

# Kluwer Arbitration Blog

## On the Role of UN Security Council Resolutions in International Commercial Arbitration

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Last year, international media reported that the Ministry of Defense of Iran and Aerospace Industries Organization have commenced an arbitration against their Russian state-owned defense contractor Rosoboronexport over the latter's refusal to deliver five batteries of the potent S-300 surface-to-air missiles under the contract signed back in 2007. Following the adoption of UN Security Council Resolution 1929, which banned supply, sale or transfer of arms to Iran, Russia's then President Medvedev issued an order to discontinue performance of the sale contract. Shortly afterwards, Rosoboronexport refunded the USD 167 million advance payment.

The Iranian party initially sought USD 900 million in damages. Subsequently, the amount in controversy rose to USD 4 billion. The averment of the Iranian envoy to Russia, Ambassador Sajjadi, that the Geneva-seated tribunal added another USD 3 billion to the quantum in the midst of the ongoing arbitration "without the claimants' request and notice" sounds somewhat bewildering. Even though the claim at hand is quite a straightforward political maneuver, the legal aspects thereof do deserve closer attention. In the author's view, the legal effect of UN Security Council Resolutions in the framework of international commercial arbitration is one of the most prominent issues raised by the controversy over the failed arms deal.

### The dilemma

The fundamental question here is whether the imposition of economic and other sanctions by the Security Council serves to relieve a party to any relevant agreement from its contractual obligations. In the same vein, it is not immediately clear if a state (its subdivision) or a private entity against which a UN embargo is directed has a legal basis to seek damages arising out of the other party's compliance with a UN Security Council Resolution.

On the assumption that the subject matter of the contract (i.e., sale of S-300 missiles) is encompassed by UN Security Council Resolution 1929, the claim against Rosoboronexport constitutes an attempt to overcome the UN embargo that has been prompted by Iran's failure to observe previous Security Council Resolutions. Because UN Resolutions are often issued as a response to wrongful conduct of a state, the principle *ex turpi causa non oritur actio* (which sets forth that a claimant is unable to pursue a cause of action arising out of her own illegal act) may suggest that the state lacks a solid foundation to claim compensation for the economic consequences of its wrongdoing. Obviously, the aforesaid principle also applies to non-state claimants acting contrary to the terms of a UN Resolution. The chances of *bona fide* claimants in

proceedings relating to UN sanctions that are at odds with existing contractual relationships of the parties are less clear.

### **Historical precedent and modern interpretation**

In 1998, the UN Compensation Commission (UNCC) had to decide on whether corporate claimants may pursue claims for losses associated with business activities that violated the UN embargo against Iraq. UN Security Council Resolution 661 adopted on 6 August 1990 under Chapter VII UN Charter was designed to address the invasion of Kuwait by Iraq. In particular, it ordered states to prevent the availability of funds or other financial or economic resources to Iraq and Kuwait, or to any commercial, industrial or public utility operating within them, except for medical or humanitarian purposes.

The UNCC held that losses incurred by claimants in connection with the transfer of goods and capital into Iraq were not compensable as the underlying transactions violated the UN sanctions. The line of reasoning employed by the UNCC indicates that non-compliance with UN Security Council Resolutions results in the inability of a transgressor to obtain compensation for damages arising out of or associated with its misconduct.

On its face, the UNCC's stand on the role of UN Security Council Resolutions calls for two remarks. First, the Compensation Committee reaffirmed the binding nature of Resolutions issued in terms of Chapter VII UN Charter. As will be discussed below, the legal status of UNSC Resolutions adopted under the preceding Chapter is not a settled matter. Notably, the UNCC award recognized, albeit implicitly, that nationals of the United Nations member states are also bound by UN Resolutions, even when the language of a Resolution expressly addresses state actors. Second, the UN adjudicatory body indicated that rights derived from commercial contracts that are performed in violation of UN Security Council Resolutions generally do not enjoy legal protection.

In light of the cited UNCC decision, should the Russian state-owned arms manufacturer deliver missile systems to Iran in breach of a UN Resolution and not get paid, then, more likely than not, the seller would not be able to enforce its contractual entitlements against the Iranian parties. But does this corollary justify a conclusion that a mandatory UN Resolution may effectively relieve a party from its contractual obligations assumed prior to the imposition of economic restrictions? The author is inclined to answer in the affirmative, for to hold otherwise is equivalent to stating that either party to a contract which runs counter to UN sanctions is effectively trapped between the negative consequences of non-compliance with binding UN Security Council Resolutions (i.e., loss of legal protection of the party's contractual rights) and those of contract breach. Technically, a UN Resolution could be deemed to operate in many different ways depending on the interrelation between the municipal law applied to any given commercial agreement and international law.

### **Legal status of UN Security Council Resolutions**

As mentioned previously, the effect of UN Security Council Resolutions is subject to controversy in literature and practice. Some scholars tend to differentiate between Resolutions passed under Chapter VI (Pacific Settlement of Disputes) and Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression) UN Charter by ascribing the binding character to the latter category of Resolutions only. It is frequently argued that Chapter VI Resolutions are not legally binding because they have no enforcement mechanism. However, this view was countered by the majority of the ICJ panel in the *Namibia* advisory opinion (1971),

which stated in the relevant part the following:

The Court stresses that a binding determination made by a competent organ of the United Nations [in the Security Council Resolution 276 (1970)] to the effect that a situation is illegal cannot remain without consequence ... By occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation.

The Court also held that the interpretation of the Security Council decisions taken under Chapter VI as non-binding declarations would render Article 25 UN Charter (which obligates the UN members to accept and carry out decisions of the Security Council) “superfluous, since this [binding] effect is secured by Articles 48 and 49 of the Charter”, and that the “language of a resolution of the Security Council should be carefully analyzed before a conclusion can be made as to its binding effect”. It bears noting that the ICJ stand on the legal effect of UN SC Resolutions is not undisputed as it is sometimes contended that the ICJ reading of UN decisions undermines the structural division of competencies foreseen by Chapters VI and VII.

Unlike their Chapter VI counterparts, Resolutions adopted in terms of Chapter VII are largely recognized as binding thus forming part of the body of international public law. International arbitral tribunals are thus able to apply norms embedded in mandatory UN Resolutions, where appropriate, in like manner as they would enforce other international law rules, provided that all disputing parties (or their home states) fall within the UN Security Council territorial ambit of regulation.

In the case at hand it is hard to identify a reason for non-application of UN SC Resolution 1929 to the merits of the pending dispute between Iran’s Ministry of Defense, Aerospace Industries Organization and Russia’s leading arms producer Rosoboronexport. For one thing, the mandatory character of the said Resolution is quite obvious as the text thereof explicitly states that the Security Council adopted it “Acting under Article 41 of Chapter VII” UN Charter. By the same token, all three parties to the arbitration proceedings are either directly or indirectly bound by the terms of UN Resolution 1929. Therefore, the arbitral tribunal in the present case will most likely not be able to avoid passing on the fundamental issue of whether the subject matter of the terminated SPA (sale of S-300 missiles) is encompassed within UN Security Council Resolution 1929, i.e., to apply and give interpretation to a UN decision, even though the ongoing proceedings distinctly fall outside the UN dispute settlement system.

### **Concluding points**

Commercial arbitration disputes involving public law matters are not rare. Yet a number of arbitral proceedings related to UN Security Council decisions is rather modest which may explain the lack of attention to the topic in scholarly literature.

In the author’s view, the full potential of UN Security Council Resolutions in international arbitration may simply be not yet discovered, although such UN decisions often intrude into the private law domain. First, the jurisprudence of the UN Compensation Committee implicitly attests that the Security Council Resolutions, especially those imposing economic sanctions, may create obligations for non-state actors. Second, UN Security Council decisions can affect the substantive rights of private parties to commercial contracts that run counter to UN SC Resolutions. Third,

there are no reasons to believe that international arbitration tribunals are prevented from interpreting and applying the Security Council Resolutions to commercial disputes, on a case-by-case basis, where the merits thereof so require.

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