remercier de leurs précieuses contributions.

Enfin, au chapitre des remerciements, nous tenons à exprimer notre gratitude à tous nos lecteurs pour leur fidélité à ces *Cahiers*. Au nom de toute l'équipe du Comité de Rédaction, nous vous présentons nos meilleurs vœux pour l'année 2023 !

Charles KAPLAN Charles NAIRAC

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Doctrine – Débats

Articles – Debates

Sanctions and International Arbitration: Challenges created by the Sanctions imposed on Russia following its Invasion of Ukraine

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Given that economic sanctions are expressly intended to interfere with international trade, it is inevitable that they create conflicts between contractual and compliance obligations, and that such conflicts may ultimately need to be resolved through international arbitration.

This article examines such conflicts and the particular challenges that the sanctions imposed on Russia following its recent invasion of Ukraine have created for international arbitration. As will be demonstrated, these sanctions will not only generate disputes, many of which may be submitted to arbitration, but also significantly complicate the process of resolution of such disputes. Given the extent of trade and investment between Russia and the western economies that have imposed sanctions on Russia, the unprecedented impact of these sanctions regimes along with the legislation that Russia has adopted to counteract the effect of foreign sanctions, these disputes and the arbitrations that may result from them may persist for years to come and could prove intractable.

Section A of this article contains an overview of the sanctions, or restrictive measures, that the United States, the European Union and the United Kingdom have imposed on Russia since its invasion of Ukraine in February 2022. Section B considers the extent to which U.S., EU, U.K. and other sanctions impact the conduct of an arbitration at its different stages, and the ability to enforce an arbitral award against a sanctioned person. It also considers the likely effect of some of the measures that Russia has implemented to counteract those sanctions on international arbitrations involving Russian parties. Section C provides some conclusions and recommendations, including on how relevant institutions such as the European Union should adapt existing sanctions regulations to counteract the effect of Russian legislation intended to undermine the international arbitration system.

1. With thanks to my colleagues Les Carnegie, Fernando Mantilla-Serrano, Thomas Lane and others who cannot be mentioned for their helpful comments. The views stated in this article are those of the author, and do not necessarily reflect those of Latham & Watkins or any of its partners, associates or clients.

A. The Sanctions imposed on Russia following its 2022 Invasion of Ukraine

Unlike United Nations sanctions, such as the comprehensive financial and trade embargo that the United Nations Security Council imposed on Iraq following its invasion of Kuwait,[2] the sanctions imposed on Russia following its invasion of Ukraine have been imposed unilaterally by certain countries pursuant to their foreign policy imperatives, albeit on an unprecedented scale and in a coordinated manner.

1. The Jurisdictional Scope of U.S., EU and U.K. Sanctions

These unilateral measures do not constitute part of international law, and the jurisdictional scope of their application depends on the legal regimes of the countries that have implemented them. Given the differences between the jurisdictional scope of U.S., EU and U.K. sanctions, and the controversies related to their perceived extra-territorial effect, it is useful to summarise how and to whom these different sanctions measures apply.

With regards to U.S. sanctions, it is first important to distinguish between so-called "primary" sanctions and "secondary" sanctions.

U.S. primary sanctions, which are generally imposed by Executive Orders issued by the U.S. President pursuant to emergency powers granted by Congress (they generally cite a number of different statutory sources[3]), are principally administered and enforced by the Office of Foreign Assets Control (OFAC), part of the U.S. Department of the Treasury. As clarified by OFAC, U.S. primary sanctions such as those imposed on Russia are binding on "U.S. persons", a term that includes all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States (regardless of nationality), and all entities organised under U.S. law and their foreign branches.[4] In practice, U.S. primary sanctions also apply to transactions denominated in U.S. dollars that involve the participation of U.S. financial institutions, e.g., through the U.S. dollar clearing system, transactions involving U.S.-origin property, and the conduct of non-U.S. persons that cause a U.S. person to breach U.S. sanctions. As a result, U.S. primary sanctions have a broad jurisdictional reach in respect of activities involving non-U.S. persons that take place outside of the United States.

U.S. secondary sanctions, on the other hand, specifically target non-U.S. persons and have an intended extra-territorial effect. U.S. secondary sanctions are often contained in legislation, such as the Countering America's Adversaries Through Sanctions Act (CAATSA), and identify penalties that the U.S. Government may impose on non-U.S. persons that engage in certain targeted activities, the

2. See in particular U.N. Security Council resolution 661 (1990) and subsequent resolutions, including resolution 778 (1992).

3. The two main underlying congressional sources for the imposition of U.S. sanctions are the Trading with the Enemy Act, passed by Congress in 1917, and the International Economic Emergency Powers Act, adopted in 1977.

4. See Basic Information on OFAC and Sanctions, FAQ 11, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs.

most extreme being inclusion in OFAC's list of "Specially Designated Nationals" (SDNs). In the context of the Russia-related programme, secondary sanctions are found in various Executive Orders that expose non-U.S. persons to a designation on the SDN list if determined "*to have materially assisted, sponsored, or provided financial, material to*" an SDN.[5] If a non-U.S. person is added to the SDN list, that person's assets are blocked and U.S. persons are generally prohibited from dealing with them. Given the ramifications of such designation (that person would effectively be excluded from the international finance system), the available penalties under U.S. secondary sanctions are harsh.

Unlike the United States, neither the European Union nor the United Kingdom, nor other countries that have imposed sanctions on Russia, such as Canada, Australia and Japan, have adopted "secondary" sanctions with an explicit extra-territorial remit. Indeed, in respect of other U.S. sanctions regimes, such as those imposed on Cuba and Iran, the European Union, the United Kingdom and other countries have adopted blocking legislation intended to protect their nationals from the extra-territorial effect of those U.S. sanctions, which they perceive to be unlawful from the perspective of international law.[6]

However, EU and U.K. (and certain other) sanctions regimes nevertheless have an effective extra-territorial application in the sense that they apply to conduct of their own nationals that take place outside the territory of the respective countries.

Thus, EU Council Regulations (which have direct legal effect as a matter of EU law) contain standard language that the sanctions (or "restrictive measures") set out in these legal acts apply:

> "*(a) within the territory of the Union;*
> *(b) on board any aircraft or any vessel under the jurisdiction of a Member State;*
> *(c) to any person inside or outside the territory of the Union who is a national of a Member State;*
> *(d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;*
> *(e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.*"[7]

Since leaving the European Union, the United Kingdom has implemented an autonomous sanctions regime which applies to all individuals and legal entities who are within or undertake activities within the territory of the United Kingdom. All U.K. nationals and legal entities established under U.K. law, including their branches, must also comply with U.K. sanctions, irrespective of where their activities take place.

The Office of Financial Sanctions Implementation (OFSI), the U.K. financial sanctions authority, has further issued guidance that states that a U.K. jurisdictional nexus (in which case U.K. sanctions would apply) "*might be created by such things as a UK company working overseas, transactions using clearing services in the UK,*

5. See Executive Order 14024 of April 15, 2021.

6. See, for example, Council Regulation (EC) No. 2271/96, the preamble of which reads: "*Whereas by their extra-territorial application such laws, regulations and other legislative instruments violate international law …*"

7. See, for example, Article 13 of Council Regulation (EU) No 833/2014.

actions by a local subsidiary of a UK company (depending on the governance), action taking place overseas but directed from within the UK, or financial products or insurance bought on UK markets but held or used overseas."[8]

Accordingly, U.S., EU and U.K. sanctions all have an effective broad extra-territorial reach, which has important consequences in the context of an international arbitration. Irrespective of whether any of these (or other) sanctions regimes might apply to one or more of the parties to a particular dispute, they may apply as part of the law of the seat of arbitration (for example, if the seat of the arbitration is in Paris, the conduct of the arbitration will need to comply with EU sanctions). Any arbitral institution and staff members will need to comply with sanctions applicable to them by virtue of their nationality, as will counsel to either party and the individual arbitrators (a U.S. arbitrator will need to comply with U.S. sanctions, irrespective of whether U.S. primary sanctions apply to any of the parties to the dispute). Separately, sanctions laws of a particular country may arguably form part of the governing law of the arbitration (for example, if two non-EU parties have selected French law as the law applicable to a specific dispute, it may be arguable that EU sanctions should apply as part of the governing law).

Further complexity results from the potential application of U.S. secondary sanctions which, as noted above, apply to non-U.S. persons. Indeed, in a 2020 decision, the English Court of Appeal held that U.S. secondary sanctions constituted "mandatory" provisions of law that excused contractual performance by a U.K. financial institution.[9] The Court of Appeal agreed that non-payment of interest under a facilities agreement was excused "*in order to comply with a mandatory provision of law, regulation or order of any court of competent jurisdiction*." That decision turned on the language of the specific contract, but losing parties (and potentially counsel and arbitrators) may be at risk of penalties under U.S. secondary sanctions if, for example, they make a payment to an SDN in breach of relevant U.S. secondary sanctions legislation.

2. The Content of the U.S., EU and U.K. Sanctions imposed on Russia

This article does not provide a comprehensive overview of the content of the U.S., EU and U.K. sanctions regimes imposed on Russia, not least since the regimes are constantly evolving. However, its useful to explain the structure of the different regimes.

It is first relevant to clarify that U.S. sanctions regimes fall into two general categories: those that constitute a comprehensive embargo on virtually all trade and other activities with the targeted country or territory and those that are limited to certain, defined trade restrictions.

The comprehensive sanctions regimes that the United States currently has in place are those imposed on Cuba, Iran, North Korea and Syria, along with those

8. OFSI enforcement and monetary penalties for breaches of financial sanctions, Guidance, para. 3.8. Furthermore, U.K. sanctions are generally extended by Orders in Council to apply in the Channel Islands, the Isle of Man and to British Overseas Territories such as the Cayman Islands and the British Virgin Islands.

9. *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821.

that target Crimea (referred to as the Crimea region of Ukraine) and the so-called People's Republics of Donetsk and Luhansk. Absent an exception under the respective sanctions regime or a general or specific licence issued by OFAC, trade and other dealings with any of these countries or territories is prohibited, assuming a U.S. jurisdictional nexus.

Aside from these comprehensive sanctions regimes, the United States maintains a number of targeted sanctions regimes or "programs." These can be divided into programmes targeting a specific country or region, such as Russia and Belarus (which are not, currently, the subject of a comprehensive U.S. trade embargo), and programmes that target a specific issue, group or activity (such as narcotics trafficking, terrorism, cyber-related activities, and global human rights).[10] The specific measures implemented pursuant to these regimes vary.

OFAC also maintains its list of SDNs, referred to above. If a person or entity is designated as an SDN (and added to the SDN list), their property is frozen or "blocked" as a matter of U.S. law, and U.S. persons are prohibited from dealing with property belonging to such persons (at least absent an exception or OFAC licence). Further, by operation of OFAC's so-called 50 percent rule, property and interests in property of entities directly or indirectly owned 50 percent or more in the aggregate by one or more SDNs are considered blocked, and it is consequently prohibited to engage in any dealing not only with SDNs, but also entities owned 50 percent or more in the aggregate by one or more SDNs.

The U.S. SDN list needs to be contrasted with other sanctions lists maintained by OFAC. Whereas all dealings with SDNs are prohibited (at least absent an exception or OFAC licence), entities listed on other lists may only be subject to certain restrictions. For example, OFAC's Sectoral Sanctions Identifications (SSI) list includes entities operating in sectors of the Russian economy that are the target of only certain "sectoral" sanctions, notably, restrictions on dealing with newly issued equity and the provision of certain types of financing.

Given the distinction between these different sanctions lists maintained by OFAC, different risks may arise in dealing with different types of U.S. sanctioned persons in the context of an arbitration. Arbitrating with an SDN may be effectively illegal assuming a U.S. jurisdictional nexus (absent an OFAC licence), whereas dealing with an entity on the SSI list may be permissible so long as no new financing is extended to that party.

While the United States has imposed country-wide or territory-wide trade embargoes on certain countries and territories, the European Union and the United Kingdom have not. Although both the European Union and the United Kingdom have imposed restrictions on certain types of trade with and investment in Iran, North Korea and Syria, along with certain other countries, including Russia and Belarus, none of them amounts to a comprehensive embargo, and neither the EU nor the U.K. have any sanctions on Cuba. Likewise, although the EU and the U.K. have imposed very broad restrictions on investment in and trade with Crimea and Sevastopol along with the non-government controlled areas of the Donetsk, Kherson, Luhansk and Zaporizhzhia oblasts of Ukraine, these restrictions do not amount to a comprehensive trade embargo.

10. The list of the different U.S. sanctions programmes is available at https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information.

Similar to the U.S. SDN list, the European Union and the United Kingdom maintain consolidated lists of persons and entities subject to blocking, or so-called asset-freeze, sanctions.

These sanctions essentially provide that funds and economic resources belonging to, owned, held or controlled by any designated person are frozen, and provide that it is prohibited (absent an exception or licence from a competent sanctions authority) to make available, directly or indirectly, funds or economic resources to or for the benefit of a designated person.

Although these targeted sanctions mirror the U.S. SDN sanctions to a certain extent, they bear some differences. For example, while the OFAC 50 percent rule extends the application of U.S. sanctions to entities 50% or more owned by one or more SDNs, EU and U.K. sanctions apply to entities majority owned or controlled by a designated person. Therefore diligence must be undertaken to ascertain not only the legal owner of a counter-party in an arbitration, but also the person or persons that exercise control over that entity taking into account certain factors identified in the corresponding sanctions regime. To add further complexity to the issue, the European Commission in April 2022 issued guidance that if an entity is owned by two or more designated persons, their ownership interests should be aggregated.[11] The result is that if a company is 30% owned by one designated person and 25% by another, the company itself should be subject to asset-freeze sanctions. By contrast, the U.K. financial sanctions authority, OFSI, around the same time, clarified that "*When making an assessment on ownership and control, OFSI would not simply aggregate different designated persons' holdings in a company, unless, for example, the shares or rights are subject to a joint arrangement between the designated parties or one party controls the rights of another.*"[12]

3. The U.S., EU and U.K. Sanctions imposed on Russia

Although the United States and the European Union (which at that time included the United Kingdom) in 2014 imposed sanctions on Russia in response to its annexation of Crimea, those sanctions were, at least if considered with hindsight, relatively limited. Both the United States and the European Union imposed limited trade restrictions on Russia, particularly targeting non-conventional oil projects (i.e., deepwater, Arctic and shale). They also imposed broad trade and investment restrictions on Crimea, and designated various Ukrainian and Russian individuals and entities, in particular those associated with the steps taken to undermine the territorial integrity and sovereignty of Ukraine and misappropriating Ukrainian state funds.

The 2014 measures appear insignificant when contrasted with the unprecedented sanctions that the United States, the European Union, the United Kingdom, along with countries such as Switzerland, the European Economic Area countries (Norway, Iceland and Liechtenstein), Canada, Australia and Japan have since imposed on Russia.

11. European Commission, Asset Freeze and Prohibition to Make Funds and Economic Resources Available, Frequently Asked Questions, No. 8.

12. U.K. Finance Sanctions, General guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018, para. 4.1.1.

Although these sanctions regimes are broadly aligned, differences and discrepancies exist between the various regimes that have resulted in significant challenges to companies operating globally (which may be required to comply with multiple sanctions regimes) and have significantly increased the scope for disputes.

Detailing the U.S., EU and U.K. sanctions regimes and the differences between them is beyond the scope of this article. Besides their range and complexity, the different measures are constantly evolving such that a description of the measures in force at the time of writing will almost certainly be out of date by the date of publication. But the challenges that the differences between the various regimes cause are already apparent.

For example, export restrictions under one sanctions regime may apply to certain items that are not restricted by another sanctions regime, and an exception or licence granted by the competent sanctions authority in one jurisdiction will not have legal effect in another. Therefore, if a company manufactures goods in the United Kingdom and exports them to Russia from Germany, it will be subject to the U.K. and EU sanctions regimes, and even if a licence may be available in the United Kingdom, exporting from Germany to Russia may require separate authorisation or may simply be prohibited.

Similarly, the trade and investment restrictions differ between the various sanctions regimes. For example, the EU restrictions on the import of Russian-origin crude oil and petroleum products contain important exceptions which are not reflected in the equivalent U.S. and U.K. sanctions. The United States and the United Kingdom have imposed broad prohibitions on new investments in Russia, whereas the European Union's current investment prohibition is limited to investments in the energy sector. The United Kingdom has implemented broad prohibitions on dealing with securities newly issued by, or extending new credit to, persons connected with Russia (as defined in the U.K. sanctions regulations), going far beyond the equivalent restrictions contained in the EU or U.S. sanctions. The European Union has adopted a €100,000 limit on the amount of funds that Russian nationals can deposit in EU banks, whereas the United Kingdom, despite initial announcements, has not implemented any similar restriction.

Furthermore, significant discrepancies exist between the United States SDN list and the EU and U.K. lists of asset-freeze targets. Alongside the different rules and guidance regarding ownership and control and aggregation of shareholdings, these discrepancies are likely to result in disputes. For example, EU borrowers under credit facilities involving Russian lenders sanctioned by the United States and the United Kingdom, but not the EU, may nevertheless be unwilling to make repayments directly to the Russian sanctioned bank, particularly if the facility agent is in, for example, London. Another issue presenting particular challenges for western companies relates to dealings with Russian businesses in which sanctioned shareholders transferred their equity interest to close family members or local managers at around the time that they were designated. The European Commission has issued guidance that transfers of assets to avoid the effects of a possible future designation can amount to circumvention (which is prohibited under the sanctions regulations) and that, irrespective of the transfers of legal title, such assets should be frozen if there are reasonable grounds to believe that the assets "*belong to*"

or are "*controlled by*" the listed person.[13] However, the European Commission guidance is expressly stated not to be legally binding, and there is significant scope for disputes (and arbitrations) when an EU actor refuses to comply with a contractual obligation if it considers that its counterparty is controlled by an EU sanctioned person, despite assurances of the counterparty to the contrary.

B. The Impact of Sanctions and Russian Counter-Sanctions on International Arbitration

It is already apparent that the imposition of sanctions on Russia is interfering with existing contractual obligations between private actors, and that such conflicts are giving rise to disputes which may be submitted for resolution by arbitration (or litigation). However, besides the fact that international trade sanctions may be giving rise to international arbitrations, they are also impacting in a number of important respects the resolution of such disputes, whether by international arbitration or court litigation.

1. The Impact of Sanctions on the Ability to Participate in an International Arbitration

If a party to an arbitration is designated under a specific sanctions regime, one immediate issue is whether the counterparty (and its counsel) can participate in the arbitration, whether individuals of specific nationalities can preside over the arbitration as tribunal members, and whether particular arbitral institutions and their staff members are subject to any constraints to administer an arbitration involving such persons (including by acceptance of an advance on costs from a sanctioned party).

The extent to which parties, counsel, arbitrators or arbitral institutions may be constrained from participating in an arbitration will depend on the applicable sanctions regime. For example, under U.S. sanctions it may be prohibited for U.S. persons to participate in an arbitration outside the United States involving sanctioned persons or sanctioned countries without a licence from OFAC. Under EU or U.K. sanctions, on the other hand, participation in an arbitration involving EU or U.K. asset-freeze targets may be permissible, but if it is necessary to access funds belonging to a sanctioned person, including to pay counsel for their fees,[14] a licence from the competent sanctions authority may be required.[15]

At the time of writing, U.S., EU and U.K. sanctions do not prohibit their respective nationals (or other persons to which the respective sanctions regimes

13. European Commission, Asset Freeze and Prohibition to Make Funds and Economic Resources Available, Frequently Asked Questions, Nos. 5 and 25.

14. U.K. and the EU sanctions regulations generally provide for the possibility to release frozen funds to pay for reasonable professional fees for legal services and associated expenses. See, for example, Article 4.1(b) of Council Regulation (EU) No 269/2014 and Schedule 5, Part 1, Regulation 3 of the Russia (Sanctions) (EU Exit) Regulations 2019.

15. OFSI has issued a general licence permitting the receipt of payments from designated persons for legal services subject to certain conditions (INT/2022/2252300) and a separate licence permitting payment of funds to the LCIA to cover arbitration costs (INT/2022/1552576).