Economic Sanctions in International Dispute Settlement

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Contents

I. Economic sanctions: general characteristics

1. Significance of international economic sanctions

Economic sanctions is a general term that describes the use or threat of coercive economic measures against states, international organisations, or individuals.[1] It is the most popular coercive measure at the international level and its significance will continue to grow.

Two factors determine the importance of economic sanctions. On the one hand, after the Second World War, the use of military force in international relations was generally prohibited. As a result, states lost this basic mean to protect their rights and interests. On the other hand, there is no equivalent in the international arena to national courts or police enforcing commitments. States and international organisations are often on their own. In this situation, politicians are keen to resort to bloodless, yet eye-catching economic sanctions.

The geopolitical situation additionally increased the popularity of economic sanctions in recent years. For instance, the United States became very active in this field; as we show below, this requires special diligence from companies that settle their transactions in US dollars or use US financial institutions. Generally speaking, sanctions can affect any branch of business, from banking and insurance, through imports and exports, to foreign investments. Caution is necessary not only with respect to measures adopted by domestic authorities in a given territory (for the EU member states, these could by the national authorities of the EU Council), but sometimes also external authorities (e.g., the US Department of State) even if the company in question does not have any direct connection to the respective territory (e.g., the US).

Popularity of sanctions: the US practice

In recent years, the United States has begun to use economic sanctions very widely. This is made possible by the role of the US dollar as the primary currency in international trade.

For instance, back in 2018, then-President Donald Trump unilaterally withdrew from the nuclear deal reached with Iran by the US, France, the United Kingdom, Russia, China, and Germany. Under the agreement, Iran abandoned its nuclear weapons development programme in exchange for the lifting of UN economic sanctions, i.e., regaining access to international markets.

Trump's decision to break the agreement entailed a ban on business relations with Iran for American businesses. The US also threatened companies of third states willing to continue business relations with Iran with secondary sanctions.

The European Union opposed the US actions and tried to circumvent the sanctions. For this purpose, the EU *Instrument in Support of Trade Exchanges* (INSTEX) was established. INSTEX, cooperating with its Iranian counterpart STFI, was supposed to settle international payments without recourse to US intermediaries and outside the SWIFT system. Ultimately,

[1] M. Menkes, *Stosowanie sankcji gospodarczych – analiza prawnomiędzynarodowa (Application of Economic Sanctions – Public International Law Analysis)*, Wyd. Adam Marszałek 2011, p. 11.

the mechanism did not inspire sufficient confidence from businesses and the initiative largely failed.

In turn, in 2020 the Trump administration decided to prevent completion of the Nord Stream 2 (NS2) gas pipeline. The pipeline running on the bottom of the Baltic Sea is intended to provide an alternative channel of Russian gas supplies to Europe, bypassing Ukraine.

The US threatened the companies involved in the construction with sanctions. Despite protests by the states involved in the project, most importantly Germany, successive companies withdrew from construction (including Swiss-Dutch Allseas and Russian pipelayers, as well as Norwegian risk management and quality assurance firm DNV GL).

Popularity of sanctions: the EU sanctions framework
In January 2021, the European Commission presented a new strategy to stimulate the openness, strength and resilience of the EU's economic and financial system.[2] The strategy aims to strengthen the EU role in global economic governance. The document is based on three pillars, one of which is the promotion of uniform implementation and enforcement of EU sanctions.

New EU priorities will include the establishment of the Sanctions Information Exchange Repository and a contact point for implementation, as well as the development of a monitoring system.

2. Business Challenges

Economic sanctions are applied in a variety of situations, including "ordinary" economic competitions (e.g., US-Chinese trade rivalry), support of democracy in foreign states (most recently support of democratic opposition in Belarus, Russia or Hong Kong), and enforcement of a state's rights (for instance, anti-dumping duties imposed on foreign aviation sectors by the US and the EU), and in reaction to violence (Russia's annexation of Crimea). States and international organisations (the UN, the EU) both use sanctions. Each time, they are subject to different, sometimes overlapping, legal regimes. From a business perspective, this calls for caution. This will be particularly important in the case of financial transactions and M&A.

Contract clauses

The basic business consequence of the adoption of economic sanctions is the sudden impediment to the performance of contracts. The question then arises of who is going to carry the financial consequences of the interrupted cooperation. The best way to control this risk is to address it in the contract in question.

Various legal orders allow rendering a contract void, or at least exempting legal liability, when the contract cannot be executed for objective reasons beyond the control of the non-performing party. Such a possibility is created by, for example, *force majeure* and *state of necessity* clauses,

[2] *Communication From The Commission to The European Parliament, The Council, The European Central Bank, The European Economic And Social Committee And The Committee of The Regions*, COM(2021) 32 final, Brussels, 19.1.2021.

or hardship and frustration of contract doctrines. However, reliance on such solutions entails considerable legal risks.

While negotiating a contract, it is thus worth considering the inclusion of a specific sanctions clause. This will allow the party to avoid, for instance, "double jeopardy", that is, a situation in which the business is faced with the choice of the lesser evil: liability for contract breach or violation of a sanction regulation.

Sanction clauses

Depending on the circumstances, the contract clauses should confirm the non-sanctionable status of:

- one or both parties, including their subsidiaries, management boards or employees,
- the actual owner(s), the beneficial owner(s), or the controlling entity(ies).

The clauses may cover different stages of sanctions proceedings including:

- the investigation,
- a wind-down period (i.e., transition periods),
- the application of sanctions.

The clauses should take into account the possible jurisdiction links:

- personal—most importantly, whether the contract can be threatened as a result of primary or secondary sanctions,
- substantive—most importantly, the risks relating to the sources of financing or plans regarding transaction profits,
- territorial—most importantly, whether the contract clause should refer to some other jurisdiction than the law applicable to the contract or place of dispute settlement.

Some organisation publish specific guidelines on sanction clauses. For instance, in June 2020 the ICC Banking Commission amended its *Guidance Paper on The Use of Sanctions CLAUSES in Trade Finance-Related Instruments Subject to ICC Rules*. In January 2021, the Baltic and International Maritime Council published a sanctions clause for the container shipping sector.

Compliance and due diligence

Transnational transactions or those with foreign partners require a compliance check with various sanction regimes. In the event of errors in assessing the admissibility of transactions, it will be particularly important to demonstrate due diligence in the implementation of internal procedures and compliance. Also, transaction reporting requires adequate planning.

Depending on the business branch and scope of activity, international systems of compliance with international sanctions may have to include:

- trainings, internal reporting, and auditing,
- dedicated sanctions compliance software,
- mechanisms for halting suspicious or incompliant transactions, for example, involving a freeze of assets or suspension of the transport of goods,
- adoption of procedures and channels of communication with public administration.

Obligatory notification of foreign investments in Poland

In accordance with Poland's "Anti-COVID 4.0" statute, an investor that intends to acquire or achieve significant participation or acquire dominance in companies recognised by the legislator as sensitive is obliged to submit a notification. The investor must provide, *inter alia*, information regarding its capital structure, scope of business activity or intentions with regard to the acquired company.

Sanctions: contractual impediments and liability shield

Regardless of the obligation to respect generally applicable regulations, legal acts imposing economic sanctions may interfere with contractual relations directly. On the one hand, the performance of the contract can thus be rendered impossible. On the other hand, the relevant act may waive liability for the contract breach.

For example, based on Council Decision 2014/512/CFSP (see below) "No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Decision, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied".

Mechanisms against sanction circumvention

Modern sanctions instruments include mechanisms against circumvention. In such instances it is insufficient to abstain from direct breaches. Actions whose indirect effect would be to circumvent sanctions also may have negative consequences.

For instance, Council Decisions 2014/386/CFSP and 2014/386/CFSP prohibit participation, knowingly and intentionally, in activities the object or effect of which is to circumvent the sanctions. Similar regulations were contained in President Obama's Executive Order 13660 (see below).

Licensing procedures

Depending on the type of sanctions instrument, specific transactions may require approval or exemptions from sanctions.

Humanitarian exemptions

Trade embargos usually include an exception in the form of specific licensing procedures for the sale or shipment of humanitarian medical and sanitary items.

In February 2021, the US Government Accountability Office (GAO) released a report on US sanctions against Venezuela. The GAO has recommended that OFAC undertake systemic information tracking in order to mitigate negative humanitarian consequences of sanctions.

Challenging sanctions

Entities affected by sanctions may challenge them before domestic or EU courts. This is the case for so-called **targeted sanctions**, imposed against specific individuals.

Targeted sanctions ("smart sanctions")

"Targeted", "smart", or "intelligent" sanctions are currently considered the most humanitarian. Rather than exerting pressure on the entire economy, which has the heaviest impact on the poorest, so-called smart sanctions allow directly targeting individuals responsible for violations of law or egregious policies. Alternatively, such sanctions can be imposed on interest groups that form the backbone of the government.

In practice, proper identification of persons or property may turn out to be impossible, and others may still suffer. Yet, even where the targeted individual has been identified correctly, sanction measures should be adopted in accordance with the relevant rule-of-law standards: transparently, in accordance with the proportionality principle, with a clear indication of the legal basis and premises of the decision.

Protection against sanctions lawsuits

Sanction acts may also protect authorities from sanction suits (this is, for instance, the case of Executive Order 13660, discussed below).

Sanctions enforcement

Economic sanctions are often enforced by a complex web of cooperating administrative bodies endowed with broad investigative powers. Failure to prepare a company to submit requested explanations or documents may entail serious financial consequences.

Financial penalties for violation of economic sanctions

In 2014, French bank BNP admitted to avoiding US sanctions imposed on Cuba, Iran, and Sudan. Ultimately, the bank reached a settlement with the US government, agreeing to pay a then-record penalty of USD 8.9 billion. A year later, Deutsche Bank was obliged to pay a penalty of USD 258 million for circumventing sanctions imposed, among others, on Iran. In

the same year, Credit Agricole was fined USD 787 million, and Commerzbank USD 1.45 billion for violations.

Penalties for the violation of sanctions are not imposed on financial organisations only. In 2015, French oil company Schlumberger was fined USD 232.7 million for breach of the embargo on Iran and Sudan.

Immediate implementation of financial sanctions

Prior notification of the addressees of sanctions, e.g., when freezing assets, may enable the immediate transfer of assets and, as a result, render sanctions useless. Accordingly, for instance, Executive Order 13664 provides for the imposition of sanctions on the date of its adoption, without prior notification.

Extended liability of legal persons

Some sanctioning instruments allow for the liability of management board members and senior company officials. This is the case of the US sanction adopted related to the defence and energy sectors by virtue of *Ukraine Freedom Support Act of 2014* (see below).

3. Instruments and structure of sanctions

Economic sanctions can be conventionally divided into trade, financial, and investment measures. In practice, the measures often have a hybrid character that combines diverse elements.

Trade sanctions include various tariffs, licenses, or other controls of transactions or embargos (partial or total). Whereas the application of tariff measures (customs) is limited, among others, by WTO law, states enjoy broader freedom with regard to non-tariff controls.

Financial sanctions include prohibiting certain transactions, denying access to financing, freezing assets, or withholding financial assistance.

Investment sanctions include, in particular, qualified requirements or a general ban on investments coming from or directed to a specific country.

Secondary sanctions

States with a high degree of economic openness and strongly integrated into global markets usually cooperate with multiple and varied partners. Global competition allows for a quick exchange of suppliers of virtually any goods and services. As a result, economic sanctions imposed by one or even a group of countries can be circumvented by changing supply channels.

In order to address this limitation, the largest economies can employ secondary sanctions to boost coercive efficiency. Such instruments play an auxiliary role to the primary sanctions. Secondary sanctions force third countries (and their businesses) to limit or break commercial relations with the primary addressees of sanctions.

For example, in 2018 the US withdrew from the nuclear deal with Iran and adopted a series of economic sanctions. The EU opposed that decision and adopted a **blocking statute**, according to which compliance with the US sanctions by EU companies was prohibited. How, then, could the US enforce the sanctions against European businesses? Here is an example.

Hungarian company "A" deals only with Hungarian-Iranian trade and does not operate in the United States. Even depriving the company of access to the US market would not be a problem for it. If, however, "A" uses the services of American bank "B", the latter risks being subject to initial sanctions if it turns out that its services facilitate "A"'s transaction with Iran (illegal from the American perspective). American financial institutions will be relevant for any payment in US dollars as the intermediary of the transaction must be directly US Fedwire or the so-called correspondent banks. Ignoring US sanctions may result in high penalties for the bank (see the case of BNP Paribas above) and even exclusion from the system. In 2012, the US even managed to force the removal of Iranian banks from the SWIFT system, *de facto* denying them access to foreign markets.

As a result, Hungarian-Iranian business A may be indirectly targeted by the US sanctions as a result of bank "B"'s involvement.

In practice, it quite often turns out that these relatively simple sanctions instruments take on a rather complex legal structure. For instance, from the point of view of Czech or French businesses, sanctions imposed by the UN, the EU, and to some extent the United States are of particular importance.

Multi-layered structure of economic sanctions

In the case of UN Security Council economic sanctions, the entity competent to implement them may be the European Union, acting alone or in cooperation with its Member States. In turn, the EU, on the basis of its own general rules and according to its own procedures, will adopt detailed implementing acts addressed to specific countries, organisations, or persons. As a result, stakeholders may have to track legislation and implementing acts at three levels.

See the consolidated sanctions lists published by:

- the United Nations Security Council,
- the European Union (the EU also published an interactive map with an iconographic display describing specific sanctions regimes),
- the United States. Compliance with US sanctions is more challenging than in the case of the UN or the EU due to the multiplicity of bodies empowered to adopt sanction measures. These include the Department of State, Department of the Treasury, Department of Defense, Department of Energy, Department of Justice, etc. Moreover,

within any one administrative body, sanction lists may be kept independently for different programmes by separate organisational units (e.g., within the Department of State this is the practise of the Bureau of International Security and Non-proliferation and the Directorate of Defense Trade Controls).

II. Economic sanctions: examples of application (Ukraine/Crimea 2014)

1. Sanctions adopted by the EU

Following Russia's aggression against Ukraine in 2014, annexation of Crimea, and occupation of part of Ukrainian territory, a number of countries and international organisations adopted economic sanctions. However, Ukraine's situation is special in the sense that the UN Security Council remains paralysed, unable to adopt sanctions against a permanent member of the Council (in this case, Russia), as they enjoy veto power. As a result, states and international organisations willing to react to Russia's illegal acts have to do so on their own.[3]

In such a situation, the quasi-automatic procedures for the implementation of UN sanctions, such as those at the disposal of the EU, do not apply.[4] In the European Union, decisions on the adoption of autonomous sanctions, i.e., those not based on a UN resolution, are made by the Council of the European Union upon a joint motion by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission (Art. 29 TEU in conjunction with Art. 215 TFEU)

In this case, the European Union has adopted a variety of sanctions packages: diplomatic, targeted at individuals, targeted at economic activity in Crimea, general economic sanctions.

- **Individual sanctions** related to actions against the territorial integrity, sovereignty, and independence of Ukraine were adopted in March 2014 via Council Decision 2014/145/CFSP. Most recently, the sanction list was broadened in October 2020 (Council Decision 2020/1368/CFSP). It currently covers 192 persons and 51 other entities. In September 2020, the sanctions were renewed until 15 March 2021 (Council Decision 2020/1269/CFSP). Another set of individual sanctions, based on Council Decision 2014/119/CFSP, was renewed until March 2021 (Council Decision 2020/373/CFSP).

- **Economic sanctions related to the annexation of Crimea and Sevastopol based on** Council Decision 2014/386/CFSP. Initially, the sanctions included only the prohibition of importing goods from this area, as well as financing or insuring such transactions. Subsequently, the measures were extended to include a prohibition on investments, financing, and the provision of services related to prohibited activities.

  Selling, delivering, transferring, or exporting goods and technology by nationals of the Member States or from the territories of the Member States in the transport, telecommunications, energy, oil, gas, and mineral resources sectors are prohibited; technical assistance or brokerage services, construction or engineering services are also

[3] Basic Principles on the Use of Restrictive Measures (Sanctions), Doc. 10198/1/04 of 7 June 2004.
[4] Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Doc. 5664/18 of 4 May 2018.

prohibited in this respect. Provision of services directly related to tourist activity was forbidden. The decision includes an anti-circumvention clause.
At the same time, the EU established exemption mechanisms, e.g., for official purposes of consular missions or missions of international organisations that are beneficiaries of international immunity under international law, located in Crimea or Sevastopol, and for projects aimed solely at supporting hospitals or other public health facilities providing medical services or civil educational establishments. The sanctions were last extended until 23 June 2021.

- **Sanctions targeted at Russian individuals related to the situation in Ukraine** were originally adopted in July and September 2014 (Council Decision 2014/512/CFSP and Regulations 833/2014 and 960/2014). In March 2015, the sanctions were linked to the implementation of the Minsk Agreement, which was to take place by the end of that year; since this did not happen, the measures were kept in force. As a result, the sanctions are extended every six months, most recently until 31 January 2021.
  In addition to individual sanctions, there is also a ban on the sale and transfer of weapons and related materials; the ban covers, *inter alia*, financing, brokerage, and assistance in such transactions. This measure also included so-called "dual-use" technologies, i.e., technologies that can be used for civilian or military purposes. Russian financial institutions have been banned from accessing the primary and secondary capital markets. The sale and delivery of certain deep-sea oil exploration and production equipment is subject to export licenses.

- **Other economic sanctions:** the EU referred to the European Investment Bank and the European Bank for Reconstruction and Development to suspend financing of new projects in the region. EU-Russia bilateral and regional cooperation programmes were reassessed, leading to the suspension of some of them.

2. Sanctions imposed by the United States

The US imposed its first sanctions relating to the crisis in Ukraine in March 2014 in three Executive Orders (13660, 13661, 13662), freezing the assets of persons responsible for or participating, *inter alia*, in activities that undermine the democracy or institutions of Ukraine, pose a threat to the peace, security, sovereignty, or territorial integrity of that country, or pursue the appropriation of Ukrainian public property. Such persons were also prohibited from entering the United States and all forms of financing their activities were banned. In subsequent decrees, the list of entities subject to sanctions was extended, and in December 2014 their scope was expanded, *inter alia*, to the prohibition of investment in Crimea, import of goods, services and technology from Crimea, export, re-export, sale and supply of goods, services and technology to Crimea, and financing, guarantee or facilitation by American entities of any transactions of **foreign persons** (*sic!*) that would violate previous limitations (Executive Order 13685).

Still, in 2014 the Congress adopted two sanctions statutes concerning Russia: *Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014* and *the*

Ukraine Freedom Support Act of 2014. Under the first act, the U.S. president was granted the authority to freeze assets and bar entry to the United States of, among others, incumbent and former officials of the Government of Ukraine responsible for or complicit in acts of violence and serious human rights violations, and Russian officials (their close associates and family members) who have contributed significantly to the corruption in Ukraine, including bribery and misappropriation of public property.

The second law imposed financial sanctions and related to the defence and energy sectors. The catalogue of sanctions includes restrictions on credit and financing of exports to Russia and on government procurement, an embargo on arms and dual-use materials exports, prohibitions on banking transactions, investments, as well as sanctions on the **board of directors, managers or persons holding similar positions** at the companies in question. The list of sanctions against foreign financial institutions includes prohibitions on opening or using correspondent accounts (necessary for financial transactions involving such institutions by U.S. institutions) or payable-through accounts (for customer service by foreign financial institutions for US banking activities). The act provides for extensive exemption mechanisms.

In carrying out Presidential Executive Orders, the Office of Foreign Assets Control (OFAC), within the Department of the Treasury, placed several hundred individuals and legal entities, vessels, and aircraft on sanctions lists (*Specially Designated Nationals List SDN* and *Sectoral Sanctions Identifications List SSI*). The Bureau of Industry and Security, i.e., a unit within the Department of Commerce, stopped issuing export licenses for military, dual-use items, as well as energy-related goods for qualified users.

Presidential Executive Orders covering, *inter alia*, sanctions on Russia were codified in the 2017 *Countering America's Adversaries Through Sanctions Act* (CAATSA) in the chapter *Countering Russian Influence in Europe and Eurasia Act of 2017*. The law, which amends the provisions of the aforementioned 2014 laws imposes sanctions related to cybersecurity, oil projects, financial institutions, corruption, human rights abuses, transactions with the Russian defense or intelligence sectors, pipeline exports, and privatisation of public property by public officials, among others. Politically, most significant was the imposition on the president of the obligation to obtain the consent of Congress for the suspension or lifting of sanctions.

In addition to the most important Russian and Ukrainian politicians, officials and military personnel, the sanctions lists include, among others, four Russian public banks (Sberbank, VTB Bank, Gazprombank, Rosselkhozbank) and its development bank (VEB), public oil companies (Rosneft and Gazpromneft, pipeline systems company Transneft), but also a private oil producer (Novatek), a public company in the defence and high technology sector Rostec, and Lukoil and Gazprom.

In the following years, the issue of sanctions against Russia, and in particular the coordination of activities between the United States and the European Union, became complicated due to controversy over the construction of the NS2 pipeline. The US has consistently opposed the investment and adopted additional sanctions against European and Russian entities involved in the project (FY2020 National Defense Authorization Act further strengthened in late 2020 in the FY2021 NDAA).

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The above example is for reference only. However, the assessment of whether a given country, company or person is subject to sanctions—in this case or others, such as the sanctions against Belarus, China, Cuba or other sanctioned regimes—requires a detailed assessment each time. Queritius offers assistance with such comprehensive legal analysis.

III. Economic sanctions: legal remedies

1. Delisting

Without going into deliberate attempts to circumvent sanctions here, the very process of transliterating and transcribing names and surnames for the purpose of converting between scriptures provides ample opportunities for confusion. In such a situation, even the mandatory notification of the interested parties about the imposition of sanctions—assuming it reaches the addressee—does not solve the problem.

In order to help individuals concerned to protect their rights, some organisations have adopted special procedures in this regard. For instance, United Nations Resolution 1730(2006) established a *De-listing Focal Point* to formally investigate and then act as an intermediary in the transmission of requests for delisting from a sanctions list to the respective government. The point also has the competence to grant exemptions from sanctions on humanitarian grounds. While most governments accept requests for delisting directly or through the Focal Point, for nationals and residents of France, Hungary, and the United Arab Emirates, the Contact Point is the only accepted addressee of requests. Points can be used by all stakeholders with the exception of entities covered by the "ISIL (Da'esh) and Al-Qaida sanctions" lists; the latter submit a request to the UN Ombudsman.

The seat of the Focal Point is in New York at the United Nations headquarters. The indicative application examination period is four months. The system of sanctions checks raises numerous reservations as to compliance with human rights and respect for the principle of a fair trial.

2. Recourse before a domestic court

The primary forum for questioning the legitimacy or legality of the sanctions imposed is usually the national courts. Depending on the circumstances, this solution has advantages and disadvantages. For now, we limit it to two remarks. First, the use of the national forum may sometimes be necessary and in other cases it may actually deprive one of access to the international protection measures indicated below. Second, in some cases, the possibility of benefiting from international protection may be conditional on the relevant allegations being invoked already at the stage of national proceedings. The use of such arguments is then of a strategic nature, despite the fact that at the domestic stage of the procedure they do not appear to be obvious or have no significant chance of success.

Economic sanctions before domestic courts

In *Mohammed Jabar Ahmed et al.*, three men whose assets had been frozen on the basis of The Terrorism (United Nations Measures) Order 2006, brought a suit against Her Majesty's

Government. Administrative decisions on the imposition of sanctions contain information that these persons supported or **could have provided support** in the commission of terrorist acts, but due to the sensitive nature of information on the proceedings, no details could be disclosed. Additional sanctions were imposed, as it later turned out, based on the Al-Qaida and Taliban (United Nations Measures) Order 2006.

Lord Sedley compared the legal situation of the three man to enslavement. Lord Hope assessed the impact of the sanctions on the lives of the three families as soulless and crushing.

The dispute reached the Supreme Court, which examined, e.g., the legality of the administrative acts, respect for the constitutional principles of proportionality and legal certainty, and the availability of judicial review procedures. The judges ruled that the UK government had exceeded its mandate in this case despite acting on the basis of UN resolutions.

Economic sanctions before domestic courts

On August 6, 2020, US President Donald Trump issued Executive Order prohibiting further transactions with TikTok within 45 days. On August 14, he obliged the owner, ByteDance, to withdraw from the investment arm of Musical.ly (now TikTok) within 90 days. As a result, ByteDance, was forced to withdraw investments in the US market and even before that, the company faced the additional legal risk of losing application hosting.

Eventually it avoided blocking by Apple's App Store or Google Play thanks to a court's temporary injunction. However, due to the general nature of the provisions of the EO, the future of the lease of the company's servers in Virginia, employment contracts, contracts for banking and legal services, user data, etc. faced legal uncertainty. This only increased the risk involved in the valuation of assets shared under constraint.

The sanctions of August 6, 2020, were imposed under the *International Emergency Economic Powers Act*, thus far applied against foreign governments or criminals, but not to foreign companies.

The US administration made it clear that the favourite in the race to take over TikTok was a company related to the president.

In this situation, TikTok decided to sue the US government in the federal court of the District of California, including for breach of the right to a fair trial.

3. Complaint to the European Court of Justice

Among the judicial mechanisms available to EU citizens and EU companies (i.e., indirectly also to entities from third countries who have registered business activity in the EU), particularly important in the context of economic sanctions is the possibility of challenging the lawfulness and compliance with general principles of EU law of both actions taken by the EU Member States and bodies of the EU itself.

Economic sanctions before the CJEU

The dispute over the freezing by Sweden of the assets of Saudi Yassin Abdullah Kadi has become a landmark case. The situation concerned listing Kadi as an Al-Qaida supporter in accordance with the UN Security Council sanctions. Kadi challenged the sanctions first in national courts and then in EU tribunals.

The General Court adjudicating in the first instance refused to examine the legality of EU law, considering that it was justified by the UN Security Council's absolute norms of international law.

On appeal, the European Court of Justice disagreed. The judges examined the legality of the relevant acts of EU law and came to the conclusion that the protection of fundamental rights is the essence of the European order. As a result, obligations towards other organisations, including the United Nations, do not exempt from respect for fundamental rights.

In December 2020 the Court of Justice has overturned the lower court judgments and thus annulled sanction listing of, *inter alia*, Hosni Mubarak, the former President of Egypt, his wife Suzanne Thabet, their sons Gamal and Alaa Mubarak, and their sons' wives Khadiga El Gammal. In December 2020 the EU General Court has annulled the 2019 acts listing of Mykola Azarov, the former Prime Minister of Ukraine.

4. Complaint to the European Court of Human Rights

With regard to the actions of states-parties violating the provisions of the European Convention on Human Rights or its additional protocols (in particular Art. 1 of Additional Protocol 1 on the protection of property rights), victims have the right to bring a complaint against such state to the European Court of Human Rights (ECHR). This path is available after the domestic means have been exhausted, i.e., after the end of the domestic proceedings by a final judgment against which there is no further appeal. Therefore, access to the ECHR is possible with a delay of several years and, at the same time, the advantage of this mechanism is its accessibility to third-country nationals.

Economic sanctions before the ECHR

Based on Resolution 1483(2003), the UN Security Council imposed sanctions on Saddam Hussein, his family, and former regime officials. On this basis, the Swiss government froze the assets of the former financial director of Iraqi intelligence, Al-Dulim, and his company Montana Management Inc. Al-Dulim failed to challenge these measures before Swiss courts. Ultimately, he brought a complaint against Switzerland before the ECHR, alleging, *inter alia*, a breach of the right to a fair trial.

The ECHR agreed with the applicant that the imposition of financial sanctions by the Security Council did not mean that their implementation can violate the fundamental principles of the legal order. The Court thus confirmed its earlier judgments in *Al-Jedda* and *Nada*.

5. Complaint to the UN Human Rights Committee

The UN Human Rights Committee is an expert body established to monitor implementation of the International Covenant on Civil and Political Rights. Out of the 173 states-parties to the Covenant, 116 acceded to the first Additional Protocol allowing the lodging of an individual complaint against a state violating the provisions of the Covenant. This right is granted, *inter alia*, to Polish or Hungarian citizens. However, for various reasons, including legally non-binding decisions on complaints, this path shouldn't constitute the primary recourse against sanctions.

Economic Sanctions before the UN Human Rights Committee

In 2008, the Human Rights Committee reviewed an individual complaint in *Sayadi*. The complaint was lodged by a Belgian couple who ran a branch of an American NGO in Belgium. The organisation has been subject to UN sanctions against Al-Qaida, Osama bin Laden, and the Taliban (UN SC Resolution 1267(1999)). As a result, the couple was placed on the sanctions list, and Belgium froze their property and prohibited them from leaving the country. The reasons for the imposition of sanctions have not been revealed.

The applicants complained that Belgium had thus breached, *inter alia*, their right to a fair trial, and the results of this action stripped them of a number of fundamental human rights. The Committee confirmed the violation by Belgium of their freedom of movement and of the applicants' right to protection of honour and reputation.

The Committee, however, refrained from assessing the compliance of Belgian actions implementing the sanctions of the Security Council with the obligation to recognise the primacy of the provisions of the United Nations Charter over other international obligations. As a result, the decision was mostly symbolic.

6. Contractual liability

In a situation where the establishment of economic sanctions makes the performance of a contract impossible, but which is not contractually regulated, a conflict of interest in the sharing of unforeseen costs becomes inevitable.

Comprehensive analysis of a contract will then be necessary, taking into account the law applicable to the contract, the forum for dispute resolution, and its location (which may indirectly affect the interpretation of other provisions of the contract).

The examples below illustrate two different approaches used by courts to assess the **risk** of sanctions.

Sanction clauses in litigation

Lamesa Investments Ltd was a company registered in Cyprus that, through a company in the British Virgin Islands, was beneficially owned by Russian citizen Viktor Vekselberg. The company lent GBP 30 million to Cynergy, a UK-based retail banking services company. Interest on the loan was payable semi-annually.

In April 2018 the US OFAC placed Vekselberg on the sanctions list, with the result that Lamesa was also blocked from trading under US law. There was no question that US financial institutions or businesses could not pursue Vekselberg or Lamesa contracts from then on.

Because a significant portion of Cynergy's transactions were dollar-denominated and, as a result, settled through correspondent bank accounts, continued cooperation with the Cypriot entity risked subjecting the British bank to secondary sanctions in the US market. This would have posed a serious threat to the bank's survival. Cynergy therefore invoked the sanctions clause, allowing it to refuse payment in order to comply with its obligations under mandatory regulations. The bank refused to pay GBP 3.6 million in interest.

Lamesa sued Cynergy, alleging that the sanctions were not imposed under either English or Cypriot law and that there was no basis for applying US law to the contract. Moreover, the US statute only permitted secondary sanctioning of Lamesa, and did not prohibit the loan as such, so it was "merely" a likely event.

Ultimately, in July 2019 an English court ruled that the contract clause was broad enough to include also the risk of secondary sanctions.

Sanction clauses in litigation

Mamancochet Mining acquired the rights under a marine cargo insurance contract that protected the insured, among others, against the risk of theft of steel billet cargoes shipped from Russia to Iran.

The insurer did not contest the rights under the policy. Instead, stated that due to the imposition of sanctions on Iran, it could not make payments without risking imposition of US economic sanctions. This was because the company in question was controlled by US investors. The defendant invoked the sanctions clause, waiving its contractual liability for failure to make payments where doing so would expose it to economic sanctions.

Mamancochet, on the other hand, argued that the dispute arose during the transition period between the imposition of US sanctions and their mandatory application to all transactions (i.e., *wind-down period*), and thus the relatively low risk of sanctions coverage was not covered by the contractual sanctions clause.

In October 2018, the court agreed with Mamancochet. The judges ruled that the agreement covered "expose to sanctions" rather than the more hypothetical "exposure to the risk of sanctions." In contrast, the insurance payment fell within the scope of the exclusion during the transition period. This understanding of the sanction clause was reinforced, according to the court, by the fact that the duty to indemnify was merely **suspended** insurer was not released from liability.

The divergent interpretations of the sanction clauses in the cases cited above clearly demonstrate that courts' interpretation of them delve in great detail into both the structure of the clauses themselves and the relevant sanction mechanisms. Thus, it is impossible to create a one-size-fits-all contractual or litigation solution here.

7. Sanctions as an impediment to arbitration

Regardless of the doubts signalled above regarding the feasibility of the contract, the imposition of economic sanctions may create practical obstacles to the implementation of even the most obvious rights under arbitration/dispute-settlement clauses. For instance:

- Nationality of the proposed arbitrator or the seat of the arbitration tribunal may prevent constitution of the tribunal;
- Although an arbitration clause may cover controversy related to the performance of the contract, it may turn out that its scope does not include issues related to the interpretation of public law (i.e., application of sanctions)—in some legal orders, a dispute may thus lose so-called arbitrability;
- Conduct of arbitration will be impossible where one of the parties to the proceedings is subject to targeted sanctions;
- Even if the tribunal could be constituted, it may turn out that one of the parties will be unable to cover its share of the costs;
- Successful conclusions of the substantive part of the dispute may lead to yet another stage of difficulties relating to award enforcement;
- Arbitral award may be annulled by a domestic authority based on public policy grounds.

Finally, even if all obstacles can be overcome, sanctions may require time-consuming compliance procedures from tribunal secretariats or arbitrators.

Sanctions as an impediment to arbitration

Military ships manufactured by Italian shipbuilding companies Fincantieri Cantieri Navali Italiani and Oto Melara were covered by the UN sanctions on Iraq. Even though the Italian companies were prevented from delivering ships to Iraq, their Syrian intermediary demanded payment of a commission.

The companies defended themselves by invoking non-arbitrability of the dispute arising in connection with the imposition of sanctions on the basis of the norms of generally applicable law. The ICC arbitral tribunal and Swiss federal court dismissed the non-arbitrability plea.

The Italian companies turned to the Italian courts with a similar request. The first instance ruled like the arbitration tribunal and the Swiss court. Yet, the Genoa court of appeals agreed with the companies.

However, it should be noted that the dismissal of the non-arbitrability claim by the ICC tribunal did not yet decide the fate of the dispute on the merits. In other words, the fact that the sanctions were in force could still exempt Italian companies from contractual liability.

Sanctions and arbitration/dispute settlement clauses under Russian law

In 2020, Russia passed a law under which Russian entities subject to sanctions can apply to a Russian court for a court order prohibiting litigation in a foreign court or international arbitration tribunal. Unenforceability of dispute settlement clauses may be declared in any dispute involving a sanctioned person, or where the grounds of the dispute are foreign sanctions against a sanctioned person.

Russian case law in this regard is so far sparse and inconsistent. However, on December 9, 2021, in the high-profile *Uraltransmash vs PESA* dispute, the Russian Supreme Court confirmed the exclusive jurisdiction of domestic courts in such cases.

The court's judgment does not have precedential power. However, in light of the Russian aggression against Ukraine in February 2022 and massive pushback from the international community, one should assume that Russian courts will uphold this approach in related disputes.

Although foreign entities have procedural means to uphold a contractual dispute resolution clause against a Russian law, the actual ability to enforce a judgment or award outside Russia may ultimately be decisive.

Conclusions

The legal assessment of the impact of economic sanctions on the conditions of international business leads to several paradoxical observations.

Fist, both economic globalisation and the anti-globalisation political climate increase the risk of economic sanctions. On the one hand, economic globalisation increases states' dependence on external sources of supply. This, in turn, creates space for the use of economic forms of coercion. On the other hand, political programmes limiting globalisation do not affect technological progress—the main driver of globalisation—but often lead to the rejection of legal restrictions on the use of economic coercion. As a result, these two contradictory trends together contribute to the growing popularity of economic sanctions. For businesses, this means additional burdens in terms of constant monitoring of the legal environment and careful planning of transactions.

Second, greater integration of economies both allows the application of sanctions and limits their effectiveness. On the one hand, economic sanctions are possible only in the case of countries that are even partially dependent on foreign goods and services. On the other hand, the possibility of diversifying sources of supply limits the effectiveness of sanctions adopted by individual entities. From a business perspective, such a situation is both an opportunity and a challenge. The need for alternative supply chains creates new opportunities. The main threat will be a violation, even unintentional, of secondary and extraterritorial sanctions.

Third, and potentially most importantly, political questioning of economic multilateralism leads to an absurd attempt to detach how foreign business is treated at home and one's own interests abroad. Domestically, states strive to protect national interests and domestic businesses at the expense of foreign ones. The very same states attempt, however, to extend protection to their own businesses active on foreign markets. This often means that the investor state's protection abroad is available only to the largest companies, while small and medium-sized businesses are often on their own. In the long run, such actions lead to the adoption of similar policies by other countries and, as a result, to an overall increase in transaction costs.

The complex and highly variable regime of international economic sanctions requires caution when planning and conducting business, or settlement of resulting disputes. Queritius will gladly suggest whether and to what extent this may require our support.

Contact

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