Kluwer Arbitration Blog

2024 PAW: Sanctions and Arbitration: Lessons Learned and Possible Strategies

Nadia Darwazeh and Sophie Grémaud (Clyde & Co) · Saturday, March 23rd, 2024

As part of the 2024 Paris Arbitration Week, Clyde & Co hosted a panel on "Sanctions and Arbitration: Lessons Learned and Possible Strategies."

The discussions addressed the impact of economic sanctions before, during, and after arbitral proceedings, from the perspective of professors, arbitrators, counsels, and institutions.

The panel, moderated by Nadia Darwazeh, comprised Emmanuel Jolivet (General Counsel at ICC and ICC Court of Arbitration), Professor Caroline Kleiner (Arbitrator and Tenured Professor of law at Université Paris Cité), Ana Stani**?** (Founder and Lawyer at E&A Law), and Sophie Grémaud.

The panellists kicked off by defining sanctions before considering their impact during contract enforcement. Subsequently, they addressed challenges that emerge during arbitration proceedings and examined the impact of economic sanctions on post-arbitration proceedings, including the annulment and enforcement of arbitration awards.

This post discusses some of the key takeaways from the event.

Definition and Scope of International Sanctions

Caroline Kleiner opened the discussion and pointed out that the terminology "economic sanctions" is not entirely accurate and that we should rather refer to coercive measures.

Sophie Grémaud then expanded on the question of extraterritoriality of sanctions and clarified the distinction between primary sanctions, which are applied within the jurisdiction of a State, and secondary sanctions, which extend beyond that jurisdiction. While the United States (US) is renowned for employing secondary sanctions, the European Union (EU) in principle steadfastly refuses to do so.

Nonetheless, this position should be nuanced, and three mechanisms were broached to illustrate a debatable extraterritorial effect of the EU sanctions regimes.

First, the terms of the legislation implementing EU sanctions are being drafted more and more

broadly, which increasingly requires one to consider factors or actions that occur beyond the EU borders.

Second, the EU began to adopt provisions against the circumvention of their sanctions, including against facilitating infringements of such prohibition. The EU can now target third-State entities with individual sanctions for carrying out prohibited transactions.

Third, the EU developed horizontal sanctions regimes which entail measures affecting individuals and entities, regardless of their locations. For instance, the EU Regulation 2020/1998 of 7 December 2020 implements restrictive measures against legal and natural persons involved in serious human rights violations and abuses, allowing human rights violations to be targeted without being limited to existing geographical regimes.

Emmanuel Jolivet confirmed that the number of sanctions had increased dramatically over the past years. For instance, since the beginning of 2024, 25% of the ICC cases involve sanction issues. Accordingly, practitioners should "always try to understand where [they] can stand."

Amongst the encountered difficulties, the following were listed: the inconsistency in the translation between the different sanctions regimes, the combination of various regimes in a single legal system, as well as the disparate and evolving interpretation of sanctions depending on the State applying the sanctions.

Practitioners should pay more attention to sanctions regimes than they tend to do. Emmanuel Jolivet stated that "a lack of awareness is the key problem" and that "most of the problems come from the lack of discussion with the stakeholders."

Challenges at the Contractual Performance Stage

Ana Stani? emphasised the importance of understanding the sanctions regimes. She noted that "the fact that one thing is prohibited does not mean that there are no liabilities down the line."

Misunderstandings around the sanctions regimes may stem from political statements, such as those made by the European Commission in the aftermath of imposing sanctions in response to the invasion of Ukraine. Even though some of those statements are not always legally true, they did not prevent some economic actors from relying on them and terminating their contracts.

Ana Stani? provided an example of a credit insurance company that decided to terminate all of its contracts when the first set of European sanctions against Russia was adopted, irrespective of the particularities of each situation. These actions led to the initiation of several arbitration proceedings.

Thus, understanding the sanctions regime is paramount and interested parties should beware of political statements.

Challenges During Arbitration Proceedings

From an arbitral institution's perspective, Emmanuel Jolivet listed six challenges that may arise

during the arbitral procedure.

- Challenge 1: Identifying the risk of the stakeholder. For instance, the impact of sanctions on insurance policies is often overlooked.
- Challenge 2: Anticipating and preventing the risk. For now, most arbitral institutions lack specific rules that handle sanctions, which implies that practitioners should be more thoughtful in determining the issues that may be at stake and the ways to solve them.
- Challenge 3: Identifying and communicating information. While there is an inherent tension between the need to communicate and confidentiality, communication can solve most of the issues that arise due to sanctions regimes. Establishing clear rules on communication at the outset of a dispute is key.
- Challenge 4: Implementing measures in compliance with any applicable policies.
- Challenge 5: Using technology. At present, many stakeholders do not fully adhere to sanctions regimes. For example, in strict terms, using Microsoft products and its services is prohibited in sanctioned countries. Practically, this means that a legal counsel would be unable to use Teams to conduct calls in a case involving parties from sanctioned countries, such as Iranian parties. Emmanuel Jolivet in particular added on this point that "if you really want to play by the book, it makes your life really difficult."
- Challenge 6: Managing financial flows. In addressing payment issues, it is crucial to consider the entire financial flow to ensure that all intermediary banks operate outside the scope of any sanctions regime. Potential solutions include engaging in discussions with regulators and obtaining approval for established procedures.

From arbitrators' perspectives, Ana Stani? and Caroline Kleiner explained that those challenges can be separated into two categories: one dealing with actual litigious transactions, and the other concerning the conduct of arbitral proceedings. The latter group raises a number of very practical difficulties.

Challenges at the Annulment and Enforcement Stage

Sophie Grémaud gave some insights on the annulment issues of arbitral awards on the grounds that the recognition or enforcement of the award would violate international public policy (Article 1520, 5 of the French code of civil procedure).

Sophie Grémaud discussed three French court decisions:

- In a decision of June 2020 (CA Paris, 3 June 2020, SA A. v N.), the Court ruled that both UN and EU sanctions are part of international public policy, while US sanctions are excluded as they are not expressions of "international consensus" in this case.
- In a decision of April 2021 (CA Paris, 13 April 2021, Guinee v AD Trade), the Court confirmed that the annulment judge is the judge who determines whether the award is in conformity with international public order (and not whether the contract conforms with a domestic or international standard). The annulment judge must therefore assess whether the recognition or enforcement of the award is likely to contravene sanctions at the time when s/he renders her/his decision (and not at the time when the award was rendered, or at the time when the facts giving rise to the dispute occurred).
- In a decision of October 2021 (CA Paris, 5 October 2021, DNO v Yemen), the Court held that it

> cannot extend the scope of sanctions but can conduct a careful factual analysis to assess whether the recognition or enforcement of the award is likely to contravene the relevant sanctions, by indirectly making funds available to individuals and entities targeted by the applicable sanctions. The Court also confirmed that it was not its role to assess whether a party might hypothetically use the money owed to violate international public order through human rights abuses in the future.

Caroline Kleiner continued to discuss the enforcement of arbitral awards. Under the New York Convention, four grounds could potentially be invoked to refuse enforcement, including on the basis of arbitrability and/or public policy. Emphasis was placed on the issue of payment. Arbitrators must be especially cautious in cases where the final award could entail a payment to a sanctioned entity or individual upon enforcement. This possibility could be addressed beforehand by the arbitrators.

To conclude the panel, Ana Stani? said a few words on the effects of sanctions and especially the impact of the exclusion from the SWIFT banking system. Consequently, transactions involving sanctioned entities or individuals are now conducted in alternative currencies and through other financial institutions. In essence, the EU-imposed sanctions regimes have catalysed the emergence of a parallel payment mechanism. As of January 2024, the BRICS countries announced the establishment of a new payment system. The question now is how this evolution will affect EU operators.

Conclusion

International sanctions will without a doubt remain a key feature in the European and international law landscape.

While these sanctions do not hinder the arbitral process, stakeholders in international arbitration should be mindful of their impact and any resulting implications to ensure the efficiency of the arbitral process.

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data of leading arbitral institutions, to uncover potential conflicts of interest.

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