Global Investigations Review

The Guide to Sanctions

Editors
Rachel Barnes, Anna Bradshaw, Paul Feldberg, David Mortlock,
Anahita Thoms and Nicholas Turner

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Publisher's Note

The Guide to Sanctions is published by Global Investigations Review – the online home for everyone who specialises in investigating and resolving suspected corporate wrongdoing.

As this book goes to press, sanctions are again in the news. Hong Kong is now a sanctioned territory, and the United Kingdom has been forced to banish Huawei from its telecommunications network as a result of US sanctions.

We live, it seems, in a new era for sanctions: more and more countries are using them, with greater creativity and (sometimes) selfishness.

And little wonder. They are powerful tools. They reach people who are otherwise beyond our jurisdiction; they can be imposed or changed at a stroke, without legislative scrutiny; and they are cheap! Others do all the heavy lifting once they are in place.

That heavy lifting is where this book comes in. The pullulation of sanctions has resulted in more and more day-to-day issues for business and their advisers.

Hitherto, no book has addressed this complicated picture in a structured way. The *Guide to Sanctions* corrects that by breaking down the main sanctions regimes and some of the practical problems they create in different spheres of activity.

For newcomers, it will provide an accessible introduction to the territory. For experienced practitioners, it will help them stress-test their own approach. And for those charged with running compliance programmes, it will help them do so better. Whoever you are, we are confident you will learn something new.

The guide is part of the GIR technical library, which has developed around the fabulous *Practitioner's Guide to Global Investigations* (now in its fourth edition). *The Practitioner's Guide* tracks the life cycle of any internal investigation, from discovery of a potential problem to its resolution, telling the reader what to think about at every stage, You should have both books in your library, as well as the other volumes in GIR's growing library – particularly our *Guide to Monitorships*.

We supply copies of all our guides to GIR subscribers, gratis, as part of their subscription. Non-subscribers can read an e-version at www.globalinvestigationsreview.com.

I would like to thank the editors of the *Guide to Sanctions* for shaping our vision (in particular Paul Feldberg, who suggested the idea), and the authors and my colleagues for the elan with which it has been brought to life.

We hope you find the book enjoyable and useful. And we welcome all suggestions on how to make it better. Please write to us at insight@globalinvestigationsreview.com.

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Foreword

I am pleased to welcome you to the *Global Investigations Review* guide to economic sanctions. In the following pages, you'll read in detail about sanctions programmes, best practices for sanctions compliance, enforcement cases, and the unique challenges created in corporate transactions and litigation by sanctions laws. This volume will be a helpful and important resource for anyone striving to maintain compliance and understand the consequences of economic sanctions.

As Under Secretary of the US Department of the Treasury's Office of Terrorism and Financial Intelligence from 2017 to 2019, I had the honour of leading incredibly dedicated professionals strategically implementing US sanctions, overseeing the United States' anti-money laundering (AML) programme, protecting the United States' financial system from abuse, and countering some of the greatest national security threats of our time. We did all of this while working closely with allies and partners around the world. Perhaps most importantly, we greatly appreciated our work with the private sector, providing guidance to financial institutions and companies regarding compliance with US law, typologies of illicit behaviour, and implementing mechanisms to protect the global financial system. Conversely, from my work in the private sector, I have appreciated efforts by the government to promote compliance through guidance and collaboration.

The compliance work conducted by the private sector is critically important to stopping the flow of funds to weapons proliferators such as North Korea and Iran, terrorist organisations like ISIS and Hezbollah, countering Russia's continued aggressive behaviour, targeting human rights violators and corrupt actors, and disrupting drug traffickers such as the Sinaloa Cartel. I strongly believe that we are much more effective in protecting our financial system when government works collaboratively with the private sector.

Accordingly, one of my top priorities as Under Secretary was to provide the private sector with the tools and information necessary to maintain compliance with sanctions and AML laws and to play its role in the fight against illicit finance. The Treasury has provided increasingly detailed guidance on compliance in the form of advisories, hundreds of FAQs, press

releases announcing actions that detail typologies, and the recent OFAC framework to guide companies on the design of their sanctions compliance programmes. Advisories range from detailed guidance from OFAC and our interagency partners for the maritime, energy and insurance sectors, to sanctions press releases that provided greater detail on the means that illicit actors use to try to exploit the financial system, to FinCEN advisories providing typologies relating to a wide range of illicit activity.

Whether it was for the Iran, North Korea or Venezuela programmes, or in connection with human rights abuses and corrupt actors around the globe, the US Treasury has been dedicated to educating the private sector so that they in turn can further protect themselves. The objective is not only to disrupt illicit activity but also to provide greater confidence in the integrity of the financial system, so we can likewise open up new opportunities and access to financial services across the globe. That guidance is particularly important today with the increased use of sanctions and other economic measures across a broader spectrum of jurisdictions and programmes.

As you read this publication, I encourage you to notice the array of guidance, authorities and other materials provided by the US Treasury and other authorities cited and discussed by the authors. This material, provided first-hand from those charged with writing and enforcing sanctions laws, gives us a critical understanding of these laws and how the private sector should respond to them. By understanding and using that guidance, private companies can help to protect US and global financial systems against nefarious actors, as well as avoid unwanted enforcement actions.

Thank you for your interest in these subjects, your dedication to understanding this important area of the law, and your efforts to protect the financial system from abuse.

Sigal Mandelker
Former Under Secretary of the Treasury for Terrorism and Financial Intelligence
July 2020

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Key Sanctions Issues in Civil Litigation and Arbitration

Claire A DeLelle and Nicole Erb[1]

Economic sanctions issues can create added complexities for parties who wish to engage in litigation or arbitration or who find themselves defendants or respondents in such proceedings. This chapter explores the judicial challenges available to parties who become sanctioned, how economic sanctions can impact a party's choice of counsel, how economic sanctions issues arise in litigation and arbitration, and issues that parties should be aware of to minimize their risks of becoming embroiled in sanctions-related adversarial proceedings.

While this chapter focuses primarily on the role of US economic sanctions in litigation and arbitration, the sanctions regimes of many other jurisdictions and international bodies, such as the European Union and its Member States, Australia, Canada and the United Nations, may also pose unique issues in disputes, and merit careful consideration where implicated.

Key sanctions issues in litigation

Can I represent a sanctioned party in a US litigation?

Authorisations for provision of legal services

All current US sanctions programmes authorise the legal representation of sanctioned parties as plaintiffs or defendants in US litigation (as well as US administrative proceedings) by 'general licences'.[2] General licences, published on the website of the US Department of the Treasury's Office of Foreign Assets Control (OFAC) or in sanctions regulations, authorise

1 Claire A DeLelle and Nicole Erb are partners at White & Case LLP. The authors wish to thank Genevra Forwood, Reuben J Sequeira, Alana Toabe, Kyle Levenberg and Matthias Vangenechten for their valuable contributions to this chapter.

2 Arguably, OFAC would violate the Fifth Amendment of the US Constitution if designated parties named as defendants in US litigation were prohibited from obtaining counsel due to US sanctions prohibitions. See, e.g., *American Airways Charters Inc. v. Regan*, 746 F.2d 865, 867, 875 (D.C. Cir. 1984) (finding that OFAC lacked constitutional authority to terminate the sanctioned defendant's attorney–client relationship under sanctions law).

certain dealings that are otherwise prohibited under the applicable sanctions.[3] General licences authorising legal representation of sanctioned parties in US litigation do not authorise all types of dealings that might arise in the course of authorised legal representation. For example, a specific licence is required to execute a settlement agreement or enforce any lien, judgment, arbitral award, decree or other order that would transfer or otherwise alter or affect blocked property or interests in property.[4] Additionally, many general licences, particularly those involving payments for authorised legal services, require submission of initial and periodic reports to OFAC.[5]

Legal services not expressly covered by a general licence can only proceed through a specific licence. OFAC has the discretion to issue specific licences authorising an otherwise prohibited dealing. Importantly, a specific licence should be secured before entering into any engagement or fee agreement for legal representation that is not otherwise authorised, as OFAC may deem agreements concluded prior to authorisation as sanctions violations. If there are arguments that the legal representation is covered by a general licence but there is doubt in that regard, the party wishing to engage in the representation can request an advisory opinion from OFAC that no specific licence is required or, if the representation is prohibited, that OFAC issue a specific licence.

Payment of legal fees by sanctioned parties

A separate licence may be required for payment of legal fees if the client is blocked or otherwise subject to sanctions affecting its assets and debt obligations. Many sanctions programmes offer general licences for payment of legal fees for authorised representation from non-blocked funds located outside the United States,[6] whereas other programmes require the receipt of a specific licence for any payment relating to legal fees.[7] A specific licence is generally required if the payment will originate from blocked funds and the payment involves a US person or other US nexus.[8] OFAC will consider issuing a specific licence, case by case, for payment of fees from blocked funds if those fees relate to challenging the client's designation.[9] If OFAC

3 See, e.g., 31 C.F.R. § 515.512 (Cuban Assets Control Regulations); 31 C.F.R. § 544.507 (Weapons of Mass Destruction Proliferators Sanctions Regulations); 31 C.F.R. § 560.525 (Iranian Transactions and Sanctions Regulations).

4 See, e.g., 31 C.F.R. § 510.507(d) (North Korea Sanctions Regulations).

5 See, e.g., 31 C.F.R. § 541.508 (Zimbabwe Sanctions Regulations, requiring an initial submission of a letter of engagement and explanatory letter prior to receipt of payment for authorized legal services, and additional quarterly reports).

6 See, e.g., 31 C.F.R. § 542.508 (Syrian Sanctions Regulations); 31 C.F.R. § 594.517 (Global Terrorism Sanctions Regulations. 'Payments from funds originating outside the United States and the formation of legal defense funds authorized'); 31 C.F.R. § 597.513 (Foreign Terrorist Organizations Sanctions Regulations, 'Payments from funds originating outside the United States and the formation of legal defense funds authorized').

7 See, e.g., 31 C.F.R. § 551.506 (Somalia Sanctions Regulations).

8 A US nexus generally exists when an activity involves a US person or touches US jurisdiction. For example, a US nexus could be established through the involvement of a US attorney or law firm, payment through a US financial institution or in US dollars, or trade of US-origin goods or services

9 See, e.g., Note 1 to 31 C.F.R. § 510.507; Note to 31 C.F.R. § 570.506; Note to 31 C.F.R. § 591.506.

authorises this use of blocked funds, it may nonetheless limit the amount of blocked funds that may be used for those fees.[10]

Many general licences for payment of authorised legal services state that US persons receiving the payment do not need to obtain separate, specific authorisation to contract for services or receive payment for services that are ordinarily incidental to the authorised payment or services, such as contracts for expert witnesses and private investigators.[11]

EU licensing requirements

EU sanctions do not impose a formal requirement for attorneys to obtain a licence or other authorisation to represent sanctioned parties. However, the receipt of payment requires a licence for clients subject to an EU asset freeze. EU asset freeze sanctions typically provide licensing grounds for Member State authorities to consider applications for exemption that would authorise payment for legal representation and other related fees. Moreover, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to counsel and the right to a determination of one's rights and obligations before a neutral tribunal to all legal and natural persons.[12]

Can sanctions designations be challenged in US courts?

Challenging a party's designation or sanctions law or regulations

Persons subject to sanctions restrictions and other interested parties can seek to overturn designations, asset freezes or sanctions provisions through litigation. Cases challenging OFAC actions, in particular, can be difficult to win because US courts are extremely deferential to OFAC given that OFAC operates 'in an area at the intersection of national security, foreign

10 See OFAC, 'Guidance on the Release of Limited Amounts of Blocked Funds for Payment of Legal Fees and Costs Incurred in Challenging the Blocking of U.S. Persons in Administrative or Civil Proceedings' (23 July 2010), at https://www.treasury.gov/resource-center/sanctions/Documents/legal_fee_guide.pdf.

11 See, e.g., 31 C.F.R. § 510.507(c) (North Korea Sanctions Regulations); Note 1 to 31 C.F.R. § 515.512 (Cuban Assets Control Regulations); Note 1 to 31 C.F.R. § 542.508 (Syrian Sanctions Regulations); Note to 31 C.F.R. § 558.507 (South Sudan Sanctions Regulations). But see the Narcotics Trafficking Sanctions Regulations and WMD Proliferators Sanctions Regulations, which do not authorise such ordinarily incidental services. 31 C.F.R. § 536.506; 31 C.F.R. § 544.507.

12 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Article 6, 213 U.N.T.S. 221.

policy, and administrative law'.[13] Although they are rarely successful, plaintiffs can challenge OFAC action by asserting many claims, including that:

- designation to the List of Specially Designated Nationals and Blocked Persons (the SDN List) violates the Fifth Amendment Due Process Clause;[14]
- comprehensive country sanctions violate the Fifth Amendment right to travel;[15]
- asset freezes are unreasonable Fourth Amendment seizures[16] or Fifth Amendment takings;[17]
- the designation authority for provision of material support violates the First Amendment;[18]

13 See *Empresa Cubana Exportadora de Alimentos y Productos Varios v. United States Dep't of Treasury*, 606 F. Supp. 2d 59, 68 (D.D.C. 2009) (quoting *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734, 375 U.S. App. D.C. 93 (D.C. Cir. 2007)) (regarding deference under the Administrative Procedure Act); for deference in Constitutional review, see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 5, 33, 34 (2010) [*Humanitarian Law Project*] (stating that it is 'vital' that courts defer to OFAC's evaluation of facts surrounding designations, given national security and foreign policy concerns).

14 See, e.g., *Zevallos v. Obama*, 793 F.3d 106, 116 (D.C. Cir. Jul. 10, 2015) (finding that the 'specially designated narcotics trafficking kingpin' plaintiff's procedural and substantive due process assertions regarding his designation were 'wrong on all counts'); *Al-Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, 686 F.3d 965, 984 to 990 (9th Cir. 2012) [*AHIF III*] (holding that OFAC's violation of plaintiff's due process rights in failing to provide an adequate reason for its designation investigation and failure to pursue potential mitigation measures were harmless).

15 See, e.g., *Regan v. Wald*, 468 U.S. 222, 243 (1984) [*Regan*] (holding that the travel-related restrictions under the Trading With the Enemy Act 1917 did not violate the respondents' right to travel protected by the Due Process Clause of the Fifth Amendment); *Clancy v. Geithner*, 559 F.3d 595, 604 to 605 (7th Cir. Mar. 11, 2009) (applying *Regan*, holding OFAC regulations implementing sanctions prohibiting travel to Iraq did not violate the plaintiff's Fifth Amendment rights).

16 See, e.g., *AHIF III*, 686 F.3d 965 (holding that OFAC was required to obtain a warrant before issuing a blocking order under the International Emergency Economic Powers Act [IEEPA] to freeze, pending an investigation, the assets of the US non-profit entity located within the United States); *KindHearts for Charitable Humanitarian v. Geithner*, 710 F. Supp. 2d 637, 646, 652 (N.D. Ohio 2010) [*KindHearts II*] (remedying an unconstitutional seizure by finding *post hoc* that OFAC may show probable cause for a warrantless blocking if 'at the time of the original seizure, it had probable cause – that is, a reasonable ground – to believe that [the blocked party], specifically, was subject to designation under [an OFAC authority]'); *KindHearts for Charitable Human. Devel. v. Geithner*, 647 F. Supp. 2d 857, 882 to 884 (N.D. Ohio 2009) [*KindHearts I*] (holding that an OFAC blocking pending investigation does not meet the special needs exception to the Fourth Amendment's warrant and probable cause requirements, as an extensive intrusion on private interest).

17 See, e.g., holdings that OFAC asset freezes are not takings under the Fifth Amendment because frozen assets do not vest in the government in *Tran Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981) cert. denied *sub nom.*, *Tran Qui Than v. Regan*, 459 U.S. 1069 (1982) (relating to the plaintiff's application for a licence to unblock funds owed to a sanctioned country bank); *D.C. Precision, Inc. v. United States*, 73 F. Supp. 2d 338, 343 n.1 (S.D.N.Y. 1999) (relating to plaintiff US entity's assets frozen at a blocked bank); *Hoang Ngoc Can v. United States*, 820 F. Supp. 106, 109 (S.D.N.Y. 1993) (relating to the plaintiff's claim to blocked assets of the former Republic of South Vietnam as alleged successor-in-interest).

18 See, e.g., *Humanitarian Law Project*, 561 U.S. at 37 to 39 (holding no free speech violation due to potential for the designated terrorist PKK to misuse plaintiff's proposed services to further terrorism); *AHIF III*, 686 F.3d at 995 and 1001.

- OFAC's authorising statute or rules and regulations are unconstitutionally vague;[19] or
- designations or asset freezes are arbitrary and capricious.[20]

Challenging OFAC blocking orders

In *Al Haramain Islamic Foundation Inc v. United States Dep't of the Treasury*, an SDN US non-profit entity successfully argued that OFAC needed a warrant to block its assets pending investigation (pre-designation) under Executive Order 13224 and could not rely on the 'special needs' exception or 'general reasonableness' test of the Fourth Amendment.[21] The Ninth Circuit reasoned that OFAC's national security aims were not rendered impracticable by a warrant requirement prior to blocking the plaintiff's assets, given the domestic plaintiff's strong interest in freedom from a blocking order's broad seizure.[22] The Court carefully limited its opinion to clarify that it did 'not address the requirements under the Fourth Amendment for other situations [beyond blocking a US person's assets pending investigation] including, for example, designations of [non-US] entities or designations [of domestic entities] by executive order' as opposed to pending investigation.[23] Despite the favourable ruling, the plaintiff received no relief as the lower court ruled the violation was harmless on remand.[24]

In *Zarmach Oil Services v. United States Dep't of the Treasury*, the US District Court for the District of Columbia (the federal trial court in Washington, DC) dismissed the plaintiff's claim that OFAC's refusal to grant an unblocking licence to the plaintiff was arbitrary and capricious and in excess of its statutory jurisdiction.[25] Even though the sanctioned party at issue in *Zarmach* only had an indirect future or contingent interest in the relevant funds[26] – which the plaintiff argued was extinguished when a third party satisfied the contract under which the funds were originally owed to the sanctioned party – the Court deferred to OFAC's determination that unblocking would be inconsistent with OFAC policy.[27]

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19 See, e.g., *KindHearts I*, 647 F. Supp. at 893 to 897, 893 n.15 (dismissing various claims that IEEPA and Executive Order 13224 both as applied and facially are vague, but noting that as applied, OFAC's failure to follow the Fourth Amendment in blocking *KindHearts* pending investigation made OFAC's authority under IEEPA and the executive order unconstitutionally vague).

20 See, e.g., *Fulmen Co. v. Office of Foreign Assets Control*, 2020 U.S. Dist. LEXIS 58308, *12 to *25, (D.D.C. Mar. 31, 2020) (holding that OFAC's rejection of the SDN plaintiff's delisting request was not arbitrary and capricious, given the substantial record and the 'extreme deference' owed OFAC given national security concerns. Of note, the plaintiff succeeded in securing delisting in the European Union.).

21 See generally *AHIF III*, 686 F.3d 965.

22 See *AHIF III*, 686 F.3d at 992 to 993 (commenting, however, that OFAC may seize/block assets 'initially pursuant to an emergency exception to the warrant requirement . . . or pursuant to a carefully circumscribed warrant' [internal citations omitted]).

23 See id., at 970.

24 See *Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, 2012 U.S. Dist. LEXIS 175759, *18 (D. Or. Dec. 12, 2012) [hereinafter *AHIF IV*].

25 *Zarmach Oil Servs., Inc. v. United States Dep't of the Treasury*, 750 F. Supp. 2d 150 (D.D.C. 2010).

26 On contingent interests, see also *Calderon-Cardona v. BNY Mellon*, 770 F.3d 993, 1002, (2d Cir. 2014) ('In the context of a blocked transaction, . . . the only entity with a property interest in [a stopped Electronic Funds Transfer (ETF)] is the entity that passed the EFT on to the bank where it presently rests'.).

27 See *Zarmach Oil Servs., Inc*, 750 F. Supp. 2d at 156, 158 to 159.

First Amendment challenges to provision of 'material support' to designated persons

Interested persons can raise free speech and association challenges regarding the prohibitions on non-designated party dealings with designated parties. US courts have examined these types of challenges in the context of dealings with persons designated as terrorists or terrorist organisations.[28] A seminal US Supreme Court case on this topic is *Holder v. Humanitarian Law Project* (*HLP*).[29] *HLP* involved a free speech and association challenge to the Anti-Terrorism Act's criminal prohibition on the provision of material support to designated terrorists. The US Supreme Court examined whether the plaintiff's proposed activities (i.e., providing legal training and assistance on international humanitarian law to the designated terrorist Kurdistan Workers' Party) would further terrorism. The Court held that the prohibition,[30] as applied to the plaintiff's activities, did not violate the plaintiff's First Amendment rights, because the government adequately substantiated its determination that prohibition of the plaintiff's activities was necessary to serve the government's urgent objective of preventing terrorism.[31] The specific planned training and services bore a real risk of furthering terrorism, even though the supporters meant to promote only the group's non-violent ends.[32] While criticised as overly broad and unsupported,[33] the Court did limit *HLP*, stating that (1) future targeting of speech or advocacy as material support may not survive First Amendment scrutiny, and (2) the holding does not suggest that 'Congress could extend the same prohibition on material support at issue here to domestic organizations'.[34]

Later cases that apply *HLP*'s standard highlight the limited nature of its holding. For example, in *Al Haramain Islamic Foundation, Inc*, a US non-profit entity, the Multicultural Association of Southern Oregon (MCASO) successfully argued that OFAC's prohibition on providing services to AHIF-Oregon – an OFAC-designated terrorist organisation – violated MCASO's First Amendment right as applied in MCASO's case.[35] MCASO's proposed activities concerned a blocked domestic branch of an international organisation, rather than a non-US terrorist organisation as in *HLP*, and there was little evidence that the 'pure-speech activities proposed by MCASO' (activities such as co-sponsoring events in the United States) would aid the terrorist purposes of the international parent organisation.[36]

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28 See, e.g., Exec. Order No. 13884, 3 C.F.R. 13884, § 1(b)(i) (5 August 2019), authorising the property blocking of persons the Secretary of the Treasury, in consultation with the Secretary of State, determines 'have materially assisted, sponsored, or provided financial, material or technological support for, or goods or services to or in support of' SDNs blocked under that Order.

29 561 U.S. 1 (2010).

30 18 U.S.C. § 2339B.

31 See *Humanitarian Law Project*, 561 U.S. at 30, 33 to 36.

32 id.

33 See Majorie Heins, 'The Supreme Court and Political Speech in the 21st Century: The Implications of *Holder v. Humanitarian Law Project*', 76 *Alb. L. Rev*. 561, 596 (2013) ('Applying this "more demanding standard," Chief Justice Roberts did not, however, make any real effort to determine whether banning the challenged aspects of "material support" would in fact accomplish the government's undisputed and urgent interest in fighting terrorism, no less that it was a narrowly tailored means of doing so' (citing *Humanitarian Law Project*, 561 U.S. at 45 to 49 (Breyer, J dissenting)).

34 See *Humanitarian Law Project*, 561 U.S. at 39.

35 See *AHIF III*, 686 F.3d 965, 1001 (9th Cir. Feb. 27, 2012) (note that the court in *AHIF* determined that the HLP test called for strict scrutiny, rather than the elevated scrutiny discussed in *Humanitarian Law Project*).

36 See id.

EU challenges to designations

Much like US court challenges to OFAC action and regulations, the Court of Justice of the European Union (CJEU) has heard a number of cases challenging EU sanctions designations. In particular, the *Kadi* cases have proven instrumental in shaping the EU sanctions framework by increasing the judicial scrutiny on European Council decisions imposing asset freezes. Following the *Kadi* precedent, the Council must provide 'individual, specific and concrete' grounds to justify each asset freeze. However, actions for asset freeze annulment have not necessarily provided substantial assistance to sanctioned plaintiffs, as the Council regularly relists those plaintiffs, providing additional grounds for their relisting. This risk of redesignation, with the lengthy CJEU procedures, may have a chilling effect on sanctioned parties challenging EU designations.

What types of cases are filed in US courts against sanctioned parties or that involve sanctions issues?

Enforcement of arbitral awards

Sanctioned party defendants face many typical causes of action in US litigation, such as breach of contract claims. But one overarching claim is for the enforcement of awards or judgments against the assets of sanctioned parties.[37] As seen in the 2019 decision *Crystallex International Corp v. Bolivarian Republic of Venezuela*, sanctioned governments and state-owned entities may still face attachment and execution litigation regarding their US assets,[38] despite the imposition of sanctions affecting those assets, under the commercial activity exception of the Foreign Sovereign Immunity Act (FSIA).[39]

In *Crystallex*, the Third Circuit held that because state-owned oil company Petróleos de Venezuela (PdVSA) was the alter ego of Venezuela, Crystallex could attach PdVSA's shares in its Delaware subsidiary PDV Holding, Inc (PDVH) in Crystallex's efforts to satisfy its unpaid arbitral award against Venezuela.[40] In evidencing the shares' continued use in commerce, the court cited the use of the shares by the state-owned alter ego to run PDVH 'as an owner, to appoint directors, approve contracts, and to pledge PDVH's debts for its own short-term debt'.[41] The Third Circuit acknowledged, however, that Crystallex could not succeed in executing upon the shares unless and until Crystallex obtained a specific licence from OFAC, because OFAC regulations prohibited any dealing in PdVSA's property.[42]

37 See, e.g., *Calderon-Cardona v. BNY Mellon*, 770 F.3d 993 (2d Cir. 2014) (petitioning to attach blocked funds allegedly belonging to the government of North Korea in satisfaction of a judgment under the Terrorism Risk Insurance Act of 2002).

38 See Exec. Order No. 13850, 3 C.F.R. 13850 (Nov. 1, 2018) (blocking all property and interests in property of Petróleos de Venezuela [PdVSA] and entities owned 50 per cent or greater by PdVSA and other blocked persons – e.g., PDV Holding, Inc [PDVH]). Note that Exec. Order No. 13884, 3 C.F.R. 13884 (Aug. 5, 2019) blocking all property and interests in property of the 'Government of Venezuela,' which is defined to include subsidiaries such as PDVH, was not issued as of the Third Circuit's 29 July 2019 decision.

39 See *Crystallex Int'l Corp. v. Bolivarian Republic of Venez. (In re Pertroleos de Venezuela, S.A.)*, 932 F.3d 126, 150 to 152 (3d Cir. 2019) cert. denied *sub nom.*, *Bolivarian Republic of Venez. v. Crystallex Int'l Corp.*, No. 19-1049, 2020 U.S. LEXIS 2681 (U.S. May 18, 2020).

40 See id., at 151.

41 id.

42 id.

Enforcement of terrorism-related judgments

Plaintiffs who obtain terrorism-related judgments against designated state sponsors of terrorism (typically default judgments where the state does not appear to defend) may seek to enforce their judgments against any assets of the state held in the United States by the state, its agencies or instrumentalities, or third parties. In addition to the exceptions to attachment and execution immunity in the FSIA,[43] plaintiffs have the benefit of using the Terrorism Risk Insurance Act to try to obtain turnover of any assets of the state or its agencies or instrumentalities that have been blocked under US sanctions laws and are held by third parties (e.g., financial institutions). Iran has appeared in several such actions to defend its interests in assets that are the subject of this type of enforcement.[44]

Challenges to OFAC's enforcement authority

Parties subject to OFAC enforcement actions for alleged sanctions violations may choose to challenge that enforcement on US constitutional or Administrative Procedure Act grounds.[45] One example from 2019 is *Exxon Mobil Corp v. Mnuchin*.[46] *Exxon* sets important precedent for parties trying to navigate the many ambiguities in US sanctions programmes. The case involved Exxon's challenge of OFAC's imposition of a US$2 million civil penalty against Exxon and certain of its subsidiaries for allegedly violating sanctions. OFAC found that

43 28 U.S.C. § 1610.

44 In one such case, Iran's central bank, Bank Markazi, challenged the constitutionality of new legislation that aided plaintiffs enforce their terrorism judgments. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). During the pendency of the enforcement proceedings in the lower courts, the US Congress issued legislation (22 U.S.C. § 8772) that made the specific assets at issue available to the *Peterson* plaintiffs to satisfy their default judgment against Iran. On the merits, the Supreme Court rejected Bank Markazi's arguments, holding that the new legislation was a valid 'exercise of congressional authority regarding foreign affairs' and not a violation of separation of powers. id. at 1314, 1328. Iran has brought a case against the United States under the 1955 Treaty of Amity before the International Court of Justice, challenging a number of measures, including the *Bank Markazi* decision. See 'Report of the International Court of Justice 1 August 2018-31 July 2019', U.N. GAOR Supp. No. 4, at paras. 166 to 175, U.N. Doc. A/74/4 (2019). In another case, *Rubin v. Islamic Republic of Iran*, the court found in Iran's favour, concluding that the plaintiffs had no right under the Foreign Sovereign Immunity Act's immunity provisions to enforce their default judgments against Iranian antiquities on loan to a US university. 138 S. Ct. 816, 821 (Feb. 21, 2018).

45 See, e.g., *Epsilon Elecs., Inc. v. Dep't of Treasury*, 857 F.3d 913, 929 (D.C. Cir. 2017) (remanding a US$4.07 million penalty notice for recalculation by OFAC given the court's holding that five of 39 sanctions violation findings were arbitrary and capricious. OFAC failed to justify its conclusion that the plaintiff had reason to know that the five relevant exports were 'destined for Iran' when sent to a Dubai distributor); id., at 932 to 934 (Silberman, J dissenting) (arguing that all 39 violation findings were arbitrary and capricious given that OFAC's 'mystifying' final agency decision 'fudged the answer to the crucial question' of whether the goods needed to actually arrive in Iran to violate sanctions, relying on ambiguity in 31 C.F.R. § 560.204 rather than 'reasoned decision-making'); OFAC, Enforcement Information for 13 September 2018: 'Epsilon Electronics, Inc. Settles Potential Civil Liability for Alleged Violations of the Iranian Transactions and Sanctions Regulations and Related Claims' (Sept. 13, 2018) (settling Epsilon's remanded penalty at US$1.5 million), at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20180913_epsilon.pdf. See also *Clancy v. Geithner*, 559 F.3d 595, 596 (7th Cir. Mar. 11, 2009) (holding that a US$8,000 fine for travel to Iraq in violation of sanctions provided adequate opportunity for response and did not violate Fifth Amendment due process).

46 2019 U.S. Dist. LEXIS 222825 (N.D. Tex., Dec. 31, 2019).

Exxon violated the Ukraine-Related Sanctions Regulations by dealing with SDN Igor Sechin when he signed a contract with Exxon in his capacity as president of Rosneft OAO, an unblocked entity. A federal court in Texas vacated the penalty, ruling that OFAC's action violated the Fifth Amendment as OFAC had failed to provide fair notice in its regulations or guidance that it viewed this conduct as illegal.[47]

The court concluded that OFAC failed to state 'with ascertainable certainty what is meant by the standard it has promulgated'.[48] The regulations and public guidance from OFAC and other government sources did not 'fairly address' that a US entity receives a prohibited service from an SDN when the SDN 'enabl[es] the US person to contract with a non-blocked entity'.[49] Notably, although the court considered Exxon's failure to seek OFAC's guidance a relevant factor, it found this was not dispositive because OFAC ultimately bears the burden of conveying its interpretation to the public.[50] At the time of writing, the *Exxon* ruling remains subject to a possible appeal to the US Court of Appeals for the Fifth Circuit by OFAC.

Contract disputes

Both sanctioned parties and interested parties (e.g., contractual counterparties) face breach of contract disputes when the United States or the European Union imposes sanctions that prevent contract completion. Contract defendants may invoke *force majeure* defences (which sometimes expressly cover the imposition of sanctions), contract illegality, compliance with contract representations and frustration, among other things. For example, a California State court held in *Kashani v. Tsann Kuen China Enterprise Co* that the defendants' cessation of manufacturing under a contract requiring shipment of US-manufactured computers to Iran did not constitute a breach of contract, because the contract was unenforceable as it was illegal under sanctions and contrary to public policy.[51] Additionally, the court rejected the plaintiffs' assertion that the potential availability of specific licences gave the contract legal effect, because the regulations indicated that a specific licence was a prerequisite to entering into a contract that would otherwise violate sanctions.[52] In *Lamesa Investments Ltd v Cynergy Bank Ltd*, the English High Court excused the defendant debtor from liability resulting from failure to pay its sanctioned party lender because its Facility Agreement contained a

47 See id., at *2; OFAC, Enforcement Information for 20 July 2017: ExxonMobil Corporation Assessed a Penalty for Violating the Ukraine-Related Sanctions Regulations, at https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170720_exxonmobil.pdf.

48 *Exxon Mobil Corp*., 2019 U.S. Dist. LEXIS 222825, at *15 (quoting *ExxonMobil Pipeline Co. v. United States DOT*, 867 F.3d 564, 578 (5th Cir. 2017) (alterations in *ExxonMobil*) (quoting *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976)).

49 id., at *25 to 26 (citing *Emp'r Sols. Staffing Grp II, LLC v. Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 489 (5th Cir. 2016)).

50 id., at *33.

51 See *Kashani v. Tsann Kuen China Enterprise Co*., 118 Cal. App. 4th 531, 537 (Cal. Ct. App. May 11, 2004).

52 See id., at 550.

requirement that performance should comply with 'mandatory provisions of law', which the Court interpreted to include compliance with the applicable US sanctions.[53]

The EU Blocking Regulation, which prohibits EU persons from complying with US sanctions on Iran and Cuba (akin to an anti-boycott rule), may pose challenges to successfully invoking US sanctions as a defence to breach of contract claims before courts in EU jurisdictions.[54] The Blocking Regulation affords EU persons protection from enforcement of judgments relating to those sanctions in the European Union and provides the right to recover legal costs and damages caused by actions based on, or resulting from, the sanctions.[55]

Disputes involving the Blocking Regulation have increased in EU national courts. In one EU contract case, a Dutch national court considered whether a Dutch company could invoke *force majeure* to terminate a software distribution contract with Cuban state-owned entities after a US investment firm purchased the Dutch company, thereby subjecting it to the prohibitions of US sanctions against Cuba.[56] In the spirit of the Blocking Regulation, the court held that the termination was not fair and reasonable, and prevented the Dutch company from invoking a US sanctions claim of *force majeure* to avoid the contract, despite the risk of OFAC enforcement.[57]

Notably, the CJEU received a request in 2020 to issue a preliminary ruling in a German case addressing the Blocking Regulation and the effect of US secondary sanctions on a contract between a German telecommunications provider and the EU branch of an Iranian bank.[58] This ruling is expected to have a significant effect on both EU law arbitrations and cases pending before national EU courts, which are also considering how US secondary sanctions will be viewed under the Blocking Regulation.

US courts have yet to consider the conflict of law posed by the EU and US regulations. At the time of writing, the authors are aware of only one reported US case substantively dealing with the Blocking Regulation and US sanctions. In *United States v. Brodie*, the Eastern District of Pennsylvania rejected a motion by EU, UK and Canadian criminal defendants to dismiss their sanctions-related indictment on grounds of foreign sovereign compulsion and comity – namely, that the EU, UK and Canadian blocking regulations compelled defendants' exports to Cuba in contravention of US Cuba sanctions.[59]

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53 [2019] EWHC 1877 (Comm) (12 September 2019); see also Charles Balmain, Raif Hassan, and Cecily Higham, 'Sanctioned default? The English High Court considers the effect of foreign illegality on English obligations', White & Case (7 October 2019), at https://www.whitecase.com/publications/alert/sanctioned-default-english-high-court-considers-effect-foreign-illegality.

54 See Council Regulation (EC) No. 2271/96 of 22 November 1996, Protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, Article 5 (EU persons referenced in Article 11 shall not comply with the sanctions, with limited exceptions), Annex, 1996 O.J. (L 309) 1. Note that Canada, Mexico and the United Kingdom maintain similar laws.

55 See id., at Articles 4 and 6 and Annex.

56 Rb. Den Haag 25 June 2019, ECLI:NL:RBDHA:2019:6301 (PAM International NV/Exact Software Nederland BV).

57 id.

58 Case C-124/20, *Bank Melli Iran v. Telekom Deutschland GmbH*, request for a preliminary ruling from the Hanseatisches Oberlandesgericht Hamburg, Germany (5 March 2020).

59 See, generally, *United States v. Brodie*, 174 F. Supp. 2d 294 (E.D. Pa. 2001).

Helms-Burton private right of action

Title III of the Helms-Burton Act provides a new private right of action in the sanctions realm. Although it was enacted in 1996, the Act was partially suspended until 2019, when the current US Administration lifted the suspension of the private right of action.[60] Title III enables US nationals to file suit in a US federal court against any third party they allege is 'trafficking' in their property confiscated by the Cuban government after the Cuban Revolution.[61] As Title III's definition of 'trafficking' is quite broad – and the Act makes provision for treble damages in some cases – an initial wave of plaintiffs rushed to file soon after the right of action became available on 2 May 2019. However, Title III plaintiffs face a host of challenges, given the legislation's complex and varied requirements for valid suits.[62]

For example, in May 2020, the US District Court for the Southern District of Florida for a second time dismissed *Gonzalez v. Amazon* – this time with prejudice – for failure to allege an actionable ownership interest in the relevant property (namely agricultural real estate in Cuba owned by the plaintiff's grandfather at the time of confiscation in 1959).[63] Gonzalez failed to allege that he inherited the property before 1996, thereby falling into one of Title III's many restrictions (specifically for property confiscated before 12 March 1996, the Helms-Burton Act's enactment date), a plaintiff must have acquired ownership and have been a US national before that date).[64] The Court initially dismissed Gonzalez's claim in March 2020 for failure to allege an actionable ownership interest and failure to allege that defendants knowingly and intentionally trafficked in the agricultural property.[65] As at the time of writing, the plaintiff's appeal is pending before the Eleventh Circuit.[66] Although *Gonzalez* sets persuasive precedent that ownership is dispositive, in the second dismissal order the court did not rule on the more contentious issue of whether the plaintiff alleged sufficient scienter for the trafficking claim.

Gonzalez may lead a trend in Title III cases, as Florida's Southern District is currently reviewing amended complaints from several other cases it initially dismissed, albeit to reconsider errors of fact and law that 'led the Court to incorrectly dismiss the instant action[s] with prejudice'.[67] Current Title III defendants are pursuing motions to dismiss on various grounds, such as subject matter and personal jurisdiction, standing and failure to satisfy Title III requirements. The pending cases (approximately 30), mostly in Florida's Southern

60 Michael R Pompeo, Secretary of State, Remarks to the Press (17 April 2019), at https://www.state.gov/remarks-to-the-press-11/.

61 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021 to 6091 (2018). The Helms-Burton Act is also known as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.

62 Nicole Erb, Claire A DeLelle, et al., 'US Lawsuits Commence against Non-US Persons for Confiscated Cuban Property, EU Raises Concerns', White & Case (7 May 2019), at https://www.whitecase.com/publications/alert/us-lawsuits-commence-against-non-us-persons-confiscated-cuban-property-eu-raises.

63 *Gonzalez v. Amazon.com Inc.*, 2020 U.S. Dist. LEXIS 82296, at *4 (S.D. Fla. May 11, 2020).

64 See 22 U.S.C. § 6082(a)(4)(B); *Gonzalez*, 2020 U.S. Dist. LEXIS 82296, at *4 to *7.

65 See *Gonzalez v. Amazon.com Inc.*, 2020 U.S. Dist. LEXIS 41718 (S.D. Fla. Mar. 11, 2020).

66 See *Gonzalez*, 2020 U.S. Dist. LEXIS 82296 appeal docketed, No. 20-12113 (11th Cir. Jun. 9, 2020).

67 See *Havana Docks Corp. v. Norwegian Cruise Line Holdings, Ltd.*, 2020 U.S. Dist. LEXIS 68314, at *40 (S.D. Fla., Apr. 14, 2020); *Havana Docks Corp. v. MSC Cruises SA Co.*, 2020 U.S. Dist. LEXIS 68313, at *40 (S.D. Fla., Apr 17 2020); *Havana Docks Corp. v. Royal Caribbean Cruises, Ltd.*, 2020 U.S. Dist. LEXIS 67682, at *33 to *34 (S.D. Fla., Apr. 17, 2020).

District, largely feature claims regarding commercial activities of US and EU defendants that allegedly benefit in some way from the plaintiffs' purported confiscated property.[68] The defendants are principally travel and vacation industry players – cruise lines, hotel companies and airlines – plus financial institutions and entities in the petroleum, mining, shipping, renewable energy and alcohol industries. Most plaintiffs are individuals and families asserting claims relating to real estate such as the Port of Havana, José Martí International Airport and various resort properties.

Even if future Title III claims are successful, plaintiffs may face difficulty in enforcing awards outside the United States. The European Union, United Kingdom and Canada have all expressed opposition to Title III suits against their nationals, which they consider to be extraterritorial applications of unilateral Cuba-related measures that are contrary to international law. Both Canada's and the EU's blocking regulations target the Helms-Burton Act, and may protect defendants from Title III award enforcement in those jurisdictions.

Terrorism claims premised on allegations that defendants provided 'material support' to state sponsors of terrorism, designated terrorists or terrorist organisations

US sanctions can create US litigation risk under anti-terrorism statutes. Various US statutes provide private rights of action for claimants to bring terrorism-related claims in US courts.[69] These claims are typically brought by victims of terrorism and their families against a wide variety of entities, including financial institutions, social media companies and pharmaceutical companies. These cases involve allegations that the private-entity defendants provided material support, often in the form of providing access to US-dollar transactions, to countries subject to sanctions and designated as state sponsors of terrorism (most commonly, Iran) or individuals and entities designated as terrorists, and that alleged material support caused the terrorist attack at issue and the plaintiffs' injuries.[70]

Courts have been reluctant, however, to embrace these attenuated theories of liability. In *Rothstein v. UBS*, for example, the US Court of Appeals for the Second Circuit affirmed dismissal of the plaintiffs' claims against UBS, despite UBS having been fined for transferring US dollar banknotes to counterparties in Iran; the Court concluded that the plaintiffs' allegations were insufficient to plausibly infer that funds transferred by UBS to Iran 'were in fact sent to Hizbollah or Hamas or that Iran would have been unable to fund the attacks by Hizbollah and Hamas without the cash provided by UBS'.[71]

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68 But see *Exxon Mobil Corp. v. Corporación CIMEX S.A. et al.*, No. 1:19-cv-01277 (D.D.C. filed on 2 May 2019).

69 See 18 U.S.C. § 2333 (providing civil cause of action to US nationals harmed by acts of international terrorism); 28 U.S.C. § 1605A(c) (providing civil cause of action against non-US sovereigns designated as state sponsors of terrorism).

70 See, e.g., *Bowrosen v. Kingdom of Saudi Arabia*, No. 16-cv-8070 (S.D.N.Y.); *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018); *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202 (2d Cir. 2014).

71 708 F.3d 82, 86, 87, 96, 97 (2d Cir. 2013); see *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 394-95 (7th Cir. 2018) (affirming dismissal in absence of 'some other fact suggesting either an intent to support terrorism or a direct provision of services to terrorists,' because 'the violation of such a broad prohibition [as found in the Iran sanctions] does not create a sufficient link to establish liability for terrorism-related torts under any traditional notion of proximate cause'); *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273-277 (D.C. Cir. 2018) (affirming dismissal where complaint 'fails to plausibly allege that any currency processed by BNPP for Sudan [in violation of US sanctions] was either in fact sent to al Qaeda or necessary for Sudan to fund the embassy bombings').

Recent amendments to the US Anti-Terrorism Act have spurred a new wave of terrorism cases raising aiding-and-abetting and conspiracy claims against private entities.[72] Courts have held that providing material support to a designated terrorist organisation is not sufficient alone to establish liability under an aiding-and-abetting theory; plaintiffs must show that the defendant in question knowingly played a part in the terrorist activities and provided substantial assistance to the designated terrorist organisation in perpetrating the terrorist acts at issue.[73] Similarly, courts have declined to equate alleged conspiracy to violate sanctions with conspiracy to commit acts of terror.[74]

Courts also have had the opportunity to consider the probative value of a defendant's OFAC designation. Although given some deference, an OFAC designation is not sufficient in itself to establish that a designated entity purposefully engaged in misconduct for the purpose of furthering terrorist aims.[75]

Criminal prosecution for violation of sanctions

The US government may pursue individuals and entities for alleged wilful sanctions violations, including individuals and entities not targeted by sanctions.[76] These criminal proceedings typically involve charges such as violating one or more of OFAC's authorising statutes, for example, the International Emergency Economic Powers Act (IEEPA), conspiracy to violate IEEPA, or additional financial crimes charges such as bank fraud and money laundering. One high-profile pending criminal case involving alleged sanctions violations is *United States v. Huawei Technologies Co, Ltd*.[77] Huawei and its co-defendants, including Meng Wanzhou, Huawei's chief financial officer, face numerous combined charges, including multiple sanctions-related charges for alleged violations of the US Iran-related sanctions in the early 2010s. The defendants potentially could face steep fines and incarceration on the sanctions charges alone.

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72 Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333(d), Pub. L. No. 114 to 222, § 4(a), 130 Stat. 852 (2016).

73 See, e.g., *Siegel v. HSBC N. Am. Holdings, Inc*., 933 F.3d 217, 224, 226 (2d Cir. 2019) (affirming dismissal, citing *Linde v. Arab Bank, PLC*, 882 F.3d 314, 319, 329 (2d Cir. 2018) (holding that 'aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist *organization*' (emphasis in original)).

74 See *Kemper*, 911 F.3d at 395 ('at most, that Deutsche Bank joined a conspiracy to evade sanctions. . . . But no facts suggest that Deutsche Bank agreed to facilitate any wrongful conduct beyond this').

75 See *In re Terrorist Attacks on Sept. 11, 2001*, 718 F. Supp. 2d 456, 486 (S.D.N.Y. 2010) (holding designation shortly after attacks at issue 'is not alone sufficient' to establish intent and granting motion to dismiss for lack of personal jurisdiction); *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 561 (S.D.N.Y. 2005) (holding designation shortly after attacks at issue 'warrants some deference' and granting jurisdictional discovery).

76 See, e.g., Verdict Form, *United States v. Nejad*, No. 1:18-cr-224 (S.D.N.Y. Mar. 12, 2020) (finding the defendant guilty on five counts, including conspiracy to violate IEEPA); *United States v. Tepper*, No. 1:18-cr-75 (N.D.N.Y. Mar. 16, 2018) (the defendant pleaded guilty to conspiracy to violate IEEPA and Iran-related sanctions, and served 24 months in prison); but see *United States v. Nejad*, 2020 U.S. Dist. LEXIS 101749 (S.D.N.Y. Jun. 9, 2020) (although the defendant was initially convicted, the government subsequently submitted a letter to the court indicating that it had determined 'that it would not be in the interests of justice to further prosecute th[e] case' based on the government's evidence disclosure failures).

77 See, generally, *USA v. Huawei Technologies Co., Ltd*, No. 1:18-cr-00457 (E.D.N.Y. filed on 22 August 2018).

Where does arbitration's intersection with sanctions differ from litigation?

Can I represent a sanctioned party in arbitration?

In general, US sanctions programmes permit legal representation of a sanctioned party in a US arbitration, but typically not representation of a sanctioned party in an arbitration outside the United States.[78] Under the EU sanctions regime, there is no formal requirement for legal counsel to obtain a licence to represent a sanctioned party in any arbitration, within or outside the European Union.

Unique among other legal services general licences, Section 560.525 of the Iranian Transactions and Sanctions Regulations authorises the initiation and conduct of arbitral proceedings and proceedings before international tribunals, within or outside the United States, that are otherwise prohibited by the sanctions. However, the arbitral proceedings must be either (1) to resolve disputes between the government of Iran or an Iranian national and the United States or a US national, or (2) 'contemplated under an international agreement', or (3) involve the enforcement of awards, decisions or orders resulting from point (1) or point (2).[79] One area of ambiguity in this general licence is OFAC's lack of formal guidance on the meaning of arbitral proceedings 'contemplated under an international agreement'. The phrase could be construed in different ways. It might cover treaties that specifically contemplate the arbitration at issue (e.g., if two countries establish an arbitral venue for specific claims). It could also cover proceedings contemplated under multilateral treaties establishing arbitral bodies, such as the ICSID Convention, or disputes arising under bilateral investment treaties. Finally, there is also an argument that 'international agreement' extends to cover international commercial contracts with an arbitration clause.

May I serve as an arbitrator if arbitration participants are sanctioned parties?

Yes. However, US persons serving as arbitrators may need a specific licence, depending on the specific restrictions applicable to the sanctioned party.[80] Although OFAC has not issued formal guidance on the subject, OFAC could reasonably view serving as an arbitrator as a prohibited provision of services to the sanctioned party, thereby requiring a licence. The general licences on the provision of legal services on their face do not extend to the provision of arbitrator services. Note that both the sanctioned party's counsel and the arbitrators may need licences before agreeing to engage in arbitration involving a sanctioned party.

Under EU sanctions, serving as an arbitrator does not require a licence, but payment of arbitrators' fees requires a licence when a paying party is subject to an EU asset freeze. If an arbitrator is a sanctioned party, depending on the sanctions restrictions applicable to them, a US specific licence may be needed to appear before them for the arbitration, and EU and US licences may be needed for the parties' payment of the sanctioned arbitrator's fees.

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78 See, e.g., 31 C.F.R. § 583.506(a)(2-3); 31 C.F.R. § 598.507(a)(2-3) (limiting arbitration initiation and conduct to defence of property interests subject to US jurisdiction of a specially designated narcotics trafficker).

79 31 C.F.R. § 560.525(a)(5).

80 See *United Media Holdings NV v. Forbes Media LLC*, No. 16 Civ. 5926 (PKC), 2017 U.S. Dist. LEXIS 222249, *10 (S.D.N.Y. Aug. 9, 2017) (citing a letter from OFAC to the defendant: 'OFAC confirmed that United Media Holding, NV was a "blocked person" under Executive order 13660. Therefore, according to OFAC, the Arbitrator and counsel for petitioners [UMH] would require a license from OFAC in order to participate in the arbitration, or otherwise deal in property in which [petitioners have] an interest').

Can I participate in an arbitration with the arbitral seat in a sanctioned country?

Sanctions prohibitions may prevent participation in an arbitration that has a seat in a sanctioned country or region absent a licence to the extent that the participation requires travel to, or engagement with individuals in, the sanctioned country or region. As at the time of writing, the United States maintains comprehensive sanctions against Cuba, Iran, North Korea, Syria and the Crimea Region of Ukraine. Comprehensive sanctions generally prohibit US persons from engaging in any commercial activity with or within comprehensively sanctioned jurisdictions. These activities can include, but are not limited to, the key elements of an international trip: travelling to or from these jurisdictions, dealings with government agents at the border, carrying laptops or other technology into the country, and paying for essentially anything in country, such as accommodation, taxis and food.[81]

Whereas the comprehensive sanctions in some countries and regions explicitly authorise (or do not prohibit) some of this activity, travel to a sanctioned country merits careful analysis to ensure that all intended activity would be exempted from or authorised under sanctions and would not implicate other legal restrictions. For example, although the North Korea Sanctions Regulations do not prohibit transactions ordinarily incident to travel to or from North Korea,[82] the US Department of State restricts the use of US passports to travel into, in or through North Korea absent special validation,[83] effectively prohibiting US persons from travelling to North Korea. Unlike the United States, the European Union does not apply comprehensive sanctions on countries (or territories) and, therefore, sanctions issues concerning the seat of arbitration are unlikely when there is only an EU nexus.

Do arbitral awards involving sanctioned parties face challenges in US court?

US efforts to enforce arbitral awards both paid to and paid by sanctioned parties may face challenges under treaties and the Federal Arbitration Act – for example, the defence that enforcement would be 'contrary to [US] public policy'.[84] Parties often successfully overcome the public policy defence given its exceedingly narrow scope: awards that 'would violate the forum state's most basic notions of morality and justice'.[85] The scope of this public policy defence may be too narrow to encompass the US sanctions regime. For example, in *Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Systems Inc*, an award in favour of the sanctioned creditor, Iranian Ministry of Defense, survived the public policy defence owing to the United States' strong public policy interest in recognising arbitral awards and the availability of a general licence for payment of the award (e.g., where

81 See, e.g., 31 C.F.R. § 510.206; 31 C.F.R. § 542.207.

82 31 C.F.R. § 510.213(d).

83 22 C.F.R. § 51.63.

84 See, e.g., New York Convention on the Recognition and Enforcement of Arbitral Awards, Article V(2)(b), 10 June 1958, 330 U.N.T.S. 3; United Nations Commission on International trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006, Article 36(1)(b)(ii) (Vienna: United Nations, 2008).

85 See *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1092, 1097 (9th Cir. 2011) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974)).

the award would not frustrate sanctions).[86] *Cubic* built on *National Oil Corp v. Libyan Sun Oil Co*, reasoning that even if award payment to a sanctioned party would contravene US public policy, the mere confirmation of an award would not, as OFAC could act to prevent payment, thus preserving public policy.[87] Similarly, in *United Media Holdings NV v. Forbes Media LLC*, a sanctioned party failed to overturn an unpaid award on multiple grounds, including failure to prove that the arbitrator engaged in 'misbehavior' in rendering an award involving blocked property and that enforcement would violate public policy, because OFAC issued specific licences for the award issuance and enforcement, and the award would actually 'further the goal of the sanctions . . . by terminating the rights of a blocked person' in a US trademark.[88]

Conclusion

The intersection of economic sanctions laws and dispute resolution poses unique challenges for parties and their attorneys. These challenges in litigation and arbitration may include procedural hurdles and complex legal frameworks, and parties may face sanctions barriers in dispute resolution or award enforcement. With careful consideration of sanctions regulations and relevant precedent, parties and their counsel may zealously and creatively engage in sanctions-related dispute resolution proceedings.

86 See id., at 1096 to 1099 (reasoning, additionally, 'We should not refuse to confirm an arbitration award because payment is prohibited when payment may in fact be authorized by the government's issuance of a specific license').

87 See *Nat'l Oil Corp. v. Libyan Sun Oil Co*., 733 F. Supp. 800, 820 (D. Del. 1990).

88 See *United Media Holdings NV v. Forbes Media LLC*, No. 16 Civ. 5926 (PKC) 2017 U.S. Dist. LEXIS 222249, *27, *34 (S.D.N.Y. Aug. 9, 2017).

Appendix 1

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Claire DeLelle, partner at White & Case and a member of the firm's sanctions and export controls practice group, is a commercial litigator who focuses on litigations involving complex international issues. She represents foreign sovereigns, their agencies and instrumentalities, including central banking authorities, and multinational companies and financial institutions in complex litigations arising under a variety of laws, including US antitrust, US anti-terrorism and US economic sanctions laws. She has extensive US litigation experience in representing clients under the 'terrorism exception' to the Foreign Sovereign Immunities Act. She has litigated these issues before US federal courts at all levels, including a recent win before the US Supreme Court on behalf of the Republic of the Sudan. She also leads global investigations in connection with voluntary self-disclosures to the US Department of Treasury's Office of Foreign Assets Control, subpoenas and requests for information. She has in-depth experience in conducting investigations and litigating matters for clients based in the Middle East and Africa, including Saudi Arabia, the United Arab Emirates, Bahrain, Jordan, Sudan and Libya.

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Nicole Erb co-leads the international sanctions practice at White & Case and serves as co-head of the firm's sanctions and export controls practice group. She represents clients in complex transnational litigation matters, civil and criminal government investigations, voluntary self-disclosures, internal audits and investigations, compliance, licensing and other regulatory matters. Her clients comprise foreign states and their state-owned entities, international organisations, international financial institutions, multinational corporations and shipping companies in the Americas, Europe, the Middle East, Russia, Africa and Asia.

Clients benefit from Nicole's skill and experience in navigating complex, multi-jurisdictional disputes in federal and state courts at all levels. Her litigation matters

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Nicole routinely represents clients before the US Department of the Treasury's Office of Foreign Assets Control, Department of Justice and Department of State.

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We live in a new era for sanctions. More states are using them, in more creative (and often unilateral) ways.

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