

# Kluwer Arbitration Blog

## LIDW 2024: Navigating the Practical Implications of Sanctions in International Arbitration

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As part of the 2024 London International Disputes Week (“LIDW”), Kirkland & Ellis hosted an event titled “[Panel Session on Sanctioned Countries](#)”. The panel, comprised of [Anna Bradshaw](#) (Peters & Peters), [James Freeman](#) (A&O Shearman), [Maya Lester KC](#) (Brick Court Chambers), [David Lorello](#) (Covington & Burlington), [Jon Newman](#) (Kirkland & Ellis), and [Dara Shagal](#) (Pinna Goldberg), discussed the practical implications of sanctions in international arbitration. Similar topics were covered in an event titled “[Arbitrating Sanctions Disputes: Key Legal Considerations and Developments](#)“, hosted by Debevoise & Plimpton. The panelists comprised of [Konstantin Bureiko](#) (Debevoise & Plimpton), [David Davies KC](#) (Essex Court Chambers), [Tony Dymond](#) (Debevoise & Plimpton), [Bibek Mukherjee](#) (Essex Court Chambers), and [Angeline Welsh KC](#) (Essex Court Chambers). This post captures the key insights and takeaways from both events.

### Regulatory Challenges

One of the primary issues arising from economic sanctions in international arbitration is the need to comply with various regulatory requirements. Dr. Bradshaw explained that legal practitioners must determine whether they need specific licenses to represent sanctioned clients or receive payments for their services. They must also stay vigilant of evolving reporting obligations and understand how these regulations impact their clients, as ignorance can lead to inadvertent breaches and severe penalties. The regulations can differ significantly depending on the entities involved, the jurisdiction and the seat of arbitration. This regulatory maze often results in delays and additional compliance burdens, complicating the arbitration process.

### Logistical Challenges

Sanctions introduce several logistical difficulties into the arbitration process. Mr. Newman noted that, for instance, arbitrators may be reluctant to accept nominations due to the complexities involved in dealing with sanctioned parties. This reluctance can limit the pool of available arbitrators, delaying the constitution of tribunals. Travel bans, moreover, may prevent parties or key witnesses from providing their oral arguments or testimonies in person, thus requiring virtual

hearings. While virtual hearings are a practical solution, they are not without their downsides, as nuances can be lost, potentially compromising the perceived fairness of the proceedings. Furthermore, securing payment and managing costs in cases involving sanctioned entities requires meticulous planning and often necessitates applications for security for costs to mitigate the risk of non-payment. This not only results in procedural delays but also creates uncertainty in the arbitration process.

### **Substantive Challenges**

The responsibility to enforce sanctions lies with the criminal authorities in the relevant jurisdictions. Mr. Newman, however, observed that arbitral tribunals must adjudicate disputes when sanctions impact contractual performance. For example, if sanctions or export controls hinder the performance of a contract, the tribunal must decide whether non-performance is justified. This involves complex legal questions, such as whether sanctions have made performance impossible and how this affects contractual enforcement under the laws of various jurisdictions.

Mr. Freeman elaborated that the complexity of this issue is compounded by differing legal interpretations and enforcement standards across jurisdictions. For instance, Russian counter-sanctions and legislative reforms, such as Article 248 of the Russian Civil Procedure Code, allow Russian courts to assert jurisdiction over disputes involving sanctioned parties, notwithstanding arbitration agreements specifying foreign forums. This provision creates jurisdictional conflicts, such as anti-suit injunctions and parallel proceedings in Russia, and poses a significant challenge to the enforcement of arbitral awards.

### **Judicial Developments**

Ongoing legal proceedings in the UK and beyond highlight the evolving landscape of sanctions in arbitration. The following sections examine some of the most recent developments. The outcome of these cases will significantly influence the role of sanctions in arbitration and reshape the broader legal framework that governs these disputes.

#### *The Notion of “Control” under UK Sanctions Law*

Mr. Bureiko provided insights into the [Sanctions and Anti-Money Laundering Act \(2018\)](#), focusing on asset freeze sanctions. These sanctions freeze the funds or economic resources owned, controlled or belonging to designated individuals, and prevent any funds or economic resources from being made available to them, directly or indirectly. Complications arise in determining who is affected by these restrictions beyond the specifically designated individuals. Under UK law, an asset freeze also applies to entities owned or controlled, directly or indirectly, by a designated person. The definitions of ownership and control are critical for determining whether companies are subject to sanctions due to indirect control by sanctioned individuals. In the UK, an entity is considered owned or controlled by a designated person whenever it is reasonable to expect that the person can ensure the affairs of the entity are conducted according to their wishes. This is a very broad and potentially all-encompassing test, clarified by case law, including the *Boris Mints* case.

Mr. Davies elaborated on the issue of control, discussing *Boris Mints*, currently pending in the Supreme Court. In this case, the [Court of Appeal](#) examined the conditions under which a person can be deemed capable of ensuring that an entity's affairs are conducted according to their wishes. The Court noted that no personal control is necessary, effectively holding that all Russian companies could be subject to an asset freeze simply because President Putin could potentially exert influence over them. This renders the listing process essentially meaningless. Acknowledging the absurdity of this outcome, the Court suggested amending the legislation accordingly. However, to date, the UK government has not implemented such changes. Instead, the government has issued guidelines that, while helpful, are not binding for interpreting the legislation. Mr. Davies also discussed the *Litasco* case, where it was held that the control test should be interpreted as focusing on the existing influence of a designated person over a company's affairs, rather than a hypothetical influence they might exert. A different interpretation would imply that President Putin could be deemed to control companies he is entirely unaware of and that operate routinely without any regard for him.

### Access to Justice

Sanctions can significantly impact access to justice for sanctioned parties. Ms. Shagal highlighted that the Russian Supreme Court's decision in *Uraltransmash* (previously discussed [here](#)), for example, presumes that sanctioned Russian entities are unable to seek justice in sanctioning states. This presumption complicates the selection of arbitration forums and legal representation for Russian parties. Ms. Lester, in addition, observed that in fact, in the last few years, many firms have disengaged from Russian clients, leading to a shake-up in the legal market. This has resulted in a landscape where the availability of legal representation varies significantly, with some firms completely withdrawing from Russia-related work while others continue to operate within the confines of sanctions.

Mr. Mukherjee also discussed access to justice for sanctioned parties, specifically referencing the Court of Appeal's clarifications in the *Boris Mints* case. The Court clarified that UK sanctions do not prevent judgments in favor of Russian sanctioned parties, as entering a judgment does not make funds available to designated persons or constitute dealing with their funds. Moreover, sanctions legislation lacks any explicit prohibition against courts entering judgments in favor of sanctioned individuals. However, it remains to be determined whether the same reasoning applies to arbitration awards.

### Enforcement of Arbitral Awards

Mr. Dymond addressed the issues that might arise when a designated person or an entity controlled by a sanctioned individual attempts to obtain the recognition and enforcement of an arbitral award rendered in their favor. In these situations, the non-sanctioned counterparty might seek to annul the award at the seat of arbitration or resist its recognition and enforcement in another jurisdiction. The primary argument for doing so would be that the award contravenes public policy. Consequently, there could be instances where specific courts might annul or refuse to recognize and enforce an award in favor of a sanctioned party.

However, it seems unlikely that English courts would routinely refuse recognition and enforcement

of awards solely because their satisfaction would theoretically violate sanctions laws. The *Boris Mints* decision confirms courts' authority to enter judgments in favor of sanctioned individuals, suggesting no inherent reasons to decline recognition and enforcement of awards rendered in favor of designated persons. The exception would be if the tribunal itself breached sanctions regulations by issuing the award, which could then provide a public policy basis for refusing enforcement.

## Concluding Remarks

International economic sanctions introduce a complex array of regulatory, logistical, and substantive challenges in international arbitration. Navigating these challenges requires meticulous compliance with regulatory requirements and a deep understanding of the evolving legal landscape. As legal frameworks and judicial interpretations evolve, Mr. Lorello suggested that ongoing dialogue with regulators is necessary to develop pragmatic solutions that address both the regulatory objective of sanctions and the need for effective dispute resolution mechanisms. This collaborative approach could help to streamline processes and reduce the barriers currently faced in arbitration involving sanctioned parties. As emphasized by Ms. Welsh, this collaborative approach is particularly crucial in the UK, especially for London, a city historically favored as the arbitration seat for numerous Russia-related disputes. A significant surge in sanction cases has arisen from measures enacted following Russia's invasion of Ukraine, a trend likely to intensify given that, according to the UK's Office of Financial Sanctions Implementation, as of March 31, 2023, over 90% of Russia's banking sector was subject to sanctions.

While sanctions add layers of complexity and delay to arbitration proceedings, the international arbitration community remains resilient, continuously adapting to ensure that justice is served even in the face of these significant obstacles.

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