Chartered Institute of Arbitrators Australia
Annual Lecture 2022

International Arbitration in a World of Sanctions[1]

President Chartered Institute of Arbitration Australia Dr Andrew Hanak KC

Mr Leon Chung, Herbert Smith Freehills

Distinguished Guests, Members of the Chartered Institute of Arbitrators

Ladies and Gentlemen, Good Afternoon

I. Introduction

1. It is indeed a great honour and privilege for me to deliver the Chartered Institute's Annual Lecture 2022 and I thank the Chartered Institute of Arbitrators, Australia and Herbert Smith Freehills for so kindly sponsoring this event.

2. Before I begin, I would like to pay tribute to a wonderful person and lawyer, the late Mr John K Arthur who so suddenly left us as a result of a tragic motorcycle accident. I was shocked when I got the news and I extend my heartfelt sympathy to his family, his colleagues and his friends at the Bar and the Chartered Institute. I am sure he is very sorely missed.

3. The World has changed. Perhaps irretrievably so. The Russian invasion of Ukraine on 24 February 2022 has ushered in a period of great instability and it is difficult to see what satisfactory outcome can emerge from this terrible, tragic conflict in the near future.

4. A former Foreign Minister of Singapore, Mr George Yeo, gave a talk at the Lee Kuan Yew School of Public Policy on 13 July 2022, entitled "Storm Clouds". He opined that we are going through a great transition in the world. Many things may happen as the old world

[1] The views in this lecture are the personal views of the speaker as a student of the law. They do not reflect and are not the views of the Judiciary or the Supreme Court of Singapore or the Chartered Institute of Arbitrators Singapore. I am greatly indebted to Ms Lu Yiwei and Justices' Law Clerk Violet Huang, for their thorough research and help in preparing this lecture. Any errors however are mine alone.

gives birth to a new world. He recalled the time when he was the Minister of Trade and Industry, (1999 – 2004), where trade was depoliticized and globalization had no limits. We have to accept that all that is now past. As we are drawn away from that zenith, we are sliding into a multi-polar world of protectionism, economic and political blocs and the fiercest rivalry the world has ever known. Mr Yeo's view is that the world's great powers are now locked in an existential fight for supremacy in technology, weaponry and economic might. To underscore his view, he pointed to a remarkable event in London on 6 July 2022. The Director-General of MI-5, Ken McCallum and FBI Director Chris Wray held an unprecedented joint press conference for business and academic leaders at Thames House, the MI5 HQ. The joint message and language used was as unprecedented as it was remarkable. Referring to MI5 and the FBI, Mr McCallum said:

> *"…our teams work tirelessly together every day to keep our two nations, and our allies, safe. … today is the first time the Heads of the FBI and MI5 have shared a public platform. … We are doing so to send the clearest signal we can on a massive shared challenge: China. … We'll talk about the whole-of-system response that we need: partnership not just between us, but with all of you, if we are to protect our economies, our institutions, our democratic values. … "*

5. Mr McCallum pointedly said he was not talking about the Chinese people, "…in whom there is much to admire...", but the Chinese Communist Party that is the challenge and who, Mr McCallum says, are engaging in a coordinated campaign on a grand scale with planned professional activity over a strategic contest across decades.[2]

6. As a student of the law, in a small country in Southeast Asia, I cannot help but see the increasingly strong rhetoric being employed by all sides. And I am very worried. That

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[2] See "Joint address by MI5 and FBI Heads" (6 July 2022) MI5 Security Service: < https://www.mi5.gov.uk/news/speech-by-mi5-and-fbi#:~:text=MI5%20Director%20General%20Ken%20McCallum,address%20at%20Thames%20House%20today.>; see also "FBI and MI5 leaders give unprecedented joint warning on Chinese spying" (7 July 2022) Guardian: <www.theguardian.com/world/2022/jul/06/fbi-mi5-china-spying-cyberattacks-business-economy>

refrain, "Never Again", so fervently embedded in our minds after World War II, seems all but forgotten.

7. I think we are undeniably in a period of great instability and that instability affects us as lawyers and arbitrators. But before I go any further, I must say that when I chose my topic for this lecture, I was not aware of that there were two learned lectures of great importance on this topic. I would have liked to claim that great minds think alike, but with the acknowledged legal learning and giant intellects of these two Judges, I had better not do so lest I earn the sobriquet "the Great Pretender".

8. The first, the Rt Hon Lord David Neuberger, delivered the Annual Lecture of the Singapore Institute of Arbitrators in October 2021. This was before Russia's invasion of Ukraine, but presciently entitled: "Sanctions in International Arbitrations: Pros, Cons and Implications".[3] The second, the Rt Hon Lord Jonathan Mance, gave the keynote speech at the Global Arbitration Review Live in London on 17 May 2022.[4] The Singapore International Commercial Court has the honour and privilege of counting them amongst our panel of International Judges. I have been greatly assisted in refining my lecture on this topic by these papers and I will be making reference to them. I highly commend these two papers to you.

9. As Lord Neuberger pointed out, the growth of international arbitration over the second half of the 20th century has been striking and the most significant cause is "the enormous growth in commercial and other cross-border activity, in terms of movement of people, of goods and of information, and indeed the increasing cross-border nature of

[3] Lord David Neuberger of Abbotsbury, *Sanctions in International Arbitrations: Pros, Cons and Implications*, Singapore Arbitration Journal (vol 1, May 2022) p 62.
[4] Alison Ross, "Lord Mance addresses GAR Live London" (17 May 2022) Global Arbitration Review: <globalarbitrationreview.com/article/lord-mance-addresses-gar-live-london>.

companies and other commercial entities." Few will quarrel with this observation that from the 1970s to perhaps 2015, globalization, in terms of the interconnectedness and interdependence in the world economies, kept reaching new heights with each passing year. The parallel rise in international arbitration is no coincidence. Many would have felt that globalization and interconnectedness was unstoppable.

10. But was it? Some economists saw danger and were proposing moderate and incremental resistance to globalization and even encouraging targeted trade barriers.[5] The Guardian reported that the IMF's World Economic Outlook for October 2016 noted that since 2012 world trade was growing at 3% per year, less than half the average of the previous three decades and it carried the warning from the IMF that free trade would be seen as benefiting only a fortunate few.[6]

11. Three tremendous jolts then occurred. First, the trade wars began in earnest when Donald Trump took office in January 2017. By 21 January 2021, Al Jazeera ran an article stating that President Trump "unleashed a torrent of economic sanctions … aimed at squeezing Iran, Venezuela and China." [7]

12. Secondly, the Covid-19 pandemic followed and revealed the Achilles heel of globalization. When it struck and borders started being closed around the world in March and April 2020, it resulted in acute shortages of food, household items, goods, material, appliances and many other components that went into everyday appliances.

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[5] Dani Rodrik, *Has Globalization Gone Too Far* (Peterson Institute for International Economics, March 1997).
[6] Larry Elliott, "IMF study warns free trade seen as benefiting 'only a fortunate few'" (27 September 2016) Guardian: <www.theguardian.com/business/2016/sep/27/international-monetary-fund-world-economic-outlook-globalisation-free-trade>.
[7] "US Sanctions under Trump: A legacy that could box in Biden" (21 Jan 2021) Al Jazeera News: <www.aljazeera.com/news/2021/1/21/us-santions-under-trump-all-you-need-to-know>.

13. Thirdly, with the Russian invasion of Ukraine, the different economic and political blocs became more stark. Two significant countries, with the largest world populations and with significant economic heft, did not vote with the majority in the UN General Assembly Resolution condemning the Russian aggression.[8] Instead, just before the Russian invasion, China announced that its strategic partnership with Russia was without limits.[9] To date, China has refused to fully condemn the Russian invasion.[10] India avoids condemning the invasion and remains aloof from the ”Western coalition”.[11] All the political and economic rivalries, some age-old , surfaced and new alliances have emerged to a perceived new world order. Whole rafts of sanctions were quickly issued by the “Western coalition” upon Russia’s invasion of Ukraine.

14. Sanctions continue to be issued as the disputes rage on and the inevitable counter-measures are implemented. This drop in international trade and commerce, the rise of economic and political blocs and the sanctions will have an impact on international arbitration.

II. The Inherent Generic Problems with Sanctions

15. At the very start, there is an inherent generic problem with sanctions. As both Lords Neuberger and Mance point out, first, the scope of the sanction is often uncertain; it is sometimes difficult to determine whether a particular party is directly, or even indirectly, affected by the sanctions. Secondly, sanctions may be contained in multiple sources of law and are complex, for example, one set of sanctions may have exceptions not found in another

[8] “Ukraine: UN General Assembly demands Russia reverse course on ‘attempted illegal annexation’” (12 October 2022) UN News: <news.un.org/en/story/2022/10/1129492>.
[9] Eustance Huang, “Take China and Russia’s ‘no limits’ relationship with a ‘grain of salt,’ says former PBOC advisor” (31 March 2022) CNBC News: <www.cnbc.com/2022/03/31/take-china-russia-no-limit-relationship-with-grain-of-salt-li-daokui.html>.
[10] *Ibid*.
[11] Shan Li, Rajesh Roy, “India Avoids Condemning Russia’s Invasion of Ukraine, Despite U.S. Pressure” (25 February 2022) The Wall Street Journal: <www.wsj.com/articles/india-avoids-condemning-russias-invasion-of-ukraine-despite-u-s-pressure-11645795824>.

set. Thirdly, sanctions are temporal in nature and can be lifted, or varied, often without any transparent logic. Fourthly some sanctions, especially those imposed by the United States often apply extraterritorially.

16. The scope of sanctions may be uncertain. In the European Union's sanctions regulation, Article 5aa(1)(a) of Regulation (EU) No 833/2014 states "[i]t shall be prohibited to ***directly or indirectly engage in any transaction*** with a legal person, entity or body established in Russia, which is publicly controlled or with over 50% public ownership or in which Russia its Government or Central Bank has the right to participate in profits or with which Russia, its Government or Central Bank has other substantial economic relationship, as listed in Annex XIX" [emphasis added].[12] This created much uncertainty over exactly what the word "transaction" covered; the term was not defined or elaborated upon in Regulation No 833/2014, nor in the later EU Council Regulation 2022/428.[13] Arbitral proceedings involve payment to arbitral institutions, engagement of arbitrators, and counsel – all of which could qualify as prohibited transactions if a sanctioned party is involved. For instance, if a State-owned enterprise has appointed a certain arbitrator, would that arbitrator be considered as directly or indirectly engaging in a prohibited transaction, especially if the claimant is a sanctioned Russian entity?

17. In the United States, considerable difficulty still exists for parties in legal proceedings, and in particular, US-based entities or individuals advising on or administering such proceedings. In the context of Russia/Ukraine-related sanctions, transactions by US persons or persons in the United States are prohibited if they involve transferring, paying, or dealing in the property of an entity or an individual listed on the Office of Foreign Assets

[12] Council Regulation (EU) 2022/428 amending Regulation No 833/2014.
[13] Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Control's ("OFAC") list.[14] Or there may be sectoral sanctions that prohibit the "provision", "exportation" or "re-exportation" of goods and services in support of certain oil-related projects in Russia.[15] Arbitration proceedings that involve legal practitioners advising such sectoral activities may be construed as falling within such prohibited transactions. Whilst specific licenses are available from OFAC, they appear limited to payment of legal fees incurred in challenging the blocking of US persons in administrative or civil proceedings. The position remains unclear as to general litigation or arbitrations that do not necessarily include challenges to such measures. Firms advising sanctioned parties, or arbitral institutions administering proceedings involving sanctioned parties, may have to incur additional compliance costs or further administrative steps to ensure compliance with the US sanctions regime.

18. Besides the uncertainty in the types of transactions prohibited by sanctions, the extraterritorial effect of certain sanctions increases the complexity of compliance. US sanctions often have significant extraterritorial effects – they could apply to foreign persons outside of the US.

19. First, there are primary sanctions against US persons that impact foreign persons. Executive Order 14065 of 21 February 2022 prohibits "any approval, financing, facilitation, or guarantee by a United States person, wherever located, of a transaction by *a foreign person* where the *transaction by that foreign person* would be prohibited by this section if performed by a United States person or within the United States."[16] This prohibition significantly affects the conduct of US banks. Every transaction in US dollars passes through

[14] Office of Foreign Assets Control, "Directive 4 under Executive Order 13662".
[15] Office of Foreign Assets Control, "Directive 4 under Executive Order 13662".
[16] Executive Order 14065 (21 February 2022), "Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine".

the US financial system and non-US banks need to use a correspondent account with a US bank. Given that US banks are required to observe US sanctions regulations, these affect transactions between non-US banks located overseas.

20. Secondly, there are secondary sanctions against *non*-US persons who engage in activities that would have been prohibited by the sanctions had such activities been carried out by a US person. For instance, in the context of sanctions against Cuba, a non-US national who "traffics in property which was confiscated by the Cuban Government" could be potentially liable to US persons who own the claim to such property.[17] The extraterritorial effects of US sanctions are no doubt controversial, testing the limits of international law on states asserting jurisdiction for activities outside of their own territory. But for practitioners, they remain part of the reality of the business and finance world that cannot be so easily circumvented.

III. When do Sanctions Apply?

21. The next level of complexity lies in the inherent nature of international commercial disputes – there are different laws that apply to different aspects of the dispute. There is the governing law of the contract, the law of the seat, and with that, often the law of the forum court. Other legal systems also surface, the laws of the respective countries of the parties, which can affect legal capacity and at the tail end, the law of the country of enforcement of the award. Consideration must now also be given to possible extra territorial effect of, for example, US sanctions.

22. This complexity is then compounded by the effect of different sanctions. There is the effect of sanctions when they are measures taken by the United Nations Security Council

[17] Section 302, Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996.

("UNSC"), but in contentious issues, UNSC sanctions are limited because any one of the five permanent members wields the veto power. When that happens, UN General Assembly Resolution 377 allows the General Assembly to consider and issue recommendations to UN members for collective measures, where there is a lack of unanimity in the UNSC. This was invoked in the Russia-Ukraine conflict, following which Resolution ES-11/1 titled "Aggression against Ukraine" was passed with an overwhelming vote of 141 votes in favour of its adoption.[18] Then there are sanctions effected by a country without sanction from the UN General Assembly.

23. The question that follows is when do sanctions become relevant – is it only when sanctions are part of the law of the seat of arbitration or when they are part of the applicable governing law? Or could they have a wider impact?

24. In her book, Dr Azeredo da Silveira sets out a few ways how arbitral tribunals may give effect to international sanctions.[19] The first way (the traditional view) is to characterize unilateral economic sanctions as factual impediments that could trigger *force majeure* or frustration defences. The second way, (and the increasingly common view), is to regard sanctions regimes as laws that apply to the dispute as part of the governing law of the contract or as overriding mandatory rules, rather than facts that frustrate the contract's performance. In practice, both discussions may be relevant. The legal effect of sanctions being treated as frustration or force majeure events is the supervening legal impossibility of performing the contractual obligations. As for treating sanctions as overriding mandatory laws, while academics classify this as an issue of procedure from a choice of law perspective,[20] it may

[18] A/RES/ES-11/1: <daccess-ods.un.org/tmp/2929343.58119965.html>.
[19] Azeredo Da Silveira, "Characterization of Trade Sanctions in a Private Law Perspective", in *Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation* (Azeredo Da Silveira, Jan 2014) at p 51.
[20] *Ibid.*

also be an issue of contractual interpretation if parties have specifically contemplated the applicability of mandatory laws to the contractual performance, besides the law governing the contract.

25. Regardless of which way sanctions are characterised, courts and arbitral tribunals need to work out the precise nature and scope of the sanctions in order to determine their effect on the underlying contract. In a recent English High Court decision, *Banco San Juan Internacional Inc v Petróleos de Venezuela S.A.*,[21] the respondent, PDVSA, who had refused to make payments, argued that its payment obligations under the contracts were illegal and unenforceable on the basis of the United States sanctions against Venezuela. The US sanctions prohibit US persons from engaging in any transaction related to "the purchase of any debt owed to the Government of Venezuela", and "any debt owed to the Government of Venezuela that is pledged as collateral"; the definition of Government of Venezuela included an explicit reference to PDVSA.[22]

26. PDVSA contended that it had been shut out of the US financial system as a result of all the sanctions, was unable to trade or engage in large dollar payments, and the bank claiming for payment would also be prohibited from receiving funds from PDVSA. One of the arguments advanced by PDVSA was that the United States sanctions should be treated as mandatory provisions of the law of the place of performance, overriding the contractual obligations, citing Article 9(3) of the Rome I Regulation which states that "effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed". Another argument PDVSA made was that it had become illegal to perform its contractual obligations.

[21] [2020] EWHC 2145 (Comm).
[22] Executive Order 13835 of May 21, 2018, "Prohibiting Certain Additional Transactions With respect to Venezuela", Section 1(a).

27. The English Court rejected both defences. The court found that PDVSA's payment to the bank would not constitute a breach of the sanctions. There was no evidence of US law suggesting that the prohibition under the US sanctions extends to the receipt by the bank of any sums from PDVSA. In any event, it was not necessarily illegal to make such payments, given the possibility of seeking an authorisation from OFAC for payments to be made. This goes back to the point made by Lord Neuberger that things are not necessarily black and white. A licensing system for carve-outs provides some degree of flexibility that could also facilitate the arbitral process.

28. In contrast, the court in *Lamesa Investments Ltd v Cynergy Bank Ltd*[23] seemed to have reached a different result because of the wording of the contractual clause which provided that one party shall not be in default if the sums were not paid "in order to comply with mandatory provision of law, regulation or order of court of any competent jurisdiction". Lamesa had lent money to Cynergy Bank under an English law facility agreement. Lamesa then became a blocked person under an US Executive Order. The question was whether Cynergy Bank was justified in refusing to pay interest to Lamesa in order to comply with the mandatory law, *ie*, the potential application of the US secondary sanctions.

29. Based on the contractual provision, the English Court of Appeal considered that even though it was not mandatory under the contract for the act of repayment to take place within US, and even though it was clear that the US sanctions were not a part of English law, the court held that Cynergy Bank was justified to do so in order to comply with the US secondary sanctions.

30. This case suggests that where there is a specific contractual clause, sanctions (and especially extraterritorial sanctions) remain relevant even if they do not form part of the

[23] [2020] EWCA Civ 821.

governing law of the contract. This presents an added layer of complexity that arbitrators should take into account.

31. Hence, the arbitral tribunal will have to consider very carefully the governing law of the contract, the laws of the seat, the forum courts and consider the effect of any sanctions affecting the contract between the parties, the arbitration agreement and the rules of the relevant arbitral institution administering the arbitration. This will not be an easy task. Does the doctrine of frustration apply? Is there any applicable law in relation to *force majeure*?

A case in point?

32. Will you, as an arbitrator give an indefinite suspension of arbitral proceedings on an application of a sanctioned party to do so? In a PCA arbitration between Nord Stream 2 AG v. the European Union,[24] the Tribunal had issued a revised procedural calendar on 30 July 2020. About seven months later, on 1 March 2022, the claimant, Nord Stream 2, sent the Tribunal an email stating that it had been designated as a US Specially Designated National ("SDN") by the OFAC's sanction list and that recent geopolitical developments have led to "…an inability on the part of the Claimant to pursue the arbitration at this time…" and in particular the Claimant's bank accounts had been blocked, meaning "…that NSP2AG is unable to make any payments or access finance…". Nord Stream 2 requested for a suspension of the arbitral proceedings as it was unable to access its bank accounts.[25] The respondent objected. On 14 March 2022, the Claimant informed the tribunal that its external counsel no longer represented it and repeated its request for a suspension until 1 September 2022, proposing to update the Tribunal in three months on its ability to continue with the proceedings. The Tribunal suspended the proceedings and vacated the scheduled hearing

[24] *Nord Stream 2 AG v The European Union*, PCA Case No. 2020-07.
[25] *Nord Stream 2 AG v The European Union*, PCA Case No. 2020-07, Procedural Order No. 8.

dates (20 June – 1 July 2022). The Tribunal fixed a further procedural meeting for 20 June 2022. This procedural meeting was pushed back to 13 October 2022, after the Claimant informed the Tribunal that it had been granted a provisional composition moratorium until 10 September 2022 in Zug.[26] No further information has been publicly released on the outcome of this procedural meeting.

33. While having a sanctioned party in the proceedings does not necessarily mean that the proceedings will grind to a halt, much depends on the type of sanctions, and whether licences could be obtained. But the example of Nord Stream 2 illustrates the practical difficulties faced by counsel and arbitrators alike in expediting the arbitration process. Besides the difficulty of parties in making payment, counsel may also be reluctant to represent sanctioned states or sanctioned individuals for both moral and practical reasons.

IV. The Position of Counsel

34. There have been high profile exodus of counsel representing Russia or Russian state entities or those companies belonging to the sanctioned oligarchs as well as the oligarchs personally. It was reported that Prof Albert Jan van den Berg has ceased acting for Russia in the *Yukos* dispute following the invasion of Ukraine.[27] Van den Berg's firm has been advising Russia for the past eight years in proceedings before the Dutch courts where Russia has been trying to overturn the Energy Charter Treaty Awards reportedly worth US$57 billion in favour of the former majority shareholders in the defunct Russian oil company Yukos.

35. Another well-known figure, Prof Alain Pellet from Curtis, Mallet-Prevost, Colt & Mosie, has withdrawn from Russia's counsel team in a pending case at the International

[26] *Nord Stream 2 AG v The European Union*, PCA Case No. 2020-07, Procedural Order No. 8.
[27] Cosmo Sanderson, "Van den Berg withdraws from Yukos case" (2 March 2022) Global Arbitration Review: <https://globalarbitrationreview.com/van-den-berg-withdraws-yukos-case>.

Court of Justice and defending Russia in two arbitrations commenced by Ukraine under the UN Convention on the Law of the Sea (UNCLOS).[28] One of them concerns coastal state rights in the Blacksea, Sea of Azov and Kerch Straits and the other over the detention of Ukranian naval vessels and servicemen in 2019. Prof Pellet said, "[l]awyers can defend more or less questionable causes, but it has become impossible to represent in forums dedicated to the application of the law a country that so cynically despises it." Similarly, Essex Court Chambers has confirmed that Sam Wordsworth KC, Amy Sander and Sean Aughey have resigned as counsel to Russia in three state to state proceedings (commenced between 2017 and 2019), in the International Court of Justice and two arbitrations under the UN Convention on the Law of the Sea (UNCLOS) before the PCA in the Hague.[29]

36. Cases of this nature may raise possible principles of access to justice and the right to legal advice and representation not only in the private contractual sphere but also in international courts. In many national legal systems, these twin rights are enshrined in law; thus an accused person has a right to be legally advised and represented and if he or she is unable to afford to retain a lawyer, there are avenues for *pro bono* schemes. But can a lawyer like Prof Pellet withdraw, without being in breach of his retainer, on moral grounds? It can be an intriguing area of the law, not least of all because there may be a question of which law is being applied and whether such a right does exist in the world of international commercial arbitration. Under many national laws, lawyers are not able to resign from a case, especially a criminal case, because the accused has a cynical attitude towards and despises the rule of law. Prof Pellet defended his action after careful consideration and

[28] Cosmo Sanderson, "Pellet and Curtis cease counsel work for Russia" (1 March 2022) Global Arbitration Review: <https://globalarbitrationreview.com/pellet-and-curtis-cease-counsel-work-russia>.
[29] *Ibid*.

reportedly said: "Putin's Russia, which muzzles all opposition and bans demonstrations against the war, does not bother too much with these principles."[30]

37. If the matter were before a national court, then different principles might apply. Many domestic courts, especially in the common law countries, retain some degree of discretion and control over the matter of discharge of counsel. In *JSC VTB Bank v Sergey Taruta*,[31] the Commercial Court of the British Virgin Islands declined to allow international law firm Ogier from discharging itself from acting for a Russia state-owned bank, VTB Bank, in a pending litigation. Ogier presented, *inter alia*, moral grounds in applying for a discharge, like an "entirely unprovoked" invasion of Ukraine, the hundreds of thousands of Ukrainians displaced and the killing and wounding of soldiers and civilians. Ogier also argued that continuing to act for VTB Bank would damage its reputation and likely run afoul of sanctions. The court's reasoning was that the firm owed duties as officers to the court. The court observed that even if the Russian bank were a pariah, pariahs have rights and can only be given a fair hearing if they have access to counsel.[32] Further, the court observed that alternative payment avenues are available even though the Russian bank had been ejected from the SWIFT network. As a commercial entity is required to be represented by a BVI-admitted legal practitioner before the BVI courts, the court's decision is perhaps unsurprising.

38. But I venture the view that in arbitration, it would be nearly impossible for any tribunal to insist on the counsel's continuing to represent a party. This is a question quite apart from considerations of a well drafted retainer and the terms of engagement. But what

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[30] *Ibid*.
[31] BVIHC (COM) 2014/0062.
[32] Kyriaki Karadelis and Sebastian Perry, "'Even pariahs have rights': law firm can't drop sanctioned Russian client" (25 March 2022) Global Arbitration Review: <www.globalarbitrationreview.com/even-pariahs-have-rights>.

should the tribunal do if the legal team of the sanctioned party withdraws, the sanctioned party cannot make any further payments or engage another legal team and in all likelihood cannot travel to the seat for the hearing, and the other party insists on going ahead with the arbitration. Can or should the tribunal suspend the hearing like the *Nordstream 2* case mentioned above?

39. Counsel may also have to navigate sanctions relating to the provision of legal services. The most recent set of sanctions imposed by the European Union last month includes a prohibition "to provide, directly or indirectly, [amongst others] legal advisory services … to: (a) the Government of Russia; or (b) legal persons, entities or bodies established in Russia".[33] The regulations make it clear in the definition of "legal advisory services" that only non-contentious legal advice is prohibited.[34] It is also specified that the sanction "shall not apply to the provision of services that are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy",[35] and "shall not apply to the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, or for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State".[36] Despite the intention of the draftsmen not to erode a party's right to counsel in contentious matters, lawyers may feel the risk of running afoul of the sanction when they give legal advice in the pre-arbitration stage when there is uncertainty as to whether an arbitration would be initiated.

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[33] Article 5n(2), Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[34] Recital 19, Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[35] Article 5n(5), Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[36] Article 5n(6), Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

40. In the sphere of international arbitration, there is another aspect which makes it practically very difficult, and therefore excusable for lawyers, not to accept new instructions or to continue to act for sanctioned parties. The professional indemnity insurers of law firms started informing or reminding their clients that they were not covered for PI risks if they acted for sanctioned parties. Anecdotally, I have been told that a number of prominent international law firms have had to stop acting for sanctioned Russian parties because their insurers have informed them that they are not covered for such work. Swiss Re have a very widely worded endorsement, of uncertain reach, which reads:

> ***No cover*** *shall be provided under this Policy for any Claim and no Benefit hereunder* ***to the extent that*** *the provision of such cover, payment of such claim or provision of such benefit* ***would expose the Insurer*** *to* ***any sanction, prohibition or restriction*** *under United Nations resolutions or* ***the trade or economic sanctions, laws or regulations*** *of the European Union, United Kingdom, United States of America* ***or of any jurisdiction applicable to the Insurer****.*
>
> [emphasis in bold and underlining added]

41. Berkshire Hathaway has this endorsement:

> *This Policy does not provide any cover and the Insurer will not be liable to pay any claim under this Policy or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose the Insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade of economic sanctions, laws, regulations of the European Union, United Kingdom, Singapore or the United States of America.*

42. Great American has a similar endorsement except it is extended to cover sanction, prohibition or restriction under UN resolutions or the trade or economic sanction, laws or regulations "of any country."

43. Lawyers therefore have a moral dimension, a legal dimension (whether they can act, for example, in aiding a sanctioned party obtain an arbitration award in its favour which can

then be enforced in all New York Conventions countries) as well as a practical dimension in that they may not have PI cover in so acting.

V. The Position of Arbitrators

44. What of Arbitrators? A well-known arbitrator I know recently applied to renew his PI policy (PI Policy for Arbitrators, Mediators, Conciliators and Expert Witnesses). In his Renewal Form there is the following question:

> *Do your business activities covered under this Insurance involve any of the countries subject to sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the EU, UK and USA?*
>
> *If yes, please provide details.*

a. Personal Liability of Arbitrators for Breach of Sanctions?

45. An even more vague question arises regarding personal liability of arbitrators in unwittingly falling afoul of sanctions. Generally in common law countries, arbitrators are conferred immunity under the respective arbitration legislations, as arbitrators may be seen as the functional equivalent of judges and may be granted judicial immunity.[37] Immunity, however, may be lifted in case of bad faith. But inadvertent breaches of sanction are unlikely to cross the threshold of bad faith and result in civil liability.[38]

46. Civil law countries tend to adopt a contractual approach in including clauses that exclude arbitrators' liability. An example is seen in the ICC's 1998 Arbitration Rules, which provides that "[n]either the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or

[37] *See e.g.* Section 28, Australian International Arbitration Act 1974; Section 25, Singapore International Arbitration Act 1994.
[38] "The Status of the Arbitrators" in Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), at pp. 557 – 628.

omission in connection with the arbitration." [39] In the treatise titled "Goldman on International Commercial Arbitration", Fouchard is of the view that it is unlikely that private arbitration rules have the power to confer judicial immunity on arbitrators. A judge's immunity results from a status that is not contractual. Moreover, unrestricted exclusion clauses are unlikely to be allowed. In civil law countries, exclusion of liability is unlikely for gross or intentional fault.

47. Moreover, institutional rules cannot bind third parties. It remains open for national authorities to bring actions against arbitrators for breaches of sanction, even if the relevant statutes and institutional rules provide for immunity. Arbitrators could still be held criminally liable. Violations of sanctions could attract criminal liability. For instance, in the US, violations of sanctions could carry criminal implications. There, it is unlawful for a person to violate, or attempt to violate, or cause a violation of any license, order, regulation or prohibition under the International Emergency Economic Powers Act ("IEEPA"). Section 1705C of the Act provides that a person who wilfully commits, attempts to commit, conspires to commit, or aids or abets in the commission of any specified unlawful act shall be fined not more than $1,000,000, imprisoned for not more than 20 years, or both.

48. Hence, arbitrators should tread with caution where sanctions may apply to ensure that they would not be violating or assisting with the violation of sanctions, even if they are unlikely to be held liable in civil settings *vis-à-vis* the parties. However there is a more worrying possibility with recent developments in Russia that arbitrators can possibly be held in contempt of a foreign court injunction ordering the tribunal to cease the arbitral proceedings either because that foreign court has assumed jurisdiction or requires for the

[39] ICC Arbitration Rules 1998, Art 34.

suspension of arbitral proceedings pending its ruling on some issue or the other. I shall elaborate on this below.

VI. Enforcement of Awards and Public Policy of States

49. Sanctions may also raise the issue of the inability to enforce an arbitral award because of the public policy exception under Article 34 of the Model Law, *viz*., where recognition of the award would be in conflict with the public policy of the State or enforcement of the award would be contrary to the public policy of the State.[40] Justice to this subject cannot be done within a short lecture and must be reserved to another occasion. Nonetheless, two short comments are apposite.

50. First, because public policy of a State is not necessarily static, enforcement is not necessarily consistent over time. For example, there are two Ukrainian Supreme Court cases that reached very different results. In a judgment dated 9 January 2020,[41] the Court held that the sanctions enacted by Ukraine against a Russian party cannot affect the enforcement of an arbitral award. In contrast, the Court in subsequent judgments declined to enforce arbitral awards on the basis that enforcing them may result in the award sum being used to strengthen the Russian military system, which would be disadvantageous to the Ukrainian military industry and detrimental to the security of the Ukrainian people.[42] Ukrainian lawyers Shenk and Tolochko, opine that the nature of contracts and characteristics of the debtor (an Ukrainian strategical defence enterprise) became determinative factors to find that the

[40] See UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 34(2)(b)(ii) "Recourse against the award", and Article 36(1)(b)(ii) "Grounds for Refusing Recognition or Enforcement".
[41] Judgment of the Ukrainian Supreme Court dated 9 January 2020 in Case No. 761/46285/16-C.
[42] Judgment of the Ukrainian Supreme Court dated 13 February 2020 in Case No. 824/100/19; Judgment of the Ukrainian Supreme Court dated 25 June 2020 in Case No. 824/174/19; Judgment of the Ukrainian Supreme Court dated 2 July 2020 in Case No. 824/101/2019.

recognition and enforcement of the arbitral awards in these cases would constitute a violation of public policy of Ukraine.[43]

51. Secondly, whether public policy of a State is engaged may depend on the type of sanction. References have already been made to multilateral sanctions imposed through the United Nations Security Council resolutions and unilateral sanctions imposed by States individually outside of the United Nations framework. The former is more likely to be accepted as part of the international public policy of the forum, the latter faces more difficulties. Currently, the sanctions against Russia are unilateral sanctions; there is no UNSC resolution owing to Russia's status as a permanent member of the UNSC.

52. In February this year, the Paris Court of Appeal accepted that the United Nations measures against Iraq fell within the French international public policy.[44] In an earlier case concerning United States sanctions against Iran, the same court ruled that these unilateral sanctions could not be regarded as a manifestation of international consensus.[45] However, this decision does not necessarily impose a blanket rule that all forms of unilateral sanctions

[43] Olga Shenk and Viktoriia Tolochko, "The Pro-Arbitration Seed Was Sown In Ukraine, But Violation of Public Policy may still Lead to a Successful Challenge" (26 February 2021) Kluwer Arbitration Blog, < http://arbitrationblog.kluwerarbitration.com/2021/02/26/the-pro-arbitration-seed-was-sown-in-ukraine-but-violation-of-public-policy-may-still-lead-to-a-successful-challenge/>.

[44] The Paris Court of Appeal, in two separate judgments delivered this year, dismissed the parties' attempt to set aside the award in contract-based arbitral awards by the ICC Tribunal. The underlying awards comprise the partial and final awards in *Iraq v Armamenti & Aerospazio Spa* (ICC Case No. 19540/MCP). The dispute stemmed from a 1983 contract for the supply for military helicopters between Iraq's Ministry of Defence, and an Italian entity called Agusta, which was eventually succeeded by the respondent. In 1986, the licence previously granted by the Italian Ministry of Foreign Trade was suspended by the Italian government in response to the UNSC Resolution 582. The respondent contended that recognizing the award would breach the UN arms embargo measures enacted against Iraq in the context of the Kuwait war, and therefore, the international public policy of France. While the court agreed that the UN measures fell within the French international public policy, the court was not satisfied that the sanctions applied to Iraq's demands, which arose from contracts and damages predating these sanctions.

[45] *TCM FR SA c. Natural Gas Storage Company*, Paris Court of Appeal, Decision No. 19-07261 (3 June 2020). The contractor in the Iran case argued that the contract required it to supply a guarantee issued by an international bank in US dollars, triggering the application of sanctions against Iran which made it impossible for the Contractor to perform such an obligation. The contractor therefore submitted that the arbitral tribunal should have taken these sanctions into account as overriding mandatory rules, and its failure to do so violated the French international public policy.

do not constitute international public policy. As the Court observed, the international public policy of the forum is to preserve certain fundamental values.

53. In this context, what kinds of sanctions are adopted or approved by the enforcement state would, I imagine, be fairly determinative in deciding when enforcement is contrary to its public policy. If, as referenced above, a state has voted with the overwhelming majority of member states in favour of Resolution ES-11/1 ("Aggression against Ukraine") at the UN General Assembly, condemning the Russian invasion and calling for ceasefire,[46] and proceeds to issue sanctions consistent with and in support of that UNGA resolution, I would venture the view that prospects of enforcement of an arbitral award by a sanctioned award creditor in that state would be very dim. From that form of international consensus, there would be a strong case to be made in that State that enforcement of the sanctioned party's award would violate the fundamental values of that polity.

VII. Recent Developments – Russia's Response to Sanctions

54. Russia acted swiftly to counter the concerted sanctions and the intractable problems it caused to Russian litigants overseas who were, in effect, being denied access to arbitral tribunals. Russia invoked a federal law, introduced in June 2020,[47] that provided for exclusive jurisdiction of the Russian state commercial courts with respect to disputes involving Russian sanctioned individuals and entities as well as foreign entities controlled by them. This provision meant that even if the parties have an alternative dispute settlement agreement, such as an arbitration agreement to submit the dispute to an arbitral tribunal

[46] UN General Assembly, *Resolution adopted by the General Assembly on 2 March 2022*, 2 March 2022, A/RES/ES-11/1: <daccess-ods.un.org/tmp/2929343.58119965.html>.

[47] No 171-FZ; see more at Poina Semina, "Extension of Exclusive Jurisdiction of Russian State Courts over Disputes Involving Sanctioned Persons: Protection of National Interests or a Threat to Party Autonomy?" (4 August 2020) Global Arbitration Report: <http://arbitrationblog.kluwerarbitration.com/2020/08/04/extension-of-exclusive-jurisdiction-of-russian-state-courts-over-disputes-involving-sanctioned-persons-protection-of-national-interests-or-a-threat-to-party-autonomy/>.

seated outside of Russia, sanctioned persons will be able to submit the dispute to the exclusive jurisdiction of the Russian commercial courts. The sanctioned party can also apply for an anti-suit injunction preventing the commencement or continuation of foreign court or international arbitration proceedings.[48] Such orders issued by the Russian courts pose significant problems to arbitrators who continue with an arbitration already in progress under the contract between the parties. I have little doubt that a sanctioned Russian entity can also apply for an injunction against the arbitral tribunal if they continue with the arbitration. In such an event, the arbitrators cannot subsequently enter Russia, (or for that matter, any other country with an extradition treaty with Russia), without running the risk of arrest and being sentenced to a jail term for contempt or disobeying the injunction order. The power to jail for contempt for disobeying an injunction exists in many common law countries, see *eg*., *Dell Emerging Markets (EMA) Ltd v Systems Equipment Services*[49] where jail sentences of 9 to 18 months were handed down to the contemnor directors.

55. In fact, the mere existence of sanctions, in itself, could be a ground for the court to grant an anti-suit injunction, as the Russian Supreme Court panel ruled in *Uraltransmash v Pojazdy Szynowe PESA Bydgoszcz Spolka Akcyjna*, (the "*UTM case*"), a case concerning a Russian sanctioned entity UTM. Specifically, the Court held that the fact of the sanction itself had created barriers to the Russian entity's access to justice in a foreign state and constituted sufficient grounds for granting an anti-arbitration injunction.[50] Although the court did not in fact grant an anti-arbitration injunction in that case because the arbitral award had been rendered, the Supreme Court's rulings were nonetheless impactful. The Russian

[48] Alexei Panich, Olga Dementyeva and Polina Podoplelova, "Russian courts to have exclusive jurisdiction over sanctioned persons" (10 June 2020) Global Arbitration Report: <https://globalarbitrationreview-com/article/russian-courts-have-exclusive-jurisdiction-over-sanctioned-persons>.
[49] [2020] EWHC 1384 (Comm).
[50] *Uraltransmash* v *Pojazdy Szynowe PESA Bydgoszcz Spolka Akcyjna*, Decisions of the Russian Supreme Court dated 21 September 2021 and 9 December 2021.

court appears to have a wider latitude in granting injunctions that might frustrate the parties' agreement to arbitrate. However, within the Russian arbitration community, there are divergent views. The Russian Arbitration Association, for instance, expressed its view that whether sanctions impede a party's access to justice must be examined based on the facts, and pointed out that even if a party's access may be impeded, it may still be possible to seek an OFAC authorisation.[51]

56. The rulings of the Russian Supreme Court have been generally followed by the Russian Commercial courts, such as the Commercial Court of the City of Moscow, which granted an anti-suit injunction on the basis that the Russian party's ability to defend itself in the UK courts would be lesser than that of a UK party, as the Russian party would be limited significantly by the US sanctions. Observers commented that the Moscow court's judgment did not mention any specific evidence that the Russian entity's access to justice in the UK had been impeded.[52] Another draft law in Russia purports to allow Russian sanctioned parties to transfer to the jurisdiction of the Russian commercial courts any disputes with certain foreign entities, such as where the foreign entities have directly or indirectly contributed to the imposition of sanctions, including by providing financial or other assistance to their initiators.[53]

57. Apart from a sanctioned State's response to protect its own jurisdiction, sanctioned States may also shift towards choosing alternative arbitration institutions that are deemed

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[51] Timur Aitkulov and Galina Valentirova, "Existence of sanctions justifies anti-arbitration injunctions in Russia" (13 January 2022) Global Arbitration Review: <https://globalarbitrationreview-com/sanctions-se-justify-anti-arbitration-injunctions-in-russia>.

[52] *Sovfracht JSC vs. Prosperity Estate Ltd.* (case No. A40-156736/2020), reported in Timur Aitkulov and Galina Valentirova, "Existence of sanctions justifies anti-arbitration injunctions in Russia" (13 January 2022) Global Arbitration Review: <https://globalarbitrationreview-com/sanctions-se-justify-anti-arbitration-injunctions-in-russia>.

[53] Juergen Mark and Olena Oliinyk, "The consequences of the sanctions against the Russian Federation and of the Russian countermeasures for international arbitration and litigation" (27 July 2022) Global Litigation News: <https://globallitigationnews.bakermckenzie.com/2022/07/27/the-consequences-of-the-sanctions-against-the-russian-federation-and-of-the-russian-countermeasures-for-international-arbitration-and-litigation/#_ftn7>.

more friendly to themselves. Professor Kazachenok opined that the sanctions policies of the United States and the European Union lead parties to favour Asian arbitration institutions as the preferred places of arbitration, as well as other Russian commercial arbitration institutions.[54] Some parties may also see Austria as a suitable seat since it is perceived to be outside the "Western Alliance" and NATO.

58. There can be little doubt that the Russian protective measure was the impetus to recent flexibility in granting licenses that exempt sanctioned parties specifically for the purpose of proceeding with arbitrations. The LCIA has recently been granted a general licence, which allows LCIA to process payments from parties subject to UK's recent financial sanctions against Russia and Belarus to cover their arbitration costs.[55] This was lauded by the director general of LCIA as striking the right balance "between efficiency and effectiveness" of sanctions and binding arbitration agreements, while protecting the rule of law.

59. In the European Union context, the European Council has recently clarified that certain transactions would be exempted from imposed sanctions. In a Resolution released in June, the Council clarified that there is an exemption granted for transactions with Russian public entities "*necessary* to ensure access to judicial, administrative or arbitral proceedings". It further clarified that the recognition and enforcement of a judgment or an arbitral award are exempted transactions.[56] While this is a much-welcomed clarification,[57] what is deemed as "necessary" to ensure access to justice remains to be seen.

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[54] S. Yu. Kazachenok, *The Impact of the Global Sanctions Policy on Arbitrating by the International Commercial Arbitration Courts: Risks and Prospects for the Russian Federation*, 19(1) Legal Concept 24 (2020) (in Russian)
[55] Sebastian Perry, "LCIA gets exemption from Russia and Belarus sanctions" (17 October 2022) Global Arbitration Review: <https://globalarbitrationreview.com/article/lcia-gets-exemption-russia-and-belarus-sanctions>.
[56] Council Regulation (EU) 2022/1269 of 21 July 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
[57] Six arbitral institutions in Europe released a joint statement, welcoming the clarification: "Joint Statement of SCC, VIAC, FAI, DIS, CAM and Swiss Arbitration Centre on the EU's 7th Sanctions Package" (26 July 2022),

VIII. Conclusion

60. I hope my lecture has not given rise to despondency or gloom. My aim was to alert the international arbitrating community to the pitfalls that have opened up as a result of these very difficult times. I firmly believe that all is not yet lost. International Arbitration has never stood still and it never will. It has always innovated, adapted and evolved to serve the needs of those who turn to this mode of dispute resolution. When the Russian Supreme Court invoked a Federal law to unilaterally render arbitration clauses and choice of law provisions of no effect and try to abrogate jurisdiction unto their own national courts, the European and English arbitral institutions acted with one voice and secured carve outs for sanctioned parties thereby removing the ground upon which the decision in the *UTM case* stood.

61. Fora such as ACICA and the Chartered Institute of Arbitrators are indispensable crucibles from which such innovative ideas are born. I am sure these five days will prove to be very fruitful and enlightening and I wish all of you a very successful conference.

62. Thank you all very much.

Justice Quentin Loh
Judge of the Appellate Division, Supreme Court of Singapore
President of the Singapore International Commercial Court

8 November 2022

<https://www.viac.eu/images/documents/JOINT_STATEMENT_7TH_SANCTIONS_PACKAGE_26_July_2022_final.pdf>; *see also* Jack Ballantyne "EU confirms arbitration carve-out in sanctions regime" (26 July 2022) Global Arbitration Review: <https://globalarbitrationreview-com/article/eu-confirms-arbitration-carve-out-in-sanctions-regime>.