Impact and Effects of International Economic Sanctions on International Arbitration

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In today’s turbulent global geopolitical landscape, economic sanctions are becoming an important feature. In essence, this is a difficult subject to discuss because it involves international diplomacy and politics. However, sanctions invariably influence global trade and commerce and directly affect the business community, including private individuals or organizations wishing to avoid international politics and diplomacy. At the same time, we are seeing an unprecedented rise in the use of arbitration to resolve international and private commercial disputes. As a result, arbitrants and arbitral players must navigate the minefield of sanctions in the midst of the already complex conduct of arbitration. This article will examine and discuss the issue of how economic sanctions affect arbitration, including reference to recent case studies and relevant events of interest to the international arbitral community.

Keywords: Arbitration, Arbitrator, Enforcement, Challenge, Counsel, Sanctions

1 INTRODUCTION

Against the backdrop of global economic growth in recent times that has brought prosperity to many nations, the world is not unencumbered by geopolitical issues. Most notably, we are seeing the imposition of economic sanctions and financial penalties applied by one or more countries against a targeted state, group, or individual. These instruments of foreign policy are designed to apply maximum economic pressure in order to obtain a desired financial or political outcome. International relations between two states and their foreign policies are based on extensive strategic decisions, which are primarily established once the behaviour of the responding state is analysed. More frequently than one would wish, some countries indulge in, inter alia, a violation of international norms, unfair trade practices, terrorism, traffic in narcotics, or proliferation of nuclear weapons, to

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name the most common. In response, consequences to such actions are set in motion by way of direct retaliation to such violations, whereby international organizations like the United Nations Security Council or the European Union, or even individual states, implement a decision against a violating state or states in the form of a penalty which is termed a ‘sanction’.

A sanction is an instrument of a diplomatic or economic nature. Essentially, the purpose of issuing sanctions is to maintain law, order, public security and peace, and to uphold essential human rights that such states violate. The basic objective of sanctions, whether they are economic sanctions or otherwise, is to respond to States that are contributing to the violation of international peace and security and to give them a ‘warning’ of sorts so as to correct their modus operandi. For instance, sanctions imposed by the United Nations Security Council pursuant to the United Nations Charter create international legal obligations for every United Nations Member State. This is important to the arbitration community because a breach of sanctions under the United Nations Charter can amount to a violation of public policy under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is a subject which will be further discussed later in this article.

This is an article relating to the effects and impact of international economic sanctions on arbitration practice and laws. This subject is worthy of examination and discourse for two basic reasons. First, the use of arbitration for the settlement of disputes in international commerce is burgeoning and unlikely to abate; in fact, arbitration is already accepted as a mainstream mechanism for transnational commercial dispute resolution. Second, sanctions, quite simply, affect international trade and therefore its dispute resolution process. Therefore, in a sea of sanctions, arbitration practitioners and lawyers must navigate a course that avoids hurdles and pitfalls that would jeopardize the conduct of arbitration or successful enforcement of its award.

Although the impact of sanctions in international arbitration is certainly not a new issue, the recent increase in the scale and type of sanctions imposed on potential parties raises many questions and generates significant uncertainty over arbitral proceedings and, more importantly, over the easy enforceability of awards. These days, sanctions involve some of the largest economies of the world, giving rise to a greater likelihood, for more of us, to be impacted by one sanction or another in the course of our practice.

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2. Articles 25 and 41.
3. Article V.
Where economic sanctions are adopted by regional international organizations (e.g., the European Union) or by a single state, the provisions are binding only on natural/legal persons under the jurisdiction of the state (or multinational entity) enacting the sanctions. Correctly identifying those bound to comply may present difficulties because sanctions are both territorial and temporal. They are informed by political realities, and one sees a trend towards an increase in the use of unilateral sanctions. However, not all sanctions are identically worded, and hence they must be examined on a case-by-case basis for their interpretation and application. For instance, in the Ukrainian crises of 2014 and 2022, due to the permanent member status of Russia on the UN Security Council, it was not possible to implement multilateral sanctions against Russia. The application of economic sanctions imposed unilaterally by the US, UK, EU and the rest of the world, in relation to the situation in Ukraine, are territorial. They apply within the sanctioning territories to any person who is a national of a state or incorporated under the law of a state, or to any legal person in respect of business done within the jurisdiction of the sanctioning state. Although arbitral tribunals may have considerable discretion in deciding whether to give effect to, for example, EU economic sanctions, there is inherent uncertainty in relation to the claim for uniform application. The choice of arbitration does not necessarily preclude their application where, for example, EU sanctions constitute the public policy of the Member States. The potential for the annulment of the arbitral award by a competent court in an EU Member State or the denial of the recognition and enforcement of the arbitral award in the EU may render the choice of arbitration moot.

2 IMPACT AND EFFECT OF ECONOMIC SANCTIONS ON ARBITRATION

There are, broadly, two types of impact where sanctions may affect arbitration: (1) the impact of international economic sanctions on the ‘players’ and ‘parties’ (namely, the arbitrators and counsel), and (2) the outcome or impact on the enforceability of arbitral awards.

2.1 WHEN AN ARBITRATOR BELONGS TO A SANCTIONED STATE

The first possible scenario deals with an arbitrator who is a sanctioned individual or is a national of a sanctioned state and is involved in an arbitral proceeding where one of the parties is from a sanctioning state. A sanctioned individual would cause concern over the legitimacy of the proceedings and the enforcement of the award.
As will be discussed later, even if none of the parties are from a sanctioning state, it would appear that there may also be repercussions for them to deal with a sanctioned arbitrator. The foremost issue that arises is due to the blocking or freezing of any payments to or from a sanctioned entity or individual, potentially preventing the payment of the arbitrators’ fees. This is not a new issue. A note issued by the International Court of Arbitration of the International Chamber of Commerce states that when completing their banking instructions, arbitrators should ensure that their bank is able to receive payments from ICC’s bank(s), taking into consideration national and international banking legislation and practices (e.g., embargo and boycott measures).

The appointment of arbitrators is principally a personal appointment or intuitu personae, where the characteristics of the individual will play a significant role in the appointment process. In this instance, there are very limited defences for a party or parties to choose an arbitrator tainted with sanctions since they are inevitably expected, if not presumed, to know who they are engaging. This is to be seen in the light of the heavy consequences that could be expected to manifest. Most likely, sanctioned arbitrators will not be appointed or, if already appointed, will be subject to challenge by a party; and if those challenges are unsuccessful, they may be subject to further challenges post-award— for example, under the United Nations Commission on International Trade Law (UNCITRAL) Model Law, in the jurisdiction seat (on grounds of the composition of the tribunal under Article 34(2)(iv), or of public policy under Article 34(b)(ii)); or in the place of enforcement (on grounds of public policy under Article 36(1)(b)(ii)). If one party proceeds with the arbitration proceedings with a sanctioned arbitrator while the other party has boycotted the proceedings, this would give rise to the fundamental question of the right to equal treatment and the right to be heard as these are essential principles of arbitral due process. A party that needs to comply with a sanction in his home country will have the right to say that he should not be placed in certain harm’s way.

Furthermore, if both of the parties, including one from a sanctioning state, proceed with the arbitration involving a sanctioned arbitrator, this is likely to give rise to a variety of issues. A similar situation is likely to ensue where both parties are not from any of the sanctioning states but they proceed to participate in proceedings involving a sanctioned arbitrator. In this instance, the rendered award may eventually be unenforceable in the jurisdiction of the party from the sanctioning state notwithstanding the possibility of penalty or secondary sanctions being imposed against a party or parties in the arbitration proceeding.

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4 Note to Parties and Tribunals on ICC Compliance (29 Sep. 2017), para. 16.
6 Model Law at Art. 18.
2.2 When a Counsel Engaged by a Party Belongs to a Sanctioned State

Dealing with sanctioned counsel or experts in arbitral proceedings is thought to be relatively straightforward if the counsel is sanctioned and engaged by a party from a sanctioning state. Not only is the payment of fees to the counsel encumbered, but the engaging party also risks consequences from breaching the sanction. In this instance, therefore, the engaging party can terminate the counsel relatively easily, as is commonly the case these days with parties changing counsel in the course of arbitral proceedings.

However, the situation might be somewhat more convoluted should a sanctioned counsel insist to be retained by a party facing another party from a sanctioning state, especially if it is a respondent. Typically, a respondent (particularly one without any counter-claim) together with its counsel is often under the illusion that, in addition to defending their case, they would also frustrate the claimant by dragging out the dispute, thus putting the proceedings in jeopardy.

With regard to this issue, such a respondent may also believe that it can insist on participating in the arbitration by retaining a sanctioned individual or entity as a guerrilla tactic designed to apply pressure on the other party that is prevented under the law of its home/place of incorporation from continuing to partake in an arbitration process that has become tainted. In such instances, the tribunal has to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, which would provide a fair means for the resolution of the matters falling to be determined. This duty is designed to safeguard against unnecessary delays and derailment of arbitral proceedings. Furthermore, the arbitral tribunal should also endeavour to render an enforceable award and must be cognizant of an implied duty on the part of the tribunal to enquire and ascertain potential issues relating to sanctions that may affect the proceedings. This is not unlike the practice that many non-legal professionals are now required to undertake in fulfilling their ‘Know Your Client’ or KYC. In this instance, it would be ‘Know Your Case’ for the tribunal. In the event that the arbitral tribunal takes the risk of allowing a sanctioned person from participating in the arbitration, it may find itself at risk of penalty or secondary sanctions.

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8 For example, US President Executive Ord. 13902 of 10 Jan. 2020 is an example of which secondary sanction may be imposed upon non-US individuals or entities if they operate in or knowingly engage ‘in a significant transaction for the sale, supply, or transfer to or from Iran of significant goods or services used in connection with a sector of the Iranian economy’ specified in the E.O., s. 1. Home treasury.gov/system/files/126/13902.pdf (accessed 20 Mar. 2022).
2.3 Arbitration involving sanctioned parties

With the proliferation of international commercial arbitration and so many arbitration ‘players’ and ‘actors’ (e.g., counsel, arbitrators and arbitral institutions) being keen to jump on the bandwagon, it is not known if many do take a step back to consider the potential effect of any economic sanctions that may impact their arbitration. The burgeoning use of arbitration in international commercial contracts means that many parties are engaged in transnational businesses more than ever before. Enthusiasts are not always experts. Whether or not disputes relating to economic sanctions are arbitrable is not the main question; rather, it is its corollary, the enforceability of arbitral awards, that is of concern.

In the context of arbitration in the United States, permission must be obtained in arbitration involving sanctioned persons or entities, by way of a license from the Office of Foreign Asset Control (OFAC). The importance of obtaining OFAC permission can be seen in the case of United Media Holdings, NV v. Forbes Media LLC.9 The sanctioned party petitioned the US District Court for the Southern District of New York to vacate the arbitral award on grounds that it violated a US sanction.10 The application was denied because neither the arbitral proceedings nor its end product award violated the Executive Order, as the arbitration was authorized by OFAC. However, a key and important observation from this case is that a license from OFAC is required to engage in arbitration with a sanctioned person, and that arbitration proceedings, unless authorized by OFAC, are covered by the sanction whereby US persons were prohibited from ‘engaging in any transactions with respect to arbitration’. The United Media Holdings case also shows the considerable difficulty that may be incurred by parties to an arbitration involving sanctioned persons. Even when proper due diligence is exercised, perhaps over-cautiously, consequent to the involvement of a sanctioned party, this may result in the proceedings being repeatedly interrupted by sanction concerns.

It is important to recall that arbitration inevitably involves a personal dimension. Arbitrators, counsel and the administrative personnel of arbitral institutions are private individuals who must comply with all the laws of the state of their residence, and may indeed face significant administrative and even criminal penalties for non-compliance. Therefore, sanctions will have a significant impact on proceedings if they relate to the individuals acting as an arbitrator, a counsel in arbitration, or a legal expert in arbitration proceedings. At the forefront of any good arbitrator’s mind must be the duty to do all one can to ensure an enforceable award at the end of the day. From an arbitrator’s perspective, deciding on the

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impact and effect of any set of sanctions, their scope and applicability, any inconsistent laws or regulations, or overriding mandatory rules in any jurisdiction, can present real complexity and real uncertainty.

A tribunal will usually have to consider the parallel existence of various applicable laws: the substantive law applicable to commercial relations between the parties, the *lex arbitri* (procedural law of the arbitration), the laws of any state where the winning party might seek enforcement of any arbitral award, and any other laws with which the dispute has a significant connection. Determining how sanctions, their scope and applicability, impact the application of all of the above laws is a very complex task indeed. Complexity and certainty do not often sit well together.

### 2.4 Arbitral Awards Arising Out of Proceedings Involving a Sanctioned Party

Notwithstanding the consequences of violating a sanction for participating in arbitrations involving sanctioned individuals or entities, much anxiety surrounds arbitral awards arising from such proceedings. They might be challenged and set aside, or enforcement might be ultimately refused, by competent national courts on the ground that they are tainted by sanction. The grounds for the intervention of a court are limited, as provided for in the New York Convention and the Model Law, although public policy features significantly. For instance, Article V of the New York Convention defines the grounds to refuse enforcement of foreign arbitral awards and these are uniform across all signatories to the Convention.

There is little current guidance as to whether economic sanctions constitute part of the public policy of an enforcing State, and if so, whether they outweigh the enforcing state’s policy in favour of the finality and enforceability of arbitral awards. It is worthy to note that the International Chamber of the Paris Court of Appeal dealt with the impact of US, UN and EU economic international sanctions against Iran on the validity of an arbitral award in a decision dated 3 June 2020 in *SA T v. N.* The court ultimately rejected the application to set aside the award. In distinguishing between sanctions, the Court held that the unilateral sanctions taken by the US authorities against Iran could not be regarded as the expression of an international consensus, since the extraterritorial scope of those sanctions is disputed by both the French and the EU authorities. The French Court found that unilateral sanctions do not fall under the qualification of French international public policy.

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Arbitrability of a dispute is also to be distinguished from enforceability in the context of sanctions. Put simply, arbitration is a private and often confidential method of dispute resolution in which the disputants, unless shackled, cannot be restrained from conducting or participating in arbitrations no matter the status surrounding it. In *La Compagnie Nationale Air France v. Libyan Arab Airlines*\(^{12}\) the Québec Court of Appeal rejected an appeal by Air France for the annulment of a partial arbitral award on grounds that the arbitral proceedings violated UN Security Council Resolution 883 of 11 November 1993 and was therefore non-arbitral, arguing also, inter alia, that the arbitral tribunal had exceeded its jurisdiction and the partial award was against public policy. The Court held that the UN Resolution itself does not prohibit the parties from initiating the arbitration.\(^{13}\) The issue of whether the sanctions apply to the claim is a matter for the determination of the arbitral tribunal and not for the Court to intervene, as arbitral tribunals enjoy a degree of autonomy and rely upon arbitration agreement unless an arbitration agreement is deemed invalid pursuant to Article II (3) of the New York Convention.\(^{14}\) This approach can be contrasted with the approach taken in the *Fincantieri*\(^{15}\) case in connection with the UN Security Council Resolution adopted on 6 August 1990 on Iraq. The Italian shipbuilders were taken to arbitration by Iraq as a result of disputes relating to the payment of commissions. They commenced proceedings in Italian Courts\(^{16}\) instead, resulting in the Genoa Court of Appeal finding that it had jurisdiction to rule on the dispute by holding that the arbitration agreements contained in the three contracts were invalid in accordance under Article II of the New York Convention due to the sanction.\(^{17}\)

As opined by a commentator, ‘in arbitrability relates to the natural limitations of arbitration as a dispute resolution mechanism of consensual character rather than to public policy’.\(^{18}\) In consideration of all the points discussed above, depending on the jurisdictions where the arbitration is seated, it would appear that an intervention through the state courts would be acceptable where this would result in a decline of jurisdiction to intervene when the court process is launched during the arbitral proceedings. However, enforcement of the award under the New York Convention and other instruments can be a different issue. Article V(2) of the

\(^{12}\) 2003 CanLII 35834 (Cour d’Appel du Québec).

\(^{13}\) Ibid., at 47.

\(^{14}\) Ibid., at 52.

\(^{15}\) Legal Department du Ministère de la Justice de la République d’Irak v. Société Fincantieri Cantieri Navali Italiani 15 Jun. 2006 Cour d’Appel de Paris 05/05404.

\(^{16}\) De Brabandere & Holloway, supra n. 7.


New York Convention provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that the recognition and enforcement of the arbitral award would be contrary to the public policy of that country. In the event that the country where enforcement is sought has implemented sanctions against individuals or entities, it would naturally follow that the courts of that country would exercise its public policy to refuse to entertain or enforce any arbitral awards which have been rendered by a tribunal which included a sanctioned individual or entity.

3 THE SANCTIONED RESPONDING TO SANCTIONS

In June 2020, the Russian Arbitrazh (‘Commercial’) Procedure Code, also known as ‘Lugovoy Law’, was amended in response to Russian sanctions. This is an example of a direct state response to economic sanctions, with an impact on dispute resolution of Russian-related disputes on the conduct of arbitral proceedings. Essentially, it established the exclusive jurisdiction of the Russian commercial courts over cases where a Russian party is subject to sanctions or if the dispute arose out of sanctions imposed on Russian entities or individuals. Sanctioned Russian entities and individuals could also apply for an anti-suit injunction prohibiting another party from bringing an action before a foreign court or arbitral tribunal. In brief, the amendment states that any sanctioned Russian individuals or entities will be able to walk away from contractually agreed arbitration clauses and enjoin their counterparties from pursuing arbitration under such clauses, regardless of the practical impact or lack thereof on their ability to participate in an arbitration. Broader ramifications of this on the practice of international arbitration remain to be seen and arbitral institutions can be expected to be watching this closely.

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21 Ibid.
22 Ibid.
4 CHINESE SANCTION AGAINST A LONDON SET OF BARRISTERS
ON 26 March 2021 AND DEALING WITH ISSUES ARISING

4.1 One year after — discussions and examination

In March 2021, for the first time an issue of explicit concern to the arbitral
community arose following the imposition of sanctions (‘263 Sanction’) by the
Ministry of Foreign Affairs of the People’s Republic of China (‘MFA’) on indivi-
duals and entities, including a London set of barristers, Essex Court Chambers
(‘ECC’). It is of particular interest and importance to discuss in some detail this
sanction by the Chinese government affecting legal professionals, including arbitral
practitioners. The 263 Sanction is on ECC as a whole and was attributed to an
opinion produced by four barristers from the barristers’ chambers23 (and then
posted onto the website of the chambers) to which the People’s Republic of
China took exception. Whilst the four barristers were not named, the sanction
itself specified other individuals alongside other entities.24

The wording of the 263 Sanction, whilst short and succinct, has given rise to
questions of its exact scope. According to the 263 Sanction, Chinese citizens and
institutions are ‘prohibited from doing business with’ the sanctioned individuals
and entities.25 Lord David Neuberger26 in a lecture27 observed that the 263
Sanction appears to have a broad reach as ‘doing business’ was ‘presumably
intended to have a wide meaning’, on the assumption that it is to be interpreted
by reference to its English version because it is directed to English-speaking
people,28 citing Lord Diplock in a 1977 House of Lords case29:

The word ‘business’ is an etymological chameleon; it suits its meaning to the context in
which it is found. It is not a term of legal art and its dictionary meanings … embrace
‘almost anything which is an occupation as distinguished from a pleasure – anything which
is an occupation or a duty which requires attention is a business’.

The 263 Sanction also presents a conundrum in the United Kingdom as a barristers’
chambers, unlike a law firm, has no legal personality of its own. Barristers’ chambers

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23 Paragraph 3 of LAWASIA Statement of Concern Regarding the People’s Republic of China’s Sanctions
24 Foreign Ministry Spokesperson Announces Sanctions on Relevant UK Individuals and Entities
25 Ibid.
26 Rt. Hon. Lord Neuberger of Abbotsbury, Former President of the Supreme Court of the United Kingdom.
2021) transcript of speech.
28 Ibid., at 35.
are simply a collection of individual self-employed barristers operating under one brand. A sanction on an organization that is not a separate legal entity raises the risk of the enduring effect of the sanction on the members of that organization. The reality is, sanctions are often formulated to forestall circumventions and are usually expansive, to be effected against legal entities including in rem and in personam. Those deploying sanctions are acutely aware that sanctioned entities may resort to turning to a proxy; this is precisely the reason why there are secondary sanctions.

In its current form, based on its literal construction arising from the plain reading of the sanction, in the absence of clarification provided or until it is lifted by the Chinese MFA, the general opinion appears to be that persons who were ECC members on the date of the sanction (i.e., 26 March 2021), appear to be sanctioned regardless of whether they have moved on to another entity. After a year since the sanction took effect, there has been no further clarification from the Chinese MFA. Indeed, it is not known if there is a way to seek written clarification from the Chinese authorities. Sanctions are not popular; it is sometimes argued that those who have left ECC, or an entity of similar structure to it, would no longer be caught by the sanction. However, this would only be conclusive if the 263 Sanction has set out its conditions and qualification. The risk of being caught by a sanction remains. It is generally widely acknowledged that sanctions are punitive and are designed to be catch-all as well as to anticipate attempts to circumvent them. Even if there is ambiguity, whilst the natural tendency is to fight it by circumvention, prudence would dictate avoiding such a route. The price to pay can be hefty if circumvention is unsuccessful. In addition, the violator of the 263 Sanction is particularly at risk not only because of possible penalties from the state if found out, but also because the secondary impact due to potential objection or challenge raised by the other party in an arbitral proceeding or during the enforcement stage can be time-consuming and costly.

Given the private nature of arbitration, unlike court litigations which are publicized, reports of the sanction taking effect can only come from the contribution of the community or from publication if the sanction becomes subject to an application or other determination before the courts. It was reported, in May 2021, that an arbitrator from ECC was removed in an International Chamber of Commerce (ICC) case due to the sanction. Since the sanction took effect, it is difficult to assess the full impact of the Sanction on how many other arbitrators and counsel have been successfully challenged and removed, as the 263 Sanction’s true impact on cases cannot be verified in the absence of information in the public domain.

30 Except for treaty-based investor-state arbitration if the parties have agreed to adhering to the rules on transparency (e.g., UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration).
Nevertheless, the Shanghai Financial Court (‘SFC’) in the case of 
Macquarie Bank Limited v. Wanda Holding Group Co., Ltd 32 (‘Macquarie’) put both the 
conservatives and opponents of the 263 Sanction in a bind. In the case, the SFC 
in its judgment of 1 November 2021 granted recognition of an arbitral award made 
by an arbitrator who was from ECC. Briefly, the SFC held that the 263 Sanction 
was against the ‘law firm’ (i.e., ECC) and not the arbitrator, and that the arbitral 
award was rendered before the sanction came into force. However, this decision 
cannot be celebrated as it is far from providing certainty for several reasons. Leaving 
aside the proposition that a barristers’ chambers can be equated to a law firm in the 
usual sense, the Chinese Supreme People’s Court (‘SPC’) established a reporting 
system33 in 1995 which requires all refusal of recognition and enforcement of foreign 
arbitral awards to be reported by the lower Chinese courts to its higher courts, 
eventually the SPC. As China moves towards a pro-arbitration stance, this reporting 
system intends to ‘strictly supervise the refusal of courts at all levels to recognize and 
enforce foreign arbitral awards’.34 However, in the case of Macquarie the opposite 
occurred: the arbitral award was not refused recognition or enforcement. and thus it 
has apparently not yet come to the attention of the SPC. It is not known whether at 
the time of publication of this article if the matter has been or will be appealed. 
However, in any case, according to the Chinese civil law system, the Chinese courts 
are not bound by judicial precedents.

As already discussed above, sanctions are not new. However, the present 
circumstances present a unique and particularly challenging situation because of 
its impact on legal and arbitral professionals, against the backdrop of arguably 
global-friendly policies towards international commerce and trade. Given China’s 
vast volume of transnational business including the widespread use of arbitration as 
a method of dispute resolution, no doubt many professionals everywhere have cast 
their sights on China, which over the years has also attracted many international 
arbitral players to its shore.

Whilst there are still questions that remain unanswered, what is certain is that 
the 263 Sanction and, for that matter, any others sanction, can pose a huge 
hindrance in conducting arbitral proceedings. After all, it is said that arbitration is 
a creature that owes its existence to the will of the parties alone.35 Typically,

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32 (2021) Hu 74 xie wai ren 1 hao.
33 Notice of the Supreme People’s Court on the Handling by People’s Courts of Issues Concerning 
34 CCC – Gao Xiahui: Positive Practice of Chinese Courts in Recognizing and Enforcing Foreign Arbitral Awards 
2022).
35 Supreme Court of Canada in Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin 
arbitral institutions are attentive to objections raised and inclined to err on the side of caution by adopting a conservative stance, especially when controversies can and should be avoided to ensure that the arbitral proceedings are not impeded. Lord Neuberger observed that\textsuperscript{36}:

In addition to this, there may be room for doubt whether some institutions, in particular the Singapore International Arbitration Centre (SIAC) or, even more, the Hong Kong International Arbitration Centre (HKIAC), would want to be responsible for administering arbitrations with a targeted person on the arbitral panel. Hong Kong is part of the People’s Republic of China (PRC) and therefore may be at least at risk of being held by Beijing subject to the 263 Sanction in the same way as the rest of China, but quite apart from that, as Mr Ngo\textsuperscript{37} points out, both the HKIAC and the SIAC are registered in the PRC and are officially permitted to administer arbitrations and carry out marketing in China.

According to another leading commentator, Stephen Jagusch QC, ‘sanctions occupy a tricky position in the legal firmament’ and should not be lightly perceived as ‘soft law’. They are a serious public policy creature which can result in fines or even imprisonment, and therefore it is only right that institutions are conservative in this regard – thus the question ‘why would they take any risks?’\textsuperscript{38} Indeed, the innate purpose of arbitral institutions and arbitral tribunals is to render arbitral awards that are enforceable; similarly, counsel and party representatives have grave professional duties towards the parties and their clients to rely on arbitral awards that can be enforced\textsuperscript{39} especially when the stakes are high.

4.2 The Proposed Test – Erring on the Side of Caution

The 263 Sanction is thought to be unprecedented and other similar sanctions could follow and be imposed by other sovereign states. This is also considering that the 263 Sanction and all other sanctions, in and of themselves, are sanctions imposed by a sovereign state as its prerogative right. When it is impossible to seek clarification on the ambit of a sanction such as the 263 Sanction, how is one to practically deal with such sanctions? Given the status quo – after all, sanctions are imposed at the ‘State’s pleasure’ – it is imperative to frame the test for the applicability of the 263 Sanction and other sanctions

\textsuperscript{36} Neuberger No. 21, para. 42. In the quotation, ‘SIAC’ refers to the Singapore International Arbitration Centre; ‘HKIAC’ refers to the Hong Kong International Arbitration Centre; and ‘PRC’ refers to the People’s Republic of China.

\textsuperscript{37} The co-author of this article.


\textsuperscript{39} Neuberger, supra n. 26, at 36: ‘So far as arbitral appointments are concerned, it is generally desirable to ensure that no party has reasonable grounds for objecting to a member of the arbitral panel, and also that no party has reasonable grounds for challenging an award made by the panel, or resisting its enforcement’.
of similar nature in the future. Based on its interpretation, and according to the general consensus from the industry in taking a conservative stance, the following conservative test is proposed for the purpose of ascertaining the inclusion and/or exclusion of the 263 Sanction in the case of barristers’ chambers, as a guide for parties involved in arbitration encountering scenarios likely to involve such a sanction:

(1) There is a risk that a person who is a member of the sanctioned barristers’ chambers entity on the date of the sanction will continue to be a sanctioned individual by virtue of being a member of the sanctioned entity on the date of the sanction, until and unless clarification is provided, or unless the sanction is lifted.

(2) There is a high risk and therefore a prudent presumption that a sanctioned individual may include a person who has moved away from a sanctioned entity in the especial case of a barristers’ chambers, after the date of the sanction, until and unless clarification is provided, or unless the sanction is lifted. Whilst there may be reasonable arguments that the sanction will discharge those who were not directly responsible for the opinion causing the sanction, the question remains why the 263 Sanction decided to name the barristers’ chambers as a whole instead of the individuals involved.

(3) There is a risk that the status of new members joining a sanctioned barristers’ chambers after the date of the sanction may appear to be indistinguishable from (1) and (2), until and unless clarification is provided, or unless the sanction is lifted. Whilst a new member had no part in the past action of the members of the chambers giving rise to the sanction, one would have effectively entered an already sanctioned entity, thus risk becoming susceptible to the sanction. Regardless of further arguments as to the sanctioning or otherwise of the new member, from a practical standpoint it would be problematic for that individual to transact in the name of a sanctioned entity (e.g., entering into letters of engagement, raising fee notes, receiving payments, etc.).

Perhaps also permission needs to be sought when Chinese law firms and clients consider appointing a sanctioned individual (whether as an arbitrator or counsel) who has moved away from, or joined, the barristers’ chambers after 26 March
2021. This is provided that an avenue like the OFAC or the MFA providing similar services exists, allowing the individual to apply for discharge or leave to appear before arbitral proceedings.

At the core of it all, considering the views from among practitioners, when in doubt it is important to err on the side of caution or adopt a conservative stance. Chinese law firms and clients are now aware of this situation and have to take necessary steps to ensure non-violation of the 263 Sanction by being very careful not to engage a sanctioned individual. They could otherwise potentially find themselves in violation of the said sanction and may face any penalties imposed by the state. In addition, they can potentially be sued for professional negligence if the award can be attacked and rendered unenforceable for being in breach of the 263 Sanction.

In fact, non-Chinese law firms and parties would also need to exercise caution when arbitrating with or against Chinese parties involving sanctioned individuals. In the present international arbitration world, non-Chinese Counsel act for non-Chinese clients against Chinese parties, given China’s vast international trade and commerce. An arbitration involving sanctioned individuals can result in the arbitral award being denied enforcement in China, whether the winning party is Chinese or not. In arbitration proceedings, Counsel is entrusted wholly by the parties to represent and manage the case for them, and thus culpability is likely to rest with Parties’ Counsel should the arbitral award fail to be enforced. It is to be borne in mind that challenges to the enforcement of arbitration awards are common, and can be expected to be launched by a losing party, especially if opportunities present themselves.

In addition to negligence, another possibility might include the deployment of ‘guerilla tactics’ by Counsel. In such a strategy, Counsel may decide to stay silent at first on the involvement of sanctioned individuals, with the view of raising it later as a challenge to the enforcement of an award. However, such an underhand strategy is likely to be futile when enforcement is sought in a country other than China, and it is also risky because it could backfire.

5 CONCLUSION

When we look back at how international commercial arbitration has progressed over the years, it is nothing short of amazing to see how international commerce

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40 Mizner, supra n. 38. According to Sarah Grimmer, Secretary-General of HKIAC, notwithstanding the applicability of the 263 Sanction in Hong Kong, in an instance where a party had rejected an arbitrator who had left ECC HKIAC complied with the request because ‘institutions are conservative and are never going to introduce problems to the constitution of the arbitral tribunal’. 
has been saturated with arbitration. We marvel to read that nearly a century has passed since a prophetic arbitral promoter from the New York State Chamber of Commerce said this about arbitration 41:

> As the trend of business becomes more complex, misunderstandings and disputes are bound to occur in increasing number. … Arbitration saves time, trouble and money not only to the disputants but to the state as well.

Nonetheless, ‘time, trouble and money’ have become commonly recognized problems of arbitration. However, as described above, these problems are likely due to the fact that arbitration has increasingly become a complex method of dispute resolution that requires consideration of a myriad of factors before, during and after its conduct. Given the oft-expressed sanguine views about arbitration vis-à-vis litigation, it is fair to wonder what people from the past would think about present-day arbitration should they be able to witness the complexity surrounding its practice today. This uncomfortable vision certainly includes the effect and impact of economic sanctions on arbitral decision making. Even though sanctions are temporal, they create legal uncertainty and unpredictability, making it very difficult to avoid expensive and damaging consequences. There may be questions left unanswered for the arbitration community in the case of sanctions but for now, thankfully, the answers to these questions must come from politicians and not from jurists.