The impact of restrictions on payments and provision of legal services under the U.S., UK, and EU sanctions regimes following Russia's actions in Ukraine on the conduct of international arbitration proceedings: a practical overview

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by H. Sheikhattar and H.A. Clemente Ramirez

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The Impact of Restrictions on Payments and Provision of Legal Services under the U.S., UK, and EU Sanctions Regimes Following Russia's Actions in Ukraine on the Conduct of International Arbitration Proceedings - A Practical Overview

Hosna Sheikhattar[1] and Héctor Clemente[2]

Abstract

This paper provides a comparative study of the autonomous sanction regimes implemented by the United States (US), the European Union (EU), and the United Kingdom (UK) in response to Russia's actions in Ukraine, examining their impact on the conduct of international arbitration proceedings. The paper also considers Russia's countermeasures, particularly its strategy of granting exclusive jurisdiction to Russian courts for disputes involving sanctioned parties, even when arbitration agreements exist. While concrete cases `in practice demonstrate that sanctions do not necessarily bring arbitrations to a complete halt, the differing and sometimes opposing sanctions regimes and their exemptions can create unique hurdles for practitioners. These challenges can increase costs, extend the duration of proceedings, and complicate recognition and enforcement of awards in certain jurisdictions. Given the global prominence of the US, EU and UK in international business and arbitration, this study aims to provide practitioners with a comparative overview of the impact of these sanctions on the provision of arbitral services and financial arrangements throughout the arbitration process.[3]

I. Introduction

1. Background

At the time of writing, a significant part of the international community, totalling 45 countries[4] — including the member states of the European Union (EU), the United States (US), the United Kingdom (UK), Switzerland, Canada, Japan, Australia, Ukraine, among other nations — have implemented an extensive array of comprehensive autonomous economic sanctions aimed at influencing Russia's actions in Ukraine.[5] These sanctions arose primarily as a response to Russia's annexation of the Crimea region in 2014 and invasion of Ukraine in 2022.

In contrast to other international events that have caused outrage within the international community, the sanctions targeting Russia's actions have been imposed unilaterally or autonomously by states and intergovernmental organizations, in many cases working in close

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[3] This paper is intended for informational purposes only and should not be construed as legal advice regarding sanctions legislation of the European Union, the United States, the United Kingdom or the Russian Federation. Readers are advised to consult legal professionals qualified in each jurisdiction for specific guidance and advice pertaining to their particular circumstances.

[4] Peter Piatetsky, 'What are Countries Doing to Counter Russia's War?' (Castellum.AI) <https://www.castellum.ai/insights/which-countries-are-taking-action-on-ukraine> accessed 25 April 2024.

[5] Minami Funakoshi, Hugh Lawson and Kannaki Deka, 'Tracking sanctions against Russia' (Reuters Graphics, 2 July 2022) <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/> accessed 25 May 2023.

collaboration. Historically, sanctions of such scale have been typically introduced by the United Nations Security Council, imposing the obligation on United Nations member states to incorporate such restrictions in their domestic legal system. However, the unilateral sanctions regimes on Russia operate outside the framework of United Nations Security Council sanctions on the basis of Chapter VII of the United Nations Charter.[6]

Russia has imposed its own sanctions in response, primarily aiming to increase the costs for sanctioning states to maintain their sanction regimes.[7] Thus, the current situation has amounted to the intervention of different legal systems, each setting up its own restrictions, some of which may overlap or contradict.

Sanctions landscape has caused many "sleepless" nights for professionals in all industries, including arbitration practitioners.[8] Concerns primarily stem from the broad scope of these regimes, the narrow scope of applicable exemptions, and the substantial penalties that entities could face for breaches. There is considerable uncertainty regarding the payment of fees and provision of legal services in arbitration when a sanctioned entity or individual is involved. Additionally, ethical and reputational concerns about rendering arbitral services to sanctioned parties have significantly impacted the international arbitration industry.

Arbitral institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Vienna International Arbitral Centre (VIAC), the German Arbitration Institute (DIS), the Hong Kong International Arbitration Centre (HKIAC), among many others, have in recent years introduced measures to guarantee compliance with international sanctions by posting their own sanctions protocols.[9] Further, especially after Russia's invasion of Ukraine in 2022, several law firms and practitioners have resigned from representing Russia

[6] On 27 February 2022, the Security Council adopted Resolution 2623, which called for an emergency special session of the United Nations General Assembly concerning Russia's invasion of Ukraine. This resolution was based on General Assembly Resolution 377 of 1950, known as the "Uniting for Peace" resolution. Resolution 377 is utilized when the Security Council, due to a lack of unanimity among its permanent members, fails to fulfil its primary responsibility for maintaining international peace and security. This allows the Security Council to convene an emergency session of the General Assembly, which can then make appropriate recommendations to member states for collective measures. The eleventh emergency special session of the General Assembly has convened on multiple occasions and has issued up to six resolutions to date concerning Russia's invasion of Ukraine. See United Nations, 'Eleventh Emergency Special Session' <https://www.un.org/en/ga/sessions/emergency11th.shtml> accessed 3 March 2024.

[7] On June 4, 2018, Russia implemented Federal Law No. 127-FZ, titled "On Measures (Countermeasures) in Response to Unfriendly Actions of the USA and Other Foreign States". Subsequently, on February 28, 2022, under the provisions of Federal Law No. 127-FZ, Russia introduced retaliatory economic sanctions targeting "unfriendly states" along with associated entities and natural persons. While Russia has implemented additional economic measures, only the actions that relate to the conduct of arbitral proceedings will be analysed.

[8] Global Arbitration Review, 'Sleepless nights over sanctions' (GAR news, 12 October 2022) <https://globalarbitrationreview.com/article/sleepless-nights-over-sanctions> accessed 27 May 2023.

[9] See SCC, 'EU Sanctions' (SCC Resource Library) <https://sccarbitrationinstitute.se/en/resource-library/eu-sanctions> accessed 25 May 2023; ICC, 'Note to Parties and Arbitral Tribunals on ICC Compliance' (ICC Digital Library, June 2016) <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/note-parties-arbitral-tribunals-icc-compliance/> accessed 25 May 2023; LCIA, 'LCIA procures a comprehensive, LCIA specific, general license regarding the Belarus and Russia (Sanctions) (EU Exit) Regulations' (LCIA, 17 October 2022) <https://www.lcia.org/News/lcia-procures-a-comprehensive-lcia-specific-general-licence-re.aspx> accessed 3 March 2023; VIAC, 'Sanctions & Arbitration. How do the two get along' (VIAC) <https://www.viac.eu/en/arbitration/content accessed 3 March 2023; DIS, 'Compliance and international sanction regimes' (DIS) <https://www.disarb.org/en/arbitration-and-alternative-dispute-resolution/arbitration/compliance-and-international-sanction-regimes> accessed 3 March 2023; HKIAC 'Sanctions Policy' (HKIAC) <https://www.hkiac.org/arbitration/sanctions-policy> accessed 3 March 2023.

and other designated entities in proceedings before local courts, arbitral tribunals, and other international adjudicatory bodies, such as the International Court of Justice (ICJ).[10]

In the Netherlands, several law firms issued a statement baptized "*Stand Firm*", where they call fellow colleagues to refuse to facilitate transactions aiming to secure the interest of "*the Russian president, the Russian state, Russian (state) companies or the Russian elite insofar as they do not openly take a stand against the invasion of Ukraine*."[11] Additionally, global international law firms have cut ties with clients involved with the Russian state, and some have even reduced or closed their offices in Russia, including such global firms as White & Case and Clifford Chance, which traditionally had very active full-service practices in Russia.[12]

In light of the ongoing crisis in Ukraine, this paper aims to provide a comparative analysis of the impact of economic sanctions against Russia on the conduct of international arbitrations involving sanctioned persons. The focus will be on analysing the sanctions regimes enacted by the EU, US, and UK authorities due to their significant impact. It is important to note, however, that other distinct sanction regimes may also apply in international disputes involving Russian parties.[13]

It is also important to acknowledge a particularity of terminology before continuing. While commonly referred to as sanctions "against" or "on" Russia in the context of the Ukraine conflict, these measures encompass a more nuanced scope. They extend beyond restrictions solely on the Russian state and have targeted related individuals, legal entities, and occupied territories. For the sake of clarity within this paper, we will continue to use the prevailing term sanctions "against" or "on" Russia, while recognizing this broader application that the term does not fully capture.

2. Scope

Given the multifaceted nature of the intersection between economic sanctions and arbitration, a clear delineation of the topic is necessary. This paper examines and compares the impacts of economic sanctions on the legal and financial relationships among different stakeholders in the

[10] See, for example, Cosmo Sanderson 'Van den Berg withdraws from Yukos case' (GAR news, 2 March 2022) <https://globalarbitrationreview.com/van-den-berg-withdraws-yukos-case> accessed 15 April 2023; Another example is White & Case's withdrawal from representing Russia before English courts in the Yukos award enforcement proceedings, see Hulley Enterprises Ltd & Ors v The Russian Federation [2022] EWHC 2690 (Comm) (26 October 2022) [13-16]; Jenna Greene, 'White & Case can't quit Russia. Karma?' (Reuters, 19 July 2022) <https://www.reuters.com/legal/litigation/white-case-cant-quit-russia-karma-2022-07-19/> accessed 15 April 2023; and Colleen Murphy '3 AM law 50 firms continue to struggle to withdraw from representing sanctioned Russian Banks' (Law.com international, 30 June 2022) <https://www.law.com/international-edition/2022/06/30/3-am-law-50-firms-continue-to-struggle-to-withdraw-from-representing-sanctioned-russian-banks/> accessed 15 April 2023.

[11] Theo Hanssen, Leonard Boender, Pieter Smits, 'Dutch Law firms join hands for Ukraine with action: Stand firms!' (DVDW news, 3 March 2022) <https://www.dvdw.nl/en/news/dutch-law-firms-join-hands-for-ukraine-with-action-stand-firm/> accessed 15 April 2023.

[12] Jenna Greene 'White & Case can't quit Russia. Karma?' (Reuters, 19 July 2022) <https://www.reuters.com/legal/litigation/white-case-cant-quit-russia-karma-2022-07-19/> accessed 2 February 2024; Sam Tobin 'Clifford Chance finalises Moscow spin-off'(the Law Society Gazette, 29 April 2022) <https://www.lawgazette.co.uk/news/clifford-chance-finalises-moscow-spin-off/5112348.article> accessed 2 February 2024.

[13] For a comprehensive list, see Richard Martin, 'Sanctions against Russia – a timeline' (S&P Global Market Intelligence, 13 June 2023) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sanctions-against-russia-8211-a-timeline-69602559> accessed 15 June 2023.

arbitration industry. In this respect, it specifically analyses the sanctions regimes enacted by the EU, the UK, and the US as a result of Russia's actions in Ukraine as well as the impact of countermeasures implemented by Russia in arbitral proceedings.

To accomplish this, the paper employs a two-fold approach based on the primary types of restrictions that can impact an arbitration: prohibitions on the transfer of funds and restrictions affecting provision of legal services, regardless of whether payment can be legally received.

Both types of restrictions are relevant for the conduct of an arbitration. Regarding restrictions on the transfer of funds and payments, various fees and expenses arise during arbitration. When one of the parties is a designated person under an applicable sanction regime, payments from, to, and on behalf of that party can be affected by the financial restrictions of a sanction regime. Specifically, due to the presence of different arbitral professionals based in different jurisdictions, the cross-border payments of fees could trigger the application of various sanctions regimes for the same transfer.

Moreover, some economic sanctions regimes have specifically targeted the provision of certain services, especially when these services may benefit designated individuals or relate to a particular region. In certain cases, these prohibitions may encompass a range of services, including legal advisory, legal representation, expert advice, administration of arbitrations, among others, and affect decision-making by arbitrators. In such cases, the mere provision of these services in the context of arbitration might run afoul of sanctions, creating potential liabilities regardless of whether payment is feasible.

Both the restrictions on payments and the outright prohibition of services can significantly impact access to legal advice and representation, both in domestic litigation and in international arbitration, sparking considerable controversy in the legal field. Any limitation on access to legal services inevitably leads to potential conflicts with fundamental rights, such as the right to be heard, access to justice, a fair trial, and effective remedies. This has led sanction regimes to include derogations and exemptions, such as general carve-outs authorizing the supply of legal services and their payments in specific circumstances, or mechanisms for obtaining a license from competent authorities. Notably, the terminology used in this regard varies per sanctions regime. While the EU sanctions regime against Russia uses the term derogations authorized by competent authorities for such mechanisms, the UK and the US use the term license. For consistency within this paper, exceptions that do not require a license will be referred to as "carve-outs". Conversely, "derogations" and "licenses" will be used interchangeably to describe exemptions requiring approval from a competent authority.

Following an analysis of the restrictions, prohibitions, and relevant exceptions (derogations and carve-outs) within EU, UK, and US sanctions on Russia as they apply to international arbitration involving sanctioned parties, this paper shifts its focus to the impact of Russian countermeasures on cross-border dispute resolution. Specifically, it examines a mechanism introduced by Russian law that allows sanctioned Russian entities and individuals to circumvent their arbitration agreements and directly file disputes before Russian state commercial courts. Since the enactment of this mechanism, several cases have arisen where arbitration proceedings were disrupted due to the issuance of anti-arbitration injunctions and the initiation of litigation in Russia based on these exclusive jurisdiction grounds. Relevant cases will be discussed to provide a broader understanding of the current situation and how these developments pertain to the sanction regimes under analysis.

It should be noted that the focus of this paper is not on the impact of economic sanctions on the subject matter of the parties' disputes. Rather, it covers the financial and professional interactions between the designated person and other arbitral professionals in the context of arbitrating a dispute. Therefore, whether or not the subject-matter of the dispute arises out of economic sanctions is irrelevant for the purpose of this analysis. Moreover, this paper will not address the enforcement stage of the arbitral award and the obstacles that may arise due to economic sanctions.

3. Structure

This paper is structured as follows: Section II introduces the economic sanctions regimes enacted by the EU, UK, and US specifically in response to Russia's military actions in Ukraine.

Section III analyses the restrictions on money transfers and dealings with designated persons (or a person owned or controlled by a designated person) imposed by each regime, and their impact on arbitral proceedings. Section IV examines additional restrictions and prohibitions specifically affecting the provision of legal services by various arbitral players under these sanction regimes.

Section V examines the novel legal mechanism employed by Russia that empowers sanctioned Russian individuals and entities to circumvent their pre-existing arbitration agreements and pursue disputes in Russian state commercial courts. The section delves into recent case law from Russian courts concerning the enforceability of arbitration agreements in these scenarios. Additionally, it analyses the reactions of national courts in sanctioning countries and the latest amendments adopted by the European Commission in response to Russia's assertion of jurisdiction over disputes covered by pre-existing arbitration agreements.

Finally, Section VI presents the authors' concluding remarks.

II. The Sanction Regimes

1. The EU Sanctions Regime on Russia

Autonomous EU sanctions constitute an essential component of the Common Foreign and Security Policy (CFSP) of the EU. In pursuit of specific CFSP objectives and in accordance with Article 215 of the Treaty on the Functioning of the European Union (TFEU), the Council of the European Union may adopt restrictive measures providing for "*the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries*" or "*natural or legal persons and groups or non-State entities*".

Depending on the nature of the restrictive measures, these might be implemented directly by the member states of the EU or at the EU level. However, measures involving economic and financial sanctions are typically enacted at the EU level and are adopted in the form of council regulations, which are directly applicable in each of the EU's member states taking precedence

over each state's domestic legislation.[14] Notably, criminal penalties due to the breach of the sanctions must be established under each member state's domestic legislation.[15]

On 5 March 2014, a few weeks after Russia's actions in Crimea and Sevastopol in February 2014, the EU imposed its first package of targeted sanctions against Russia enacting the Council Regulation (EU) No 208/2014 (CR 208/2014).[16] CR 208/2014 targets entities considered responsible for the misappropriation of Ukrainian State funds and for human rights violations in Ukraine, providing for the freezing of funds and economic resources, and prohibition of making funds available to designated entities. Shortly after, on 17 March 2014, the EU expanded the scope of its restrictions by enacting the Council Regulation (EU) No 269/2014 (CR 269/2014)[17] focusing on individuals involved in implementing decisions that threaten the territorial integrity of Ukraine. Similar to CR 208/2014, CR 269/2014 also involved freezing of funds and prohibition of making funds available to designated entities.

On 23 June 2014, with Council Regulation No 692/2014 (CR 692/2014),[18] the EU imposed trade restrictions on goods originating from the Autonomous Republic of Crimea and the city of Sevastopol. CR 692/2014 also limited the import of certain goods into the EU from these regions and restricted the provision of specific services. Notably, contentious and non-contentious legal services are not explicitly addressed.

On 31 July 2014, the EU expanded its sanctions by enacting the Council Regulation (EU) No 833/2014 (CR 833/2014)[19] which imposed, *inter alia*, restrictions on exports of certain dual-use goods and technology, and on the provision of related services, such as financial services, services related to military operations to entities in Russia or for use in Russia, and 'non-contentious' legal services.

After 2014, the regulations establishing the EU sanctions developed throughout the years. However, it was after Russia's full-scale invasion in February 2022 that the scope of the prohibitions significantly expanded. On 23 February 2022, similar to CR 692/2014, the EU enacted Council Regulation (EU) No 2022/263 (CR 2022/263),[20] introducing trade and investment restrictions on non-government-controlled areas of Ukraine in the oblasts of Donetsk, Kherson, Luhansk and Zaporizhzhia.

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[14] Article 288 of the consolidated version of the TFEU [2012] OJ C 326/47. See, recently, Case C-234/17 XC and Others v Generalprokuratur [2018] ECJ 853, para 36.

[15] Richard Gordon, Michael Smyth, Tom Cornell, Sanctions Law (Hart Publishing 2019), para. 2.41 and 3.27.

[16] Current consolidated version as of 6 March 2024 of the Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine [2014] OJ L 66 (CR 692/2014).

[17] Current consolidated version as of 24 June 2024 of the Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 078 (CR 269/2014).

[18] Current consolidated version as of 6 October 2022 of the Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol [2014] OJ L 183 (CR 692/2014).

[19] Current consolidated version as of 24 June 2024 of the Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine [2014] OJ L 229 (CR 833/2014).

[20] Current consolidated version as of 7 October 2023 of the Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the illegal recognition, occupation or annexation by the Russian Federation of certain non-government-controlled areas of Ukraine [2022] OJ L 042I (CR 263/2022).

All council regulations are subject, *inter alia*, to the fundamental rights recognized within the EU and the limits they impose on the implementation of legislation that curtails said rights. These include, among others, the right of access to an effective remedy, a fair trial, protection of personal data, and confidentiality of communications between lawyers and their clients.[21] These fundamental rights have influenced the scope of the EU sanctions. In the context of legal disputes, including arbitration, both CR 208/2014 and CR 269/2014, in their respective article 4(1)(b), empower competent authorities from each member state to authorize the release of funds in cases where the funds are "*intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services*". As analysed further in section III.1, designated entities may apply for a license to the relevant authority in each member state to execute all necessary payments for the successful conduct of an arbitration.

Moreover, regarding the provision of legal services, CR 833/2014 specifically restricts the provision of "non-contentious" legal services to the government of Russia and to legal entities established in Russia. This categorization of "non-contentious", as discussed in section IV.1 below, aimed to exclude from the scope of EU sanctions the provision and access to legal representation in dispute resolution mechanisms, such as in arbitration proceedings.

To date, the latest versions of the referred council regulations are the main instruments that contain EU sanctions on Russia.[22] These council regulations incorporate a standard clause that defines their scope of application,[23] often referred to as a "jurisdictional clause"[24]. Following uniform criteria used across EU sanctions regimes,[25] this provision articulates the EU's stance on the extent to which it can extend its jurisdiction to subject individuals and entities to the restrictions outlined in the sanctions. The EU's sanctions jurisdictional clause covers all situations involving: (i) the territory of the EU, including its airspace; (ii) aircraft or vessels of an EU member state, (iii) nationals of an EU member state, (iv) companies and other entities incorporated or constituted under the law of an EU member state or (v) any business done in whole or in part within the EU.[26]

2. The UK Sanctions Regime on Russia

Similar to the EU, the UK's sanctions on Russia also date back to 2014, following the annexation of Crimea. As a member state of the EU at the time, the UK initially adopted these

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[21] See recital 6 of both CR 208/2014 and CR 269/2014; and article 6(b) of CR 833/2014.

[22] European Commission, 'Sanctions adopted following Russia's Military aggression against Ukraine' <https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#timeline-measures-adopted-in-2022-2023> accessed 18 February 2024. For a historical recount, see Council of the European Union, 'Timeline – EU restrictive measures against Russia over Ukraine' <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/history-restrictive-measures-against-russia-over-ukraine/> accessed 18 February 2024.

[23] Council of the European Union (doc. 5664/18), Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy – update, 1 May 2018, <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> accessed 18 February 2024, para 58. See also, Article 17 of CR 269/2014 and CR 208/2014; Article 13 of CR 833/2014; Article 15 of CR 2022/263; and Article 10 of CR 692/2014.

[24] Tom Ruys, Felipe Rodríguez Silvestre, 'Secondary Sanctions after Russia's invasion of Ukraine. A whole new world?' (Ghent Rolin-Jaequemyns International Law Institute at Ghent University, working paper, September 2023), 5 <https://www.law.ugent.be/grili/sites/default/files/working-paper/grili_working_paper_ruys-rodriguez_silvestre_chapter_handbook_secondary_sanctions_sept_2023.pdf> accessed 5 May 2024.

[25] Council of the European Union (n 23), para 88.

[26] Council of the European Union (n 23), para 52.

restrictions directly through coordinated measures at an EU level. Described as "*the lead in the pencil* (...) *of the EU's sanctions policy*",[27] the UK played a prominent role in the design and adoption of comprehensive EU sanctions targeting entities linked to Russia's leadership.

However, as the UK exited the EU, new legislation was introduced providing a modern framework vesting wide powers in the UK's authorities for the introduction of autonomous sanctions.[28] The main instrument to this effect is the 2018 Sanctions and Anti-Money Laundering Act,[29] which granted powers to "*appropriate ministers*" to issue secondary legislation implementing sanctions programs considered necessary for the purposes listed in the act.[30]

On 11 April 2019, pursuant to the 2018 Sanctions and Anti-Money Laundering Act, the UK Secretary of State introduced the Russia (Sanctions) (EU Exit) Regulations 2019, which aimed to "*replace, with substantially the same effect, the EU sanctions regimes relating to Russia's actions in relation to Ukraine*".[31] The regulations entered into force on 31 December 2020, and the intention of the UK authorities was, at least initially, to "*transpose as identically as possible the EU regimes*"[32] providing a theme of continuity with regards to the restrictions in force under the sanctions.[33]

The relevance of the EU's position on the application of UK sanctions has been recently tested by English courts. In *Youssef, R (On the Application Of) v The Secretary of State for Foreign, Commonwealth and Development Affairs*,[34] Justice Garnham in the context of UK sanctions against ISIL (Da'esh) and Al-Qaida, considered the value of EU case law for the interpretation of UK sanctions:

> "[Claimant's counsel] *refers the Court to the decision of the CJEU in Kadi 1 and to European Commission v Kadi (C-584/10 P) [2014] 1 CMLR 24 (CJEU) ("Kadi 2"). However, the position as a matter of EU law is now irrelevant. First, as Sir James submits, this is not an area of 'retained EU law'; nor are any of the judgments referred to by the Claimant in his Statement of Facts and Grounds 'retained EU case law' within*

[27] Select Committee on the European Union, External Affairs Sub-Committee, Oral Evidence Brexit: Sanctions Policy, 20 July 2017, HL, Q11. This quote can be attributed to Mr. Tom Keatinge, a specialist adviser on illicit finance to the UK Parliament's Foreign Affairs Committee at the time of the cited statement.
[28] See Gordon, Smyth, Cornell (n 15) paras 3.9. and 3.10. LLC Synesis v Secretary of State for Foreign, Commonwealth and Development Affairs [2023] EWHC 541 (Admin) (14 March 2023), [15] ffs; PJSC National Bank Trust and another v Mints and others [2023] EWHC 118 (Comm) [13].
[29] Nicola Newson, 'Sanctions and Anti-Money laundering Bill (HL Bill 69 of 2017-18)' (House of Lords Library briefing, 26 October 2017) <https://researchbriefings.files.parliament.uk/documents/LLN-2017-0074/LLN-2017-0074.pdf> accessed 20 April 2023, 1-3.
[30] Gordon, Smyth, Cornell (n 15) para 3.13.
[31] Explanatory Memorandum to the Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855 <https://www.legislation.gov.uk/uksi/2019/855/pdfs/uksiem_20190855_en_001.pdf> accessed 20 April 2023, para 2.1.
[32] Alan Duncan, 'Answer to a Parliamentary Question on the Russia (Sanctions) (EU Exit) Regulations 2019' HC Deb 14 May 2019, cols 1-9 <https://hansard.parliament.uk/Commons/2019-05-14/debates/8efb6ac8-c56b-44c0-ac2d-7da2bae3014a/Russia(Sanctions)(EUExit)Regulations2019> accessed 1 May 2023.
[33] See *PJSC National Bank Trust & Anor v Boris Mints & Ors* [2023] EWHC 118 (Comm) (27 January 2023) [45] ffs, [83].
[34] [2021] EWHC 3188 (Admin).

the meaning of s.6 of the European Union (Withdrawal) Act 2018. The 2018 Act and the 2019 Regulations create a new domestic framework" (emphasis is ours).[35]

However, in the context of UK sanctions on Russia, the English Court of Appeal has turned to pre-Brexit EU sanctions to analyse and delineate the scope of the current UK sanctions regulation.[36] Therefore, the EU's sanctions could still be of relevance, at least to the extent that they can be a useful reference under UK domestic statutory interpretation principles.

The Russia (Sanctions) (EU Exit) Regulations 2019 are not the only instrument in force which includes sanctions in the UK involving actions by certain actors linked with Russia. The UK's Global Human Rights Sanctions Regulations 2020, Global Anti-Corruption Sanctions Regulations 2021, and the Chemical Weapons (Sanctions) (EU Exit) Regulations 2019 are also statutes which have been used to designate and sanction Russian officials and related nationals.[37] However, for the comparative analysis subject of the present study, only the Russia (Sanctions) (EU Exit) Regulations 2019 will be analysed. Yet, it is flagged to the reader, that similar to the US sanctions regime, there are distinct instruments that could be applicable in the context of UK sanctions involving entities related to Russia's actions in Ukraine.

The UK sanctions on Russia include both targeted sanctions introduced on the basis of the designation of specific persons and comprehensive sanctions covering defined regions, specific services and industries. As further explained in section III.2, similar to EU sanctions, the UK sanctions imposed financial sanctions, including asset freezes and the prohibition of making funds available to designated entities.[38]

The imposition of economic sanctions involves considerations of foreign policy and national security, areas where limitations and scrutiny by UK courts have traditionally been kept to a minimum. However, an exception to these limited constraints includes the fundamental rights of individuals as enshrined in the European Convention on Human Rights.[39] Presumably with such limits in mind, UK authorities have issued general licenses easing the restrictions for the payments of specific fees and services. In the context of legal disputes, including international arbitration, these include a general license allowing for payments to the LCIA[40] and a "legal services general license" covering the payment of legal fees by designated entities to their counsel and related services. The LCIA license became effective on 17 October 2022, with no

[35] ibid, [64] – [65]. See, also, Justice Jay's clarification of UK's sanctions interpretation in LLC Synesis v Secretary of State for Foreign, Commonwealth and Development Affairs [2023] EWHC 541 (Admin) (14 March 2023) [30].
[36] Mints & Ors v PJSC National Bank Trust & Anor [2023] EWCA Civ 1132 (06 October 2023) [189] - [201].
[37] Claire Mills, 'Sanctions against Russia' (House of Commons Library, Research Briefing, 23 May 2023) <https://researchbriefings.files.parliament.uk/documents/CBP-9481/CBP-9481.pdf> accessed 28 May 2023 8-27. Nicola Newson, 'Magnitsky Sanctions' (House of Lords Library, 18 June 2021) <https://lordslibrary.parliament.uk/magnitsky-sanctions/> accessed 12 March 2023.
[38] See Regulations 11-15 of the Russia (Sanctions) (EU Exit) Regulations 2019.
[39] Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39 (19 June 2013) [21] (Lord Sumption).
[40] OFSI, 'General Licence INT/2022/1552576 – London Court of International Arbitration (LCIA) arbitration costs' (17 October 2022).

set expiration,[41] and the legal services general license, effective from 28 October 2022,[42] has subsequently been reissued with modifications on 29 April 2023, 29 October 2023, and 26 April 2024.[43]

Furthermore, as discussed in section IV.2, the UK sanctions prohibited the provision of "legal advisory services" to any non-UK person if the advice is related to an activity that would be prohibited or contravene certain regulations if conducted by a UK person or within the UK. Nevertheless, the UK sanctions maintained legal representation services as permissible engagements with designated parties, including specifically in the context of an arbitration.

The scope of application of UK sanctions on Russia largely follows a similar structure to the EU sanctions. The sanctions' territorial scope extends to "*conduct (by any person) in the United Kingdom*"[44] and its territorial sea.[45] As to the sanctions' personal scope, insofar as the conduct of a "United Kingdom person" is concerned, the sanctions apply extraterritorially.[46] The term "United Kingdom Person" or "UK person" has been defined in Section 21(2) of the Sanctions and Anti-Money Laundering Act 2018 as: "*(a) a United Kingdom national, or (b) a body incorporated or constituted under the law of any part of the United Kingdom*."

3. The US Sanctions Regime on Russia

US sanctions imposed on entities or natural persons related to Russian Federation precede Russia's actions in Ukraine in 2014. A significant body of restrictions was established by US authorities for diverse motives, including Russia's: (i) interference with US elections; (ii) malicious cyber-enabled or intelligence activities; (iii) use of chemical weapons; (iv) human rights abuses; (v) utilization of energy exports and product as a geopolitical tool; (vi) illicit trade with North Korea; and (vii) support to the governments of Syria and Venezuela.[47]

Currently, there are multiple legal authorities in force, in the form of acts by the US Congress and executive orders by the President of the US, which could be considered under the umbrella of US sanctions targeting Russia. However, this paper will focus exclusively on US sanctions enacted as a direct response to Russia's actions in Ukraine.

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[41] OFSI, 'General Licence INT/2022/1552576 – London Court of International Arbitration (LCIA) arbitration costs' (17 October 2022). To date, the General License for the LCIA has been amended in three opportunities, on 5 June 2023, 13 November 2023 and 15 December 2023. It is worth noting that it might be revoked, modified or suspended at any time by the HM treasury.

[42] Solicitors Regulation Authority 'OFSI declares legal fees general license' (SRA news, 10 November 2022) <https://www.sra.org.uk/sra/news/sra-update-109-general-ofsi-licence/> accessed 5 May 2023. OFSI, Legal Services General License under the Russia Regulations and the Belarus Regulations INT/2022/2252300 (28 October 2022).

[43] See OFSI, 'Legal Services General license under the Russia Regulations and the Belarus Regulations INT/2023/2954852' (29 April 2023); OFSI, 'General Licence Under the Russia Regulations and the Belarus Regulations INT/2023/3744968' (25 October 2023), amended on 15 December 2023; OFSI, 'General Licence Under the Russia Regulations and the Belarus Regulations INT/2024/4671884' (26 April 2023). According to paragraphs 11 and 12 of the legal services general license, it takes effect from 00:01 on 29 April 2024 to 23:59 on 28 October 2024, and it might be revoked, modified or suspended at any time by the HM treasury.

[44] Regulation 3(7) of the Russia (Sanctions) (EU Exit) Regulations 2019.

[45] Regulation 3(5) of the Russia (Sanctions) (EU Exit) Regulations 2019.

[46] Regulations 3(1) and 3 (4) of the Russia (Sanctions) (EU Exit) Regulations 2019.

[47] Cory Welt and others, 'U.S. sanctions on Russia', (US Congressional Research Service, R45415, 18 January 2022) 1-2.

As explained below, the relevant instrument will primarily be the Ukraine-/Russia-Related Sanctions Regulations issued by the Treasury Department's Office of Foreign Assets Control (OFAC) and additional legal instruments, such as OFAC's directives and advisory material.

The initial basis for most of the US sanctions related to Russia's invasion of Ukraine can be found in four executive orders (E.O.) — number 13660, 13661, 13662, and 13685 — issued by the US President under its authority granted in the National Emergencies Act (NEA; P.L. 94-412; 50 U.S.C. 1601 et seq.), the International Emergency Economic Powers Act (IEEPA; P.L. 95-223; 50 U.S.C. 1701 et seq.), the Countering America's Adversaries Through Sanctions Act (Public Law 115-44) (CAATSA), and the Ukraine Freedom Support Act of 2014 (Public Law 113-272).[48] These four E.O.s were issued during President Obama's presidency in 2014.

The scope and reach of said prohibitions have been further expanded in subsequent authorities, including E.O.s13.849,[49] and 14.065.[50] OFAC has subsequently implemented and codified all relevant authorities of several specific sanctions regimes, including the one relevant to this paper, the "Ukraine-/Russia-Related Sanctions Regulations", which is published in the Code of Federal Regulations (CFR) in part 589.[51]

Current US sanctions against Russia include the two common structures of international economic sanctions, namely, targeted sanctions and comprehensive sanctions. The main body of sanctions adopted the structure of targeted sanctions, including asset freezes and prohibition of making available funds. These restrictions are not aimed directly at the Russian state and its citizens as a whole, instead, the sanctions target specific individuals, entities, and most recently vessels and aircraft. Each particular subject is identified by designation on either the Specially Designated Nationals and Blocked Persons List (SDN) or the Sectoral Sanctions Identifications List (SIS), both issued by OFAC.[52] In the case of the SIS,[53] entities involved in a specific sector of the target economy, such as the financial, energy, and defence sectors, are specifically targeted under "sectoral" sanctions. These sanctions are more narrowly defined compared to general restrictions. While they prohibit certain transactions, including investments and lending operations, they also permit individuals subject to the sanctions regime to engage in designated transactions with the targeted entities.

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[48] Federal Register, 'Ukraine/Russia Related Sanctions Regulations' (US National Archives and Records Administration, 2 May 2022) <https://www.federalregister.gov/documents/2022/05/02/2022-09371/ukraine-russia-related-sanctions-regulations> accessed 20 April 2024.

[49] Executive Order N° 13.849 was issued on 20 September 2018. This E.O. targets entities and individuals involved in significant transactions with the defence or intelligence sectors of the Government of the Russian Federation. This instrument includes asset freezes and restrictions on financial transactions.

[50] Executive Order N° 14.065 was issued on 21 February 2022. This E.O. expanded the scope of the U.S. embargo in the "so-called Donetsk People's Republic and Luhansk People's Republic regions of Ukraine". See Office of Foreign Assets Control, 'What does Executive Order (E.O.) 14065 do?' (US Department of the Treasury, 2 March 2022) <https://ofac.treasury.gov/faqs/1006#:~:text=14065%20that%20are%20or%20come,blocked%20persons%20are%20also%20blocked> accessed 13 May 2024.

[51] Office of Foreign Assets Control, 'Amendment to the Ukraine-Related Sanctions Regulations and Associated Administrative list updates' (US Department of the Treasury, 29 April 2022) <https://ofac.treasury.gov/recent-actions/20220429> accessed 13 April 2023.

[52] Welt and others (n 47) 8.

[53] See Office of Foreign Assets Control, 'Sectoral Sanctions Identifications (SSI) List' (US Department of the Treasury, 19 May 2023) <https://ofac.treasury.gov/consolidated-sanctions-list/sectoral-sanctions-identifications-ssi-list> accessed 25 May 2023.

However, with regards to specific regions, such as part of the Ukrainian territory under Russia's control, namely the Crimea region,[54] and the regions ascribed to the "Donetsk People's Republic" and the "Luhansk People's Republic", the US has established a comprehensive embargo prohibiting, *inter alia,* any investment, import, export, or the provision of specific services to said regions, including legal services.[55]

As elaborated in sections III.3 and IV.3, concerning the impact of US sanctions on arbitral proceedings, any payments from, on behalf of and to a designated person require a license from OFAC, including the payment of professional fees to arbitral practitioners and administrative fees to arbitral institutions. However, uniquely to US sanctions, the payment for certain legal services is expressly permitted using funds from outside the United States under specific circumstances.

A wide range of legal services are exempted from the general services provision for both designated entities and covered regions. Regarding international arbitration, although the carve-out lacks absolute clarity, initiating and conducting an arbitration seated in the US and representing a designated party involved in such arbitration are permitted. This carve-out also covers related services, including those provided by expert witnesses. However, for arbitrations seated in another jurisdiction and other services not covered by the carve-outs, such as handling settlement agreements, a license is required.[56]

The scope of US sanctions has the same dual structure adopted by the UK and EU sanctions. First, there is a territorial scope based on the territorial delimitation of state jurisdiction. For US sanctions, this includes the "*United States, its territories and possessions, and all areas under the jurisdiction or authority thereof*".[57] Second, there is a personal scope based on the concept of US persons. US persons are defined as "*any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States*".[58] However, unique to US sanctions, there are several instances of what are referred to as "secondary sanctions". In the context of US sanctions, this means that parties not originally subject to US jurisdiction can be targeted for sanctions if they engage in certain dealings with individuals or entities already sanctioned by the US. For instance, the US enacted legislation that allowed for the imposition of sanction on non-US entities involved in the construction of the Nord Stream 2 pipeline.[59]

III. Application of Economic Sanctions to Transfer of Money to/from/on Behalf of the Sanctioned Entity to Different Arbitral Professionals

In addition to a valid arbitration agreement, payment is necessary to initiate and run arbitration proceedings. For example, in the case of an institutional arbitration administered by the ICC,

[54] See 31 CFR § 589.206, 31 CFR § 589.207, 31 CFR § 589.208, and 31 CFR § 589.306. The previous references are not exhaustive and other provisions may also be relevant.
[55] See United States President, E.O.s 14065 of February 21, 2022, section 1.
[56] For a general overview, see Claire DeLelle and Nicole Erb, 'Key Sanctions Issues in Civil Litigation and Arbitration' (Global Investigation Review, 8 July 2022) <https://globalinvestigationsreview.com/guide/the-guide-sanctions/third-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration> accessed 26 May 2023.
[57] 31 CFR § 589.338.
[58] 31 CFR § 589.339.
[59] For more examples with respect to US sanctions on Russia, see Christine Abely, 'The Russia Sanctions. The Economic Response to Russia's Invasion of Ukraine' (CUP, 2024) 48 ffs.

the claimant must pay 5,000 USD when it files a request for arbitration to cover the initial administrative expenses.[60] From the commencement of arbitration proceedings, the potential impact of economic sanctions comes into play. For example, payments originating from a designated Russian party to the arbitration institution to cover institutional costs as well as arbitrators' fees might be subject to prior authorization, licenses and/or extensive delays due to compliance verifications.[61] If payments are in dollars and routed through the US, they might bring the US sanctions into play, forcing parties to use other currencies if possible. Furthermore, if one of the arbitrators has a jurisdictional link with the EU, UK or US, they might be precluded from receiving their fees or acting as such.

To address this issue, the current section is organized as follows: Sections III.1 to III.3 examine the payment restrictions within the EU, UK, and US sanctions regimes against Russia, respectively, detailing their applicable derogations and exceptions. Section III.4 provides a comparative overview of these three regimes, and finally, section III.5 addresses the impact of these restrictions on relevant monetary transfers during arbitration proceedings.

1. Restrictions on Transfer of Funds in the EU Sanctions Regime Against Russia

Under EU sanctions regimes, restrictions on transfers of funds generally have two elements: 1. An asset-freeze: a requirement to freeze all funds and economic resources belonging to, owned, held or controlled by any person targeted by sanctions;[62] and 2. a non-provision restriction: a prohibition to make any funds or economic resources available, directly or indirectly, to or for the benefit of persons targeted by sanctions.

The EU sanctions regime against Russia adopts this structure in both articles 2 of CR 269/2014 and CR 208/2014, which provides:

> *"1. All funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I, shall be frozen.*
>
> *2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I".*

As mentioned above, the territorial and personal scopes of the EU sanctions regimes are uniformly defined in all EU Regulations concerning restrictive measures. Accordingly, Article 17 of CR 269/2014 sets forth:

> *"This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory*

[60] International Chamber of Commerce, 'Costs and Payment' (ICC Arbitration) <*https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/*> accessed 2 February 2024.

[61] Professor Mashkour explains in detail a real-life case scenario where payment restrictions significantly disrupted the initiation and conduct of an arbitration. Moshkan Mashkour 'International Arbitration Faced with the Challenge of Economic Sanctions' (International Law Review, Volume 40, Issue 71, Fall 2023) 226-228.

[62] The notion of 'funds, other financial assets and economic resources' in sanction regulations has been widely interpreted by the CJEU. See Case C-550/09 Criminal Proceedings Against E & F [2010] ECR I-06213, para 69.

of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union". [63]

Restrictions on the transfer of funds under the EU sanctions regime on Russia are applicable within the territory of the EU to all persons (EU and non-EU), and outside the territory of the EU, with respect to EU natural and legal persons. Additionally, EU sanctions apply to all entities involved "in respect of any business done in whole or in part within the Union".

Therefore, in principle, two factors should be checked for the applicability of EU sanctions to the transfer of funds: (a) The existence of a territorial link between the EU and either the involved natural or legal person, or the conduct itself; and (b) the existence of a personal nexus of the natural or legal person with the EU. This includes when a natural person is a national of a member state or when the legal entity is incorporated under the laws of a member state.

Beginning with the first category, there is a degree of ambiguity with this scope of application as there is no clear outline with regards to when a non-EU person, natural or legal, or a conduct, can be considered to be located or performed "*within the Territory of the Union*" or related to "*business done in whole or in part in the Union".* The EU Commission is reiterative in clarifying that EU sanctions "*have no extraterritorial effect*" and therefore do not apply to entities incorporated in third countries, even to subsidiaries of EU companies incorporated in third states.[64] However, it is not clear to what extent connecting factors such as principal place of business, domicile, residency, presence, being subject to insolvency proceedings and others could subject a non-EU natural or legal person to EU sanctions under the territorial scope.

Regarding the conduct itself, in the context of the transfer of funds, the determination of the territory within which the transfer of funds takes place is not always a straightforward exercise. However, this determination can have serious implications as non-EU parties involved could be subject to sanctions. The European Commission has considered that if a non-EU party carries out a payment that can be deemed to be done within the Union, said party is subject to EU sanctions.[65]

Transfers of funds often include different parties, namely the originator, the beneficiary, the sending bank, the receiving bank, and the intermediary bank.[66] The originator is the party that

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[63] See Article 17 of CR 208/2014; Article 13 of CR 833/2014; Article 15 of CR 2022/263; and Article 10 of CR 692/2014.

[64] European Commission, 'Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (14 May 2024), question N° 34 of section 2 "Export-Related Restrictions For Dual-Use Goods And Advanced Technologies", 146 <https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-consolidated_en.pdf> accessed 25 May 2024.

[65] The European Commission has explicitly stated that "*by way of example, a non-EU company shipping agricultural products from Russia directly to a non-EU countries has no obligations* (...). *However, if the same company imports the products via the Union or* ***carries out payment in the Union****, then it has to comply with EU sanctions as it is entering the EU international market*" (emphasis added). European Commission, 'Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (14 May 2024), question N° 7 of section 1 "Trade in Agricultural and Related Products from Russia", 258 <https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-consolidated_en.pdf> accessed 25 May 2024.

[66] See Article 2 of the 1994 UNCITRAL Model Law on International Credit Transfers. Available at <www.uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-credittrans.pdf> accessed 28 May 2023.

at its initiative funds are transferred, the beneficiary is "*the person designated in the originator's payment order to receive funds as a result of the credit transfer*".[67] A sending bank and a receiving bank are respectively the bank issuing a payment order and the bank receiving the payment order.[68] On the other hand, an intermediary bank is "*any receiving bank other than the originator's bank and the beneficiary's bank*".[69] When a credit transfer is international, some or all of these parties are nationals of or have their place of business in different countries. Therefore, there are multiple places where it can be considered as the place where payment took place.

One useful reference for this determination could be the conflict-of-laws rule in the UNCITRAL Model Law on International Credit Transfers, which specifies that the applicable law for a payment order is the law of the receiving bank.[70] From a private-international-law perspective, the localization of the place of payment is one of the overlooked areas in both case law and doctrine.[71] Yet, it could be argued that the place of transfer of funds should be considered to be the location of the receiving bank in every segment of an international transfer. In any case, these considerations remains a matter of statutory interpretation of the sanction regulations under EU law.

In addition to the place of transfer of funds as the trigger for the extraterritorial reach of the EU sanctions, one might also think of the currency and the use of a corresponding bank based in the EU to clear the transaction as a factor that could trigger EU sanctions with respect a transfer of funds outside the EU. In contrast with the position in the US, as will be described below in section III.3, some scholars consider that there is no sign that EU sanctions would apply in these cases, where all other factors are non-EU.[72] Other authors have criticized the US position of asserting jurisdiction for the purposes of US sanctions based only on the corresponding bank and currency nexus, claiming it is unsupported under international law doctrines.[73] It remains to be seen whether EU authorities will adopt a similar approach, specifically considering the EU's long-standing position against "extraterritorial" measures.[74]

One might also think of the seat of arbitration as a relevant connecting factor. As recently reported in the 2022 Russian Arbitration Association Survey, in addition to Moscow, London, Paris, and Geneva are the preferred jurisdictions for Russian parties when selecting the seat of

[67] Article 2(d) of the 1994 UNCITRAL Model Law on International Credit Transfers.
[68] Article 2(e)(f) of the 1994 UNCITRAL Model Law on International Credit Transfers
[69] Article 2(g) of the 1994 UNCITRAL Model Law on International Credit Transfers.
[70] See Article Y of the UNCITRAL Model Law on International Credit Transfers. The United States Uniform Commercial Code (UCC), § 4A-507, has a similar approach by designating the law of the jurisdiction in which the receiving bank is located as the governing law in the absence of contrary express agreement
[71] See, in general, Luca G. Radicati Di Brozolo International Payments and Conflicts of Laws, The American Journal of Comparative Law 48 (2000) 307.
[72] Ruys and Rodríguez Silvestre (n 24) 5.
[73] See, e.g., Susan Emmenegger, 'Extraterritorial Economic Sanctions and Their Foundation in International Law' (2016) 33 Arizona Journal of International and Comparative Law, 655-656; Mathias Audit, 'Sanctions contre BNP Paribas: l'extraterritorialité du droit américain est-elle conforme au droit international?', (Les Echos, 25 June 2014) <https://archives.lesechos.fr/archives/cercle/2014/06/25/cercle_101744.htm> accessed 3 May 2024, Julia Schmidt, 'The Legality of Unilateral Extra-Territorial Sanctions under International Law' (2022) 27 Journal of conflict & security law 53.
[74] The European Commission has considered as "extra-territorial measures" any "*legislative or regulatory measures that seek to apply beyond the territory of a sovereign, and without a sufficient nexus with that country*". See European Commission 'Communications 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' (19 January 2021) COM(2021) 32 final <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2021:32:FIN&rid=1> accessed 25 may 2024.

their arbitral proceedings.[75] Since all three jurisdictions have sanctions regimes in force, the question of whether a sanction regime can impact an arbitral proceeding based solely on the nexus created by the selection of an arbitral seat is of considerable practical importance. Answering this question depends on the scope of application of each sanction regime.

A starting point is to identify the prohibited conduct and determine factors for categorizing such conduct. Article 2 of Council Regulation 269/2014 is concerned with making funds available, not arbitrating a dispute. Nevertheless, in defining the territorial scope of the payment restrictions, the role of the seat of arbitration as the juridical domicile of arbitration should not be overlooked. The seat of arbitration is, in private-international-law terms, a connecting factor which relates an arbitration to a given procedural order.[76] In other words, if an arbitration is seated in an EU member state, it is presumed that the arbitration has taken place in the territory of that member state and that the proceedings are subject to said State's jurisdiction. Therefore, if the place of incorporation of an arbitral institution is not within the EU, but the seat of arbitration is in the EU and the arbitral institution offers its services with regard to such an arbitration, it is arguable that this case can be categorized as "*any business done in whole or in part within the Union*"[77] and thus within the scope of application of the EU sanctions. In such cases, irrespective of the territory within which transfer of funds take place and regardless of the nationality of the arbitral professionals involved, an EU-seated arbitration may be sufficient to trigger the territorial application of the EU sanctions to all parties, including the asset freeze and non-provision of funds prohibitions.

Turning to the personal scope of EU sanctions, nationality would be the determining factor for natural persons. Any national of a member state is subject to EU sanctions. Therefore, EU nationals acting as counsel, arbitrators, experts or staff of an arbitration institution or being a party in the arbitration are bound to the transfer of funds restrictions. This includes cases of EU nationals acting as employees of law firms, arbitral institutions and other legal entities. The EU Commission has established that even in the case of an EU national working for an entity incorporated under the law of a third state, they "*can be held personally liable for participating in transactions which breach EU sanctions*".[78]

In the case of legal persons, including arbitral institutions, the place of incorporation or constitution should be the relevant factor in determining if a sanctions regime applies to an arbitral institution. Therefore, having an arbitral institution incorporated or constituted under the laws of an EU member state is sufficient to trigger the asset freeze and non-provision restrictions of the EU sanctions regime, irrespective of the place of transfer. Similarly, if a sending, receiving, or intermediary bank involved in the process of transfer of funds is incorporated or constituted under the law of an EU member state, the restriction of Article 2 of CR 269/2014 will apply based on the personal scope of the Regulation.

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[75] The Russian Arbitration Association 'The 2022 Russian Arbitration Association Survey: The impact of sanctions on commercial arbitration' (2023) 8 <https://arbitration.ru/upload/medialibrary/319/rwbwb3rdjvkywize5jo5e6nu12t8c6it/RAA-2022-Study-on-sanctions_eng.pdf> accessed 17 July 2023.

[76] See, in general, Franco *Ferrari, 'Plures Leges Faciunt Arbitrum'* (2021) 37 Arbitration International *579.*

[77] Article 17 (e) of the CR 269/2014.

[78] European Commission, 'Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (14 May 2024), question N° 34 of section 2 "Export-Related Restrictions For Dual-Use Goods And Advanced Technologies", 146 <https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-consolidated_en.pdf> accessed 25 May 2024.

In line with all other EU sanctions, the EU sanctions on Russia, recognize the possibility of granting an exemption by the competent authorities, allowing for payment to be made in certain cases. Article 4(b) of CR 269/2014 provides that:

> *"By way of derogation from Article 2, the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as they deem appropriate, after having determined that the funds or economic resources concerned are:*
>
> *[…]*
>
> *b) intended exclusively for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services[…]".*[79]

From the above, it can be concluded that an arbitral institution incorporated in the EU when receiving funds from a party which has been designated by the EU sanctions against Russia can benefit from this derogation if the competent authorities authorize the release of funds.

The CJEU, in an analogous sanction regime and in the context of a legal fees license request involving a judicial review challenge to an EU sanction, established that when dealing with such an authorization request, the competent national authority does not enjoy absolute discretion to grant the license, but must take into considerations the fundamental rights involved.[80]

To the best of our knowledge, there are no official region-wide statistics on the timeframe and number of authorizations for the payment of reasonable legal fees granted by competent authorities of member states. Some member states' competent authorities have published general guidance on how to apply for authorization. For instance, the Finnish Ministry of Foreign Affairs states that the average processing time for authorization applications is two to three months.[81] The French General Directorate of the Treasury provides an online platform to submit authorizations requests, although an expected timeframe is not provided. However, it is established that an omission of response within two months can be considered a denial.[82]

2. Restrictions on Transfer of Funds in the UK Sanctions Regime on Russia

Similar to Article 2 of Council Regulation (EU) No 269/2014, Regulations 11-15 of the UK Sanction Regulations on Russia[83] set out financial sanctions against designated persons, including asset freezes and prohibitions on making funds and economic resources available to designated persons. Regulation 11.1 stipulates:

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[79] See also Article 4(b) of CR 208/2014.
[80] Case C-314/13, Užsienio reikalų ministerija and Finansinių nusikaltimų tyrimo tarnyba v Vladimir Peftiev and Others, CJEU [2014] ECR 1645, paras. 20, 41.
[81] Ministry of Foreign Affairs in Finland, 'Applying for an authorisation specified in the EU Sanctions Regulations' <*https://um.fi/applying-for-an-exemption-from-sanctions*> accessed 25 May 2024.
[82] Diretion Génerale du Trésor, 'Foire aux questions - Téléservice sanctions financières internationales' (French Ministry of Finance, 13 July 2023) <*https://www.tresor.economie.gouv.fr/services-aux-entreprises/sanctions-economiques/foire-aux-questions-teleservice-sanctions-financieres-internationales*> accessed 24 April 2024.
[83] Russia (Sanctions) (EU Exit) Regulations 2019 S (S.I. 2019/855).

> *"A person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources".*

Regulation 12.1 prohibits "*mak[ing] funds available directly or indirectly to a designated person*" whereas Regulation 13.1 extends this prohibition of making funds available to "*any person for the benefit of a designated person*". Regulations 14.1 and 15.1 mirrors the same prohibitions for "*economic resources*".

As referred to above in section II.2. and similarly, to the EU, two factors are relevant for the applicability of UK sanctions to the transfer of funds: The existence of (i) a territorial nexus between either the natural or legal person involved or the conduct itself; or (ii) a personal nexus of the entities involved.

The personal nexus is with respect to a "UK person", *i.e.,* all UK nationals and legal entities established under UK law. They will be subject to sanctions, "*irrespective of where their activities take place*".[84] With regards to the territorial nexus, there is also a similar degree of ambiguity as under EU sanctions. It is not clearly defined the connecting factors to determine when a natural or legal person, or the relevant conduct itself, can be considered to be within UK territory. In any case, if the territorial nexus is satisfied, the sanctions apply regardless of the nationality or place of corporation of the sender or receiver, or of the other banks and institutions involved.

The UK's Office of Financial Sanctions Implementation (OFSI) refers to these two scopes under a single term, the "UK nexus". In its Financial Sanctions Enforcement and Monetary Penalties Guidance, the OFSI established that "*a breach does not have to occur within UK borders for OFSI's authority to be engaged. There simply has to be a connection to the UK, which we call a UK nexus*".[85] Among the examples provided, OFSI mentioned some that could include non-UK persons, such as "*transactions using clearing services in the UK, actions by a local subsidiary of a UK company (depending on the governance), action taking place overseas but directed from within the UK, or financial products or insurance bought on UK markets but held or used overseas*". However, OFSI was careful to clarify that said examples are not exhaustive. The delimitation of the UK sanction's scopes is ultimately a matter of statutory interpretation.[86]

Along the same lines of what we discussed in the previous section, it is not clear whether an arbitral seat within the UK can operate as a connecting factor for determining that a prohibited conduct has taken place within the UK. In principle, arbitrations seated in the UK are subject to the arbitral order of the UK.[87] In delignating its territorial scope of application, the UK sanctions refer to (prohibited) *"conduct (by any person) in the United Kingdom"*. It is not clear if such territorial delineation extends to the seat of arbitration. Indeed, when it comes to

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[84] Office of Financial Sanctions Implementation, 'UK Financial sanctions general guidance' (Guidance, 16 May 2024) <*https://www.gov.uk/government/publications/financial-sanctions-general-guidance/uk-financial-sanctions-general-guidance*> accessed 26 April 2024.

[85] Office of Financial Sanctions Implementation, 'Financial sanctions enforcement and monetary penalties guidance' (Guidance, 16 May 2024) <https://www.gov.uk/government/publications/financial-sanctions-enforcement-and-monetary-penalties-guidance/financial-sanctions-enforcement-and-monetary-penalties-guidance> accessed 26 April 2024. See also Gordon, Smyth, Cornell (n 15) para. 3.54-3.55

[86] Regarding the principles of statutory interpretation applicable to UK sanctions, see *Mints & Ors v PJSC National Bank Trust & Anor* [2023] EWCA Civ 1132 (06 October 2023) [21] - [26].

[87] See, e.g., Article 2(1) of English Arbitration Act 1996.

payment restrictions, the prohibited conduct is dealing with funds or economic resources or making funds or economic resources available. Having the seat of arbitration within the EU does not necessitate any of the abovementioned prohibited conduct. Moreover, unlike the EU sanctions against Russia, there is no reference to a more general wording such as any business done in whole or in part within the UK. Instead, UK authorities refers to the concept of UK nexus. This makes it more difficult to argue that the seat of arbitration within the UK can *per se* trigger the application of payment restriction of the UK sanctions against Russia.

If and when payments are prohibited by the UK Sanction Regulation against Russia, the same regulation provides for the possibility of obtaining a license for payments which are otherwise prohibited. Regulation 64 of the UK Sanction Regulation against Russia stipulates:

> *"(2) The Treasury may issue a licence which authorises acts by a particular person only—*
>
> *(a) in the case of acts which would otherwise be prohibited by regulations 11 to 15, where the Treasury consider that it is appropriate to issue the licence for a purpose set out in Part 1 of Schedule 5".*[88]

According to case law, the licensing grounds specified in the regulations are separate, cumulative, and should be interpreted in an ordinary, non-restrictive manner.[89] Moreover, as mentioned above, the OFSI has issued general licenses allowing specific prohibited activities, without the need for a specific license. For instance, on 17 October 2022, the OFSI issued a general license enabling designated persons to make payments to the LCIA to cover their arbitration costs, including the expenses of the arbitral tribunal and the tribunal secretary.[90] Shortly after, on 28 October 2022, the OFSI issued a "Legal Services General Licence" which was subsequently reissued with modifications on 29 April 2023, 29 October 2023, and 26 April 2024. Issued under Regulation 64 of the Russian Regulations, this license enabled the payment of legal fees owed by a designated person, distinguishing between services engaged prior to and subsequent to the designation of the sanctioned person.

Despite the potential difficulties in the implementation of these licenses, as it will be discussed below,[91] they provide some assurance for parties involved, allowing to access legal representation, including in the context of arbitral proceedings. Further, only in the cases of arbitral proceedings administered by the LCIA, a designated person will be able to cover other related services, including the payments of the arbitral tribunal and the tribunal secretary. In the case of other unlicensed arbitral institutions or in *ad hoc* proceedings, parties will require a specific license from OFSI if UK sanctions are applicable to the case.[92]

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[88] Part 1 of Schedule 5 lists legal services as a valid ground to obtain a license and defines them as "*(a) reasonable professional fees for the provision of legal services, or (b) reasonable expenses associated with the provision of legal services*."

[89] Mints & Ors v PJSC National Bank Trust & Anor [2023] EWCA Civ 1132 (06 October 2023) [214], [218].

[90] OFSI, 'General Licence INT/2022/1552576 – London Court of International Arbitration (LCIA) arbitration costs' (17 October 2022).

[91] See Section III.5.6.

[92] Prior to the General LCIA license, it has been publicly disclosed that the OFSI has granted licenses allowing parties to pay legal fees, the LCIA arbitration and the tribunal fees, payment of adverse costs and counsel fees. See, e.g., *PJSC National Bank Trust & Anor v Boris Mints & Ors* [2023] EWHC 118 (Comm) (27 January 2023) [152].

In general, licenses only authorize payments within the jurisdiction covered by the sanction regime in question. Therefore, if a party is designated in both EU and UK sanctions, a license issued by the OFSI does not authorize payments prohibited by the EU sanctions regime. Consider the following example. An arbitral institution incorporated in the UK is administering a dispute which involves a party sanctioned by both the UK and the EU sanctions against Russia. When receiving funds from the designated party, the arbitral institution can benefit from the derogation of Regulation 64 if the OFSI issues a specific license or general license that is applicable for such payments. This is because an arbitral institution based in the UK is a legal person "*incorporated or constituted under the law of any part of the United Kingdom*".[93] However, if payments from the sanctioned party are transferred from a bank account in the EU (hence, conduct taking place in the territory of the EU),[94] the restrictions of the EU sanctions regime to payments originating from the EU will also be applicable to the sender, hindering payment. In such cases, the sender needs to additionally apply to the EU competent authorities for an authorization to pay to an arbitral institution outside the EU.

Regrettably, there are no public records on how many cases designated persons have benefited from general licenses or the number of specific licenses granted by OFSI for the payment of legal fees. Recently, the English High Court dismissed a challenge to the validity of an LCIA arbitration agreement based on alleged issues of access to justice arising from UK sanctions and the difficulties faced by designated entities in obtaining legal services.[95] The court deemed the argument "*close to unarguable*",[96] considering the licensing regime available for the payment of legal fees and the increasing familiarity from practitioners with the licensing process in the UK.

3. Restrictions on Transfer of Funds in the US Sanctions Regime Against Russia

The US sanctions on Russia also include asset freezes and restrictions on provision of funds, goods and services. Such restrictions prohibit receipt from and making funds available to designated persons. Section 589.201(a) of Title 31 of the US Code of Federal Regulation (hereinafter "the US Regulation on Ukraine-/Russia-Related Sanctions")[97] blocks "*all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person*" of the designated persons. Further, § 589.201(b) of the same Regulation prohibits:

> *"(1) The making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to paragraph (a) of this section; and*
>
> *(2) The receipt of any contribution or provision of funds, goods, or services from any person whose property and interests in property are blocked pursuant to paragraph (a) of this section".*

[93] Section 21(2) of Sanctions and Anti-Money Laundering Act 2018.
[94] Article 17 (a) of the CR 269/2014.
[95] Airbus Canada Limited Partnership v Joint Stock Company Ilyushin Finance Co (No. 2) [2024] EWHC 790 (Comm) (27 March 2024).
[96] Airbus Canada Limited Partnership v Joint Stock Company Ilyushin Finance Co (No. 2) [2024] EWHC 790 (Comm) (27 March 2024), [16].
[97] 31 CFR § 589.201.

The territorial and personal scope of the US sanctions regime against Russia extends to "[a]*ll property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any US person*".[98] The term US person has been defined as: "*any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States*."[99] The United States itself is defined as "*the United States, its territories and possessions, and all areas under the jurisdiction or authority thereof*".[100]

The scope of the US sanctions against Russia focuses on property and interests in property, encompassing cases where such property and interests are already within US territory, as well as those that later come within its territory. As regards the personal scope of US sanctions, unlike the EU and UK sanctions, they also extend to permanent residents. Moreover, as long as a person is within the territory of the US, they will be treated as a US person for the purposes of US sanctions. Ambiguity remains as it is not clear when a natural or legal person is in the United States in several cases. For instance, under similar sanctions regimes, OFAC has considered a foreign entity to be in the US, and therefore a US person, because the entity entered into bankruptcy proceedings in the US.[101]

Additionally, non-US persons are also prohibited from "*causing or conspiring to cause US persons to wittingly or unwittingly violate US sanctions, as well as engaging in conduct that evades US sanctions*".[102]

Based on the aforementioned scope of the rules, international payments entering the territory of the US are subject to the asset freeze and non-provision restrictions. Consequently, in the process of international transfers of funds, the intervention of the US financial system and the US dollar, though corresponding banks based in the US that provide clearing services, also trigger the application of sanctions.[103] A clear example involves a non-US arbitral institution that holds a bank account in the US. In principle, absent a license, it cannot accept or process payments originating from a sanctioned party into its US bank account, as such a payment would "*come within the United States*".[104] In June 2023, Swedbank Latvia, a subsidiary of a Sweden-based financial institution, was found by OFAC to be in breach of US sanctions. The

[98] 31 CFR § 589.201.
[99] 31 CFR § 589.339.
[100] 31 CFR § 589.338.
[101] See case of B Whale Corporation, a company based in Taipei, Taiwan and a member of the TMT group of shipping companies. Office of Foreign Assets Control, 'OFAC Issues a Finding of Violation to B Whale Corporation, a Member of the TMT Group of Shipping Companies, for a Violation of the Iranian Transactions and Sanctions Regulations' (Treasury, 3 February 2017) <https://ofac.treasury.gov/media/11196/download?inline> accessed 18 January 2024.
[102] Office of Foreign Assets Control, 'Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Obligations of foreign-based persons to comply with U.S. sanctions and export control laws' (Treasury, 6 March 2024) 2 <*Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: - Obligations of foreign-based persons to comply with US sanctions and export control laws OVERVIEW*> accessed 8 May 2024.
[103] Michael Gurson, 'The U.S. Jurisdiction over Transfers of U.S. Dollars between Foreigners and over Ownership of U.S. Dollar Accounts in Foreign Banks' (2004) Colum Bus L Rev 721.
[104] 31 CFR § 589.201.

grounds cited by OFAC were the fact that the Swedbank Latvia used US correspondent banks to process payments to individuals in sanctioned jurisdictions.[105]

Therefore, the involvement of any US persons in the process of payment triggers the application of such restrictions. For example, if an arbitral institution organized under the laws of the US is administrating the case, restrictions on the transfer of funds from a sanctioned party would apply to the case even if payments take place outside of the US territory. Moreover, payments that transit the US financial system through a clearing or correspondent bank process also trigger the application of US sanctions. The clearing of dollars between two foreign banks through US financial institutions in support of sanctioned payments occurring outside the United States still involves a violation of the US sanctions due to the fact that property would "*come within the United States*" when a US corresponding bank is involved. Additionally, in such cases, the non-US persons causing a violation of US sanctions may also be penalised.[106]

Whether this territorial delineation also extends to arbitrations with a seat in the territory of the US is again not very clear. It appears from the wording of § 589.201 that the intended territorial scope of the US sanctions regime against Russia is defined by reference to the location of property and interests in property. The seat of arbitration does not always coincide with such location(s). Consider a hypothetical arbitration case seated in the US involving a designated party by the US sanctions against Russia. In the absence of any US persons in the arbitration and when payments do not originate from or enter the US territory in the process of international credit transfer, it is difficult to argue that the seat of arbitration being in the US is per se sufficient for the application of asset freeze and non-provision restrictions. In such cases, it should be assessed if the prohibited conduct, which is payment, involves any US person or the US territory. If none of these nexuses exists, the seat of arbitration being in the US does not seem to be a sufficient connecting factor for the application of payment restrictions.

Similar to the EU and UK sanctions against Russia, the US sanctions against Russia also provide mechanisms which authorize payments from designated persons in certain situations. The US sanctions regime against Russia contains a general carve-out regarding the provision of certain legal services. This carve-out also extends to "[i]*nitiation and conduct of legal, arbitration, or administrative proceedings before any US Federal, State, or local court or agency*".[107] The "*receipt of payment of professional fees and reimbursement of incurred expenses*" for such authorized services is also carved out through § 589.507, which authorizes certain payments for legal services from funds originating outside the United States, under specific circumstances. In all other cases, such payments may be authorized via a specific license.[108]

US authorities have also issued general licenses allowing for the transfer of funds that would otherwise be prohibited, under specific circumstances. In the context of international arbitration, transactions necessary for the conduct of official business of the International Centre for Settlement of Investment Disputes (ICSID) are authorized.[109] The license granted to

[105] See Office of Foreign Assets Control, 'Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: Obligations of foreign-based persons to comply with U.S. sanctions and export control laws' (Treasury, 6 March 2024) 4 <*Department of Commerce, Department of the Treasury, and Department of Justice Tri-Seal Compliance Note: - Obligations of foreign-based persons to comply with US sanctions and export control laws OVERVIEW*> accessed 8 May 2024.
[106] International Emergency Economic Powers Act, 50 USC § 1705.
[107] 31 CFR § 589.506 (a) (3).
[108] 31 CFR § 589.506 (a).
[109] 31 CFR § 589.511 (b).

ICSID appears to implement the immunities outlined in Articles 21 and 22 of the ICSID Convention, which establish immunity "*from legal process*" for counsel, parties, arbitrators, experts, and witnesses participating in proceedings "*in the exercise of their functions*".

4. Comparative overview

Common across all three regimes, the transfer of funds to or on behalf of a designated person requires a specific or general license from the respective competent authority. Unlike US and EU sanctions, UK sanctions offer a unique approach by providing for the issuance of general licences by OFSI. Such general licences allow for the payment of legal fees up to a specified cap and the payment of administrative fees to the LCIA. To the best of our knowledge, with the exemption of ICSID, other arbitral institutions, such as the ICC and the American Arbitration Association (AAA), have not received a similar license or authorization. Some practitioners have noted that the Permanent Court of Arbitration (PCA) "*does not need to get approval from the EU and can make payments without considerable complications*".[110] This is presumably based on the privileges and immunities granted to the PCA in its headquarters agreement with the Netherlands.[111]

A distinguishing feature of US sanctions is the explicit allowance for payments using funds from outside the US under specific circumstances. In contrast, EU and UK sanctions do not include such an exemption and instead focus on issuing specific licenses on a case-by-case basis or general licenses. However, payments with funds from outside the EU and UK could potentially be permissible if structured in a manner that avoids violating the sanctions' scope rules.

5. The Impact of restrictions on Relevant Payments and Transfers of Money in the course of an arbitration

The following sections examine how EU, UK, and US sanctions against Russia affect specific payments and transfers of funds during an arbitration and the procedures for processing these payments. Each section will focus on a specific payment or transfer of funds including registration (III.5.1) and advance fees to arbitral institutions (III.5.2), payments to and from arbitrators (III.5.3), substitute deposits by non-designated parties (III.5.4), restitution payments (III.5.5), and fees to legal representatives (III.5.6).

5.1 Payment of Registration fees to Arbitral Institution

Generally, initiating the arbitral proceedings under the rules of an arbitral institution requires the payment of a registration fee.[112] The restrictions on the transfer of funds can directly affect the transfer of registration fees to an arbitral institution at the outset of an arbitration.

First and foremost, the place of incorporation of the arbitral institution can trigger the application of the respective restrictions on payment. As seen above, in all of these sanctions

[110] Statements attributed to Vladimir Khvalei, Chairman of the Board of the Russian Arbitration Association and Partner at Mansors. See Russian Arbitration Association, 'RAA Arbitration Seminar & Network Summary' (27 March 2023) <https://arbitration.ru/en/press-centr/news/raa-arbitration-seminar-networking-summary/> accessed 4 May 2024.

[111] Article III (2) of the Agreement concerning the Headquarters of the Permanent Court of Arbitration, March 30, 1999.

[112] See, e.g., Article 4(4) of the ICC Arbitration Rules (2021); Article 1.1(vi) of the LCIA Arbitration Rules (2020).

regimes a legal person is subject to the personal scope of the prohibitions in the economic sanctions when they are incorporated, constituted or organized under the laws of the sanctioning state. US sanctions seem to be clearer by explicitly including foreign branches in the personal scope of sanctions.[113] Additionally, if one of the intermediary banks or the bank of the arbitral institution is located within the territory of each of the sanction regimes studied in this work, the respective regime would be applicable.

As mentioned above, it is not clear under any of the three sanctions regimes whether and to what extent the seat of arbitration being in the territory of a sanctioning state is sufficient of the application of a sanction regime. While some authors have generally considered the economic sanctions imposed by the seat of arbitration as overriding mandatory rules which should be respected, when it comes to the specific payment restrictions in the UK and the US sanctions regimes against Russia, the wording of the scope rules does not seem to support such extension of scope in the absence of any other connecting factors justifying the application of these sanctions to payments to arbitral institutions. As regards the EU sanctions, the term "*any business done in whole or in part within the Union*" may justify the application of payment restrictions to the payment of registration fees when the arbitral seat is located in the EU despite the absence of any other links with an EU person or the EU territory.

Belship Navigation, Inc. v. Sealift, Inc[114] and *United Media Hldgs., NV v Forbes Media LLC,*[115] are both examples of cases subject to US sanctions where OFAC issued licenses allowing payments to be made in the course of an arbitration proceedings to the arbitral institutions, including the AAA. Within the EU, the administrative steps required for authorization varies per member state and per arbitral institution. For instance, the SCC asks the designated parties to apply for an authorization from Swedish regulatory authorities for the payment of the registration fee and/or advance on costs prior to filing for arbitration.[116] In its official web page, the ICC establishes that it "*is bound to operate in conformity with applicable sanctions regulations*", including explicitly UN, EU, and US sanctions.[117] The ICC refers to its "*Note to Parties and Arbitral Tribunals on ICC Compliance*", in which it informs that the ICC conducts due diligence on both the parties and the arbitrators constantly during the proceedings.[118] With regards to payments, the ICC uses commercial banks in France, and therefore, any payments made to the ICC or requested from the ICC must comply with EU and French sanctions.[119]

Moreover, the ICC requests from parties that, prior to any payment, they must inform the ICC in advance of the payment in question in the case that there is reasonable doubt of the application of sanctions. In the case that a party is subject to US sanctions, the ICC precludes

[113] 31 CFR § 589.339 defines the term Unites States person as: "*any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States*."
[114] No. 95 CIV. 2748 (RPP), 1995 WL 447656, 1996 A.M.C. 209 (S.D.N.Y. July 28, 1995).
[115] No. 16 CIV. 5926 (PKC), 2017 WL 9473164 (S.D.N.Y. 9 August 2017).
[116] SCC, 'General Information for Parties Covered by the EU Sanctions'<https://sccarbitrationinstitute.se/sites/default/files/2022-11/general-information-to-listed-parties-11-march-2022.pdf> accessed 14 March 2023.
[117] ICC, 'Costs and Payment', (ICC Arbitration) <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/> accessed 28 May 2023.
[118] ICC (n 9).
[119] ibid, paras 14-17.

the execution of any payments in US dollars.[120] Other leading arbitral institutions have also adopted similar precautions, such as the VIAC,[121] the HKIAC,[122] and the DIS.[123]

In sum, under the three sanctions regimes analysed, if the registration fees originates from a designated party's funds which are subject to the transfer restriction, parties will have to request for a specific license to the competent authorities. The LCIA appears to be an exception as the jurisdiction where it is based, England, has issued a general license allowing for the execution of related payments to and from the institution. It is worth noting that the LCIA license was granted for an indefinite duration and may be revoked at any time. Prior to the general license, the OFSI issued specific licenses for parties to execute payments for administrative fees and advanced payments.[124]

5.2 Payment of Advance on Costs to Arbitral Institutions

In addition to registration fees, most institutional arbitration rules contain provisions for payment of a deposit by the parties to ensure that the relevant fees and expenses of the arbitrators and administration of the arbitral proceedings by the institution are covered.[125] This deposit is also known as an advance on costs. What makes the advance on costs distinctive from registration fees is that the ultimate recipient of the former varies in each case. In other words, these deposits are initially paid to the institution, but will eventually be transferred by the institution to arbitrators or will be kept by the institution to cover its own fees and expenses.

In fact, the relationship between the party paying the advance on costs and the institution receiving and keeping this amount is a debtor-creditor relationship. Some arbitration rules even explicitly provide that the advance on costs will be the property of the arbitral institution to be eventually disbursed according to the rules.[126]

If in the course of an arbitration, one of the parties, who has already transferred the advance on costs, becomes subject to a freezing order under an applicable sanction regime, different scenarios are conceivable depending on the restrictions of the sanctions in question as well as the legal relationship between the arbitral institution and the way advances on costs are handled. According to some authors, since the party who has paid the deposit remains the owner or beneficial owner while an arbitral institution acts as a deposit holder, the advance on costs already transferred to the arbitral tribunal should in principle be frozen.[127] Nevertheless, such an assumption about the ownership of the deposit by a party seems to disregard the debtor/creditor nature of the relationship between the parties and the institutions. In principle, the ownership of the deposit depends on the applicable law to the contractual relationship between the party in question and the arbitral institution.

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[120] ibid, para 10.
[121] VIAC (n 9).
[122] HKIAC (n 9).
[123] DIS (n 9).
[124] *PJSC National Bank Trust & Anor v Boris Mints & Ors* [2023] EWHC 118 (Comm) (27 January 2023) [152].
[125] See, e.g., Article 37 of the ICC Arbitration Rules (2021); Article 24 of the LCIA Arbitration Rules (2020).
[126] See. e.g., Article 24.2 of the LCIA Arbitration Rules (2020).
[127] Mercédeh Azeredo da Silveira and Stephan den Hartog, 'Asset Freezes and the Payment of Advances on Costs: Are the Proceedings Bound to End Before They Have Even Begun?' (10 October 2021): <http://arbitrationblog.kluwerarbitration.com/2021/10/19/asset-freezes-and-the-payment-of-advances-on-costs-are-the-proceedings-bound-to-end-before-they-have-even-begun/> accessed 18 March 2022.

While most arbitral institutions are silent on the ownership of the amounts paid as an advance on costs before they are ultimately paid to the respective beneficiaries, the most recent version of the LCIA Rules makes it clear that the arbitral institution is regarded as the owner of such deposits before they are distributed.[128] In this sense, with such transfer of ownership, deposits cannot be considered as funds belonging to, owned, held, or controlled by a designated party and an arbitral tribunal should be able to subsequently transfer them to the ultimate beneficiaries, e.g., arbitrators. Nevertheless, one might still argue that the subsequent distribution of the amounts by the arbitral institution can be considered as making funds available to any person for the benefit of a designated person. It remains to be seen to what extent the term "*for the benefit of a designated person*" can be interpreted broadly.

In any event, the restrictions on the transfer of funds can also affect the transfer of advances on costs from a designated party to an arbitral institution. Such transfer maybe covered by the scope rule of any of the analysed sanctions regimes irrespective of the ultimate receiver of the amount. Therefore, if an arbitral institution is incorporated in a sanctioning state or if any of the banks involved in the process of international transfer of credit are located within the territory of the sanctioning state, the restrictions on the transfer of funds hinder the payment of the advance on costs by a designated party. In these cases, a license or authorization will be required to move on with the proceedings.

5.3 Payments from Arbitral Institution to Arbitrators

Arbitrators are entitled to be compensated in respect of their work and expenses. In arbitrations administered by arbitral institutions, the collection of the payments for the arbitrators' fees and expenses is handled by the institution itself.[129] As mentioned above, at the outset of institutional arbitral proceedings, major arbitral institutions require that parties pay a certain lump sum to secure the financial resources necessary for carrying out the arbitration procedure. This amount can be used to pay any part of the arbitration costs, including the arbitral tribunal's fees and expenses.[130]

If payments from the arbitral institutions to arbitrators are covered by asset freeze and non-provision restrictions of the EU, UK, or US sanctions against Russia, authorization from competent authorities are necessary.

In the case of EU sanctions, the mechanism for obtaining an authorization recognized in Article 4.1 of Council Regulation (EU) No 269/2014 can be used for payments from the arbitral institutions to the arbitrators. As regards the UK sanctions, obtaining a specific or general license pursuant to the Regulation 64 of the UK Sanction Regulation against Russia can solve the problem of payments from the arbitral institution to the arbitrators. In the case of the LCIA,

[128] See, Article 24.2 of the LCIA Arbitration Rules: "The Advance Payment for Costs shall be the property of the LCIA, to be disbursed or otherwise applied by the LCIA in accordance with the LCIA Rules and invested having regard to the interests of the LCIA. The parties agree that the LCIA shall not act as trustee and its sole duty to the parties in respect of the Advance Payment for Costs shall be to act pursuant to these LCIA Rules."
[129] Nigel Blackaby KC and others, Redfern and Hunter on International Arbitration (Oxford University Press 2022) 278.
[130] See, e.g., Article 37 of ICC Rules of Arbitration 2021; Article 24 of London Court of International Arbitration (LCIA) Arbitration Rules 2020.

its general license specifically covers transfer of received funds to pay for arbitration costs,[131] which should include payment to the arbitrators.

The US Sanctions regime against Russia has more clarity in this regard by introducing a carve-out explicitly authorizing receipt of professional payments if originating from outside the US.[132] A non-US arbitral tribunal can benefit from this carve-out when transferring the fees and expenses of a US arbitrator if the deposit provided by the designated party has not originated from the US. However, if this is not a possibility, then a specific license from OFAC for the payment of the costs and expenses of arbitrators is necessary.[133]

5.4 Substitute Advance on Costs from Non-Designated Parties

In institutional arbitration, when a party refuses to pay its share of the advance on costs, most institutional arbitration rules permit the other party to make a substituted payment on behalf of the defaulting party.[134] Where the respondent is a designated party under an applicable sanctions regime, it is arguable that a substitute payment by a non-designated party can still be considered as a breach of non-provision restrictions of all the three above-mentioned sanctions regimes. This is because such substitute payments can be considered as making funds available "*for the benefit of a designated person*".[135] Such restriction on substitute payments can result in frustrating the arbitral process because the respondent might have no incentive to obtain the required authorizations for payment. The solution to this problem is an explicit authorization from competent authorities for substitute payments by a non-designated party.[136]

Consider the following example. An arbitral institution incorporated in an EU member state administers a case with a sanctioned party designated by both EU and UK sanctions regimes against Russia. The other party to this arbitration is a UK person. If the designated party refrains from paying the advance on costs, a substitute payment from the UK person to the arbitral institution needs specific authorizations from both the competent authorities of the UK and the EU. Similarly, if the non-designated party is a US person, its substitute payment on behalf of the designated person needs to also be authorized by OFAC through a specific license. It should be noted that the carve-out mentioned in CFR § 589.507 is not applicable in such cases because a US person is in possession of the source of payment.[137]

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[131] General Licence – London Court of International Arbitration (LCIA) Arbitration Costs INT/2022/1552576, para 4.1.

[132] 31 CFR § 589.507: 'Receipt of payment of professional fees and reimbursement of incurred expenses for the provision of legal services authorized pursuant to § 589.506(a) to or on behalf of any person whose property and interests in property are blocked pursuant to § 589.201 is authorized from funds originating outside the United States [emphasis added], provided that the funds do not originate from: (i) A source within the United States; (ii) Any source, wherever located, within the possession or control of a U.S. person; or (iii) Any individual or entity, other than the person on whose behalf the legal services authorized pursuant to § 589.506(a) are to be provided, whose property and interests in property are blocked pursuant to any part of this chapter or any Executive order or statute.'

[133] 31 CFR § 589.506 (a).

[134] See, e.g., Article 24.6 of LCIA Arbitration Rules 2020.

[135] Article 2 of Council Regulation (EU) No 269/2014; Regulation 13. 1 of Russia (Sanctions) (EU Exit) Regulations 2019; 31 CFR § 589.201.

[136] Mercédeh Azeredo da Silveira and Stephan den Hartog (n 127).

[137] See 31 CFR § 589.507(ii).

5.5 Restitution Payments from the Arbitral Institution to Designated Persons

Non-provision restrictions of the three sanctions regimes discussed above can also limit the return of unused advances on costs to the designated party. This is because the return of the deposit can be categorized as "*making funds available to the designated person*".[138] A prior specific authorization for the release of funds to pay the advance on costs does not *per se* allow for restitution payments.[139] Therefore, these kinds of payments need specific authorization from the competent authority in order to be sanction-compliant.

5.6 Payments from the Sanctioned Party to Legal Representatives

As described above, under the US, UK and EU sanctions regimes, the restrictions on transfer of funds are also applicable to payments to legal representatives and other third parties for services related to an arbitration. Therefore, parties must obtain a prior license/authorization from competent authorities to transfer of money from frozen funds to and from designated parties. In principle, it will be for the sanctioned party to arrange these licenses.

Under the UK's general legal service licenses, parties are able to pay up to half a million British pound (500,000.00 GPB) on legal fees for a period of 6 months. Provided that the terms of the licenses are met, this instrument allows UK law firms and counsel to obtain payment for legal services provided to designated persons. The license defines the relevant services subject to it as "*legal services provided to a DP, including legal advice and/or representation in court, whether provided within the UK or another jurisdiction, in relation to any matter except a claim for defamation or malicious falsehood*."[140]

Prima facie, the broad definition of the licensed services would include the representation of a designated person in the context of an arbitral proceedings. It is worth noting that, in the listed expenses covered by the license, the instrument includes the "*fees for expert witnesses*."[141] Thus, both counsel and experts should be covered by the general legal services license.

The general legal services license provides two distinct parts, and both include a different authorization. Part "A" covers all payments for legal services owned by the designated person "*in accordance with an obligation which was entered into by the DP prior to the date of the DP's designation*." Part "B", in contrast, covers the payment of legal services that are not based on a prior obligation. While Part "B" shares a similar structure with Part "A", it additionally imposes restrictions on the hourly rates that legal advisors can charge, including a cap of 1,500 GBP per hour, also including VAT.[142] Each part is independent from the other and each provide for an overall limit of 500,000 GBP (including VAT if applicable) for professional and counsel fees, and a separate limit for expenses of up to 10% of the total legal fees or 50,000.00 GBP including VAT, whichever is the lower.[143]

[138] Article 2 of Council Regulation (EU) No 269/2014; Regulation 12.1 of Russia (Sanctions) (EU Exit) Regulations 2019; 31 CFR § 589.201.
[139] Mercédeh Azeredo da Silveira and Stephan den Hartog (n 127).
[140] OFSI, 'Legal Services General licence under the Russia Regulations and the Belarus Regulations INT/2024/4671884' (26 April 2024) para. 3.
[141] ibid.
[142] ibid, para. 7 of part B.
[143] ibid, para. 3 and 4 of Part A and para. 3 and 4 of Part B.

Nevertheless, the general legal services license has not been free of controversy and questions from practitioners have predominantly focused on the scope of the fees caps as provided in the license, and on whether the cap covers all undertakings with the same law firm or if it applies individually to each case where the same counsel is engaged.

The wording of the first general license generated doubts regarding how the fee caps operate. The license, in force from 28 October 2022 to 28 April 2023,[144] provided that the fees and expenses caps applied throughout the duration of the license.[145] Additionally, it provided that if at any point it is estimated that the limits will be exceeded or are in fact exceeded, the license will not apply to "*any further payment of any nature in relation to the entirety of the Legal Services nor to any other act in relation to the provision of the Legal Services*".[146] This particular formulation raised doubts in cases where the expected fees where superior than the half a million fee limit. The text of the license did not specify whether parties could still pay up to the half a million cap, or if the license was not applicable altogether if the expected fees surpassed the limit.

This doubt with regards to the fee limit was addressed by the English High Court in *VTB Commodities Trading DAC v JSC Antipinsky Refinery*.[147] The judgment was rendered by Justice Foxton considering the Claimant's executive officer application for permission to represent the company in the proceedings as Claimant's prior counsel had recently requested to come off the record due to their failure to receive a license from OFSI allowing for the payment of legal fees.

With regards to the limitation clause of the general license, Justice Foxton, interpreted that the license was only applicable to engagements where the total of the anticipated professional legal fees, counsel fees, or expenses, did not surpass the license limits during the duration of the license. In other words, if in the context of a litigation, the designated person's counsel fees or counsel's expense exceeds the limits provided in the first license, the "*General Licence will not apply at all (rather than simply not applying to any excess)*."[148]

Adopting this interpretation, Justice Foxton ruled that the license was not applicable to the case subject to its decision, considering specifically that "*on any view, the level of costs required to bring this case to the eve of trial will be very substantially in excess of £500,000*", and therefore, the expenses limit was not enough to cover the anticipated expenses.[149]

Fortunately, this interpretation was corrected in the legal services license issued on 29 April 2023, the second of its kind. The new provision of the April 2023 license clarified that if the professional and counsel fees and expenses limits are exceeded, the license will no longer apply to "*any payment of any nature **above those limits** nor to any other act in relation to the*

[144] OFSI, Legal Services General License under the Russia Regulations and the Belarus Regulations INT/2022/2252300 (28 October 2022)
[145] Sections 5, 6, and 7 of Part A and Sections 4, 5, and 7 of Part B of the OFSI, 'Legal Services General License under the Russia Regulations and the Belarus Regulations INT/2022/2252300' (28 October 2022).
[146] Section 7 of Part A and Section 6 of Part B of the OFSI, 'Legal Services General License under the Russia Regulations and the Belarus Regulations INT/2022/2252300' (28 October 2022).
[147] [2022] EWHC 2795 (Comm).
[148] [2022] EWHC 2795 (Comm) [31.vi]
[149] [2022] EWHC 2795 (Comm) [69.ii]. Surprisingly for some, the half a million GBP fee cap can fall short in some cases. In this sense, see Jonathan Browning, 'When £500,000 Isn't Enough to Represent Sanctioned Oligarch' (Bloomberg, 28 November 2022) <https://www.bloomberg.com/news/articles/2022-11-28/when-500-000-isn-t-enough-to-represent-a-sanctioned-oligarch> accessed 4 June 2023.

provision of the Legal Services."[150] In this sense, on 2 May 2023, the OFSI further clarified in a publication published in its official blog that "*the General Licence has been drafted to make clear that it may be used to start paying/receiving fees and/or expenses in cases where the total fees and/or expenses exceed the legal fees and/or expenses caps. Where fees and/or expenses exceed the relevant cap(s), then applicants will have to submit specific licence applications (...)*". [151] Therefore, a designated person may still use the 2023 April to pay for its counsel fees until it exceeds the applicable limits, regardless of whether the fees or expenses estimates are higher. A specific licence will still be needed for any fees or expenses which exceed the limits.

Further, the April 2023 license additionally clarified that the limits can be accumulated in cases where services were provided before and after the designation of the designated person.[152] The most recent license, of 26 April 2024, has kept the same formulation.[153]

Returning to *VTB Commodities Trading DAC v JSC Antipinsky Refinery*, Justice Foxton further considered that there are additional greys areas that the license fails to clarify, such as with regards to how the fees limits apply in the case of separate but related undertakings between the same law firm and the same client, or when several law firms are involved in the matter.[154] The application of said limits is of paramount importance for arbitral proceedings, considering that it is common to have many law firms participating in cases where parties engage in parallel proceedings before national courts on related jurisdictions while the arbitral proceedings are still active.

Justice Foxton did not directly engage with the question and, therefore, did not provide much clarity on the issue. However, it did mention, in passing, that "*certainly, work done pursuant to a single letter of engagement would appear to attract a single £500,000 limit*."[155]

This position was later clarified in the latest license on 26 April 2024. In the financial sanctions FAQs published by OFSI, in the section of "General License", this question is addressed as follows:

> "*OFSI has amended the General Licence so the £500,000 caps for Parts A and B, and the related expenses caps, now apply to each law firm instructed by the designated person. The caps cover all the designated person's matters being handled by that law firm (i.e., the caps do not apply to each individual matter at that law firm). This change is effective from 29 April 2024*."[156]

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[150] OFSI, 'Legal Services General licence under the Russia Regulations and the Belarus Regulations INT/2023/2954852' (29 April 2023).
[151] OFSI, 'New Legal Services General License' (OFSI Blog, 2 May 2023) <https://ofsi.blog.gov.uk/2023/05/02/new-legal-services-general-licence/> accessed 17 May 2023.
[152] See Section 7, OFSI, 'Legal Services General licence under the Russia Regulations and the Belarus Regulations INT/2023/2954852' (29 April 2023). Also, see OFSI (n 150). See, recently, Solicitors Regulation Authority 'New legal services general license' (1 May 2024) <https://www.sra.org.uk/sra/news/sra-update-127-new-ofsi-licence/#:~:text=The%20new%20Legal%20Services%20General%20Licence%20makes%20clear%20that%3A,which%20exceed%20the%20capped%20amounts.> accessed 15 May 2024.
[153] OFSI, 'Legal Services General licence under the Russia Regulations and the Belarus Regulations INT/2024/4671884' (26 April 2024) para. 6 of part A and para. 5 of part B.
[154] [2022] EWHC 2795 (Comm) [31.vii].
[155] [2022] EWHC 2795 (Comm) [31.vii].
[156] OFSI 'Guidance. UK Financial Sanctions FAQs' (8 May 2024) question no. 50 <https://www.gov.uk/government/publications/uk-financial-sanctions-faqs/uk-financial-sanctions-faqs> accessed on 20 May 2024.

This answer clarified the position both before and from now on with respect to the scope of the caps provided in the general legal services licenses. On and after 29 April 2024, the fee cap under the general legal services license includes all matters handled by a specific legal counsel or law firm.

The financial sanctions FAQs published by OFSI addressed other questions with regards to the application of the general legal services licenses. For instance, it clarifies that: (i) it only applies to UK law firms and counsel, and not to counsel based in other jurisdictions, (ii) in certain circumstances non-designated persons could pay the fees of designated persons, (iii) the fee cap on a specific license can be complemented with the general licenses, and (iv) payments under the license must be done in a UK bank account, among many others.[157]

Under US sanctions, legal services exemption allows for the payment of fees for specific services, including with funds from outside the US. However, as analysed above, the application of the available exemptions to international arbitration proceedings is not clear and, at least in one case, OFAC's action suggest that not all domestic arbitrations will be covered by the exemption. In *United Media Hldgs., NV v Forbes Media LLC,*[158] which involved an arbitration seated in New York administered by the AAA, OFAC's interpretation was that US counsel, and the sole arbitrator, both required a specific license to participate in the proceedings.

IV. Application of Economic Sanctions to Provision of Legal Services by Arbitral Institutions, Arbitrators, and Legal Counsel

In addition to asset-freeze and non-provision restrictions, economic sanctions against Russia also contain other restrictions on entering into transactions and provision of a wide array of services to sanctioned entities. While most economic sanctions regimes do not specifically prohibit the provision of arbitral services to a designated party, general prohibition against transactions with listed persons can potentially extend to contractual arrangements within the context of an arbitration between the parties and the institution, the parties and the arbitrators as well as the parties and the counsel.

In the context of international arbitration, a standard arbitral proceeding may involve the services of legal counsel in charge of the representation of each party, arbitrators, tribunal secretaries, experts, translators, and services of specialized institutions, who may undertake different administrative and substantive tasks. In these cases, the sanction may prohibit the creation of specific legal relationships or conduct of certain acts, regardless of any potential dealing with frozen funds or economic resources.

On first glance, it is possible that the relationship between the sanctioned party on the one hand and arbitration institution, arbitrators and legal counsels on the other hand can be characterized as a prohibited commercial transaction,[159] technical assistance,[160] or prohibited legal service under the applicable sanction regime. Potential extension of compliance requirements to the

[157] ibid, questions No. 55, 58, 67 and 84.
[158] No. 16 CIV. 5926 (PKC), 2017 WL 9473164 (S.D.N.Y. 9 August 2017).
[159] See, e.g., Article 5 aa of the EU Council Regulation No 833/2014.
[160] See, e.g., Article 1(c) of the EU Council Regulation No 833/2014 providing that '"technical assistance" means any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including verbal forms of assistance'.

arbitral institutions, arbitrators, counsel and experts can also be due to the fact that many sanction programs contain general prohibitions against evasion, facilitation, conspiracy and causing another person to violate any prohibition under the sanctions.[161] This prohibition disincentivizes any attempts by counsel to devise structures that may allow the arbitration to proceed while avoiding the scope of the sanctions. Additionally, the so-called "*no- claim*" provisions in certain sanctions regimes[162] as well as general prohibitions of "*making funds available*" might raise concerns as to the legality of rendering an award by an arbitral tribunal. The following paragraphs will address the potential extension of each of these prohibitions to the legal services provided by arbitral professionals under the selected sanctions regimes..

1. Restrictions Potentially Affecting Provisions of Legal Services by Arbitral Professionals in the EU Sanctions Regime Against Russia

1.1 Prohibition on the Provision of Legal Services

The EU sanctions on Russia have a number of prohibitions which have raised doubts as to their application to the provision of services by arbitral institutions, arbitrators, legal counsel and other actors in the context of an arbitral proceeding.

Initially, on 15 March 2022, the EU introduced a general prohibition "*to directly or indirectly engage in any transaction*" with Russian entities designated under the sanctions.[163] The all-encompassing wording of the prohibition raised concerns about the extent to which legal services could be prohibited by this restriction. As provided in the EU sanctions guidelines, all EU restrictive measures "*must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy*".[164] Consequently, in its seventh package of sanctions against Russia, the instruments introduced a carve-out clarifying that this general prohibition is not applicable to the provision of legal services in the context of arbitral and judicial proceedings. In this sense, article 5aa (3)(g) of CR 833/2014, read as follows:

> *"transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014".*

This carve-out is broad enough to cover contractual relationships between different arbitral professionals on the one hand and designated persons on the other hand. However, the EU eighth package of sanctions against Russia introduced a new limitation specifically targeting the provision of legal advisory services. According to Article 5n (2) of the Council Regulation No 833/2014:

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[161] See, e.g., The U.S. Department of the Treasury, Ukraine-/Russia-Related Sanctions Regulations, US 31 CFR § 589.201(a)(6)(vii)(B).
[162] See, e.g., Article 11 of EU Council Regulation No 833/2014 of 31 July 2014.
[163] Article 5aa of EU Council Regulation No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014).
[164] Council of the European Union, 'Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy', para 9 (document 5664/18, 4 May 2018) <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf> accessed 12 April 2023.

> *"It shall be prohibited to provide, directly or indirectly, architectural and engineering services, **legal advisory services** and IT consultancy services to:*
>
> *(a) the Government of Russia; or*
>
> *(b) legal persons, entities or bodies established in Russia*".[165]

For the purposes of the sanctions, "Legal advisory services" has been defined as:

> *"The provision of legal advice to customers in non-contentious matters, including commercial transactions, involving the application or interpretation of law; participation with or on behalf of clients in commercial transactions, negotiations and other dealings with third parties; and preparation, execution and verification of legal documents. 'Legal advisory services' does not include any representation, advice, preparation of documents or verification of documents in the context of legal representation services, namely in matters or proceedings before administrative agencies, courts or other duly constituted official tribunals, or in arbitral or mediation proceedings*".[166]

This ban, although comprehensive in terms of its targets (covering both Russian Government and legal person established in Russia), has been carefully designed to no to interfere with the fundamental right of access to justice and to an effective legal remedy as recognized in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the European Convention on Human Rights. This delineation is achieved by limiting the definition of "legal advisory services" to "non-contentious matters". Furthermore, Article 5n (5)(6) of the same Regulation explicitly provides that the prohibition:

> *"(5) 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.*
> *(6) 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, provided that such provision of services is consistent with the objectives of this Regulation and of Council Regulation (EU) No 269/2014*".[167]

Given this clear delineation, this prohibition does not apply to arbitrators, arbitral institutions, legal counsel and other service providers in the context of an arbitral proceeding "*in a member state*". In arbitral proceedings "*outside an EU member state*", the European Commission has clarified that the carve-out provided in article 5n (6) does not apply. However, it has further explained that article 5n (5), may allow EU persons to provide legal services involving contentious proceedings outside the union, provided these services are "*strictly necessary*" to

[165] (Emphasis added). Consolidated text of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229 31.7.2014).
[166] 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, Recital 19.
[167] CR 833/2014.

ensure the right of defence and to an effective legal remedy.[168] Yet, uncertainty remains due to the lack of technical precision in the language. What do the regulation and European Commission mean by an arbitration "in" or "outside" a member state? Does it refer to the seat of the arbitration, the physical location of the arbitrators, or the arbitral institution administering the case? Caution suggests that it should be deem that any of these scenarios may trigger sanctions.

Moreover, concerns have been raised with regard to the potential application of this ban to providing pre-trial/pre-arbitral advice to Russian entities concerning the viability of potential claims and defences by attorneys and legal counsel that are nationals of EU member states or are operating within the EU.[169] It is arguable that if pre-trial/pre-arbitral advice is not followed by a ultimate decision to engage in legal or arbitral proceedings, the advice might be regarded as *"legal advice […] involving the application or interpretation of law"* and thus prohibited.[170] It remains to be seen how this provision will be applied to pre-trial/pre-arbitral advice that is not followed by a contentious proceeding. Notably, there is a pending challenge before the Court of Justice of the European Union to annul the prohibition of legal services under article 5(n) (2) of the CR 833/2014.[171]

1.2 No-Claims Provisions

In addition to restriction explicitly dealing with provision of services, there has also been doubts on the legality of deciding the case and subsequently rendering an award by arbitrators in disputes involving "*claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly by Regulation (EU) 833/2014*".[172]

Article 11 of CR No 833/2014 prohibits satisfaction of such claims when they are made by designated entities or "*any other Russian person, entity or body*". It is noteworthy that this provision originates from United Nations sanctions practices, which have also incorporated similar provisions.[173] These No-Claims provision has generated discussion as to whether they preclude a designated person for initiating an arbitration which relates to the claims referred in Article 11. However, prevailing interpretations suggest that said restriction does not concern

[168] European Commission, 'Commission Consolidated FAQs on the implementation of Council Regulation No 833/2014 and Council Regulation No 269/2014' (14 May 2024), question N° 24 of section 8 "Provision of Services", 339 <https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-consolidated_en.pdf> accessed 25 May 2024.

[169] Mercédeh Azeredo da Silveira and Stephan den Hartog, 'The EU's Eighth Package of Sanctions Against Russia and the Potential Ramifications of a Blanket Ban on Legal Advisory Services '(1 November 2022): <http://arbitrationblog.kluwerarbitration.com/2022/11/01/the-eus-eighth-package-of-sanctions-against-russia-and-the-potential-ramifications-of-a-blanket-ban-on-legal-advisory-services/> accessed 29 November 2022.

[170] ibid.

[171] See announcement by the Court of Justice of the European Union in Case T 828/22 ACE v Council Case T 828/22 [2022] OJ 71, vol. 66 27 February 2023, 37.

[172] Article 11 of EU Council Regulation No 833/2014 of 31 July 2014.

[173] For example, see paragraph 8 of the United Nations Security Council Resolution 883. See also, Eric De Brabandere and David Holloway, 'Sanctions and International Arbitration' in Larissa van den Herik (ed), Research Handbook on UN Sanctions and International Law (Edward Elgar Publishing 2017) 310. This point is also discussed in PJSC National Bank Trust & Anor v Boris Mints & Ors [2023] EWHC 118 (Comm) (27 January 2023) [37] - [39].

the initiation of a proceeding, but rather it relates to the admissibility or the lack of substantive merits of such claims.[174]

The current wording of CR No 833/2014 supports this position. Paragraph 3 of Article 11e clarifies that bringing claims as to the legality of non-performance is not per se prohibited:

> *"This Article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation".*

Although Article 11 makes an explicit reference to the right to "*judicial review"* of claims as to the legality of non-performance, the same right should also exist with regard to arbitrators when the scope of the arbitration agreement allows for submission of such claims to arbitration. Furthermore, paragraph 2 of the same provision sets forth:

> "*In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim*".

Addressing the possibility of enforcement in this paragraph logically implies that the pursuit of claims to the point of enforcement and satisfaction is in itself allowed.[175] Therefore, nothing in this provision prohibits an arbitral tribunal from deciding a claim as to the legality of non-performance disputes. The no-claim restriction is better understood to apply at the enforcement stage, where satisfaction of claims is involved.

1.3 Aiding and Abetting Restrictions

In line with many other sanctions regimes, the EU sanctions against Russia include prohibitions against aiding and abetting violation of economic sanctions. According to Article 9.1 of Council Regulation 269/2014, "[i]*t shall be prohibited to participate, knowingly and intentionally, including indirectly, in activities the object or effect of which is to circumvent' the prohibitions of the Regulation".*

It can be inferred from these prohibitions that arbitration cannot be employed as a method to circumvent economic sanctions. Consequently, if it can be demonstrated that the parties' intention in referring their disputes to arbitration is to evade economic sanctions, the mandate of an arbitral tribunal becomes unlawful under these sanction regimes. In the EU, this is reinforced by case law from different member states which have affirmed that an arbitration agreement becomes unenforceable if it is deemed that arbitrating a dispute would enable the parties to circumvent EU overriding mandatory rules.[176]

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[174] De Brabandere and Holloway (n 173) 310. The authors cite as relevant case law, La Compagnie Nationale Air France v Libyan Arab Airlines (31 March 2003) CanLII 35834 (2003) (Cour d'Appel du Québec) [47]. The Canadian court, in the context of UN sanctions, considered, *inter alia*, that "*it would be illogical to believe that the regulation specifying the embargo prevents the parties from initiating the arbitration process*".

[175] This argument was also used by Justice Cockerill in the context of pre-2018 UK sanctions regime, see PJSC National Bank Trust & Anor v Boris Mints & Ors [2023] EWHC 118 (Comm) (27 January 2023) [43].

[176] Jan Kleinheisterkamp, 'Overriding Mandatory Laws in International Arbitration' (2018) 67 International & Comparative Law Quarterly 903, 906–908. The author cites different decisions refusing to give effect to

Despite the recognition of the competence-competence principle in most jurisdictions, national courts of the sender countries (i.e., countries imposing economic sanctions) may declare an arbitration agreement as unenforceable at the pre-award stage if it can be demonstrated that the arbitral tribunal's mandate is illegal due to an intention for evasion of applicable economic sanctions regimes. However, it is not yet clear how the intention for evading economic sanctions can be established. Moreover, the frequency of such instances in practice is yet to be determined, particularly in cases where arbitration agreements were concluded before the imposition of sanctions. In these instances, it may be more challenging to establish that arbitration was agreed upon with an intention to evade economic sanctions.

In conclusion, the prohibitions against aiding and abetting do not necessarily result in the lack of jurisdiction for an arbitral tribunal. However, if it can be proven that the mandate of an arbitral tribunal is illegal due to an intention for circumvention and/or evasion of economic sanctions, the national courts in the sender states might invalidate an arbitration agreement at the pre-award stage or, where applicable, issue an anti-arbitration injunction. In any case, even if an arbitration agreement is not declared unenforceable due to the risk of circumventing economic sanctions at the pre-award stage, if the award issued by an arbitral tribunal violates the prohibitions of the applicable sanctions regime, its recognition and enforcement in the sender states may be denied on the grounds of breaching public policy.

2. Restrictions Potentially Affecting Provisions of Legal Services by Arbitral Professionals in the UK Sanctions Regime against Russia

2.1 Prohibition on the Provision of Legal Services

Currently, UK sanctions specifically prohibit, *inter alia,* the provision of accounting, public relations, advertising, architectural, auditing, engineering, trusts, IT consultancy, design services and, most recently, legal advisory services.[177]

Until June 30, 2023, legal advisory services were not expressly included as a prohibited service.[178] This exclusion was an intentional one,[179] reaffirmed by the OFSI itself on its press release announcing a General Licence for the payment of fees involving legal services, on 28 October 2022. The statement reads as follows:

arbitration or choice-of-court because of the potential circumvention of mandatory rules, especially those originating in EU law. See, e.g., Cour De Cassation (Belgium), Nov. 16, 2006, Van Hopplynus Instruments S.A. V. Coherent Inc., 2007 Revue Belge De Droit Commercial 889 (Belg.); Oberlandesgericht [OLG] München [Superior Regional Court], May 17, 2006, 2006 Wertpapier Mitteilungen 1556, 2007 Praxis Des Internationalen Privat- Und Verfahrensrechts 322 (F.R.G.).

[177] Regulation 54B, 54D, 60DB, paragraph 8A of Schedule 3J of the Russia (Sanctions) (EU Exit) Regulations 2019. See Export Control Joint Unit of the Department for International trade, 'Supplying professional and business services to a person connected with Russia' (Guidance, 7 February 2023) <https://www.gov.uk/government/publications/professional-and-business-services-to-a-person-connected-with-russia/professional-and-business-services-to-a-person-connected-with-russia> accessed 28 April 2023.

[178] As explained below, the third Amendment of the Russia (Sanctions) (EU Exit) Regulations 2019 introduced a prohibition for the provision of "*legal advisory services*".

[179] See Gordon, Smyth, Cornell (n 15) para 3.77. AO Alfa-Bank v Kipford Ventures Ltd BVIHC (COM) 2022/0007 (15, 23 June 2022) [2] "*The sanctions regime does not prevent legal practitioners from acting for sanctioned entities*."

> "[i]*n acknowledging the importance of a person's ability to receive legal advice and representation, OFSI has long had a position of not prohibiting the provision of legal advice to a designated person under an asset freeze*".[180]

However, less than a month after this statement, in September 2022,[181] In response to the annexation by Russia of the regions of Donetsk, Luhansk, Kherson and Zaporizhzhia located in Ukraine, the UK's government announced that it was going to ban additional services, including "*transactional legal advisory services*." In its announcement, it was stated as a supporting rationale for this measure that "*Russia is highly dependent on Western countries for legal services with 85% of all legal services being imported from G7 countries*", and that the "*UK accounts for 59% of these imports*".

Notably, the two amendments introduced following the announcement, in December 2022[182] and March 2023,[183] did not incorporate the referred ban in the text of the Regulation. However, on June 30, 2023, in the third Amendment of the Russia (Sanctions) (EU Exit) Regulations 2019, a prohibition for the provision of "*legal advisory services*" was finally introduced. The prohibition is outlined in sections 54B, 54D, 60DB and paragraph 8A of Schedule 3J of the Regulations.

The scope of the prohibition of "*legal advisory services*" explicitly carves-out legal representation, including in the context of arbitral proceedings.[184] The Explanatory Memorandum to the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023, in its paragraph 7.7 clarifies that "*this restriction is limited to legal advisory services and does not cover legal representation services. Access to legal representation is an important element of the core democratic principle of the rule of law, and this sort of legal service has therefore been excluded*".[185]

Consequently, the current position in the UK is relatively clear; with the emphasis on the prohibition of "*legal advisory services*", the legal services provided by arbitrators, arbitral institutions and legal counsel to a designated party as long as it is in the context of an arbitration, are not prohibited. Case law has been consistent on the importance of the access to the legal system as a fundamental right. In *JSC VTB Bank v. Taruta a.o.*,[186] the British Virgin Island High Court, addressing a counsel's request to withdraw from representing a designated entity in the proceedings, established that, despite the asset freeze, "*sanctioned entities retain*

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[180] OFSI, 'Legal Fees General Licence' (OFSI Blog, 28 October 2022) <https://ofsi.blog.gov.uk/2022/10/28/legal-fees-general-licence/> accessed 27 April 2023.

[181] Department for International Trade 'Sanctions in response to Putin's illegal annexation of Ukrainian regions' (UK Government news, 30 September 2022) <https://www.gov.uk/government/news/sanctions-in-response-to-putins-illegal-annexation-of-ukrainian-regions?utm_content=immediately> accessed 1 May 2023.

[182] The Russia (Sanctions) (Overseas Territories) (Amendment) Order 2023.

[183] The Russia (Sanctions) (Overseas Territories) (Amendment) (No. 4) Order 2022.

[184] Paragraph 8A(1)(b) of Schedule 3J clarifies that "Legal Advisory Services" "d*o not include any representation, advice, preparation of documents or verification of documents undertaken as part of legal representation services provided in, or in anticipation of— (…)* (ii) *arbitral or mediation proceedings"*. Paragraph 8A(2)(b) of Schedule 3J further defines *"legal representation services"* as *"advice given in relation to a dispute or potential dispute, and on the settlement of a dispute, whether or not proceedings referred to in sub-paragraph (1)(b) are commenced in relation to the dispute."*

[185] The Explanatory Memorandum to the Russia (Sanctions) (EU Exit) (Amendment) (No. 3) Regulations 2023, 2023 NO.713, <https://www.legislation.gov.uk/uksi/2023/713/pdfs/uksiem_20230713_en_001.pdf> accessed 20 May 2024.

[186] JSC VTB Bank and (1) Sergey Taruta (2) Arrowcrest Ltd BVIHC (COM) 2014/0062 (17, 22 March 2022).

all their civic rights, including full access to the Courts and an entitlement to have their rights and obligations determined by this Court".[187]

Nevertheless, some uncertainty remains regarding the position of related service providers, such as expert witnesses. These professionals are typically engaged in arbitral proceedings for tasks like quantifying damages or providing opinions on specific legal systems. Some areas of expertise, such as accounting services, are explicitly prohibited under the sanctions. However, since the fee for expert witnesses has been included as authorized expenses in the legal services general licenses allowing for payment of legal fees, it might suggest that these services are also permitted. Assuming the contrary would imply that while payment for an expert is allowed, a specific license would still be required to actually provide the service. Yet, this element is not explicitly clarified by the sanctions and practitioners have shown concern in this regard.[188]

Additionally, even within the carve-out for legal representation, the situation becomes complex when considering the relationship between providing legal services and remunerating legal professionals for their fees and expenses. Asset freeze and non-provision restrictions prohibit payments from a designated person's funds or economic resources unless authorized by a license. While legal representation of a designated person is lawful under the UK sanctions regime, remuneration for such services cannot be executed until a license is obtained. In recent practice, these concerns have been mitigated by the legal services general license, which, given its numerous extensions, suggests that UK authorities intend to maintain it permanently.

However, beyond the limits of the legal services general license, it is conceivable that arrangements such as pro bono services, where no remuneration is agreed upon in exchange for legal services, or agreeing to payment at a later stage, could allow arbitral professionals to provide services to a designated person without the need for a license. Although rare, there are instances of arbitrations where parties have been represented by pro bono counsel.[189] Other alternatives could include a designated person's counsel waiting until a license is obtained to bill for services or agreeing to make remuneration subject to the approval of a specific or general license.

Notably, common law courts have considered the possibility of providing legal services while expecting payment on a later stage as an alternative not covered by the UK sanctions. In *AO Alfa-Bank v. Kipford Ventures LTD*,[190] the Eastern Caribbean Supreme Court dealt with the restriction in force under UK sanctions to represent a designated person in a legal proceeding before the British Virgin Islands' local courts. Pursuant to the Russia (Sanctions) (Overseas Territories) Order (2020), the UK sanctions regimes is applicable, with certain modifications, to the British Virgins Islands (BVI) territory.

Claimants, AO Alfa-Bank, were designated under UK sanctions on 24 March 2022. Immediately afterwards, on 1 April 2022, the claimant's counsel applied for a license before the competent authority in the BVI and before the OFSI. As of the court judgment in June 2022,

[187] JSC VTB Bank and (1) Sergey Taruta (2) Arrowcrest Ltd BVIHC (COM) 2014/0062 (17, 22 March 2022) [12].
[188] See Jack Ballantyne, 'Is London still a hub for Russian disputes?' (GAR news, 15 May 2023) <https://globalarbitrationreview.com/article/london-still-hub-russian-disputes> accessed 2 June 2023.
[189] For example, in the Bangladesh Accord arbitration cases, the unions party to the proceedings received pro bono representation. See, Richard Croucher and others, 'Legal Sanction, International Organisations and the Bangladesh Accord' (2019) 48 Industrial Law Journal 549, 561.
[190] BVIHC (COM) 2022/0007 (15, 23 June 2022).

both applications were pending. Eventually, on 28 July 2022, the claimant's counsel obtained a license granted by the BVI's authorities. However, until at least September 2022, the license request before the OFSI was still pending.[191]

Meanwhile, on 15 June 2022, the court heard two applications: one from the claimant's counsel seeking to withdraw from its representation due to, *inter alia,* its inability to provide legal services to a designated person without a license. the second one, a request from the designated person itself, requesting to vacate pending hearings which were to be held at the end of June and the beginning of July. On 23 June 2022, the court rendered its judgment, adjourning the claimant's counsel's application and addressing its arguments regarding the permissibility of providing legal services in the period before a license is granted. In its decision, Justice Jack noted that the claimant's counsel was not prepared to act *pro bono*. Therefore, it explored what it considered to be an alternative, "*namely, working in the expectation of receiving payment once a licence was granted*". In this case, the main concern was regarding whether said alternative could be considered as providing credit to the designated person, which is a criminal offense under the sanctions.

Justice Jack considered that the issue revolved around whether doing work before billing and before payment falls within the definition of "*funds*" and "credit" in section 60(1)(e) of the Sanctions and Anti-Money Laundering Act 2018. Relying of the BVI attorney general's opinion, acting as *amicus curiae*, Justice Jack ultimately concluded that this alternative approach did not fall under these concepts.

The judge considered, among other factors, that the term "credit" in the regulations pertains to financial commitments rather than agreements involving deferred payment. Justice Jack further noted that "*as a matter of ordinary language, a provider of services who does work and then bills for it, is not advancing a credit to the client. This is so, whether or not, the client subsequently pays for that work*".[192]

The judge further asserted that two additional factors supported the permissibility of providing services before payment. The first was that criminal statutes should be interpreted in favour of the liberty of the subject. The second concerned the parties' right to a fair hearing under the BVI Constitution.[193]

In *VTB Commodities Trading DAC v JSC Antipinsky Refinery*,[194] Lord Foxton mentions the prospect of offering pro bono services without providing a definitive response:

> "*I am satisfied on the material before me that VTB is not presently in a position to pay for legal representation in this jurisdiction, as a result of sanctions imposed by orders made pursuant to the Russia (Sanctions) (EU Exit) Regulations 2019 (the 2019 Regulations). As I have stated, the solicitors previously acting for VTB (PCB Byrne (PCBB)) have come off the record. The effect of the evidence before me is that neither that firm of solicitors nor counsel were willing to undertake this hearing* ***without remuneration (assuming that the provision of legal services without remuneration***

[191] AO Alfa-Bank v Kipford Ventures Ltd BVIHC (COM) 2022/0007 (26, 27 September 2022) [5].
[192] AO Alfa-Bank v Kipford Ventures Ltd BVIHC (COM) 2022/0007 (15, 23 June 2022) [9].
[193] AO Alfa-Bank v Kipford Ventures Ltd BVIHC (COM) 2022/0007 (15, 23 June 2022) [10] – [11].
[194] [2022] EWHC 2795 (Comm)

would not contravene the 2019 Regulations*). Nor can they be criticised for adopting that position*". [195]

Nevertheless, these alternatives are not risk free. This is particularly because, depending on the circumstances, it could be considered that by agreeing to provide services in a *pro bono* basis or by accepting payment at a later stage, the service provider is attempting to bypass sanctions, breaching the instrument, and incurring on liability under the sanctions.

2.2 "Making Available" or "Dealing" with Funds or Economic Resources

Another issue worthy of consideration is with regard to rendering an award by arbitrators and its potential qualification as "making available" funds or economic resources or "dealing" in funds and economic resources. This point was recently addressed by the English High Court, albeit in the context of rendering a judgment by national courts.[196] *PJSC National Bank Trust & Anor v Boris Mints & Ors* involved a claim of around US$850 million from two Russian banks against certain individuals who allegedly conspired with representative of the banks to enter into uncommercial transactions with companies related to the defendants. One of the Claimants, Bank Otkritie, was sanctioned by UK and US authorities in February 2022. The defendants raised several concerns regarding the effects of the sanction to the current proceedings, including whether the asset freeze provided by the UK sanctions precluded the courts entering a judgement in favour of the Claimants. The defendants argued, *inter alia,* that a judgement fell within the definition of "funds" under the UK sanctions and, by deciding a dispute entering a judgement, especially in favour of a designated person, the court would be in itself dealing with a fund in violation of the sanctions.

Justice Cockerill, after a comprehensive analysis of the UK sanctions regime in force, decided, *inter alia,* that for the purposes of the 2018 Act, specifically under sections 60(1)(2) of the Act, a judgment debt could be considered a "fund" and a cause of action an "economic resource".[197] This conclusion directly meant that both concepts are subject to the asset freeze under regulations 11-15 of the UK Sanction Regulations against Russia, and in particular to the prohibition to deal and make available frozen funds and economic resources of a blocked entity.[198] However, considering the rules of statutory interpretation, Justice Cockerill concluded that these prohibitions did not bite to entering a judgement, as the regulations failed to provide a sufficient level of clarity that it was the legislator's intention to preclude a designated person from the fundamental right of access to the court.[199] Accordingly, the judgment held that a court can properly enter a judgment on a designated person's claim, and a license is not required for such conduct. The application of these elements to arbitral tribunals is not directly addressed in this judgment.[200] However, in passing, Justice Cockerill considered that, although the treatment of courts are not to be automatically transferred to arbitral tribunal, in the case of the prohibition of dealing and making available, the regulation did not intend to make a distinction.[201]

[195] (Emphasis added) [2022] EWHC 2795 (Comm) [3].
[196] [2023] EWHC 118 (Comm) (27 January 2023).
[197] [2023] EWHC 118 (Comm) (27 January 2023) [122].
[198] See Regulations 11(5) and 12 of Russia (Sanctions) (EU Exit) Regulations 2019.
[199] [2023] EWHC 118 (Comm) (27 January 2023) [123] – [139].
[200] ibid [162].
[201] ibid [148].

2.3 Aiding and Abetting Restrictions

Mirroring the relevant provisions of the EU sanctions against Russia, Regulation 19 of UK Sanction Regulations on Russia provides that:[202]

> "*(1) A person must not intentionally participate in activities knowing that the object or effect of them is (whether directly or indirectly)*
> *(a) to circumvent any of the prohibitions in regulations 11 to 18,*[203] *or*
> *(b) to enable or facilitate the contravention of any such prohibition.*
> *(2) A person who contravenes the prohibition in paragraph (1) commits an offence*."

Similar to the aiding and abetting restrictions within EU sanctions, the prohibitions against such activities do not automatically bar arbitration professionals from offering legal services. However, if the arbitral tribunal's mandate is demonstrably established to be illegal due to its intended circumvention or evasion of economic sanctions, the national courts in the sender states may take action. This action could involve invalidating the arbitration agreement before an award is issued or, in applicable cases, issuing an anti-arbitration injunction.

3. Restrictions Potentially Affecting Provisions of Legal Services by Arbitral Professionals in the US Sanctions Regime against Russia

3.1 Prohibition on the Provision of Legal Services

The US sanctions on Russia prohibit the provision of any service by, to, or for the benefit of any designated entity, or to any service performed on behalf of a person located in the designated regions. This prohibition also includes cases where the benefit of such services is otherwise received in the Crimea region[204] or other designated regions of Ukraine, *i.e.,* the "DNR" or "LNR" regions of Ukraine.[205]

The prohibition applies to services performed in the United States or by US persons, wherever located. Therefore, the scope of the prohibition is twofold as it binds any US person as defined in the instrument and any entity, regardless of its status, if the service is performed in the US. The prohibition does not distinguish with regards to the position in which an individual provides the service, such as in-house counsel, employee, or external contractor.[206]

The sanctions include different general carve-outs to the general services prohibition, including one pertaining to "*legal services*". The legal services carve-out lists specific services pertaining to the legal professions that can be performed without a specific license. Among the listed grounds, the ones of particular relevance for arbitration proceedings are listed in § 589.506(a)(2) and § 589.506(a)(3). Both provisions read as follows:

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[202] Russia (Sanctions) (EU Exit) Regulations 2019 S (S.I. 2019/855).
[203] These articles set out the financial and investment restrictions against designated persons in the UK sanctions regime against Russia. Among these restriction asset freezes and restrictions on transfers of funds are the most relevant for the purpose of commercial disputes submitted to arbitration.
[204] 31 CFR § 589.201(b), 31 CFR § 589.207, and 31 CFR § 589.405
[205] Expanded in the E.O. No 14065 of February 21, 2022, section 1.
[206] This was clarified by OFAC. See OFAC 'Guidance on the Provision of certain services relating to the requirements of U.S. sanctions law' (Department of the treasury, 12 January 2017) <https://ofac.treasury.gov/media/6211/download?inline> .

"*(a) The provision of the following legal services to or on behalf of (designated persons) [...] is authorized, provided that any receipt of payment of professional fees and reimbursement of incurred expenses must be authorized pursuant to § 589.507, which authorizes certain payments for legal services from funds originating outside the United States; via specific license; or otherwise pursuant to this part:*

(2) Representation of persons named as defendants in or otherwise made parties to legal, arbitration, or administrative proceedings before any US Federal, State, or local court or agency;

(3) Initiation and conduct of legal, arbitration, or administrative proceedings before any US Federal, State, or local court or agency".

The carve-out further authorizes third parties to perform "*related services*" to the authorized legal services, and US persons who provide authorized services to contract and pay for said related services.[207] The instrument describes "*related services*" as the ones that are "*ordinarily incident*" to the legal services authorized in the prohibition carve-out list, such as those "*provided by private investigators or expert witnesses*".[208]

The regulations further clarify that any other legal services not otherwise authorized under the specific carve-outs, require a specific license.[209] Notably, US sanctions do not define nor qualify the concept of "*legal services*" for the purposes of the general prohibition. However, the carve-outs themselves provide a useful reference as to what services are prohibited. The fact that the sanctions carve out certain legal services under specific conditions, suggests that said services, outside the scope of the relevant carve-out, are prohibited. For example, the initiation or conduction of an arbitration on behalf of a designated person that is not before "*any US Federal, State, or local court or agency*" would be a prohibited act for US persons or when performed within the US.

Similar prohibitions can be found in prior US sanctions regimes, including those against Sudan and Libya. These regimes included interpretative provisions that listed the representation by a US person of "*an individual or entity with respect to* (…) *commercial arbitration*" as an example of a prohibited service.[210]

In other words, the delineation of the carve-out should be the initial step when assessing whether intervention in an arbitration is permissible under US sanctions. Both carve-outs that are relevant for arbitral professionals authorize proceedings before "*any US Federal, State, or local court or agency*". This wording provides fertile ground for controversy, as international commercial arbitral proceedings do not technically take place before US courts or agencies. Prior formulations in other sanctions instruments were more consistent with the nature of commercial arbitration. For instance, the Kosovo Sanctions Regulations in force in 2002

[207] 31 CFR § 589.506(c).
[208] 31 CFR § 589.506(c), 589.404.
[209] 31 CFR § 589.506(b).
[210] Michael Malloy, United States economic sanctions: theory and practice (The Hague Kluwer Law International 2001) 275, 541; also, see 31 CFR § 538.406(d) of the Sudanese Sanctions Regulations revised as of July 1, 2014, no longer in force. Available at: <*https://www.govinfo.gov/content/pkg/CFR-2014-title31-vol3/xml/CFR-2014-title31-vol3.xml*> accessed 27 May 2023.

included a legal service carve-out for representation of a designated entity that have been made a party to "*domestic US legal, arbitration, or administrative proceedings*."[211]

Despite the obscure wording of this provision, it is conceivable that the intention of the legislator was to allow for proceedings administered by arbitral institutions organized under US laws. It follows that arbitrations involving US persons but administered by non-US arbitral institutions cannot benefit from this carve-out. As regards *ad hoc* arbitrations, the situation is more unclear. While one might argue that, by way of implication, this carve-out also extends to arbitrations seated in the US, the wording of the exception does not support this interpretation. Nevertheless, commentators, without touching upon the deficiencies of the formulation of the carve-out, have concluded that it allows "*legal representation of a sanctioned party in a US arbitration*"[212] or "*with respect to arbitration in the United States".*[213] Unfortunately, the references do not provide clear guidance on when an arbitration can be considered to be "in" the US. Various elements could suggest a territorial connection with a state, including the arbitration's seat, the venues where procedural acts are conducted (which may also occur online), the domicile of the arbitrators or parties, or the statutory seat or principal place of business of the administering institutions.

Moreover, this carve-out is concerned exclusively with the prohibition for providing legal services.[214] Hence, parties must still ask for a license to deal with frozen assets or make available economic resources or funds to a designated person, even in the context of the licensed services. However, as mentioned above, section 589.507 authorizes any service provider that falls within the carved-out legal services to receive payment from the sanctioned entity with "*funds originating outside the United States*" not controlled by or sourced from another entity with blocked assets, located in the US, or a US person.[215]

If the designated entity does not have any resources available that originate outside the US, the remaining option is to apply before OFAC for a specific license in order to execute payments using frozen assets. It is worth noting that any US person that receives funds pursuant to section 589.507 is under a duty to annually report to OFAC about the funds received.[216]

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[211] Malloy (n 210) 277.

[212] Claire DeLelle and Nicole Erb, 'Key Sanctions Issues in Civil Litigation and Arbitration' in Rachel Barnes and others (eds), *Global Investigation Review's Guide to Sanctions* (3rd edn, Law Business Research 2022) 403.

[213] Joanne Denton, Satindar Dogra, Kerstin Wilhel et al, 'Key Sanctions Issues in Civil Litigation and Arbitration' (Global Investigation Review, 29 September 2023) <https://globalinvestigationsreview.com/guide/the-guide-sanctions/fourth-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration> accessed 12 January 2024.

[214] 589.506(a): "*The provision of the following legal services […] is authorized, provided that any receipt of payment of professional fees and reimbursement of incurred expenses must be authorized pursuant to § 589.507, which authorizes certain payments for legal services from funds originating outside the United States; via specific license; or otherwise pursuant to this part* […]."

[215] See Order on defendant's motion to dismiss for lack of jurisdiction in *Bank Otkritie Financial Corporation v. Aleksandr Blyumkin*, (Los Angeles Super. Ct., 21STCP03455, 20 October 2022), section of the judgement titled "Legal Representation of Sanctioned Entity" <https://unicourt.com/case/ca-la23-bank-otkritie-financial-corporation-a-russian-public-joint-stock-company-vs-aleksandr-blyumkin-753855> accessed 8 May 2023. The court, interpreting 31 C.F.R. § 587.507 —nearly identical to § 589.597— held that under said provision "*payment may be received from 'funds originating outside the United States' not controlled by or sourced from another entity with blocked assets, the United States, or a U.S. person*." The case concerns a complaint filed on October 8, 2021, by the plaintiff, Bank Otkritie, seeking recognition of a prior Russian judgment issued against Aleksandr Blyumkin, a U.S. resident, by a municipal court in Moscow, Russian Federation. The lawsuit is currently pending, and we have been unable to access the case docket to verify the accuracy of the information available online.

[216] 31 CFR § 589.507(b)

In *United Media Hldgs., NV v Forbes Media LLC,*[217] the arbitral proceedings were seated in New York and the arbitration was subject to the arbitral rules of the AAA. In this case, OFAC issued specific licenses expressly permitting the defendant, its attorneys, and all other persons participating in the arbitration proceeding to engage in all transactions necessary for the conduct of the arbitration. Regrettably, the judgment recollection of OFAC's communication does not fully describe OFAC's reasoning. In the judgment, there is no mention of the application of the carve-out provided in section 589.506(a), nor is the possibility of the parties to finance the proceedings with funds from outside the US jurisdiction analysed.

It is possible to argue that OFAC's interpretation was solely based on the need to have a license for receiving payment and not for providing the service itself. Yet, in *United Media Hldgs., NV v Forbes Media LLC,* the proceedings were suspended by the AAA due to the potential risk of sanctions if the arbitration continued, not for lack of funds. This indicates that the issue may relate more to the actual performance of the service and not exclusively as to the payment of the arbitrator or administrative fees. Yet, it remains to be seen whether US authorities provide further clarification or interpretative guidance.

Hence, the position of the US sanctions is that both the payment and the provision of all relevant related services in the context of an arbitral proceeding are prohibited unless a carve-out applies, or a specific license is obtained.

One could question whether, if said distinction between prohibiting both the undertaking to provide a service and to receive payment for said service, is necessary. As highlighted by judge MacKinnon's dissenting opinion in *American Airways Chaters, Inc. v Regan,* in the context of US sanctions against Cuba, the distinction between permitting a lawyer to enter into an employment contract and permitting him to be paid for performing under the contract is "*a very fine distinction, and hardly a practical one. It seems elementary that if one has a right to a lawyer, it must include a right to pay the lawyer.*"[218] In any case, given the separate nature of these prohibitions, it is logical that their respective carve-outs are also separate. However, when a specific license is needed, as evidenced in *United Media Hldgs., NV v Forbes Media LLC,* the OFAC may authorize different prohibited acts with a single license by using general wording such as "all transactions".

So far, the discussion focuses on US persons wherever located and non-US persons acting in the US territory. Despite this intended scope of application, the US sanctions against Russia also contain secondary sanctions against "foreign persons". Consequently, complications might arise even in those cases which have no apparent link with the US but include a foreign person who:

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[217] United Media Holdings, NV v. Forbes Media, LLC, No. 16 CIV. 5926 (PKC), 2017 WL 9473164 (S.D.N.Y. 9 August 2017), 10: (citing a letter from OFAC to the defendant: 'OFAC confirmed that United Media Holding, NV was a "blocked person" under [Executive Order] 13660. Therefore, according to OFAC, the Arbitrator and counsel for petitioners [UMH] would require a license from OFAC in order to participate in the arbitration, or "otherwise deal in property in which [petitioners have] an interest"').

[218] American Airways Charters, Inc. v. Regan, 746 F.2d 865, 884 (D.C. Cir. 1984). The case involved a dispute where American Airways Charters challenged OFAC's requirement to obtain specific licenses for flights to Cuba, arguing the licensing exceeded OFACs authority under the Trading with the Enemy Act. Among other issues, the court considered OFAC's claim that its authority extended to conditioning the "mere formation of an attorney-client relationship" on prior approval. The court ultimately rejected this position, noting that such an interpretation "would trench on a right of constitutional dimension." American Airways Charters, Inc. v. Regan, 746 F.2d 865, 867 (D.C. Cir. 1984).

"*facilitates a significant transaction or transactions, including deceptive or structured transactions, for or on behalf of:*

(1) Any person subject to sanctions imposed by the United States with respect to the Russian Federation; or

(2) Any child, spouse, parent, or sibling of an individual described in paragraph (a)(6)(vii)(B)(1) of this section".[219]

It may be argued that the provision of arbitral legal services by non-US arbitral institutions or arbitrators may facilitate a "significant transaction" for the designated party and can therefore establish a ground for imposing secondary sanctions against the non-US arbitral institution or arbitrators. In determining whether a transaction is significant, the OFAC has listed various factors, among others: the size, number, frequency, and nature of the transactions, the level of awareness of the management, the nexus between the transaction and the sanctioned person.[220] Despite its broad scope, this legal ground has not, so far, been invoked in the OFAC's enforcement actions to target non-US persons outside of US jurisdiction.[221] As regards arbitral institutions organized under non-US laws, the risk of application of this prohibition does not seem to be a significant one. This is because 31CFR § 589.413(i) explicitly states that a transaction is not significant if US persons would not require specific licenses from OFAC to participate in it. Since the "*[i]nitiation and conduct of […] arbitration […] proceedings before any US Federal, State, or local court* or agency*"* does not require a specific license from OFAC, provision of arbitral services by non-US arbitral institutions and arbitrators should not constitute a "significant transaction" for the purpose of § 589.201 (a) (6)(vii)(B). However, as discussed above, the scope of the exemption in § 589.413(i), with regard to international commercial arbitration, is not entirely clear. This, in turn, can raise questions as to the position of non-US arbitrators and arbitral institutions. The safest option for interested persons would be to seek interpretative guidance from OFAC.

3.2 Aiding and Abetting Restrictions

Section 589.213 of the US Regulation on Ukraine-/Russia-Related Sanctions[222] prohibits:

"*(a) Any transaction on or after the effective date that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this part is prohibited.*

(b) Any conspiracy formed to violate the prohibitions set forth in this part is prohibited".

[219] 31 CFR § 589.201 (a) (6)(vii)(B).
[220] US Department of the Treasury, 'the Office of Foreign Assets Control, Frequently Asked Questions: Ukraine-/Russia-Related Sanctions' <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/542> accessed 29 November 2022.
[221] US Department of the Treasury, 'Civil Penalties and Enforcement Information' <https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information> accessed 29 November 2022.
[222] 31 CFR § 589.213.

Therefore, similarly to the UK and EU sanctions, if it can be demonstrated that the parties intended to evade economic sanctions by referring their disputes to arbitration, the mandate of the arbitral tribunal becomes unlawful.

4. Comparative Overview

The position adopted by the US sanctions contrasts with the UK and EU sanctions to the extent that legal services involving the representation of a designated party in a dispute are expressly prohibited.

US sanctions indeed include a caver-out that allows for the initiation, conduction, and representation of a designated party in an arbitration "*before any US federal, state, or local court or agency*". However, at least with regard to international arbitration, the wording of this carve-out is far from providing any assurance. At first, it appears that it allows for the provisions of legal services in arbitrations seated in the US, whereas for arbitrations seated in other jurisdictions, a license may be required. Yet, in *United Media Hldgs., NV v Forbes Media LLC*,[223] the licenses ultimately issued by OFAC suggest that certain arbitrations seated in the US may also require a license.

In turn, the position under EU and UK sanctions is more flexible. Both under EU and UK sanctions, legal services in contentious matters involving a designated person, which presumably includes an arbitration proceeding, are not prohibited.

In any event, the need for a license to execute any payments renders this distinction irrelevant as in most cases the inability to lawfully receive or execute a payment can easily bring the arbitral proceedings to a halt. Thus, the existence of a specific or general license will still be paramount in most cases under the three regimes.

As potential alternatives, it can be argued that the possibility to lawfully provide services albeit payment restriction, may open the possibilities for arrangements, such as *pro bono,* payment subject to a suspensive condition, among others. Creative arrangements could provide effective solutions for parties when facing the application of EU and UK sanctions. However, it remains to be seen how said arrangements will be interpreted by the respective authorities.

It is likely that most arbitral practitioners providers would still have risk-averse positions and not dare to explore the preferred alternatives. The three regimes include provisions that prohibit attempts to unlawfully evade the application of sanction regimes under strict liability. Thus, arbitral practitioners aiming to explore alternatives in good faith could still be found liable.

V. The Impact of Exclusive Jurisdiction of Russian Arbitraz Courts on the Arbitral Tribunal's Jurisdiction

1. Russian Courts and Enforcement of Arbitration Agreements Involving Sanctioned Parties

In response to the impact of economic sanctions on the Russian sanctioned parties in international arbitration proceedings and in litigation outside the Russian Federation, the Russian Parliament has adopted legislation which confers jurisdiction to the Russian state

[223] No. 16 CIV. 5926 (PKC), 2017 WL 9473164 (S.D.N.Y. 9 August 2017).

commercial courts ('*arbitrazh*' courts, '*арбитражные суды*' in Russian) over disputes involving sanctioned individuals and entities.[224] It is important to note that this legislation does not automatically deprive arbitral tribunals of jurisdiction over disputes involving sanctioned persons. Nevertheless, according to this provision, sanctioned persons can unilaterally disregard their arbitration agreements if they are concerned that they would be barred from access to justice in the foreign arbitral procedure. In such cases, exclusive jurisdiction is granted to the Russian *arbitrazh* courts and anti-arbitration injunctions prohibiting commencement or continuation of foreign arbitration proceedings may be issued in Russia.[225]

In *Uraltransmash v. PESA*,[226] the Russian Supreme Court found that Article 248.1 of the Commercial Procedural Code of the Russian Federation ("*Арбитражный процессуальный кодекс Российской Федерации*" in Russian) does not require the sanctioned person to prove circumstances demonstrating that the sanctions in fact created obstacles to the access to justice. Instead, the mere fact that sanctions had been imposed over a Russian party is deemed sufficient to conclude that it would not have access to justice.

In another case, *JSC Baltiysky Zavod (Zavod) v. Wartsila Oyj Abp (Wartsila)*,[227] the Commercial (*Arbitrazh*) Court of Saint Petersburg deviated from the previously prevailing position on the interpretation of Article 248.1 of the Russian Commercial Procedural Code. The court ruled that the mere presence of sanctions was not an automatic ground for invoking this article, which designates exclusive jurisdiction to Russian courts. In this case, the Russian party had disregarded an FAI (Arbitration Institute of the Finnish Chamber of Commerce) arbitration clause by bringing proceedings before the Commercial (*Arbitrazh*) Court of Saint Petersburg. This court terminated the proceedings based on the existence of a valid arbitration agreement. In its reasoning, the court emphasized that EU sanctions did not prohibit sanctioned individuals or entities from pursuing arbitration. Additionally, it relied on a statement from the FAI assuring independence and impartiality towards all parties in the dispute. However, the Thirteenth Commercial (*Arbitrazh*) Court of Appeal reversed this decision, aligning with the holding of the supreme court, confirmed that the mere imposition of economic sanctions on a Russian entity participating in a dispute in international commercial arbitration outside the territory of the Russian Federation was sufficient to conclude that their access to justice was constrained.[228]

The broad interpretation of Russian courts' exclusive jurisdiction extends even to arbitrations administered by institutions located in non-sanctioning states, where other factors, such as the seat of arbitration, are related to a sanctioning state. In the case of *Linde v. RusChemAlliance*, the Commercial (*Arbitrazh*) Court of Saint Petersburg ruled that an HKIAC arbitration clause was unenforceable, despite Hong Kong not imposing sanctions on Russian parties.[229] The dispute involved a contract between RusChemAlliance (RCA), a Russian company, and Linde GmbH (Linde), a German construction firm, for the engineering, procurement, and construction of an LNG plant in Russia. The contract, governed by English law, provided for HKIAC arbitration in Hong Kong, with hearings in Stockholm, Sweden.

[224] Article 248 to the Russian Arbitrazh Procedural Code. See Russian Federal Law No. 171-FZ of 8 June 2020.
[225] Articles 248.1 of the Commercial Procedural Code.
[226] Case No 309-ES21-6955 (1-3) (9 December 2021), Russian Supreme Court .
[227] Case No A56-82244/2022 (7 June 2023), Commercial (*Arbitrazh*) Court of Saint Petersburg.
[228] Case No A56-82244/2022 (21 August 2023), Thirteenth Commercial (*Arbitrazh*) Court of Appeal.
[229] Case No A56-129797/2022 - 8 June 2023 (8 June 2023), Commercial (*Arbitrazh*) Court of Saint Petersburg.

Linde argued that the litigation in the Commercial (*Arbitrazh*) Court should be suspended until a final award was rendered in the Stockholm-seated HKIAC arbitration it had earlier filed. The German company subsequently obtained an order from the High Court of Hong Kong requiring RCA to stay its suit pending the final determination by the Tribunal in the Arbitration.[230] Despite this injunction, in its ruling, the Commercial (*Arbitrazh*) Court of Saint Petersburg determined it could continue to hear the lawsuit under Article 248.1 of the Commercial Procedural Code of the Russian Federation. The court argued that the HKIAC was not sanctions-neutral and could not guarantee the Russian entity a fair trial. It emphasized that although the HKIAC is based in Hong Kong, which operates under Chinese jurisdiction, it has a distinct legal system influenced by the UK, with British and European judges playing significant roles. The court also highlighted "objective restrictions" on the legal representatives RCA could use in the arbitration, as well as on the payment for their services, due to the seat being in Stockholm and existing EU sanctions.

Concurrently, RCA initiated separate proceedings in the Commercial (*Arbitrazh*) Court of Saint Petersburg seeking an anti-suit injunction against Linde concerning the ongoing HKIAC arbitration and related proceedings before the High Court of the Hong Kong Special Administrative Region. RCA requested over €1.5 billion in compensation if Linde failed to comply with the court's order. On April 15, 2024, the Russian court partially granted RCA's application, issuing an anti-suit injunction concerning the HKIAC and certain other proceedings but dismissing the compensation request.[231]

Despite the broad interpretation of obstacles to access to justice for Russian designated entities and individuals by Russian courts, some Russian courts have clarified that the mechanism provided in Article 248.1 of the Commercial Procedural Code is only available to Russian parties who are designated individuals or entities under foreign economic sanctions against Russia. In *LLC Atlant v. RCO S.N.C.*, the Commercial (*Arbitrazh*) Court of Irkutsk Oblast distinguished between those cases where the Russian party to the dispute is named as a sanctioned person or entity by a foreign sanctions regime and those cases where the Russian party is not specifically listed as a sanctioned person.[232] The court concluded that the broad interpretation of Article 248.1 offered by the Russian Supreme Court in *Uraltransmash v. PESA*, cannot be extended to non-sanctioned Russian persons. Although this judgment was reversed in cassation by the Commercial (*Arbitrazh*) Court of the Eastern Siberian District due to lack of notification of the foreign respondent, the cassation court confirmed the finding of lower courts with regard to the scope of Article 248.1 of the Commercial Procedural Code.[233] The cassation court emphasized that the Russian party had failed to provide evidence of specific economic sanctions imposed on them by the states where the respondent is located (Italy) or where the arbitral institution is based (Sweden). It further argued that the Arbitration Institute of the Stockholm Chamber of Commerce guaranteed impartiality and independence of the procedure for Russian parties, as established on their website. It then concluded that, under such circumstances, Russian entities are presumed to have the assurance of fair proceedings.

Nevertheless, there are other decisions where Russian commercial (*arbitrazh*) courts have argued that Article 248.1 of the Commercial Procedural Code of the Russian Federation

[230] The interim injunction of 17 March 2023 was upheld in the Decision of the Court of First Instance of the High Court of Hong Kong [2023] HKCFI 2409 (27 September 2023).
[231] Case No A56-13299/2024 (15 April 2024), Commercial (*Arbitrazh*) Court of Saint Petersburg.
[232] Case No A19-10204/2022 (17 January 2023), Commercial (*Arbitrazh*) Court of Irkutsk Oblast.
[233] Case No A19-10204/2022 (19 July 2023), Commercial (*Arbitrazh*) Court of the Eastern Siberian District.

extends to disputes between a Russian or foreign person if the basis for such disputes are restrictive measures introduced by a foreign state against citizens of the Russian Federation and Russian legal entities. In these decisions, the courts argued that there is nothing in Article 248.1 limiting its application only to those Russian persons who have been personally designated.[234] Due to the highly political context of these cases, it seems that the extent to which Russian courts interpret Article 248.1 broadly or narrowly also depends on the political sensitivity of the case.

These decisions from Russian courts demonstrate that Russian parties who are designated under any economic sanctions regime against Russia can invoke Article 248.1 of the Commercial Procedural Code to disregard their arbitration agreements and initiate proceedings before Russian commercial (*arbitrazh*) courts. In such cases, according to Russian courts, the mere fact that a Russian person or entity is sanctioned by a state is sufficient to prove that the access to justice for the Russian sanctioned party has been constrained. For Russian parties not specifically designated under sanctions, the situation is less clear. It appears that Russian courts might apply a lower threshold to accept jurisdiction in politically sensitive cases. However, it remains to be seen whether Russian courts will develop a more consistent approach in these situations.

2. Arbitral Tribunals and Exclusive Jurisdiction of Russian Commercial (Arbitrazh) Courts

Having explained the position of Russian law on the exclusive jurisdiction of Russian commercial (*arbitrazh*) courts, we will now discuss whether such exclusive jurisdiction affects an arbitral tribunal's decision on its jurisdiction. According to the principle of competence-competence, an arbitral tribunal has the autonomous power to decide on its jurisdiction. Therefore, it is unlikely that an arbitral tribunal seated outside Russia would recognize the exclusive jurisdiction of Russian commercial (*arbitrazh*) courts and conclude that it lacks jurisdiction based on Russian law.

3. National Courts Outside Russia and Exclusive Jurisdiction of Russian Commercial (Arbitrazh) Courts

Similarly, national courts in sanctioning states on Russia are unlikely to give effect to the decisions of Russian commercial (*arbitrazh*) courts allowing for the disregard of arbitration agreements. In practice, even if a Russian commercial (*arbitrazh*) court assumes jurisdiction over a dispute involving a sanctioned party, an arbitral tribunal can still assert its jurisdiction and render an award. Furthermore, it is unlikely that national courts in states imposing sanctions against Russia would enforce anti-arbitration injunctions issued by Russian commercial (*arbitrazh*) courts. These national courts will, in principle, recognize and enforce an arbitral award if the arbitration agreement is valid and enforceable, even if a Russian commercial (*arbitrazh*) court has concluded otherwise.

In jurisdictions where anti-suit injunctions are permitted, national courts may issue such injunctions against Russian proceedings that breach arbitration agreements. A series of cases before English courts illustrates this point. One notable case is *Unicredit Bank GmbH v RusChemAlliance*. This case originates from the abovementioned contract between RCA, a Russian company, and Linde, a German contractor. The contract provided for advance

[234] See, e.g., Case No A56-74595/2023 (10 November 2023), Commercial (*Arbitrazh*) Court of Saint Petersburg.

payments to Linde, secured by advance payment guarantees to RCA. Some of these bonds were issued by UniCredit Bank GmbH (Unicredit), with additional bonds provided by other European banks.

The dispute arose when RCA attempted to call on the bonds after Linde halted its performance of the contract, citing EU sanctions on Russia. Although RCA was not itself sanctioned, the German Federal Office for Economic Affairs and Export Control had instructed Linde to cease performing the EPC Contracts. RCA terminated the EPC Contracts on grounds of material breach and demanded payment under the bonds. Unicredit refused to pay, citing EU sanctions.

The bonds were governed by English law and provided for ICC arbitration seated in Paris. Instead of initiating arbitration, RCA filed proceedings in the Commercial (*Arbitrazh*) Court of Saint Petersburg, which accepted jurisdiction.[235] In response, Unicredit sought an anti-suit injunction from the English court to restrain the Russian proceedings, alleging that RCA's actions breached the arbitration agreements in the bonds.

At first instance, the Judge refused to grant an anti-suit injunction.[236] However, in February 2024, the Court of Appeal found in favour of Unicredit, granting an anti-suit injunction and ordering RCA to terminate the Russian proceedings.[237] The Court of Appeal argue that the arbitration agreement was governed by English law and therefore, English courts were in a position to issue anti suit injunctions in support of the arbitration. On 23 April 2024, the Supreme Court dismissed RCA's jurisdictional appeal and upheld the anti-suit injunction.[238]

In another case, *Barclays Bank plc v VEB.RF*, the High Court granted an anti-suit injunction to prevent VEB (the state development bank of Russia) from pursuing a claim in Russian courts, in breach of an arbitration clause, and an anti-enforcement injunction to restrain VEB from enforcing any orders made by the Russian courts.[239] The court rejected VEB's argument that the arbitration agreement was frustrated by sanctions, indicating that sanctions do not obstruct sanctioned entities from accessing justice or fulfilling contractual obligations.

These cases demonstrate that while Russian litigants may attempt to transfer disputes to Russian courts or obtain anti-arbitration injunctions, courts in sanction-imposing states like the UK will uphold arbitration agreements and, if applicable, issue injunctions to prevent breaches of these agreements. It remains to be seen how national courts in countries where anti suit injunctions are not available will try to counter the Russian Courts

4. The EU's Response to Russia's Anti-Suit Injunctions

Recently, in its 14th package of sanctions,[240] the EU introduced a new version of article 5ab to the amended CR 833/2014. This new article prohibits EU persons and entities from engaging in any direct or indirect transactions with parties that have initiated claims before Russian

[235] Case No A56-74595/2023, Commercial (Arbitrazh) Court of Saint Petersburg.
[236] Unicredit Bank GmbH v RusChemAlliance LLC [2023] EWHC 2365 (Comm).
[237] Unicredit Bank GmbH v RusChemAlliance LLC [2024] EWCA Civ 64.
[238] UniCredit Bank GmbH (Respondent) v RusChemAlliance LLC (Appellant), UKSC 2024/0015, Oral Order of the Supreme Court of the United Kingdom - 23 Apr 2024.
[239] Barclays Bank plc v VEB.RF [2024] EWHC 1074 (Comm).
[240] The EU Commission Press Release of 24 June 2024, 'EU adopts 14th package of sanctions against Russia for its continued illegal war against Ukraine, strengthening enforcement and anti-circumvention measures' <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3423> accessed 8 July 2024.

courts based on Article 248 or similar legislation and in connection with claims arising from contracts or transactions impacted by existing EU sanctions (CR 833/2014 and CR 269/2014). Through this measure, the EU aims to prevent sanctioned entities from using Russian courts to undermine or circumvent its sanctions regime.

The effectiveness of this new deterrent in discouraging Russian parties from relying on Article 248 remains to be seen. However, for those already designated under EU sanctions and thus prohibited from conducting business with EU counterparts, the added disincentive to pursue legal action in Russia may have limited impact.

VI. Conclusions

International arbitration involving entities subject to international sanctions is highly likely to face additional risks and administrative burdens due to various restrictions and penalties that may impact the conduct of the proceedings and the stakeholders involved. The proliferation of multiple, overlapping, or contradictory regimes has significantly increased uncertainty and costs of arbitration. Therefore, arbitral professionals are advised to conduct thorough compliance checks and consider potential sanctions regimes when drafting arbitral agreements or conducting arbitration.

While the three sanctions regimes discussed in the article share common policy goals, these regimes differ in their approaches to restrictions on payments and the provision of legal services. Therefore, it is difficult to set standards and common grounds between these regimes. Moreover, the broad and sometimes ambiguous language employed in sanctions regulations grants significant discretionary power to enforcement authorities. This discretion allows for a flexible response to evolving circumstances, including those not immediately apparent, but also creates uncertainty for various stakeholders. In many cases, enforcement authorities might decide to implement stricter measures against targeted entities to align with their respective state's foreign policy. Consequently, in cases of uncertainty, practitioners should err on the side of caution, assume they are likely subject to sanctions, and seek interpretative guidance from the relevant authorities whenever possible.

Among the selected regimes, US sanctions seem to be the most restrictive. The provision of contentious and non-contentious legal services and all transfer of funds to, from or on behalf of a designated person or in a covered region in an arbitration outside of the US, are subject to a prior license. Therefore, irrespective of whether the services are provided on an onerous basis or gratuitously, a license is still required for international arbitration that is outside of the US. The sanctions contemplate a carve-out, allowing for the provision of legal services related to arbitration proceedings in the US. However, the carve-out's wording lacks a clear formulation and, therefore, fails to provide adequate guarantees specifically in cases with cross-border elements. These concerns are further supported by a recent case before US courts, *United Media Holdings, NV v. Forbes Media, LLC*,[241] where even an arbitration seated in the US was still subject to licensing requirements. Finally, parties may execute fund transfers without a license for services covered by the carve-out, only if the funds are located outside the US, among other conditions.

In contrast, EU and UK sanctions adopt a relatively more tempered approach. Both regimes prohibit the transfer of funds and dealings involving a designated person. However, they

[241] No. 16 CIV. 5926 (PKC), 2017 WL 9473164 (S.D.N.Y. 9 August 2017).

explicitly exclude the provision of legal services in the context of disputes ("*contentious legal services*") from these restrictions under specific circumstances. Nevertheless, the requirement for a license to execute any payments under both the EU and UK sanctions regimes often renders the legality of providing legal services in the context of an arbitration less relevant. The inability to lawfully receive or execute payments can easily bring arbitral proceedings to a halt. Therefore, obtaining a license remains paramount in most case*s.*

Favouring certainty and clarity, UK sanctions allow for the issuance of general licenses by OFSI. The existing general licenses relevant for arbitration permit payments for the provision of legal representation services by UK lawyers and payments to the LCIA, the UK's most prominent arbitral institution. Notably, recent case law interpreting UK sanctions has confirmed that legal representation is not prohibited by sanctions and that the general licenses allow for payments of legal fees. Case law has also explored possible alternatives, such as the provision of services *pro bono* or when payment is agreed on at a later stage. Nevertheless, it remains uncertain to what extent parties might be able to successfully enter into these kinds of arrangements as there is no definitive authority on the matter.

Despite the differences between the three sanctions regimes in the form of carve-outs or mechanisms for obtaining authorization from competent authorities, economic sanctions severely complicate the conduct of an arbitration and entail a high degree of uncertainty. In particular, the lack of stable guarantees due to the revocable nature of licenses still presents a highly risky option for arbitral professionals and the parties engaged in an arbitration which involves a designated person under any of the three sanctions regimes. Furthermore, due to the cross-border nature of international arbitration, there is also a risk for the application of different sanctions regimes. This is due to different possible connecting factors that may be relevant, such as the arbitral seat, the nationality of arbitral professionals, and even the jurisdiction of the banks involved in the cross-border transfer of funds. Consequently, some Asian jurisdictions and ad hoc arbitrations are options that have grown in popularity for Russian parties.[242]

The challenges do not cease after overcoming the restrictions imposed by sanctioning states. On the other side of the coin, the exclusive jurisdiction of Russian (*arbitrazh)* courts has further complicated an already distressed practice. Russian courts have consistently ruled that economic sanctions against a Russian party create an unequal position in any arbitration conducted outside of Russia. This has led to a growing trend[243] of Russian courts setting aside arbitration agreements and asserting exclusive jurisdiction in cases involving designated persons potentially affected by economic sanctions. This trend poses a serious threat to the enforcement of arbitral awards in Russia. While anti-arbitration injunctions issued by Russian courts are unlikely to be recognized by arbitral tribunals and national courts in sanctioning states, Russian courts are likely to deny recognition and enforcement of an arbitral award that disregards the exclusive jurisdiction of Russian (*arbitrazh)* courts on the grounds of the arbitral tribunal's lack of jurisdiction or a breach of public policy.

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[242] 2022 Russian Arbitration Association Survey. See also, Jack Ballantyne, 'Is London still a hub for Russian disputes?' (GAR news, 15 May 2023) <https://globalarbitrationreview.com/article/london-still-hub-russian-disputes> accessed 2 June 2023 (required subscription).

[243] Most recently, see Jack Ballantyne, 'More Russian injunctions against European gas buyers' (Global Arbitration Review news, 19 June 2024) <https://globalarbitrationreview.com/article/more-russian-injunctions-against-european-gas-buyers> accessed 19 June 2024 (requires subscription).

The extent to which sanctioning states intend to continue affecting international dispute resolution mechanisms, particularly international arbitration, through the use of economic sanctions as a foreign policy tool, remains uncertain. However, the current unprecedented sanctions regime targeting Russia, and Russia's retaliatory measures, may spur the establishment of reasonable boundaries on how states can influence parties' access to dispute resolution methods during international conflicts.