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BOOK REVIEW

EU INTERFERENCE IN ARBITRATION: SPECIAL EMPHASIS ON THE EFFECT OF UNILATERAL SANCTIONS

Ahan Gadkari[†]

Abstract

The European Union (EU) imposes economic sanctions in the form of a rule that requires consistent implementation. Several EU legislations that impose economic sanctions are justified by the requirement for their uniform application or implementation throughout the EU. In light of this, the issue to be addressed is to what degree unilateral EU sanctions are universally enforced or given effect in international commercial arbitration. Arbitral courts implement UNSC-imposed sanctions as part of international or transnational public policy. However, the issue is whether EU sanctions implemented unilaterally outside the UN framework are administered consistently in arbitration processes. This paper investigates whether the selection of arbitration and a specific venue for arbitration may, in practise, result in the disregard of EU sanctions and the assertion that these sanctions are consistently implemented. It is maintained that the choice of arbitration and the site of arbitration outside the EU does not exclude a priori the application of EU sanctions but makes their implementation less predictable in a specific instance. This poses an undeniable threat to the uniform implementation of EU sanctions

Keywords: arbitration, EU, implementation, economic sanctions

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I. Introduction

Economic sanctions have varied effects on arbitration, which have been extensively studied in academic literature. This paper attempts to add to the argument surrounding a specific kind of sanctions, notably European Union (EU) unilateral sanctions. EU sanctions are a key component of the EU's Common Foreign and Security Policy. The EU imposes economic sanctions in the form of a rule that requires consistent implementation. Several EU legislations that impose economic sanctions are justified by the requirement for their uniform application[1] or implementation[2] throughout the EU.[3] In light of this, the issue to be addressed is to what degree unilateral EU sanctions are universally enforced or given effect in international commercial arbitration.

EU-implemented sanctions issued by the United Nations Security Council (UNSC) are not covered in length here. The reason for this is that arbitral courts apply multilateral economic sanctions enacted by the UNSC regardless of the applicable legislation since they are often seen as part of international or transnational public policy.

In the context of private international law, economic sanctions qualify as overriding obligatory measures. Economic sanctions, including

[1] Council Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine [2014] OJ L229/1–11, Preamble, ¶6.
[2] Council Regulation (EEC) 2340/90 of 8 Aug. 1990 preventing trade by the Community as regards Iraq and Kuwait [1990] OJ L213/1–2, Preamble.
[3] Panos Koutrakos, Trade, Foreign Policy and Defence Under the Law of the EU 64 (Hart 2001).

embargoes,[4] import and export restrictions,[5] or freezing assets,[6] are classified as superseding obligatory requirements. In accordance with Article 9(2) of the Rome I Regulation, the courts of the Member States adopt EU sanction rules as superseding obligatory requirements of the forum, regardless of the applicable legislation.[7] They may even implement economic sanctions imposed by third parties according to Article 9.3 of the Rome I Regulation.

However, what happens if the economic sanctions do not interfere in court procedures, but rather in the process of an arbitral tribunal? It may be part of the deal strategy for the parties to specify arbitration in order to avoid EU sanctions. Arbitral tribunals, unlike the courts of Member States, are not governed by the Rome I Regulation, which ensures the consistent application of EU sanctions.

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[4] Cyril Nourissat, *Lois de police étrangères devant le juge français du contrat international: une première sous l'empire de la Convention de Rome et peut-être pas une dernière sous l'empire du règlement 'Rome I'*, 51 Revue Lamy droit des affaires 63, 64 (2010); Aurore Marchand, *Cass. com., 16 mars 2010, no 08-21.511. FS-P +B, Sté Ap Moller Maersk A/S c/ Sté Viol frères et a. – Note*, 141 JDI 99, 101 and 103 (2011); Laurence Landy-Osman, L'embargo des Nations Unies contre l'Irak et l'exécution des contrats internationaux, 17 Droit et Pratique du Commerce International 597, 607 (1992); Michael Cremer, Embargovorschriften als Eingriffsnormen, 10 Bucerius Law Journal 18, 18 (2016); Sophie Mathäß, Die Auswirkungen staaten- und personenbezogener Embargomaßnahmen auf Privatrechtsverhältnisse, 58 (Nomos 2016); Francisco Garcimartín Alférez, Embargo, in Encyclopedia of Private International Law, 599, 603 (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., Elgar 2017); Chambre de commerce internationale, L'apport de la jurisprudence arbitrale (Paris: CCI Institut 1986).

[5] Ivana Kunda, Internationally Mandatory Rules of a Third Country in European Contract Conflict Laws 132 (Rijeka Law Faculty 2007); Norbert Horn, Zwingendes Recht in der internationalen Schiedsgerichtsbarkeit, SchiedsVZ 209, 210 (2008).

[6] Sophie Wernert, Le gel d'avoirs étrangers. Aspects de droit international public et de droit international privé 91 (Mémoire de DEA, Université Paris II Panthéon-Assas 2001).

[7] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I') [2008] OJ L177/6–16.

Parties may evade the binding power of overriding obligatory measures, such as economic sanctions, by an agreement bestowing jurisdiction on a court or arbitral tribunal. Therefore, overriding obligatory rules are seen as semi-necessary, quasi-necessary,[8] or semi-obligatory.[9] This entails the transfer of the legal dispute from the predetermined jurisdiction of a state court to an arbitral tribunal based on an arbitration clause.[10] This occurrence entails the devaluation[11] or dilution[12] of overriding obligatory measures and is thus regarded as the simple transaction planning of the parties deactivating overriding obligatory measures.[13] The sanctions may be deactivated by transferring a (possible or real) legal dispute, based on the parties' agreement to bestow jurisdiction on an arbitral tribunal, which will presumably not impose the sanction at issue. The same is possible with EU sanctions administered by the courts of Member States, but not necessarily by an arbitral tribunal.

In addition to choosing arbitration, the parties are also allowed to choose the location of the arbitration. Occasionally, as a result of meticulous transaction preparation, the parties choose an arbitration venue outside the EU in order to prevent the unintended effects of EU sanctions on their contractual relationship. Commentators often drew attention to a prospective or actual shift from conventional European arbitration venues to other locations, such as Hong Kong and Singapore, in order to avoid the implementation of EU sanctions in sanctions involving Russian parties or a Russian place of performance. Diverse scholars have suggested that the EU sanctions on Russia have

[8] Luca G. Radicati di Brozolo, Mondialisation, Juridiction, Arbitrage: vers des règles d'application semi- nécessaires ?, 92 RCDIP 35 (2003).
[9] Dominique Bureau & Horatia Muir Watt, Droit international privé, Tome I (Thémis 2007) 597.
[10] Louis d'Avout & Dominique Bureau, Lois de police étrangères devant le juge français du contrat international, La Semaine Juridique – Entreprise et Affaires 23, 26 (2010).
[11] Id. at 25-26.
[12] Bureau & Muir Watt, supra n. 9, at 598.
[13] Dominique Bureau & Horatia Muir Watt, L'impérativité désactivée ?, 98 RCDIP 1 (2009).

varying degrees of influence on the selection of the arbitration site. Some writers have seen an increase in the Far East's arbitration market as a result of Russian sanctions,[14] whilst other research have shown rather stable preferences in terms of arbitration destinations.[15]

This paper investigates whether the selection of arbitration and a specific venue for arbitration may, in practise, result in the disregard of EU sanctions and the assertion that these sanctions are consistently implemented. It is maintained that the choice of arbitration and the site of arbitration outside the EU does not exclude *a priori* the application of EU sanctions but makes their implementation less predictable in a specific instance. This poses an undeniable threat to the uniform implementation of EU sanctions.

If the legal issue involves an economic consequence, arbitration processes raise additional concerns. These include the composition of the tribunal, the arbitrability of the dispute, the application or implementation of the economic punishment, especially when it is not part of the *lex contractus*, and the acceptance and enforcement of arbitral rulings. The EU sanctions imposed on these matters will be analysed in detail in the next section.

II. Constitution of the Tribunal

Under the concept of *competence-competence*, an arbitral tribunal has the authority to choose its own jurisdiction. To decide on its own competence, however, requires the creation of the arbitral tribunal.

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[14] Olga Boltenko, Hong Kong Emerges as Russia's Refuge While the EU's Sanctions Cripple Major Russian Businesses, http://arbitrationblog.kluwerarbitration.com/2014/11/24/hong-kong-emerges-as-russias- refuge-while-the-eus-sanctions-cripple-major-russian-businesses/ (last visited 21 Jun. 2022).

[15] Russian Arbitration Association, 2016: Russian Arbitration Association Survey: The Impact of Sanctions on Commercial Arbitration 5 and 11, http://arbitrations.ru/upload/medialibrary/e1e/2016-raa-survey-on- sanctions-and-arbitration.pdf (last visited 21 Jun. 2022).

Occasionally, the question arises as to whether an arbitral tribunal can be formed pursuant to an arbitration clause and whether a party can participate in the formation of the tribunal by appointing an arbitrator, particularly when a sanction prohibits initiating proceedings to enforce or satisfy claims relating to contracts affected by economic sanctions. The United Nations (UN) sanctions on Iraq,[16] Yugoslavia,[17] and Libya[18] featured such a ban, which was expressed in the English form as "no claim shall be lie."

Air France v. Libyan Airlines provides a guiding path on how such concerns can be addressed. Air France and Libyan Arab Airlines (LAA) entered into an agreement wherein Air France agreed to maintain LAA's aircraft and provide flight crew and special air transport services.[19] The agreement stipulated arbitration in line with the International Air Transport Association's Arbitration Rules (IATA). Following the Lockerbie and Ténéré bombings, the UN imposed sanctions on Libya, which the EU and Canada then enforced. In addition to prohibiting the provision of maintenance and other services for Libyan aircraft, the sanctions precluded claims brought by Libyan businesses in respect to contracts covered by the UN sanctions. LLA started arbitration proceedings against Air France for breach of contract with IATA. Air France alleged that the United Nations sanctions prevented it from appointing an arbitrator. In line with IATA Arbitration Rules, the Director General of IATA nominated an arbitrator on behalf of Air France. The tribunal was then composed of an arbitrator chosen by LAA and a president elected by the two arbitrators. The arbitration was held in Montreal, and the parties chose French law to regulate the case's substance. Air France contended, however, that UN sanctions precluded its involvement in any actions filed by a Libyan enterprise. The Court of Appeal ruled that the UN resolutions did not preclude Air France from appointing an arbitrator,

[16] UNSC Resolution 687 (1991), Art. 29.
[17] UNSC Resolution 757 (1992), Art. 8.
[18] UNSC Resolution 883 (1993), Art. 8.
[19] Air France v. Libyan Airlines, Cour d'appel du Québec, Judgment of 31 Mar. 2003, Revue de l'arbitrage 1365 (2003) with a note by Alain Prujiner.

since it would have been nonsensical to prevent the parties from initiating arbitration procedures, even if their goal is to determine the application of the restrictive measures at issue. The arbitral tribunal has the authority to determine whether the dispute is arbitrable and if it may be presented before it.

In lieu of filing claims or initiating procedures, EU sanction measures often restrict the satisfaction[20] or grant[21] of claims impacted by the sanctions. A request for arbitration is thus not prohibited by these provisions.[22]

The involvement of arbitration institutions, arbitrators, and attorneys in the arbitration processes is an additional issue. Economic sanctions may influence more than only the contractual relationship between the parties who have to resort to arbitration. When receiving or transferring monies from or to a party subject to an economic sanction, arbitrators and arbitral institutions must take economic sanctions into consideration.[23] Frequently, economic sanctions block a party's assets and limit the movement of monies.[24] It is possible that the punishment regulations may impact the transfer of funds required to initiate

[20] E.g. Council Regulation (EU) 2015/1755 of 1 Oct. 2015 concerning restrictive measures in view of the situation in Burundi [2015] OJ L257/1–10, Art. 10; Council Regulation 833/2014, Art. 11.

[21] Council Decision (CFSP) 2015/1333 of 31 July 2015 concerning restrictive measures in view of the situation in Libya, and repealing Decision 2011/137/CFSP [2015] OJ L206/34–60, Art. 11.

[22] Irina Moutaye & Elena Billebro, Choice of Arbitration Venue in Light of Sanctions Against Russia 1, 4–6, http://www.sccinstitute.com/media/76670/choice-of-arbitration-venue-in-light-of-the-sanctions- against-russia.pdf (last visited 22 Jun. 2022).

[23] Elliott Geisinger, Philippe Bärtsch, Julie Raneda & Solomon Ebere, Les Consequences des sanctions economiques sur les obligations contractuelles et sur l'arbitrage commercial international, Revue de Droit des Affaires Internationales, 405, 431–432 (2012).

[24] Mathias Audit, L'effet des sanctions économiques internationales sur l'arbitrage international, in L'ordre public et l'arbitrage, Actes du colloque des 15 et 16 mars 2013 (Dijon) 143, 146–147 (Eric Loquin et Sébastien Manciaux eds, LexisNexis 2014).

arbitration or pay the arbitration cost.[25] The breach of such restrictions may be forbidden not only for the person transmitting the cash, but also for the arbitrator(s) or arbitration institution receiving them.[26] Additionally, the sanctions system prohibits, on occasion, the provision of technical help to sanctioned transactions. In a wide sense, technical aid may also include the sanctions of arbitration organisations, arbitrators, and attorneys who undertake to represent sanctioned clients. Even if such a wide interpretation is debatable, it has been argued that uncertainties may be dispelled by getting a licence from the appropriate authorities.[27] Notably, EU sanction laws occasionally allows the release of frozen money by administrative authorisation if it is required "for payment of reasonable professional fees or reimbursement of incurred expenses associated with the provision of legal services."[28] These expenses may include expenditures for legal counsel and arbitral tribunal work. The Court of Justice of the European Union (CJEU) has ruled that national authorities do not have absolute discretion when deciding whether or not to release frozen funds. Rather, they must respect the right of the affected individual to an effective judicial remedy, which affords everyone the opportunity to be advised, defended, and represented.[29] Nonetheless, the appropriate national body may verify that the funds are intended only for the payment of fair professional fees and reimbursement of expenditures incurred in connection with the performance of legal services. It may also impose specific limitations (such as permitting bank transfers instead of cash payments) to ensure that the sanction's

[25] Id. at 146-147.
[26] Id. at 146-147.
[27] Moutaye & Billebro, supra n. 22 at 6–7.
[28] Council Regulation (EU) 269/2014 of 17 Mar. 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/6–15, Art. 4(1)(b). John Beechey, Jacomijn van Haersolte-van Hof & Annette Magnusson, The potential Impact of the EU Sanctions Against Russia on International Arbitration Administered by EU-Based Institutions 1, 3 and 6, http://www.sccinstitute.com/media/80988/legal- insight-icc_lcia_scc-on-sanctions_17-june-2015.pdf (last visited 22 Jun. 2022).
[29] Case C-314/13 Užsienio reikalų ministerija and Finansinių nusikaltimų tyrimo tarnyba v. Vladimir Peftiev et al., ECLI:EU:C:2014:1645.

intended purpose is not defeated, and the granted exemption is not twisted.

III. Arbitrability

The Once the parties have nominated the arbitrators and the tribunal has been established, it may determine its own competence, including whether the dispute is arbitrable.[30] Whether situations involving economic sanctions may be arbitrated must be investigated.

The general position in the legal literature is that a disagreement is not arbitrable just because it involves the application of superseding obligatory laws.[31] Due to the principle of separability, the fact that the legal dispute concerns the issue of imposing an economic punishment, which might render the contract invalid, does not impact the legality of the arbitration provision.[32] This strategy is supported by both judicial and arbitral practise. In *Mitsubishi v. Soler*, the United States Supreme Court made clear that the implementation of antitrust principles that qualified as overriding statutory requirements did not exclude the arbitrability of a case.[33] This perspective was clearly validated by arbitration practise in respect to a number of superseding statutory provisions,[34] such as economic sanctions. It has been stated that public policy may eventually govern the recognition and enforcement of the award if the result is inappropriate for the state in which recognition

[30] Audit, supra n. 24 at 146.

[31] Jean-Baptiste Racine, L'arbitrage commercial international et les mesures d'embargo. À propos de l'arrêt de la Cour d'appel du Québec du 31 mars 2003, 134 JDI 89, 92 and 95–101 (2004); Geneviève Bastid- Burdeau, Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international, Revue de l'arbitrage 753, 758–759 (2003); Marc Blessing, Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts 58–59 (Helbing & Lichtenhahn 1999).

[32] Geisinger, Bärtsch, Raneda & Ebere, supra n. 23 at 426.

[33] Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

[34] Société Labinal v. Société Mors et Société Westland Aerospace Ltd., Cour d'appel de Paris (1ère chambre, s. A), Judgment of 19 May 1993, 120 JDI 957 (1993) with the case note of Laurence Idot, 120 JDI 979, 980 (1993); Revue de l'arbitrage 645 (1993) with the case note of Charles Jarrosson, Revue de l'arbitrage 653 (1993).

and enforcement are being sought. As we shall see later, public policy is narrowly defined under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), which reduces the power of this protection. Regarding the potential application of economic sanctions, a number of judgments indicate that cases involving economic sanctions are arbitrable and, thus, the tribunal has the authority to continue on the merits of the case and determine whether the economic penalty is applicable in the current situation.

In the *Fincantieri case*, the Swiss Federal Tribunal determined that an economic sanctions dispute was arbitrable.[35] Two Italian businesses, Fincantieri-Cantieri and Melara, tasked an agent with selling ships and other military equipment to the Iraqi government. Both the contract with the Iraqi government and the contract with the agency were properly executed until 1987, when the responsible Iraqi authorities halted payments. Before the ICC Court of Arbitration, the agent demanded the commission from the principals. The defendants objected to the tribunal's jurisdiction on the grounds that the issue could not be arbitrated since the UN had imposed sanctions on Iraq, which had been applied under Italian and Swiss law. The Geneva-based arbitral panel established its jurisdiction in the case. The defendants petitioned the Swiss Federal Tribunal to vacate the verdict. This was denied because Article 177(1) of the Swiss Private International Law Act allowed any dispute involving an economic interest to be arbitrated. Claiming the agency fee from the principals qualified as an economic dispute. The fact that the economic sanctions imposed on Iraq may have caused questions about the legality of the contract or the difficulty of performance did not necessarily imply that the dispute was not arbitrable. The Federal Tribunal could not identify any basic legal principle that would have created a governmental monopoly over the resolution of disputes affected by public law norms.

[35] Fincantieri-Cantieri Navali v. M, Tribunal fédéral suisse (1re Cour civile), Judgment of 23 June 1992, Revue de l'arbitrage 691 (1993).

Moreover, it has been questioned whether the arbitrability of a legal issue is precluded if the sanctioning measure prohibits the execution of claims relating to contracts or transactions impacted by the penalty. In *Air France v. Libyan Airlines*, the Quebec Court of Appeal determined that a UN censure on Libya did not impede the arbitrability of the issue. In addition, the Court of Appeal stated that the arbitral panel did not breach international public policy by asserting its own authority to resolve the issue.

The existence of an overriding obligatory measure, such as a financial penalty, does not exclude the arbitrability of the issue.[36] A properly constituted arbitral tribunal has the authority to determine whether the case fits within the scope of the economic penalties.[37] A party's mere assertion that a claim cannot be taken before a court or arbitral tribunal owing to the existence of an economic penalty is insufficient to exclude arbitration.[38] The sanctioning clauses barring the execution of claims impacted by economic sanctions have to do with the admissibility of the claims, not their arbitrability.[39] The fact that the arbitrability of superseding obligatory provisions is not eliminated does not exclude state control permanently, but merely delays it until the annulment or recognition and execution of the judgement occurs.[40] Regarding the recognition and enforcement of arbitral awards, the question of arbitrability may still arise under Article V(2)(a) of the New York Convention, which states that recognition and enforcement of an arbitral award may be refused if the court in the country where recognition and enforcement are sought determines that the subject

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[36] Racine, supra n. 31 at 101.
[37] Eric Loquin, Les effets des lois d'embargo sur la mise en oeuvre des clauses compromissoires, RTD Com. 66 (2001).
[38] Id.
[39] Garima Shahani, Impact of Sanctions Under the CISG, 33 ASA Bulletin 849, 854 (2015).
[40] See, Pierre Mayer, L'étendue du contrôle, par le juge étatique, de la conformité des sentences arbitrales aux lois de police, in Vers de nouveaux équilibres entre ordres juridiques – Liber amicorum Hélène Gaudemet-Tallon 460, 462 (Tristan Azzi ed., Dalloz 2008).

matter of the parties' dispute cannot be settled by arbitration under the law of the forum.

The preceding instances clearly demonstrate the arbitrability of economic punishment proceedings. Some scholars even discuss a basic theory of international arbitration law according to which the public policy aspect of the applicable rules does not make the proceedings non-arbitrable.[41] In the context of economic sanctions, it has been stated that arbitrability is no longer a legitimate subject of debate.[42]

Courts in several Member States have rejected the arbitrability of legal disputes involving the application of overriding mandatory provisions in general and economic sanctions in particular, despite considering the arbitrability of cases involving public law norms as a "general principle" or finding that the arbitrability of sanction cases has not been discussed.

German courts saw as unconstitutional agreements delegating jurisdiction to a court of another state where the choice of forum resulted in the avoidance of the application of overriding obligatory requirements originating from domestic or EU legislation. This is true for arbitration agreements as well. If there is a possibility that the tribunal will not implement the overriding obligatory clause, it may be possible to demonstrate the arbitration agreement's invalidity.[43] In a ruling, the Federal Court of Justice (BGH) specifically looked back to its previous ruling on the invalidity of a choice-of-court clause to prevent the implementation of overriding obligatory requirements of German securities law,[44] and reached the same conclusion for arbitration agreements.[45] The protection afforded to agents by the

[41] Racine, supra n. 31 at 96.
[42] Audit, supra n. 24 at 147 and 150.
[43] Mathäß, supra n. 4 at 60–61.
[44] BGH, Urteil vom 12 Mar. 1984 – II ZR 10/83.
[45] BGH, Urteil vom 15 June 1987 – Az. II ZR 124/86.

German provisions implementing the Commercial Agents Directive[46] could not be nullified by a choice-of-court and arbitration agreement, according to a decision of the OLG München.[47] It stipulated that these overriding mandatory provisions could not be derogated from (in addition to a choice of California law) by an agreement conferring exclusive jurisdiction to a court in California if the law of the chosen forum did not recognise an equivalent claim for compensation for the agent. Insofar as there is a clear risk that the court in a third country, adopting its own legal approach, would not enforce the overriding obligatory requirements of German law, such a waiver of jurisdiction is unconstitutional. The Munich Court of Justice determined that the same applies to arbitration agreements. In a similar decision, the Austrian OGH determined that an arbitration clause relating to an agency agreement between a US principal and an Austrian agent is unlawful if it attempts to ignore overriding obligatory clauses. According to the Austrian laws implementing the Commercial Agents Directive, the agent in this instance could not have asserted a claim for remuneration upon the end of the agency contract. The OGH stated that US law does not offer an equal level of protection for agents and that the only way to assure the adoption of the overriding obligatory provisions of the Commercial Agents Directive is to refuse the acceptance of the arbitration clause.

It was contended that the *effet utile* of superseding EU statutory rules, such as those in the Commercial Agents Directive, necessitates (under certain conditions) the illegality of choice-of-law provisions and choice-of-court agreements.[48] The *effet utile* of EU law may necessitate the application of superseding obligatory EU law rules against choice

[46] Council Directive 86/653/EEC of 18 Dec. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] OJ L382/17–21.

[47] OLG München, 17 May 2006 – 7 U 1781/06, IPRax 322 (2007). *See* David Quinke, Schiedsvereinbarungen und Eingriffsnormen – Zugleich Anmerkung zu OLG München, Urt. v. 17. Mai 2006, Az. 7 U 1781/06 –SchiedsVZ 246 (2007).

[48] Giesela Rühl, Die Wirksamkeit von Gerichtstands- und Schiedsvereinbarungen im Lichte der Ingmar- Entscheidung des EuGH, IPRAX, 294, 299 (2007).

of court and arbitration agreements. This is a challenging subject because it requires a decision between the legal certainty and predictability associated with jurisdiction and arbitration agreements and the need for the universal implementation of the overriding obligatory requirements of EU law. There is a strong interest in the *effet utile* utility of EU legislation with respect to EU sanctions that need universal execution. A ruling by the CJEU on this issue might dispel doubt. German courts have the opportunity to obtain a preliminary judgement from the CJEU regarding the impact of superseding EU required standards on national law-based jurisdiction agreements, but they have not done so as of yet.[49]

Specifically, Italian courts denied the arbitrability of issues involving the imposition of economic sanctions, although on different grounds, if they concerned economic sanctions. In a judgement, the Court of Appeal of Genoa denied the arbitrability of a contractual dispute over the delivery of corvettes by Italian shipbuilders to the Iraqi Navy as a result of the UN and EU sanctions imposed during the Gulf War.[50] This was justified by the clause of the Italian Civil Procedure Code allowing matters to be filed to arbitration unless the parties are unable to exercise their rights freely. The Court of Appeal held that the arbitrability of the matter must be assessed in line with Italian law, the law of the forum, since the court seized may reject its jurisdiction based on its own legal system's principles. Upon the conclusion of the contracts, the dispute may have been subject to arbitration since the parties were free to dispose of their rights resulting from the contracts. However, the intervening embargo prevented the parties from disposing of their rights freely. The EU embargo legislation, Council Regulation (EEC) 3541/92, declared the arbitration provision invalid and the matter non-

[49] Id. at 298-300.

[50] Fincantieri – Cantieri Navali Italiani S.p.A. & Oto Melara S.p.A. v. Ministry of Defence, Armament & Supply Directorate of Iraq et al., Italy No. 138, Corte di Appello, Genoa, Judgment of 7 May 1994, cited in XXI Yearbook of Commercial Arbitration, 1996, 594 (Albert Jan van den Berg ed., 1996).

arbitrable.[51] Since the economic penalties prevented the parties from freely exercising their rights, arbitration was not an option. The decision of the Court of Appeal of Genoa reveals that the evaluation of the dispute's arbitrability ultimately rely on the national regulations governing the types of disputes that may be submitted to arbitration. Intriguingly, this case, like the judgement of the Swiss Federal Supreme Court, included Fincantieri and Oto Melara, but in this instance, their claim was pursued directly against the Iraqi Ministry of Defense, without the use of an intermediary. [52] In an unusual continuation of the case, recognition and enforcement of the award were sought in France based on the Brussels Convention 10 years later. The Cour d'appel de Paris denied the appeal based on the arbitration exemption of Article 1(2)(4) of the Brussels Convention [53] and determined that the Court of Appeal of Genoa restricted itself to establishing the illegality of the arbitration agreement without ruling on the merits. Due to the fact that, in the existence of an arbitration agreement, arbitration must take precedence, unless the arbitration provision is plainly invalid or inapplicable, the decision was delivered by a court that lacked the jurisdiction to hear it, therefore the judgement could not be received in France.

More recently, the Supreme Court of Cassation of Italy ruled that an arbitration provision was null and unlawful and that a case involving economic sanctions could not be arbitrated.[54] Regarding a contract for

[51] Council Regulation (EEC) 3541/92 of 7 Dec. 1992 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions, the performance of which was affected by United Nations Security Council Resolution 661 (1990) and related resolutions [1992] OJ L361/1–3, Art. 2(1)(a).

[52] L. Matray, L'embargo national et international dans l'arbitrage, 74 Revue de droit international et de droit comparé 7, 16 (1997).

[53] Legal Department du Ministère de la Justice de la République d'Irak v. Sociétés Fincantieri Cantieri Navali Italiani, Finmeccanica et Armamementi e Aerospazio, Cour d'appel de Paris (1re Ch. C), Judgment of 15 June 2006, 1 Revue de l'Arbitrage 87 (2007).

[54] Government and Ministries of the Republic of Iraq v. Armamenti e Aerospazio S.p.A. et al., Italy No. 189, Supreme Court of Cassation of Italy, Case No. 23893, 24

the sale of helicopters between an Italian seller and the Iraqi government and the Ministry of Defence, the seller delayed delivery and initiated an action for damages for non-performance of the contract before an Italian court, notwithstanding an arbitration provision in the contract. The UNSC and the EU slapped sanctions on Iraq for its invasion of Kuwait while withholding delivery. The Supreme Court of Cassation concluded that an Italian court had the right to claim jurisdiction in this case, since the embargo was transnational and the legitimacy of the arbitration provision could only be assessed by state courts and not by "private judges," i.e. an arbitral tribunal. The court's reasoning was consistent with the aforementioned ruling of the Court of Appeal of Genoa. Under Italian law, only conflicts involving rights over which the parties have complete discretion may be arbitrated. Due to the imposition of economic sanctions, the previously lawful arbitration provision became null and invalid since the parties were no longer able to exercise their rights to the dispute's subject matter freely. Article II(1) and (3) of the New York Convention provided foundation for the court's ruling. Since the embargo was subsequently removed, the issue arose as to whether the claim may be arbitrated retroactively. This argument was rejected by the court, which determined that Italian law acknowledged the supervening invalidity of acts and transactions but not their supervening legality.

The preceding analysis demonstrates that while the majority of authors, arbitral awards, and court decisions consider matters involving economic sanctions to be arbitrable, the court practise of other countries takes a different stance based on either the requirement of effet utile under EU law or national provisions limiting the disputes that may be subject to arbitration. If a matter is deemed non-arbitrable, a court in a Member State will claim jurisdiction and apply EU sanctions without question. However, the fact that the issue regarding the imposition of an EU economic censure is arbitrable does not always

Nov. 2015, cited in XLI Yearbook of Commercial Arbitration 2016 503 (Albert Jan van den Berg ed., 2016).

indicate that the sanction will not be implemented. This relies on the arbitral tribunal that decides the law applicable to the dispute's merits.

IV. Question of Applicable Law

Once it has been determined that the arbitral tribunal has the authority to continue and that the dispute is amenable to arbitration, the panel must assess the applicable legislation and, relatedly, the applicability of superseding obligatory laws. The Rome I Regulation's conflict of laws provisions, and notably Article 9, do not bind arbitral tribunals as they are not courts of Member States. The substantive law relevant to the dispute is generally determined by agreement between the parties. In its absence, the applicable law may be determined using a variety of methods. The relevant law may be decided either directly, by applying the law judged suitable by the tribunal (for instance, on the basis of a close link), or indirectly, by applying the applicable conflict of laws regulations. Consequently, arbitral tribunals have significant discretion on the application of EU sanctions. Nonetheless, this also suggests that there is no certainty that independent EU sanctions will be enforced in arbitration.

In arbitration, it has been argued whether overriding obligatory requirements should be considered at all. Some writers endorsed this position,[55] while others believed that resort to public policy was sufficient. Given that, unlike state courts, arbitral tribunals get their authority from the autonomy of the parties and not from a sovereign state, it may be deduced that arbitral tribunals are not bound by any required requirement that was not anticipated by the parties.[56] The second approach regards the application of overriding obligatory rules foreign to the *lex contractus* as an abuse of the arbitral tribunal's

[55] Laurence Idot, Les conflits de lois en droit de la concurrence, 122 JDI, 320, 329 (1995); Yves Derains, Les normes d'application immédiate dans la jurisprudence arbitrale, in *Mélanges offerts à Berthold Goldman* 29 (Philippe Fouchard, Philippe Kahn & Antoine Lyon-Caen eds, Litec 1982).

[56] Karsten Thorn, Artikel 9: Eingriffsnormen, in Europäisches Zivilprozess- und Kollisionsrecht vol. 3, 432, 471 (Thomas Rauscher ed., Otto Schmidt 2016).

authority, particularly in the event of a choice of law by the parties, which might result in the nullification of the award.

The topic of whether arbitral courts apply overriding statutory requirements, such as economic sanctions, is essential since their ignorance may encourage private parties to avoid these rules.[57]

Moreover, arbitrators are often cautioned that by neglecting an economic consequence, they run the danger of having their judgement invalidated by the appropriate national court or denied recognition and enforcement.[58] This is an incentive for adhering to the economic sanctions imposed by the state with the authority to annul the arbitral judgement and the state where recognition and enforcement may be sought.[59] The basic provision of the ICC Arbitration Rules that "the arbitral tribunal … shall make every effort to make sure that the award is enforceable at law" is often cited.[60] This may be seen as a reflection of the parties' justified expectation that the tribunal would take reasonable measures to issue a judgement that is enforceable.[61] However, it is not always possible for an arbitral tribunal to determine where the decision will be enforced, and thus, the overarching obligatory standards governing which countries should be considered are not always unambiguous.[62] A number of writers have suggested a pragmatic solution to this problem.[63] Consequently, if all accessible assets are situated in a single state, it is not permissible to disregard that state's overriding required laws in order to assure enforcement. In

[57] Mayer, supra n. 40 at 467.
[58] See, Bernardo Cortese, International Economic Sanctions as a Component of Public Policy for Conflict-of-Laws Purposes, in Economic Sanctions in International Law/Les sanctions économiques en droit international vol. 23, 717, 741 (Laura Picchio Forlati & Linos-Alexander Sicilianos eds, Hague Academy of International Law, The Law Books of the Academy, Nijhoff 2004); Idot, *supra* n. 55, at 335.
[59] Cortese, supra n. 58 at 741.
[60] ICC Arbitration Rules 2017, Art. 42.
[61] Andrew Barraclough & Jeff Waincymer, Mandatory Rules of Law in International Commercial Arbitration, 6 Melb. J. Int'l L. 205, 216 (2005).
[62] Idot, supra n. 55, at 336.
[63] Barraclough & Waincymer, supra n. 61 at 216.

contrast, if significant assets are situated in many nations, it is not required to take into consideration the overriding obligatory rule imposed by just one of them.

Sanctions may be found in the law of the state where the arbitral tribunal's seat is located, the *lex contractus*, and the law of a third nation. These examples will be examined in the next section.

A. Sanctions and Lex Contractus

Arbitral tribunals, like state courts, recognise the legislation adopted by the parties. In the absence of a choice of law, however, the arbitrators choose the applicable law. In both instances, the issue of whether the applicable legislation permits economic sanctions emerges.

Because the selected legislation is to be implemented in its totality, the majority of writers believe it to be self-evident that the arbitrators' choice of relevant law includes overriding obligatory measures,[64] such as economic sanctions.[65] The rules' public law or overriding obligatory nature does not preclude their use as part of the *lex contractus*.[66] Such practise was accepted in arbitral practise regarding export controls.[67]

Others oppose a sweeping application of the *lex contractus'* overriding obligatory measures. Private-law oriented mandatory aspects of the relevant legislation may be incorporated into the application of the *lex contractus*. In German and Swiss literature, however, several scholars argue that the execution of foreign overriding obligatory rules originating in public law must be predicated on a particular link

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[64] Idot, supra n. 55 at 335; Christian Forwick, Extraterritoriale US-amerikanische Exportkontrollen 134 (Verlag Recht und Wirtschaft 1992); Bastid-Burdeau, *supra* n. 31, at 770; Matray, supra n. 52 at 30; Chambre de commerce internationale, *supra* n. 4, at 43.

[65] Landy-Osman, supra n. 4, at 612; Mercédeh Azeredo da Silveira, Trade Sanctions and International Sales 111–112 (Kluwer 2014); Audit, supra n. 24, at 151.

[66] Landy-Osman, supra n. 4, at 612–613.

[67] ICC Award of 1982, No. 2930, cited in IX Yearbook of Commercial Arbitration 105, 107 (Pieter Sanders ed., Kluwer 1984).

(*Sonderaknüpfung*).[68] This unique relationship is necessary regardless of whether the overriding obligatory requirement is in the lex contractus, the law of the state where the arbitral tribunal is headquartered, or the legislation of a third nation. There is no difference in this regard, however the implementation of the overriding obligatory provisions of the *lex contractus* is more likely than foreign laws owing to the existence of a close link.[69] It is contended that parties' selection of a neutral seat for arbitration and this state's law as applicable does not necessarily suggest that they want the implementation of this state's overriding obligatory requirements.[70]

The argument that the application of overriding obligatory measures to the legal dispute is inconsistent with the parties' reasonable expectations is not persuasive.[71] Neither the parties nor the tribunal may cherry-pick the rules of the applicable law and omit the non-desired overriding obligatory rules, such as economic sanctions. In the situation of choice of law, the parties choose the relevant law in its totality, and in the lack of a choice, the governing law applies in its entirety. Parties cannot circumvent required requirements safeguarding public or private interests by relying on their genuine expectations.

If the *lex contractus* is the law of a Member State, it is likely that EU sanctions will apply. EU and national legislations execute UN sanctions, although the implementing measures often exceed the limits established by the UN. In *Government & Ministries of the Republic of Iraq v. Armamenti e Aerospazio SpA et al.*, the Supreme Court of Cassation of Italy characterised the UN and EU sanctions as acts of international public policy that trumped French law, which otherwise governed the contract, and held that their effects had to be evaluated in accordance with the *lex fori*. It is not surprising to characterise the UNSC sanction resolutions as constituting international public policy,

[68] Anton K. Schnyder, Anwendung ausländischer Eingriffsnormen durch Schiedsgerichte, 59 RabelsZ 293 (1995); Horn, supra n. 5, at 213.
[69] Horn, supra n. 5 at 213.
[70] Schnyder, supra n. 68 at 303.
[71] Landy-Osman, supra n. 4 at 611–612.

but the implementing regulations referred to in the decision (Regulation (EEC) 2340/ 1990 and Regulation (EEC) 3155/1990) extended the sanctions to non-financial services beyond the UNSC resolution.[72] The Supreme Court of Cassation seems to have ignored this distinction, and as a result, more extended EU sanctions were declared to be part of international public policy. In the current instance, however, this was immaterial since the applicable French legislation already included EU sanctions.

By award, a sole arbitrator of the Chamber of Arbitration of Milan applied Council Regulation (EEC) 2340/90 of 8 August 1990 prohibiting trade by the Community with Iraq and Kuwait, implementing the UNSC resolution against Iraq, as well as Italian embargo legislation, even in the legal relationship between a subcontractor and a main contractor for the supply of parts for the construction of a plant in Iraq by the main contractor, because of the economic and functional interdependence.[73] The arbitrator might do so in accordance with the relevant Italian law, while noting that EC and national sanctions laws must have been implemented in the EC, regardless of the law applicable to the contract, due to their public law nature.

It must be recognised that even *lex contractus*-mandated economic sanctions may be overturned if they contradict international or transnational public policy.[74] This is clearly the case when a unilateral penalty imposed by the *lex contractus* is criticised by the international

[72] Council Regulation (EEC) 2340/90 of 8 Aug. 1990 preventing trade by the Community as regards Iraq and Kuwait [1990] OJ L 213/1–2; Council Regulation (EEC) 3155/90 of 29 Oct. 1990 extending and amending Regulation (EEC) 2340/90 preventing trade by the Community as regards Iraq and Kuwait [1990] OJ L304/1–4.
[73] CAM Case No. 1491, Award of the Chamber of Arbitration of Milan, 20 July 1992, cited in XVIII Yearbook of Commercial Arbitration 1993 80 (Albert Jan van den Berg ed., Kluwer 1993).
[74] Matray, supra n. 52 at 31–36; Shahani, supra n. 39 at 855.

community, such as by a resolution of the UN General Assembly,[75] as occurred with the Helms-Burton Act.[76] This is essential for the European Union, which aimed to exclude the extraterritorial implementation of the US embargo against Iran, Cuba, and Libya by blocking legislation.[77]

Similar to EU competition legislation, EU economic sanctions must be implemented as part of the Member States' public policy. In the *Eco Swiss decision*, the CJEU emphasised that Article 81 of the EC Treaty barring anticompetitive agreements is a key requirement for the internal market's operation.[78] If the legislation of a Member State enables the annulment of an arbitral judgement for reasons of public policy, the award must be annulled if it fails to comply with Article 81 of the European Community.[79] Both the EU's implementation of UN sanctions and its unilateral imposition of economic sanctions should be seen as expressions of public policy, since they embody the core policy aims and values of the EU. In light of this, disobeying an EU censure may result in the nullification of an arbitral judgement. However, this is only the case if a court of a Member State moves through with the annulment request. If the court with jurisdiction over the annulment is situated outside the EU, it is not always possible to obtain an annulment.

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[75] UN General Assembly Resolution 68/8, 29 Oct. 2013. *See* Mercédeh Azeredo da Silveira, Economic Sanctions, Exchange Control Regulations and the Like: Black Sheep Among the Provisions of the Lex Contractus?, http://arbitrationblog.kluwerarbitration.com/2014/09/26/brussels-sanctions-against-russia-and-moscows-retaliatory-measures-through-the-eyes-of-the-arbitrator/ (last visited 26 Jun. 2022).

[76] Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act, Pub. L. 104–114, 110 Stat. 785, 22 U.S.C., ss 6021–6091).

[77] Council Regulation (EC) 2271/96 of 22 Nov. 1996 protecting against the effects of the extra- territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom [1996] OJ L309/1–6.

[78] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International N.V. [1999] E.C.R. I-3055, ¶36.

[79] Id. ¶¶37, 41.

In the lack of worldwide acceptance, the Swiss Federal Court dismissed the public policy qualifying of the EC competition regulations.[80] Two Italian businesses reached an agreement to submit a combined bid for the construction of two bridges along the high-speed railway route between Milan and Naples. The contract stipulated the jurisdiction of an arbitral tribunal in Lausanne under the rules of the International Chamber of Commerce (ICC) and the application of Italian law. Despite the agreement, one of the parties won the bid by submitting a combined proposal with other firms. The other party filed a claim for damages before an arbitral panel for breach of contract. The successful bidder contested the claim on the grounds that the contract was invalid and unlawful under EC and Italian competition law. The arbitral panel ruled in the claimant's favour.

The defendant corporation petitioned the Swiss Federal Court to overturn the judgement on the grounds that it breached public policy under Article 190(2)(e) of the Swiss Private International Law Act because it did not comply with European Community and Italian competition standards. According to the court, an award violates public policy if it is incompatible with the principles of the system of values to be followed, ideally by all countries from a Swiss perspective, i.e., if it disregards the fundamental and universally acknowledged values that, according to the concept prevalent in Switzerland, should form the basis of all legal orders. The Swiss Federal Court determined that EC competition laws do not correspond to this conception of public policy since competition regulations are based on a variety of economic models that may vary from the economic model prevalent in Switzerland or the EC. These systems could not be labelled immoral or contradictory to basic legal principles based only on their departure from the Swiss model. It is not conceivable to draw a transnational norm or a rule of international public policy from differences in competition regulations. This result is unaffected by the CJEU's

[80] Tribunal fédéral 4P.278/2005, Judgment of 8 Mar. 2006, Ire Cour civile; Marcel Meinhardt & Jan- Michael Ahrens, Wettbewerbsrecht und Schiedsgerichtsbarkeit in der Schweiz – Eine Würdigung des Entscheids des Bundesgerichts vom 8. März 2006 – SchiedsVZ, 182 (2006); Horn, supra n. 5 at 2011.

attachment of Article 81 EC to the Member States' public policy. Taking into account the above, the Swiss Federal Court determined that competition regulations are not among the rules that express fundamental and commonly accepted values, which, according to the notion prevalent in Switzerland, should form the basis of all legal regimes. Therefore, the violation of competition laws does not come under Article 190(2)(e) of the Swiss Private International Law Act, and the Swiss Federal Court denied the request for annulment without reviewing the application of competition rules in the specific situation.

This logic may also apply to the EU's unilateral sanctions. In the preceding instance, Italian law, the law of an EU Member State, governed the contract, and the parties' action largely had repercussions in Italy; hence, there was a strong relationship to EU law. Nonetheless, courts in non-EU nations do not always follow the same foreign policy aims and ideals as the EU. A court outside the EU may determine that a unilateral EU sanction is not to be followed, and the non-observance of a unilateral EU sanction does not necessitate the annulment of an arbitral award on the basis of public policy as conceived by the forum, despite the fact that unilateral EU sanctions unquestionably fall under EU public policy.

B. Sanctions by a Third State

It is possible that the economic penalty is located in the legislation of a state other than the *lex contractus* state, and the tribunal must determine whether or not to take it into consideration. The issue presented is whether sanctions against a third nation should be enforced as a legal norm or taken into account at the level of substantive law. Several academics are of the opinion that third country overriding required requirements should not be imposed immediately, but should be considered.[81] Indeed, arbitral tribunals often use this method. When arbitral tribunals implement economic sanctions that are not part of the *lex contractus* at the level of substantive law, they may do so in a number of ways. The tribunal may take the economic penalties as a fact

[81] Derains, supra n. 55 at 38.

that constitutes a force majeure event that excuses parties from performance.[82] The general provisions of contract law prohibiting illegality or immorality may also serve as a legal basis for taking into account foreign economic sanctions.[83]

The criteria for determining whether to administer a non-*lex contractus* economic penalty are articulated in many ways. The majority of writers need a tight relationship between the case and the state imposing an overriding required requirement[84] or the overriding obligatory measures itself.[85] The experience of arbitration also shows that overriding required laws of a third state may be granted effect if there is a direct connection between the case and that state.[86] Other factors include shared values underlying the norm and widely accepted values,[87] the motivations of the issuing state,[88] the goal of the legislation,[89] and the consequences of applying or not applying (giving effect to or not giving effect to) the norm.[90] Derains and Matray propose enforcing or adopting foreign overriding required rules if this satisfies the parties' reasonable expectations.[91] In light of this, it must be determined to what degree parties may anticipate the implementation of such standards, such as economic sanctions, under the given circumstances.[92] Matray adds that the adoption of the close link criteria may mitigate the subjectivity of this test.[93] In the case of the Amsterdam Grain Trade Association, in relation to contracts

[82] Racine, supra n. 31 at 103; Bastid-Burdeau, supra n. 31 at 771; Chambre de commerce internationale, supra n. 4 at 43–44.
[83] Bastid-Burdeau, supra n. 31 at 772.
[84] Blessing, supra n. 31 at 64.
[85] Bastid-Burdeau, supra n. 31 at 772; Matray, supra n. 52 at 37; Forwick, supra n. 64 at 134.
[86] Amsterdam Grain Trade Association, Award of 11 Jan. 1982, cited in VII Yearbook of Commercial Arbitration 158, 160 (Pieter Sanders ed., Kluwer 1983).
[87] Blessing, supra n. 31 at 64.
[88] Shahani, supra n. 39 at 854.
[89] Id. at 854.
[90] Blessing, supra n. 31 at 64; Shahani, supra n. 39, at 855; Idot, supra n. 55 at 336.
[91] Derains, supra n. 55; Matray, supra n. 52 at 41.
[92] Forwick, supra n. 64, at 134.
[93] Matray, supra n. 52 at 41.

between an Austrian and a Dutch company for the sale of various grain products, the court noted that even in the case of a close connection between the contracts governed by Dutch law and Austria, no effect could have been given to the Austrian mandatory currency provisions because it would have resulted in the potential nullification of the contract.[94] This suggests that the tribunal weighed the interests of a state involved in the transaction in addition to the interests and expectations of the parties. This is also possible with regards to the execution of EU economic sanctions, when the EU's interests are plainly discernible. However, it is uncertain if such an approach is consistent with the impartial stance of arbitrators.

C. Sanctions of the State of the Seat of the Arbitral Tribunal

Overriding required requirements of the state of the arbitral tribunal's seat are not automatically implemented. Unlike national courts, arbitration tribunals are not state organs, hence they lack a forum and have no connection to the legal system of the state where the seat of arbitration is located. For them, all necessary overarching standards are strange.[95]

Some scholars continue to contend that arbitral tribunals, like courts, should follow the overriding required requirements of the law of the state where the arbitration is seated.[96] This idea, according to which a legal issue has a direct connection to the law of the state in which the tribunal is situated and is thus relevant, has been refuted by legal literature and the regulations of arbitration organisations. As a result, the tribunal is not required to apply the overriding obligatory measures of the state's law of the State of its seat.[97] They may be applied as part of the *lex contractus* or as any foreign law considered relevant by the judge. From this, it may be deduced that an arbitral tribunal's disregard for the overriding obligatory measures of the *lex arbitri* is not a

[94] Amsterdam Grain Trade Association, Award of 11 Jan. 1982, at 160.
[95] Thorn, supra n. 56 at 471.
[96] Shahani, supra n. 39 at 854.
[97] Blessing, supra n. 31 at 13.

sufficient basis for the annulment of an arbitral ruling.[98] Some scholars continue to contend that the arbitral tribunal cannot disregard economic sanctions of the tribunal's seat state.[99] The observance of the forum's pecuniary sanctions may be vital to preventing the prospect of the award being annulled by a court of the tribunal's home country. It is possible for a tribunal in a Member State not to apply EU sanctions, particularly if the applicable legislation is not a Member State's law. Nevertheless, if the arbitral tribunal does so, it runs the danger of having its judgement overturned by a court in that Member State. Only if the court of a Member State is competent to annul the award due to the non-application of an EU penalty is annulment guaranteed. As we have seen in the case of the Swiss Federal Court's disregard for EC competition rules, if the court with jurisdiction over the annulment is located outside the EU, there is no assurance that disregarding EU rules of public policy, such as economic sanctions, will result in the annulment of the award.

V. Enforcement of Arbitral Award

Sri Article V(2) of the New York Convention permits the court in the country where recognition and enforcement are sought to refuse recognition and enforcement of an arbitral award if, among other things, the subject matter of the dispute is not arbitrable under the country's own law or if recognition or enforcement would be contrary to the country's public policy.

The issue arises as to whether the forum may reject the acceptance and enforcement of a judgement if an overriding obligatory requirement of the forum, such as a monetary fine, was not implemented by the arbitral tribunal.

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[98] Dietmar Czernich, Die Rom I-VO als Grundlage für die Anwendung von Eingriffsnormen durch Schiedsgerichte, 62 RIW 701, 702 (2016).
[99] Geisinger, Bärtsch, Raneda & Ebere, supra n. 23 at 423–424.

Under the New York Convention, the public policy exemption must be interpreted narrowly.[100] This is also the case with the United States, which heavily employs economic sanctions[101] and attempts to persuade even its allies to comply with them. Public policy, as defined by the New York Convention, has often been used to prevent the acceptance and execution of foreign arbitral judgements against US firms claiming the implementation of US economic sanctions. Nevertheless, US courts are often unwilling to adopt the public policy defence of the New York Convention, and this applies to instances involving economic sanctions as well. In Parsons & Whittemore v. RAKTA, the US Court of Appeals narrowed the idea of public policy within the meaning of the New York Convention to the preservation of the forum state's "most basic notions of morality and justice."[102] It proved that public policy is not a narrow instrument for serving national political goals and does not include "the vagaries of international politics. To put this statement in the context of the application of economic sanctions, if the Court of Appeals accords public policy a supranational meaning, then disregarding a sanction other than one imposed by the UNSC is not a basis for the denial of recognition and enforcement of a foreign arbitral award, even if such disregard implies setting aside domestic foreign policy interests and objectives. In other situations, Parsons & Whittemore was used. The US judicial practise established that "public policy" and "foreign policy" are not identical and clarified that public policy, as defined by the New York Convention, cannot be used to further national political goals.[103] It was said that the decision of "public policy" must be a

[100] In the United States: Parsons & Whittemore Overseas Co., Inc. v. Société Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974); Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512 (2d Cir. 1975); Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd., 737 F.2d 150 (2d Cir. 1984); in Switzerland: Inter Maritime Management S.A. v. Russin & Vecchi, Tribunal fédéral, Judgment of 9 Jan. 1995.

[101] Geisinger, Bärtsch, Raneda & Ebere, supra n. 23 at 429.

[102] Parsons & Whittemore Overseas Co., Inc. v. Société Generale de l'Industrie du Papier (RAKTA), supra n. 100.

[103] National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Del. 1990), Judgment of 15 Mar. 1990.

condensation of a number of official pronouncements.[104] US case law establishes that foreign policy goals are insufficient to reject recognition and implementation of a foreign arbitral decision, even if the award is not necessarily in agreement with US foreign policy and the US sanctions programme.[105]

It is questionable whether the courts of EU Member States would adopt such a lenient stance if an arbitral ruling were to disregard EU sanctions. This is due to the fact that EU sanctions are part of EU public policy. This may be derived from the *Eco Swiss ruling* of the CJEU, in which it was stated that Article 81 of the EC Treaty must be considered a matter of public policy within the meaning of the New York Convention, which is a reason for the denial of recognition and execution of an arbitral result.[106] Similarly, the recognition and enforcement of a judgement in a Member State may be rejected if the defendant disregards an EU punishment. Clearly, this creates an incentive for arbitral tribunals situated in the EU to follow economic sanctions imposed by the EU in order to prevent subsequent annulment or, regardless of the venue of arbitration, to secure recognition and enforcement of the judgement inside the EU. The *Eco Swiss judgement* has been interpreted in such a way that the courts of the Member States are required to apply the overriding mandatory provisions of EU law ex officio when ruling on the annulment or recognition and enforcement of arbitral awards, even if the disputing parties do not raise their application.[107]

To consider EU sanctions as part of the public policy that permits denial of recognition and enforcement under the New York Convention has the effect of compelling arbitral tribunals to consider EU sanctions if the parties have assets in the EU. In such circumstances, resort to arbitration outside the EU is ineffective. If enforcement on EU territory does not pose a danger, EU sanctions ignored by an arbitral tribunal

[104] Antco Shipping Co., Ltd. v. Sidermar S.P.A., 417 F. Supp. 207 (S.D.N.Y. 1976).
[105] Silveira, supra n. 65 at 122.
[106] Eco Swiss, supra n. 78 ¶¶38–39.
[107] Kunda, supra n. 5 at 257–261.

outside the EU will have no further repercussions. It is commonly acknowledged that a forum's public policy may serve as a basis for annulment, as well as denial of recognition and execution, of an arbitral judgement. Regarding the public policy of nations outside of the forum, however, a control is lacking.[108] If recognition and enforcement are sought outside of the EU, the public policy exception is unlikely to be used on the basis that EU sanctions were violated.

VI. Conclusion

The EU implements UNSC sanctions and unilaterally imposes sanctions. Arbitral courts implement UNSC-imposed sanctions as part of international or transnational public policy. However, the issue is whether EU sanctions implemented unilaterally outside the UN framework are administered consistently in arbitration processes.

EU sanctions do not prohibit the establishment of the tribunal or the participation of arbitrators or legal counsels in arbitral procedures. Concerning the arbitrability of issues involving EU sanctions, uncertainties exist. Cases involving economic sanctions are arbitrable, according to a significant portion of the legal literature and arbitral rulings. However, German and Austrian court experience has deemed arbitration agreements unlawful if they provide a danger of evading the execution of overriding statutory rules. The purpose of this strategy is to secure the effectiveness of EU legislation. A consequence of this approach is that an arbitration agreement may be deemed invalid if it raises a danger that EU sanctions will be circumvented. However, the CJEU has not yet evaluated the legal validity of this method. The experience of Italian courts also questions the arbitrability of such legal conflicts, but on the basis of national law. Arbitral tribunals are not constrained by predetermined standards when considering the application of overriding obligatory measures, and hence have a great deal of latitude in applying sanctions, which creates confusion around the implementation of EU sanctions. Frequently, while executing UN sanctions, the EU exceeds its requirements. The 'hard core' of

[108] See ,Mayer, supra n. 40 at 471.

sanctions imposed by the UN Security Council will undoubtedly be enforced by arbitral courts, but this is not always the case for EU sanctions that exceed those imposed by the UNSC. Similar ambiguities pertain to unilateral sanctions enacted outside of the UN sanctions framework. EU sanctions are likely to be implemented when they are part of the *lex contractus*. If an EU punishment is extra-contractual, it may be granted effect if a close connection to the case can be shown.

The fact that the arbitration is taking place in an EU member state is not a determining factor for the implementation of EU sanctions. This is due to the fact that an arbitral tribunal does not give preference to the legislation of its seat state. It must be understood, however, that if an EU punishment is disregarded, the award is more likely to be overturned by the courts of the Member States, since EU sanctions represent the public policy of the Member States. Similarly, even though the seat of arbitration is situated outside the EU, if recognition and enforcement are sought in the EU, arbitrators may take this element into consideration to raise the likelihood of EU sanctions taking effect.

This means that, despite the considerable latitude arbitral tribunals have in implementing economic sanctions, the possibility for rejecting the consequences of a decision that disregards EU sanctions may be a motivation for arbitral tribunals to implement them. This may impede efforts to choose arbitral processes and arbitration locations outside the EU to avoid the imposition of unilaterally imposed EU economic sanctions.

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