

INTERNATIONAL ARBITRATION

The Impact of Sanctions on International Arbitration in Russia

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1. Introduction

Over the centuries, Ukraine has been ruled by different powers, including the Russian and Austro–Hungarian empires, Poland, and Lithuania. The region’s diverse geography and history of conquests by different factions have contributed to the creation of a complex tapestry of multi-ethnic states.¹

Russia and Ukraine share a similar ancestry that goes back to Kyivan Rus, the first Slavic state that was centered in Kyiv, the current capital of Ukraine. This state is regarded as the cradle of Russia and Ukraine. Ukraine has had several powers’ dominance over the ages. Mongol soldiers invaded Kyivan Rus in the thirteenth century from the east. Polish and Lithuanian troops invaded from the west in the sixteenth century. “Left Bank” Ukraine was the name given to the region east of the Dnieper River when it was conquered by the Tsardom of Russia in the seventeenth century. Poland ruled over the region known as “Right Bank” Ukraine, which is west of the Dnieper River. “Right Bank” Ukraine was conquered by Russia in 1793.

This policy prohibited the use and study of the Ukrainian language and required conversion to the Russian Orthodox faith.²

The collapse of the Soviet Union and the subsequent NATO enlargement of Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia, in the

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¹ Katya CENGEL: The 20th-Century History Behind Russia’s Invasion of Ukraine. *Smithsonian Magazine*, March 4, 2022. <https://tinyurl.com/45ye5cyk>

² Eve CONANT: Russia and Ukraine: the tangled history that connects—and divides—they. *National Geographic*, February 24, 2023. <https://tinyurl.com/mvxewp75>

opinion of Russian President Putin, constitute the greatest geopolitical disaster of the 20th century. Albania and Croatia joined in 2009, and Montenegro joined in 2017. After North Macedonia became a member of NATO in 2020, it became clear that the organization wanted to invade both Georgia and Ukraine.³ However, the conflict impeded Georgia's attempts to join. Russia's acquisition of the Crimean Peninsula was one of the main turning points in the recent history of ties between Russia and Ukraine.

The primary procedural aspect of arbitration concerning recognition and enforcement focuses on the arbitration agreement, as observed in international practices. This aspect also serves as a key ground for refusal in cases of default by any party involved. The arbitration agreement delineates crucial legal relationships between disputing parties, particularly in cases of contractual or non-contractual disputes. Furthermore, the scope of the arbitration agreement extends beyond commercial matters to encompass statutory documents of companies and shareholder agreements.

Jurisdiction represents another crucial consideration in the step-by-step process of recognizing and enforcing foreign arbitration awards. In the Russian Federation, jurisdiction is determined by various levels of state courts, with the ultimate enforcement authority resting with the Supreme Court of the Russian Federation. A single judge is responsible for implementing decisions rendered by foreign arbitration tribunals.⁴

2. The Legal Framework

The 1993 Federal Law on International Commercial Arbitration was amended in 2017 to govern international commercial arbitration across Russia, unifying and harmonizing legal practice. Russian Law on International Commercial Arbitration (unofficial RAA English translation)

The law placed Russia on the list of nations with contemporary arbitration laws and is essentially a mirror image of the UNCITRAL Model Law on International Commercial Arbitration (1985). Furthermore, the number of

³ Abdel Salam Sayed Muhammad AL-WAHATI: Egyptian public opinion's attitudes toward the Russian-Ukrainian freedom and its repercussions. *Algerian Journal of Media and Public Opinion Research*, Volume 6., Issue 1. (2023) 79.

⁴ Ulugbekovna OCHILOVA AZIZA: Enforcement Arbitration Agreement of Arbitral Awards. *Web of Humanities: Journal of Social Science and Humanitarian Research*, Vol. 1., No. 8. (2023) 62–68.

cases involving recognition and enforcement before state courts increased due to the expansion of both local and international arbitration. The Supreme Arbitral Court (Supreme Commercial Court) established the non-binding rules for annulling, accepting, and upholding arbitral verdicts based on the instances that were reported. These rules, which are covered in more detail below, are a crucial legal aid for navigating the Russian judicial system.⁵ Russia is a party to the New York Convention and has been one of the original member states since 1958 (as USSR).

3. Arbitrability

International commercial arbitration is the legal recourse for any business disputes involving foreign parties, including those in which a Russian corporation with overseas investments is one of the parties. The amount of foreign involvement needed in a Russian business with foreign interests for a dispute to qualify for international arbitration is not specified by law. In actuality, this criteria might be met by even a small foreign investment in a Russian business. It is important to remember that commercial disputes resulting from company insolvency, company registration, reorganization, liquidation, reputational protection for businesses, and, lastly, competition concerns, do not meet the requirements to be arbitrated.

4. Arbitration Agreement

A requirement for the arbitration agreement's written form is outlined in the law. Evidence of a formal arbitration agreement may also be shown through the exchange of letters, faxes, emails, and other communications. Even in the absence of a formal written agreement, the parties to a dispute may nevertheless prove that an agreement to arbitrate exists if they submit their statements of claim and response without further contesting the arbitral tribunal's jurisdiction.

Numerous court cases that have been publicized examine the existence and legality of arbitration agreements. State courts frequently hear challenges to

⁵ Good examples in this regard are the papers of Valentina VADI: Crisis, Continuity, and Change in International Investment Law and Arbitration. *Michigan Journal of International Law*, Vol. 42., No. 2. (2021) 321–367; and Peter BEKKER: International Law in Time of Crisis: COVID-19 and Foreign Investments. *CMS Law-Now*, 04. 05. 2020. <https://acortar.link/XNAW49>

arbitral verdicts based on flaws in arbitration agreements. Two of the most common arguments are the name of an arbitration institution being spelled incorrectly or incompletely; and the lack of specific references to the procedures (arbitration or conciliation) of the institution. An arbitration agreement should be properly drafted with these fundamentals in mind.⁶

The recent court ruling in Russia emphasizes the importance of carefully drafting international arbitration clauses to refer to specific arbitral institutions.

4.1. Arbitration and Arbitral Award

Given that arbitration results from the parties' choice to submit their issues to a private conflict resolution mechanism, there is a strong awareness in Russia that arbitration is an apparatus distinct from the state court system. However, arbitration and "arbitral" courts are not the same thing in Russia. The state courts handling business disputes are known as "Arbitration Courts", according to a tradition dating back to the Soviet era. Except for having the power to annul, recognize, and uphold arbitral verdicts, arbitral courts are part of the state legal system and have little to do with arbitration. Even though the terms "arbitration" and "arbitral" sound similar, they are two distinct and independent dispute settlement processes. In actuality, an arbitral tribunal is a self-regulating dispute resolution mechanism known as "treteyskiy sud". It is widely understood in Russia to be a different apparatus from the state court system.

5. Enforcement of Foreign Arbitral Awards

The NY Convention serves as the legal foundation for the execution of foreign arbitral rulings in Russia. The USSR actively participated in the convention's formulation and, by 1960, had ratified it. However, before 1992, there was not a single case in Russia where a foreign arbitral award was enforced in court under the NY Convention. It might be because the parties were state-owned businesses and had to willingly abide by the arbitral rulings.⁷

⁶ Alireza ANZARI – Leila RAISI: International Standards of Investment in International Arbitration Procedure and Investment Treaties. *Revistas Jurídicas*, Vol. 15., No. 2. (2018) 13.

⁷ RUSSIAN ARBITRATION ASSOCIATION: Arbitration in Russia.
<https://arbitration.ru/en/dispute-resolution/arbitration-in-russia.php>

These days, each year 50-70 applications are reviewed by Russian courts seeking recognition and enforcement of foreign arbitral rulings under the NY Convention. The remaining rewards are presumably accepted voluntarily. An experienced local attorney should be considered early on in the proceedings when handling a situation involving the enforcement of a foreign arbitral award in Russia, as this calls for a thorough approach and familiarity with all formal and procedural requirements of the state courts.

Russia then launched a wave of missile attacks on Kyiv and several other Ukrainian cities. These attacks were the most violent since the first week of the war, and they directly targeted the energy infrastructure, the security services, and the office of the Ukrainian president. Russia's military doctrine requires it to employ all of its military capabilities if its lands are attacked. This action was strongly denounced by the international community in 2014, which worsened the situation between the two nations. The conflict then intensified when the Ukrainian government's soldiers launched a war in eastern Ukraine.⁸

The beginning of the sentence is missing. The pro-Russian separatists were charged with aiding the separatists, Russia mobilized its soldiers and launched a military intervention on the Ukrainian border in October 2021. The Russian Federation launched a massive invasion of Ukraine early on Thursday, February 24, 2024, as a result of growing tensions between the two countries.⁹

Europe, the United States, and the international community condemned this Russian move and imposed sanctions on Russia. The conflict has led to significant loss of life and displacement of people, as well as economic and political consequences for both countries.

It is clear from the historical relations between Russia and Ukraine that they are rooted, in periods of common heritage, hegemony, annexation, and conflict. These historical events have greatly shaped the current political scene between the two countries, which has pushed Ukraine to resist Russia, and its desire to ally more closely with the European Union and NATO. Atlantic.

⁸ Russia–Ukraine relations. <https://en.m.wikipedia.org/>

⁹ Fatima Al-Zahra MASOUDI – Bilal ZARROUQI: The Ukrainian crisis and its repercussions on Russian-Western economic relations. *Journal of Law and Political Science*, Volume 9., Issue 1. (2023) 8123.; Jamal Fourar AL-AIDI: The Russian-Ukrainian war and its repercussions from the perspective of international law. *World Politics Magazine*, Vol. 7., No. 2. (2023) 151

6. Sanctions

Economic sanctions have developed into a key tool of economic warfare in recent years, particularly during strong political unrest or conflict. The latest sanctions are particularly significant to the Caucasus and Central Asia since they are primarily directed towards Russia, to which Russia has responded with countersanctions. The influence of economic sanctions on international commercial arbitration is examined in this article, focusing on situations when some states or groupings of states have imposed them rather than the UN Security Council. It covers both the enforcement and recognition of foreign awards as well as the conduct of arbitration (including questions of arbitrability and applicable legislation).¹⁰

The EU has implemented twelve sanctions packages targeting the economies of Belarus and Russia in particular sectors since the beginning of Russian aggression against Ukraine in 2014 alone. It has also produced a list of over 1900 people and businesses subject to travel restrictions and asset freezes. Despite being targeted and specialized, those sanctions nonetheless have an impact outside of Russia because of how much they affect imports and exports, commodity prices, and significant economic sectors. To put it, in an era of globalized and interconnected economic reality, it is nearly impossible to prevent a spillover effect beyond Russian boundaries.

The existing sanctions regime is not only curious from a legal standpoint, but it also has a large impact. Public international law does not consider EU sanctions to be standard countermeasures. These are coordinated actions taken by many states in retaliation for another state's illegal actions against a third. The EU is not associated with Russia's actions against Ukraine. The question of whether there is a means to check, balance, and lessen the impact of EU sanctions for people who find themselves to be "collateral damage" arises from these two particularities: the broad and partially undesired impacts of the sanctions and their legal uncertainty.¹¹

Nation-states have historically employed coercive means to shape behavior; these tactics date back to the League of Nations and have become

¹⁰ Andrey KOTELNIKOV: International Commercial Arbitration and Economic Sanctions. In: Alexander TRUNK – Azar Aliyev – Marina TRUNK-FEDOROVA (eds.): *Law of International Trade in the Region of the Caucasus, Central Asia and Russia*. Brill–Nijhoff, 2022.

¹¹ Julia HILDEBRANDT: Collateral Damage Through Sanctions: The Role of ISDS for Third Party Investors Impacted by EU Sanctions Against Russia [pre-publication]. *European Investment Law and Arbitration Review*, Vol. 9., No. 1. (2024).

increasingly common, particularly in the aftermath of the Cold War. The goals of contemporary sanctions, which might take the form of trade, economic, or diplomatic actions, are to penalize violators, discourage aggression, or bring about regime change. These actions have developed into targeted sanctions in the twenty-first century. Unintended repercussions and the necessity of maintaining international unity are two issues that still need to be resolved. Sanctions continue to be an important part of international diplomacy, despite continuous discussions over their morality and effectiveness. They show efforts to minimize collateral damage and strike a balance between policy goals. Quick food and beverages Giants.¹²

Following increasing pressure to take action, McDonald's, Coca-Cola, Starbucks, and Heineken are the most recent businesses to declare they are ceasing operations in Russia.

McDonald's and Starbucks announced that they would be temporarily closing their respective 850 and 100 coffeestores in Russia. The companies didn't say much about the disagreement at first, but according to Anna MacDonald, a fund manager at Amati Global Investors, shareholders "wouldn't stand" for the ongoing flow of earnings from Russia, so they acted.

Pepsi, which has a stronger presence in Russia compared to its rival Coca-Cola, has announced the discontinuation of production and sale of Pepsi and other international brands in Russia. However, the company, which employs 20,000 people in Russia, has clarified that it will continue to offer other products. Food companies Nestle, Mondelez, Procter & Gamble, and Unilever have halted investment in Russia but said they would continue providing essentials.

British American Tobacco has announced that it plans to divest its Russian business, citing an unsustainable operating environment.

International sanctions against nations like Iran and Venezuela have long been a source of contention for the arbitration community, thus, the effect of these restrictions on international arbitration is not a new problem. Renewing attention is necessary because the extraordinary breadth and depth of the sanctions imposed on Russian parties by the US, UK, and EU, among other authorities, in response to the military conflict in Ukraine in March 2022, is bound to have an impact on 2023.

¹² Becky SULLIVAN: Russia's at war with Ukraine. Here's how we got here. *npr.org*, February 24, 2022. <https://www.npr.org/2022/02/12/1080205477/history-uk>

6.1. Sanctions may create an impetus for parties to initiate arbitration

Typically, the arbitration process begins when one party sends the other side a formal written request that outlines the specifics of the dispute and the relief that the party is seeking. The Notice of Arbitration is the name given to this request. The arbitration process is usually governed by particular arbitration rules or an administrative organization that the parties have previously agreed upon. The arbitration procedure formally starts when the replying party has had a chance to reply and the arbitral tribunal is formed. Typically, the arbitration process begins when one party sends the other side a formal written request that outlines the specifics of the dispute and the relief that the party is seeking. The Notice of Arbitration is the name given to this request. The arbitration process is usually governed by particular arbitration rules or an administrative organization that the parties have previously agreed upon. The arbitration procedure formally starts when the replying party has had a chance to reply and the arbitral tribunal is formed.

After initiating the arbitration process, the parties may engage in various procedural steps:

After commencing the arbitration process, parties agree upon the selection of arbitrators according to predetermined rules. If the parties fail to reach an agreement, an administering institution or designated appointing authority may intervene.

A preliminary hearing may be conducted to address procedural matters, establish a timeline, and resolve preliminary issues. This can help to streamline the arbitration process.

The process of resolving a dispute involves the claimant submitting a detailed statement of claim and the respondent responding with a statement of defense, which outlines each party's position and evidence.

During the document production or discovery phase, parties may share relevant information to gain a better understanding of each other's cases.

Parties may submit witness statements and expert reports. The arbitrators determine the admissibility and weight of the evidence.

The arbitrators oversee the proceedings in all stages, making sure that the process is conducted fairly and efficiently. During the final hearing, both parties get a chance to present their case verbally, and the arbitrators then deliver a verdict. The arbitration process is generally more efficient and private compared

to traditional litigation, such as when companies stop performing their contracts to comply with an international sanctions regime.

Understanding the stance taken by national courts on the matter is crucial when debating the effects of international sanctions before international arbitral tribunals. International arbitration does not function “floating in the transnational firmament, unconnected with any municipal system of law”, as Lord Justice Kerr famously said.¹³ On the other hand, following the arbitral tribunal’s decision, the national courts of both the arbitration’s seat and the enforcement forums will have a voice in whether the arbitral award is upheld or invalidated, particularly in light of the public policy exception. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, for instance, has Article 34(2)(b)(ii).

For example, RusChemAlliance (a Gazprom venture) recently announced that it intends to pursue a billion-euro HKIAC arbitration against Linde (a German multinational corporation) after the latter had suspended operations to construct a gas processing plant in the Baltic Sea to comply with international sanctions against Russia.¹⁴

If history is any indication, 2023 may experience an influx of arbitrations initiated by non-Russian investors against Russia for expropriation claims. More recently, ExxonMobil has reportedly reserved its right to pursue arbitration against Russia for alleged expropriation of its multibillion-dollar oil and gas Sakharin-1 project, following the issuance of decrees by Russia to seize shares in the project and transfer them to a state-controlled company after ExxonMobil halted production in May 2022 to comply with international sanctions.

7. The International Arbitration Landscape in Russia

Russia has become a major force in international arbitration, indicating that arbitration is becoming a more widely accepted method of resolving disputes. Among the landscape’s salient features is that the Law on International Commercial Arbitration essentially governs Russia’s arbitration laws by using the New York Convention to recognize and enforce foreign arbitral rulings (Article 1.1). Moscow acts as a center for international arbitration. These organizations

¹³ Lord Justice Kerr in *Bank Mellat v Helleniki Techniki* [1984] SA I QB 291, 301 (Eng.) rejecting the idea of international arbitration as a transnational, independent system of justice.

¹⁴ Dictionary, *Between a Rock and a Hard Place: Claims against Russia in Investment Treaty Arbitration* – Part Two of Two, 2022.

handle issues and offer a forum for settling maritime and international business conflicts.

Russian arbitration institutions and professionals have gained recognition on the international stage, establishing Russia as a favorable location for resolving cross-border disputes. The expertise of Russian arbitrators has expanded, attracting parties from diverse jurisdictions.

Russia's commitment to international arbitration is evident through its participation in key conventions like the UNCITRAL Model Law. This participation fosters alignment with global best practices and facilitates the enforcement of arbitral awards.

8. The impact of sanctions on international arbitration in Russia

Following the military exception in Ukraine, Brazil issued tough, effective measures in response to international sanctions imposed by other countries. This contributed to the influx of investment, as well as the increase in investors who welcomed the trend towards extremism.

To date, 40% of foreign direct investment (FDI) flows have been directed towards transition economies in Southeastern Europe, the Commonwealth of Independent States, and Georgia, according to a report.¹⁵

In 2021, the net foreign direct investment in Brazil reached \$40.45 billion.¹⁶

However, the Russian government believes that many bans and limitations, including those that prohibit the use of foreign currencies, need transaction approval, and do not withhold intellectual property rights.¹⁷ This regulation typically covers both “non-find” countries and investors. For instance, altering the circumstances to the point where patent holders represent nations where the

¹⁵ *World Investment Report*. United Nations Conference on Trade and Development, 2021. https://unctad.org/system/files/official-document/wir2021_en.pdf

¹⁶ World Bank, Foreign Direct Investment, Net Flows (*Balance of Payments, current US\$*) – Russian Federation. Available at: <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>

¹⁷ Decree No. 299 of the Government of the Russian Federation, ‘On amendments to Clause 2 Methodology for determining the amount of compensation paid to a patentee when a decision is made to use an invention, utility model or industrial model without his consent, and the procedure for paying it’ dated March 6, 2022.

manufacture and sale of commodities will not be one of the activities that arise in the use of their inventions, advancements, or designs.¹⁸

Arbitral institutions will be bound by the sanctions legislation applicable in their jurisdiction, which may impact their ability to register new cases, receive funds, and administer cases involving sanctioned entities. The International Chamber of Commerce (ICC), LCIA, and Stockholm Chamber of Commerce have confirmed that they will continue to accept requests for arbitration and administer cases brought by or against sanctioned entities. However, they will carry out due diligence and request information from the parties (before registering and during the arbitration) to identify whether any license or exemption application needs to be made. This is likely to necessitate delays in the arbitration procedure.

For arbitrations administered by the LCIA, on October 17, 2022, OFSI issued a general license of indefinite duration permitting persons sanctioned under Russia (Sanctions) (EU Exit) Regulations 2019 and the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 to make payments to the LCIA for arbitration costs (including the tribunals' fees and expenses, the LCIA's administrative charges, and the registration fee), and permitting the LCIA to use these funds to pay for arbitration costs. However, the general license does not apply to cases in which the LCIA merely acts as a fund holder, or to United Nations (UN) Commission on International Trade Law cases administered by the LCIA. In these cases, and in arbitrations administered by other institutions, specific licenses will be required before payments are made.

The ICC's Note to Parties and Arbitral Tribunals on ICC Compliance guides parties and arbitrators in ICC arbitrations involving a sanctioned party. For example, where any party is subject to US sanctions, no payment by any party may be made in US dollars (including the filing fee). Instead, the ICC may apply a different fee scale denominated in euros.

As a result of sanctions, there has been a rise in the number of parties choosing arbitral institutions in jurisdictions that do not have comprehensive sanctions regimes (the Hong Kong International Arbitration Centre being a popular example). However, this would not avoid the need for arbitrators and processing banks to comply with sanctions applicable to them.

The potential impact of EU sanctions against Russia on international arbitration administered by EU-based institutions was addressed in a joint

¹⁸ Dictionary, *Between a Rock and a Hard Place: Claims against Russia in Investment Treaty Arbitration* – Part Two of Two, 2022.

statement released on June 17, 2015, by the International Chamber of Commerce, the London Court of International Arbitration, and the Stockholm Chamber of Commerce. The statement clarified that, aside from compliance measures, the sanctions imposed by the EU on Russia in 2014 do not prevent parties from referring their disputes to arbitration at an EU-based institution or result in a significant change in the administration of arbitral proceedings.

Regarding this, Russia published a list of nations deemed “unfriendly” on March 5, 2022. These nations included the US and Canada, the majority of European nations (including the 27 EU members as well as Albania, Andorra, Iceland, Liechtenstein, Monaco, Montenegro, Norway, San Marino, Switzerland, and the UK (including Jersey, Anguilla, the British Virgin Islands, and Gibraltar) as well as Australia, Japan, Micronesia, New Zealand, Singapore, South Korea, Australia, and Taiwan.¹⁹

9. How to file an arbitration case against Russia

Sanctions may make it more difficult for arbitrators, arbitral organizations, or the parties themselves to take part in arbitration. For example, a hearing scheduled for June 2022 was canceled by a tribunal located in Canada that was sitting in a PCA arbitration that Nord Stream 2 AG (a Swiss subsidiary of Gazprom) brought against the EU under the ECT. This was done after the U.S. government imposed financial sanctions on Nord Stream 2 AG, citing the company’s inability to “make any payments or access finance”.

Furthermore, not all arbitral institutions have the authority to handle arbitrations involving approved organizations, and those that do typically have to apply for licenses or complete other administrative procedures. As a result, even though penalties and the parties’ incapacity to carry out their obligations under pre-existing commercial contracts may give rise to conflicts, these problems and the sanctions themselves are anticipated to make it difficult for businesses to do business in 2023. To solve these issues, a few arbitral institutions have already started implementing administrative changes. For instance, the UK’s Office of Financial Sanctions Implementation granted the LCIA, one of the few organizations with sanctions-addressing regulations, a license in October 2022

¹⁹ Russian government approves the list of unfriendly countries and territories. *TASS*, March 7, 2022. <https://tass.com/politics/1418197>

to handle payments from entities covered by specific sanctions against Belarus and Russia.

In the context of international arbitration, the annulment or refusal to recognize and enforce an arbitral award may be predicated upon a finding by the court that the award contravenes the public policy of the forum state. This principle is enshrined in the Model Law, where it stipulates that an arbitral award may be set aside if it is found to be in conflict with the public policy of the state. Similarly, both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)²⁰ and the Model Law incorporate public policy as a ground for refusing recognition and enforcement of arbitral awards. Article V(2)(b) of the New York Convention and Article 36(1)(b)(ii) of the Model Law²¹ explicitly recognize public policy as a basis for refusal of recognition and enforcement. Notably, the interpretation of public policy by national courts may evolve over time, particularly in response to international sanctions regulations. Consequently, if national courts determine that adherence to international sanctions is an essential component of public policy, they may invalidate or decline to enforce an arbitral award that contravenes or disregards such sanctions.

Several legal instruments may provide a basis for bringing claims against Russia through investor-state arbitration, inter alia under the Energy Charter Treaty (ECT), one of the bilateral investment treaties (BITs), or existing contracts with state entities.

As a result, energy businesses can think about their alternatives under the 53 signatory and contracting countries of the Energy Charter Treaty. Russia has approved the ECT but has not signed it. This indicates that although Russia has expressed a desire to abide by the pact, it has not committed to do so. ECT has, nevertheless, only been temporarily implemented, and there have been instances in which investors have successfully sued Russia under European sanctions legislation. The arbitrators decided that arbitration was allowed in these circumstances due to the treaty's provisional applicability.

²⁰ Art V(2)(b) of the New York Convention provides that “[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that [...] the recognition or enforcement of the award would be contrary to the public policy of that country”.

²¹ Art 36(1)(b)(ii) of the Model Law provides that “[r]ecognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only [...] (b) if the court finds that [...] (ii) the recognition or enforcement of the award would be contrary to the public policy of this State”.

Russia has entered into several bilateral investment treaties (BITs) to safeguard investors and their investments against actions by the state, such as expropriation and unfair or discriminatory treatment. These BITs mandate that fair and equitable treatment is to be provided. You can find a list of the dozens of bilateral investment treaties that Russia has entered into here. To avail of the protection, the country in which the investment owner is located must have a bilateral investment protection agreement that allows for investment arbitration with Russia.

Ukraine and Russia, for example, have a bilateral treaty providing for arbitration under the Stockholm Chamber of Commerce Rules and the UNCITRAL Arbitration Rules, which was ratified in friendly terms on 27 January 2000.²²

Before initiating arbitration, an entity should determine with the assistance of its legal counsel whether investment treaty arbitration is available, the likelihood of success of the claim, and the cost of pursuing the claim.

It should be noted that Russia signed the International Centre for Settlement of Investment Disputes (ICSID) Agreement on June 16, 1992. However, it did not enter into force for Russia. Consequently, the majority of arbitrations against Russia were UNCITRAL arbitrations, often administered by the Permanent Court of Arbitration (PCA) in The Hague, or the Stockholm Arbitration Chamber of Commerce.

Typically, a mandatory negotiation or so-called cooling-off period before the commencement of arbitration (often six months) is required, which can then continue, for example, with the submission of the request for arbitration and the formation of the arbitral tribunal.²³

10. Impact on Arbitrators

If one of the parties to the arbitration is sanctioned, arbitrators may not be permitted to serve as arbitrators or to be paid for their services if they do not have a license or authorization from the appropriate sanctioning body. The relevant sanctions system may provide an exemption that covers arbitrators'

²² Russian Federation and Ukraine BIT (1998).

²³ Dictionary, *Between a Rock and a Hard Place: Claims against Russia in Investment Treaty Arbitration*—Part Two of Two, 2022.

fees ²⁴) or that necessitates obtaining a license or prior authorization from the appropriate sanctions body. It can be essential to submit license applications to several sanctions authorities. Additionally, if the license's terms only permit a certain amount of money, it might be necessary to submit repeated applications to authorize extra payments during the arbitration.

11. Enforcement of arbitration awards against Russia

Sanctions could hinder the implementation of an arbitration decision.

The enforcement of an award may give rise to various sanctions-related concerns. According to the New York Convention, there are two reasons why enforcement of an award involving sanctions issues may be contested: (1) the dispute's subject matter was not deemed arbitrable under the rules of the enforcing country, or (2) the enforcing country's public policy would be violated if the award were recognized or enforced.²⁵

There is a general agreement among scholars and in most places disputes related to sanctions are eligible for arbitration. Nonetheless, some domestic courts have taken a different stance. The *Fincantieri* case is a good illustration of the conflicting opinions on this matter. The case involved a disagreement between two Italian firms and an agent they had hired to finalize deals with the Republic of Iraq. The tribunal ruled²⁶ that the dispute was arbitral, and the Swiss Federal Tribunal affirmed that decision rejecting the allegation that the dispute was not arbitral as a result of the UN embargo against Iraq. However, the Genoa Court of Appeal held that the dispute was arbitral and should be referred to the Italian courts instead.²⁷

Since the issue was arbitral and the Genoa Court of Appeal lacked jurisdiction to decide it, the Paris Court of Appeal declined to enforce the Genoa Court of

²⁴ Exemptions often refer to legal fees and fees for the provision of legal services, without specifying whether this includes arbitrators' fees. If in doubt, parties should seek a license or clarification from the relevant sanctions authority.

²⁵ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Article V(2)(a) and (b). 22.

²⁶ *Fincantieri Cantieri NAVALI Italiani SpA and OTO MELARA SpA v. ATF* (25 November 1991), *ICC Award No. 6719 (Interim Award)* *Journal du droit international* (1994), 1071.

²⁷ *Fincantieri Cantieri NAVALI Italiani SpA and Oto MELARA SpA v. Ministry of Defence, Armament and Supply Directorate of Iraq, Republic of Iraq* (1996), XXI YBCA 594.

Appeals ruling in further proceedings held in Paris.²⁸ Parties should check the position in any domestic courts in which enforcement may be sought.

In terms of public policy, different courts take different views on what constitutes ‘public policy’. However, many courts have distinguished between transnational sanctions regimes (such as UN sanctions and, for EU Member States, EU sanctions), which may form part of international public policy, and sanctions regimes imposed by individual states, which do not.²⁹ The New York Convention’s “contrary to public policy” exception is typically interpreted narrowly in light of the finality of arbitral rulings. Successful uses of the exception are uncommon. For instance, a sanctioned party that is denied the opportunity to obtain legal counsel for the arbitration may object to enforcement because due process was not followed, as a matter of procedural public policy.³⁰

An arbitral award under the New York Convention may be refused execution by a national court on the grounds that it “would be contrary to the public policy of that country”. Although courts in sanctioning nations have previously determined that the public policy favoring the enforcement of an arbitral award over the public policy against it with regard to a sanctioned corporation, the fact that the most recent penalties are predicated on the deployment of armed force may tilt the scales in the other direction. To add to the complexity, as of June 2020, Russian commercial courts have the exclusive authority to hear cases involving entities that are subject to sanctions relating to Russia, thanks to a modification to the Russian Arbitrage Procedure Code.

The implementation of the resulting arbitration ruling is undoubtedly the largest obstacle to bringing claims against Russia. Investors may need to enforce arbitration rulings in a third country where Russia owns assets since Russia has a pattern of contesting awards and is unwilling to abide by them voluntarily.³¹

In the event that the claim is successful, one of the 172 states that are parties to the 1958 New York Convention on the Recognition and Enforcement of

²⁸ Legal Department of the Ministry of Justice of the Republic of Iraq v. *Fincantieri-Cantieri Navali Italiani* (15 June 2006) Rev Arb (2007) (Paris Court of Appeal, France), 87.

²⁹ For example, the Paris Court of Appeal in *Sofregaz v. Natural Gas Storage Company* (Chamber 5–16, 3 June 2020, No. 19-07261) rejected an application to set aside an award rendered in favour of an Iranian company, holding that US sanctions did not form part of international public policy and therefore could not found a set-aside application.

³⁰ See, generally, *Redfern and Hunter on International Arbitration*, 7th edition (Oxford University Press, 2022) [11.69]–[11.77] for an explanation of the grounds of due process, as provided under Article V(1)(b) of the New York Convention.

³¹ Dictionary, *Possible claims for compensation against Russia after its invasion of Ukraine*, Part Two: Claims related to Russia’s domestic measures against foreign investors, 2023.

Foreign Arbitral Awards may enforce the award. However, because most state assets cannot be seized, the idea of sovereign immunity makes it challenging to enforce arbitral verdicts against sovereign nations.

12. Asset freezes

A legal procedure known as “asset freezing” includes temporarily preventing an individual or organization from accessing or transferring their assets. This may occur for a number of reasons, such as sanctions, legal actions, or investigations. Assets are frequently frozen in order to protect money in court, maintain legal compliance, or handle national security issues. The following are some situations in which asset freezing could happen: legal actions, criminal investigations, financing of terrorism, bankruptcy procedures, foreign policy measures, and sanctions; however, in this paper, I will focus on the freezing of Russian assets under sanctions and how it affects the implementation of arbitral awards.

Sanctions regimes often complicate seizing assets to satisfy arbitration awards.

In November 2021, the Court of Justice of the European Union ruled that a creditor of a sanctioned entity must obtain prior authorization from the competent national authority before seeking enforcement. In September 2022, the French Court of Cassation issued rulings in line with that decision.

While sanctions can be useful in identifying assets by flagging them in sanctioning states, gaining access to those assets can be challenging when they are blocked. To seize sanctioned property, extensive authorization processes are often required, and creditors may need to wait in a queue.

Sanctions are likely to affect arbitration proceedings, well into 2023 by influencing substantive matters of disputes as well as by creating procedural hurdles to arbitral proceedings and the enforcement of awards.

As seen with Danone, leaving a country can result in billions of dollars of losses, as demonstrated by BP and Renault.

Because of the crisis in Ukraine, other nations chose to freeze the Russian Central Bank’s reserves. But because sovereign immunity comes into play, this does not inevitably mean that more of these assets can be seized and paid for to provide compensation. As of right now, certain nations have made the decision to demand special legislation, that revokes the Russian Federation’s immunity and permits the expropriation of Russian property (as demonstrated by the UK’s

backing for the Ukraine bill and its seizure of Russian state property),³² and the US bill entitled Asset Confiscation for the Ukraine Reconstruction Act³³. This does not mean that these funds can be easily secured by arbitration award debtors, however, even if these laws are enacted.

Even if the disagreement is resolved, you can still have a lot of real-world issues. Numerous nations have implemented policies that forbid offering financial services to specific Russian banks by cutting these banks off from the SWIFT network. In an effort to bolster the ruble, the Russian government officially outlawed the export of any foreign money or monetary instruments for amounts greater than \$10,000 in US dollars by any Russian citizens. Finally, banks may choose not to undertake or facilitate any transactions with Russian counterparties due to the intricate and ever-changing sanctions relating to Russia. Even if there are no sanctioned individuals or organizations involved, they may decide not to handle any money connected to Russia.³⁴

the uncertain geopolitical landscape and Russia's response to international sanctions have created a challenging environment for foreign investors, influencing foreign direct investment and raising concerns about intellectual property rights enforcement. Although legal instruments such as the Energy Charter Treaty and bilateral investment treaties can facilitate arbitration claims against Russia, the reality of enforcing arbitration awards is a major obstacle. Therefore, investors should consider the risks, costs, and potential rewards of arbitration against Russia and seek legal counsel to evaluate the viability of their claims. This position highlights the complexities of international arbitration amid volatile global politics, emphasizing its importance in dispute resolution and the challenges inherent in its application.

These actions affect a large number of individuals and companies. Therefore, investors affected by these actions could consider filing legal claims against Russia

³² Confiscation of Russian state assets and support for Ukraine's draft law, 2023.

³³ Asset Confiscation of Ukraine Reconstruction Law, 2022.

³⁴ Stephan den HARTOG: Challenges Faced by Arbitration Institutions Amidst New Waves of Sanctions Against Russia. *Kluwer Arbitration Blog*, March 23, 2022.

13. Conclusion

When enforcement is tried in a nation that has imposed its counter-sanctions, certain problems might occur. The Russian Arbitral Procedure Code changed on June 19, 2022, giving Russian courts exclusive jurisdiction over disputes involving Russian-sanctioned parties, effectively allowing Russian parties to ignore arbitration clauses in their contracts. This means that any attempt to enforce an arbitral award against a Russian-sanctioned party's assets located in Russia is almost certain to fail.³⁵

Practically speaking, an exemption or license under the relevant sanctions regime is likely to be needed for the settlement or enforcement of an award, whether it is made against or in favor of a sanctioned party, to allow the sanctioned party to make or receive any payments or transfers.

Sanctions have a complex and dynamic effect on arbitration in Russia that necessitates ongoing evaluation and adjustment. While navigating these obstacles, corporations, arbitration institutions, and legal experts must uphold the values of justice, impartiality, and efficacy in dispute settlement. The tactics and procedures used in arbitration under the framework of Russia's sanctions will change as the geopolitical environment does.

Sanctions against Russia have indirect implications for arbitration because of their economic consequences. Uncertainties and economic downturns may influence parties' desire to arbitrate disputes, which could have an impact on the volume of cases handled overall and the dynamics of the arbitration community.³⁶

Sanctions play a role in the way legal systems, both domestically and abroad, change as organizations and attorneys adjust to the shifting geopolitical environment. As a result, arbitration rules and procedures might need to be modified to account for the complexity that sanctions bring.

³⁵ <https://globalinvestigationsreview.com/guide/the-guide-sanctions/fifth-edition>

³⁶ Confiscation of Russian state assets and support for Ukraine's draft law, 2023.