THE GUIDE TO SANCTIONS

THIRD EDITION

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

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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.

When this guide was launched, I wrote that we were living in a new era for sanctions: more and more countries were using them, with greater creativity and (sometimes) self-centredness. I had no idea how true this statement would prove. Recent events have supercharged their use, to the point where, as our editors write in their introduction, 'sanctions never sleep'. And then Russia invaded Ukraine …

Sanctions have truly become a go-to tool. And little wonder. They are powerful; they reach people who would otherwise be beyond our reach. They are easy – you can impose or change them at a stroke, without legislative scrutiny. And they are cheap (in the simplest sense)! It's up to others once they're in place to do all the heavy lifting.

The heavy lifting part is where this book can help. The pullulation of sanctions regimes, and 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.

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 should help them to do so even better. Whoever you are, we are confident this book has something for you.

The guide is part of the GIR technical library, which has developed around the fabulous *Practitioner's Guide to Global Investigations* (now in its fifth 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.

David Samuels
Publisher, GIR
June 2022

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Foreword

I am delighted to welcome you to this third edition of Global Investigations Review's *The Guide to Sanctions*. The international, geographical, political, criminal, legal and regulatory elements that make up sanctions programmes ensure that this will remain one of the most complex compliance areas facing practitioners. The following chapters contain important information, advice and best practice for sanctions and export controls as a compliance discipline, courtesy of some of the world's leading legal, forensic and compliance specialists. The daily change to the international regimes requires practitioners and businesses to be constantly monitoring and horizon-scanning across all relevant jurisdictions, and the Guide is packed full of resources that will enable readers to do just that.

The current sanctions environment makes this Guide a must read for any practitioner who manages or advises on sanctions compliance. This Guide is the work of leading industry specialists who have all given their time and expertise to produce a resource that should be on every bookshelf. At a time of growing complexity, readers may find the Guide worthy of being constantly consulted as a valuable reference resource, not only in its own right, but also for the treasure trove of links and references to information and guidance provided by the regulators who guide industry in implementing sanctions policy.

Sanctions never sleep, and since the previous version of this Guide, we have seen the UK settle into an autonomous programme and increased international coordination with major countries and blocs looking to align as closely as possible. The US is no longer the only major player.

The sanctions regimes in place for countries such as Iran, Syria, North Korea and Yemen, to name just a few, have continued to evolve, but the focus since August 2021 has been squarely on Russia and Belarus. This Guide will bring you

up to date with the significant changes in those regimes, as at the time of writing, covering both the sanctions and export controls, as well as updating you on the developments in other regimes, including China and Hong Kong.

As with earlier editions, this third edition covers the major sanctions programmes from the United Nations, the United States, the European Union, the United Kingdom and the Asia-Pacific region, including the types of prohibitions imposed by the relevant programmes, the licence procedures and the measures that are available to challenge listings. Each of the major jurisdictions has an enforcement section that details the process and elements of enforcement from the relevant jurisdiction. The Guide also covers the re-emergence of thematic sanctions programmes; no longer limited to terrorism and narcotics, these programmes have seen a significant growth over the past few years. The third edition welcomes new authors who share their experiences representing sanctioned clients, among others.

The section on compliance programmes will enable readers to review their own programmes against best practice and improve and enhance their own controls if required. The final section covers sanctions and export controls in practice, giving good advice on how to navigate international, extraterritorial and often conflicting requirements of global sanctions and export control rules.

It is important to remember that financial crime is not a competition and that we make the biggest impact when we work together across industry and governments. The partnerships and collaboration across the globe play an important part in managing international sanctions. Part of my role at UK Finance is to liaise with industry and governments to help promote public–private partnerships and ensure that we are all fighting financial crime, especially in the sanctions space, as a coordinated and collaborative network of specialists, in the UK and elsewhere.

The Guide to Sanctions is intended to enable readers to be a valuable part of the sanctions and export controls community, dedicated to fighting financial crime and helping to protect our wider society from the impacts of those that seek to cause harm on the international stage.

Neil Whiley
Director of Sanctions, UK Finance
June 2022

Part III

Sanctions in Practice

CHAPTER 19

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 legal representation of parties subject to sanctions, the judicial challenges available to parties who become sanctioned, how economic sanctions issues arise more broadly in litigation and arbitration, and issues that parties should be aware of to minimise 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, the United Kingdom, 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 and US administrative proceedings (but typically not in litigation proceedings outside the US) by 'general

1 Claire A DeLelle and Nicole Erb are partners at White & Case LLP. The authors wish to thank Genevra Forwood, Matthias Vangenechten, John Hannon and Chad Farrell for their valuable contributions to this chapter.

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 certain dealings that are otherwise prohibited under the applicable sanctions.[3] General licences authorising legal representation of sanctioned parties in US litigation typically do not authorise all types of dealings that might arise in the course of authorised legal representation.[4] For example, a specific licence is ordinarily 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.[5] Additionally, many general licences, particularly those involving payments for authorised legal services, require submission of initial and periodic reports to OFAC.[6]

Legal services to a sanctioned person not expressly covered by a general licence can only proceed through a specific licence. OFAC has 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 interpretive guidance from OFAC that no specific licence is required or, if the representation is prohibited, that OFAC issue a specific licence.

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2 Arguably, the Office of Foreign Assets Control (OFAC) would violate the Due Process Clause of 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).

3 See 31 C.F.R. § 501.801 (Licensing).

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

5 See, e.g., 31 C.F.R. § 510.507(d) (the North Korea Sanctions Regulations). OFAC has offered additional guidance with respect to legal actions involving Venezuela that may require a specific licence; see Frequently Asked Question 808, OFAC (9 December 2019), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/808; Frequently Asked Question 809, OFAC (9 December 2019), https://home.treasury.gov/policy-issues/financial-sanctions/faqs/809.

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

Payment of legal fees by sanctioned parties

A separate licence may be required for receipt of 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,[7] whereas other programmes require a specific licence for the receipt of payment of legal fees.[8] 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.[9] 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.[10] If OFAC authorises this use of blocked funds, it may nonetheless limit the amount of blocked funds that may be used for those fees.[11]

Many general licences authorising receipt of payment of legal fees for 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 incident to the authorised payment or services, such as contracts for expert witnesses and private investigators.[12]

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7 See, e.g., 31 C.F.R. § 542.508 (the Syrian Sanctions Regulations); 31 C.F.R. § 594.517 (the Global Terrorism Sanctions Regulations); 31 C.F.R. § 597.513 (the Foreign Terrorist Organizations Sanctions Regulations).

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

9 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.

10 See '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', OFAC (23 July 2010), at https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20100722_33; see also Note to 31 C.F.R. § 510.507 (the North Korea Sanctions Regulations); Note to 31 C.F.R. § 591.506 (the Venezuela Sanctions Regulations).

11 See OFAC, footnote 10.

12 See, e.g., 31 C.F.R. § 510.507(c) (the North Korea Sanctions Regulations); Note 1 to 31 C.F.R. § 515.512 (the Cuban Assets Control Regulations); Note 1 to 31 C.F.R. § 542.508 (the Syrian Sanctions Regulations); Note to 31 C.F.R. § 558.507 (the South Sudan Sanctions Regulations). But see 31 C.F.R. § 536.506 (the Narcotics Trafficking Sanctions Regulations) (ordinarily incidental services not authorised); see also 31 C.F.R. § 544.507 (the WMD Proliferations Sanctions Regulations).

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.[13]

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 policy, and administrative law'.[14] 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;[15]

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

14 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 (D.C. Cir. 2007)) (regarding deference under the Administrative Procedure Act); see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 5, 33–35 (2010) (*HLP*) (evaluations by Congress and the Executive related to distinguishing material support for a foreign terrorist group's violent activities are entitled to deference).

15 See, e.g., *Al-Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, 686 F.3d 965, 984–90 (9th Cir. 2012) (*AHIF III*) (holding that OFAC's violation of the 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); *Zevallos v. Obama*, 793 F.3d 106, 116 (D.C. Cir. 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'); *Strait Shipbrokers Pte. Ltd. v. Blinken*, No. 1:21-cv-1946, 2021 U.S. Dist. LEXIS 152112, at *30 (D.D.C. 12 August 2021) (rejecting the plaintiffs' claims of due process violations for (1) failing to provide plaintiffs with pre-designation notice of their Specially Designated National (SDN) designations and (2) failing to provide

- comprehensive country sanctions violate the Fifth Amendment right to travel;[16]
- asset freezes are unreasonable Fourth Amendment seizures[17] or Fifth Amendment takings;[18]

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plaintiffs with the 'factual basis for their SDN designations nor the materials on which those materials were purportedly based'); *Askan Holdings v. United States Dep't of the Treasury*, 155 Fed. Cl. 216, 222 (Fed. Cl. 2021) (*Askan II*) (dismissing the plaintiff's claims that OFAC 'failed to provide the plaintiff with sufficient notice and a hearing, unreasonably delayed processing the plaintiff's license applications, and failed to provide to the plaintiff in a timely manner the unclassified information supporting [its] determination'). In several recent cases, courts rejected due process claims raised by foreign, non-citizen plaintiffs for failure to demonstrate entitlement to Fifth Amendment protections. See *Rakhimov v. Gacki*, No. 1:19-2554, 2020 U.S. Dist. LEXIS 68764 at *12–14 (D.D.C. 20 April 2020); *Bazzi v. Gacki*, 484 F. Supp. 3d 70, 76–78 (D.D.C. 2020); *Fulmen Co. v. Office of Foreign Assets Control*, No. 1:18-cv-2949, 2020 U.S. Dist. LEXIS 58308, *21 (D.D.C. 31 March 2020) (*Fulmen*). In another recent case, the court could not determine if a foreign non-citizen plaintiff was entitled to Fifth Amendment protections based on the record before it, but determined that OFAC had provided all process due in any event. See *Olenga v. Gacki*, No. 1:19-cv-1135, 2020 U.S. Dist. LEXIS 225084, at *23–38 (D.D.C. 30 November 2020).

16 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, 604–05 (7th Cir. 2009) (applying *Regan*, holding that OFAC sanctions regulations prohibiting travel to Iraq did not violate the plaintiff's Fifth Amendment rights).

17 See, e.g., *AHIF III*, 686 F.3d at 990–95 (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 Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 646, 652 (N.D. Ohio 2010) (*KindHearts II*) (finding that OFAC may remedy an unconstitutional seizure post hoc by showing 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. Dev. v. Geithner*, 647 F. Supp. 2d 857, 882-84 (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).

18 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). See also *Askan II*, 155 Fed. Cl. 216 at 220 (the plaintiff alleged that the OFAC blocking order

- the designation authority for provision of material support violates the First Amendment;[19]
- the sanctions' authorising statute or OFAC's rules and regulations are unconstitutionally vague;[20]
- designations or asset freezes are arbitrary and capricious;[21] or
- failure to publish a general licence violates a federal statute such as the Freedom of Information Act.[22]

Designations contested in court may originate with agencies other than OFAC. In the recent case *Xiaomi Corp. v. Department of Defense*,[23] the plaintiffs successfully contested the designation by the Department of Defense (DoD) of Xiaomi Corporation under Section 1237 of the National Defense Authorization Act

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violated the Fifth Amendment due process and takings clauses by denying the plaintiff access to and use of its property).

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

20 See, e.g., *KindHearts I*, 647 F. Supp. 2d at 893–97, 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); *Open Soc'y Justice Initiative v. Trump*, 510 F. Supp. 3d 198, 213 (S.D.N.Y. 2021) (*OSJI*) (the plaintiff alleged that the 'vague terms' of Executive Order 13928 permitted arbitrary enforcement).

21 See, e.g., *Fulmen*, No. 1:18-cv-2949, 2020 U.S. Dist. LEXIS 58308, at *12–25 (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); *Rakhimov*, 2020 U.S. Dist. LEXIS 68764, at *14–18 (OFAC's designation of the plaintiff was based on a wide range of materials, including substantial non-classified material, and was not arbitrary and capricious); *Olenga*, 2020 U.S. Dist. LEXIS 225084, at *41–51 (OFAC's designation of the plaintiff, even based on unclassified administrative record alone, was neither arbitrary nor capricious); *Ajaka v. Gacki*, No. 1:19-cv-01542 (CJN), 2021 U.S. Dist. LEXIS 154303, at *14 (D.D.C. 17 August 2021) (holding that OFAC's designation was not arbitrary and capricious and did not deprive the plaintiff, who was involved in selling electronics to Syrian entities, of due process).

22 See, e.g., *Askan Holdings, LTD. v. United States Dep't of the Treasury*, 2021 U.S. Dist. LEXIS 182330, at *5 (D.D.C. 23 September 2021) (*Askan I*) (the plaintiff alleged that OFAC violated the Freedom of Information Act by not publishing a general licence that authorised escheatment of blocked funds).

23 No. 1:21-cv-280, 2021 U.S. Dist. LEXIS 46496 (D.D.C. 12 March 2021) (*Xiaomi*).

for Fiscal Year 1999, as amended by Executive Order 14032.[24] The court found the plaintiffs showed a high likelihood of success in their claims based on the Administrative Procedure Act (APA), and so granted a preliminary injunction against enforcement of the designation and resulting prohibitions.[25] Specifically, the court found that the DoD decision memo explaining the basis of the designation failed to explain why Xiaomi met the statutory criteria of Section 1237, and so the designation qualified as 'arbitrary and capricious';[26] that Xiaomi did not, in fact, meet the statutory criteria for designation under Section 1237;[27] and that the designation did not rest on 'substantial evidence' as required by the APA.[28] The DoD did not appeal the decision, and the court issued a final order vacating the designation as an improper agency action under the APA.[29] In a subsequent case, *Luokung Tech Corp v. DOD*,[30] the court relied heavily on the analysis in *Xiaomi* in issuing a preliminary injunction against the Section 1237 designation of another Chinese technology company.[31]

Challenging OFAC blocking orders

In *Al Haramain Islamic Foundation Inc v. United States Department of the Treasury*, a US non-profit entity designated to the SDN List 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.[32] The Ninth Circuit reasoned that OFAC's national security aims were not rendered impracticable by

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24 Section 1237 directs the Secretary of Defense, with the input of the Attorney General, the Director of the Federal Bureau of Investigation and the Director of Central Intelligence, to identify 'Chinese Communist Military Companies' (CCMCs) that operate 'directly or indirectly in the United States or any of its territories or possessions'. id. at *2–4. Executive Order 13959, as expanded by Executive Order 14032, prohibits United States persons from engaging in select investment activities with CCMCs. See Continuation of the National Emergency With Respect to the Threat From Securities Investments That Finance Certain Companies of the People's Republic of China, 86 Fed. Reg. 62711 (9 November 2021).

25 id. at *11–24, *37.

26 id. at *13–15.

27 id. at *15–19.

28 id. at *19–23.

29 See Joint Status Report, *Xiaomi*, No. 1:21-cv-280 (D.D.C. 11 May 2021); Joint Proposed Order, *Xiaomi*, No. 1:21-cv-280 (D.D.C. 20 May 2021); Final Order, *Xiaomi*, No. 1:21-cv-280 (D.D.C. 25 May 2021).

30 No. 21-cv-583, 2021 U.S. Dist. LEXIS 86378 (D.D.C. 5 May 2021).

31 id. at *16–34, 45–46.

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

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.[33] The court 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'.[34] But on remand, the lower court ruled the violation was harmless.[35]

In *Zarmach Oil Services v. United States Department of the Treasury*, the District Court for the District of Columbia dismissed the plaintiff's claim that OFAC's refusal to release blocked funds was arbitrary and capricious and in excess of its statutory jurisdiction.[36] Even though the sanctioned party only had an indirect future or contingent interest in the relevant funds[37] – 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.[38]

In *Askan Holdings v. United States Department of the Treasury* (*Askan I*), a foreign importing company challenged OFAC's decision to block the release of funds transferred through a US bank,[39] and during the pendency of proceedings in the district court filed a complaint in the Court of Federal Claims.[40] During the pendency of proceedings, OFAC authorised the release of the blocked funds.[41] Since the time the funds had been blocked, they had escheated to the Comptroller of the State of New York as abandoned funds.[42] The Comptroller returned the

33 See id. at 992–93 (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') (citation omitted).

34 See id. at 995 n.18.

35 See *Al Haramain Islamic Found., Inc. v. United States Dep't of the Treasury*, No. 3:07-CV-01155, 2012 U.S. Dist. LEXIS 175759, at *18 (D. Or. 12 December 2012) (*AHIF IV*).

36 *Zarmach Oil Servs., Inc. v. United States Dep't of the Treasury*, 750 F. Supp. 2d 150, 155–59 (D.D.C. 2010).

37 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 (EFT)] is the entity that passed the EFT on to the bank where it presently rests.').

38 See *Zarmach Oil Servs., Inc.*, 750 F. Supp. 2d at 156, 158–59.

39 2021 U.S. Dist. LEXIS 182330.

40 *Askan II*, 155 Fed. Cl. at 216.

41 *Askan I*, 2021 U.S. Dist. LEXIS 182330 at *3.

42 *Askan II*, 155 Fed. Cl. at 219.

funds to the plaintiff with interest.[43] OFAC moved to dismiss the plaintiff's complaint for mootness.[44] The plaintiff argued that its claim based on OFAC's unreasonable delay in processing its licence request was still a live controversy because a risk existed that different funds might be blocked in future transactions as Askan continued to engage in international commerce.[45] The court granted OFAC's motion, holding that '[a]sserting a due process claim to challenge expired agency action is quintessential mootness where the Court's decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future'.[46]

In a recent case, downstream investors in entities owned 50 per cent or more by an individual designated as an SDN filed a civil action against OFAC, the Treasury Secretary and OFAC's Director, alleging claims for violation of the Fourth and Fifth Amendments and the APA. The investors alleged that they had been harmed by application of OFAC's 50 Percent Rule, which blocked the entities in which they were involved, where they had been unable to collect certain proceeds and fees to which they would otherwise have been entitled and take certain action to prevent harm to their investments.[47]

The court granted the defendants' motion to dismiss, finding that the investors had failed to state their claims. The court found that:

- even assuming the 50 Percent Rule constituted an unlawful 'seizure' under the Fourth Amendment (the defendants argued that blocking is not a seizure), the seizure was not unreasonable, as it must be, because an 'important public and government interest' is served 'in ensuring that SDN-owned properties and entities are blocked, and sanctions upheld', and the government needs to prevent the SDN from manipulating the property;
- there was no Fifth Amendment violation where OFAC is not required to provide advance notice of its blocking action and OFAC had not denied the investors' licensing application; and
- the investors' APA claims that the defendants acted arbitrarily and capriciously was conclusory.[48]

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43 ibid.

44 *Askan I*, 2021 U.S. Dist. LEXIS 182330, at *3.

45 id. at *8 n.5.

46 id. at *9 (internal quotations omitted).

47 *US VC Partners GP LLC v. US Dep't of the Treasury*, 19 Civ. 6139 (GBD), 2020 U.S. Dist. LEXIS 170713, at *4 (S.D.N.Y. 17 September 2020).

48 id. at *6–13.

Notwithstanding these conclusions, the court granted the investors leave to amend their complaint to add a claim under the APA to compel agency action unlawfully withheld or unreasonably delayed.[49] After filing an amended complaint, the defendants answered and the parties engaged in discovery, during which the court ordered the defendants to produce the complete administrative record. After a further amended complaint, the parties engaged in settlement discussions and informed the court in October 2021 that they had reached an administrative agreement regarding the investors' pending licences. The parties voluntarily dismissed the action shortly thereafter.

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

Sanctioned persons and their would-be supporters can raise free speech and association challenges regarding the prohibitions on non-designated party dealings with designated parties. A seminal US Supreme Court case on this topic is *Holder v. Humanitarian Law Project* (*HLP*).[50] *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.[51] The Court held that the prohibition, 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.[52] 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.[53] While criticised as overly broad and unsupported,[54] the Court did limit its ruling, stating that (1) future targeting

49 id. at 6.

50 561 U.S. 1 (2010).

51 The plaintiffs in *HLP* proposed to provide legal training and assistance on international humanitarian law to designated terrorists the Kurdistan Workers Party, but feared they could not do so for fear of prosecution under 18 U.S.C. § 2339B. See 561 U.S. at 10.

52 See *HLP*, 561 U.S. at 30, 33–36.

53 ibid.

54 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 *HLP*, 561 U.S. at 45–49 (Breyer, J dissenting)).

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'.[55]

In *Al Haramain Islamic Foundation, Inc v. US Department of the Treasury*, 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 rights.[56] 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.[57]

In *Open Society Justice Initiative v. Trump* (*OSJI*),[58] the plaintiffs sought relief against a prohibition on making 'any contribution or provision of funds, goods, or services' to any person designated under Executive Order 13928, which had provided for sanctions directed at the International Criminal Court (ICC) over certain investigations of US military forces.[59] (Executive Order 13928 was later revoked by President Biden in April 2021).[60] The plaintiffs in *OSJI* had worked with ICC officials sanctioned under Executive Order 13928 on matters (other than) those ICC investigations at issue in Executive Order 13928, and wished to continue doing so but for the prohibition.[61] The plaintiffs alleged, among other claims, a violation of their First Amendment rights. The court, finding that the 'restrictions prohibit or chill significantly more speech than . . . is necessary to achieve their end', and that the plaintiffs were likely to succeed on their First Amendment claim, issued a preliminary injunction.[62]

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55 See *HLP*, 561 U.S. at 39.

56 See *AHIF III*, 686 F.3d 965, 1001 (9th Cir. 2012). Notably, the court in *AHIF III* read *HLP* to require strict scrutiny for the purposes of First Amendment analysis of the Executive Order at issue. id. at 997–998.

57 See id. at 1001.

58 No. 1:20-cv-8121, 2021 U.S. Dist. LEXIS 405 (S.D.N.Y. 4 January 2021).

59 See id. at 1–2, 15–16.

60 Executive Order 14,022, 86 Fed. Reg. 17896 (1 April 2021).

61 See Executive Order 13,928, 85 Fed. Reg. 36139 (15 June 2020); OSJI, 2021 U.S. Dist. LEXIS 405, at *2, *10–15.

62 *OSJI*, 2021 U.S. Dist. LEXIS 405, at *41. The order only enjoined enforcement of Executive Order 13928 against 'conduct specifically addressed in [the] complaint and [the opinion]' (i.e., conduct not related to the investigations forming the basis of Executive Order 13928). See id.

Challenging other economic restrictions under US law

Recent litigation has tested the limits of Executive Branch authority to restrict certain economic activity under the International Emergency Economic Powers Act (IEEPA).[63] On 6 August 2020, then-President Trump issued a pair of Executive Orders requiring the Secretary of Commerce to 'identify' prohibitions on certain transactions involving two Chinese-owned mobile apps – specifically, the video app TikTok and the communications app WeChat.[64] The prohibitions eventually identified by the Commerce Department were designed to 'eliminate access' to the apps and 'significantly reduc[e] their functionality'.[65] While President Biden later revoked and replaced both of these Executive Orders in June 2021,[66] several litigations were initiated in the interim.

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63 IEEPA, codified at 50 U.S.C. § 1701 et seq., empowers the President to regulate a variety of economic transactions following a declaration of national emergency. The President may delegate this authority to department or agency heads under 3 U.S.C. § 301. While sanctions authority is often delegated to the Secretary of Treasury, and in turn to OFAC, the President may delegate IEEPA authority to other agencies, such as the Department of Commerce.

64 Previously, President Trump had declared a national emergency to exist with respect to the threat of foreign adversaries creating and exploiting vulnerabilities in information and communications technology and services. See Executive Order 13,873, 3 C.F.R. 13873 (2020). In Executive Order 13,942, President Trump prohibited 'any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, with [TikTok owner ByteDance Ltd.], or its subsidiaries, in which any such company has any interest, as identified by the Secretary of Commerce . . . .' (85 Fed. Reg. 48,637 (6 August 2020)). In Executive Order 13,943, President Trump prohibited 'any transaction that is related to WeChat by any person, or with respect to any property, subject to the jurisdiction of the United States, with [WeChat owner Tencent Holdings Ltd.] or any subsidiary of that entity, as identified by the Secretary of Commerce . . . .' (85 Fed. Reg. 48,641 (6 August 2020)).

65 'Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States' (18 September 2020), US Dep't Com., https://2017-2021.commerce.gov/news/press-releases/2020/09/commerce-department-prohibits-wechat-and-tiktok-transactions-protect.html; see also 'Identification of Prohibited Transactions To Implement Executive Order 13942 and Address the Threat Posed by TikTok', 85 Fed. Reg. 73,191 (24 September 2020); 'Identification of Prohibited Transactions to Implement Executive Order 13943 and Address the Threat Posed by WeChat . . .' (21 September 2020), US Dep't Com, www.commerce.gov/sites/default/files/2020-11/WeChatFR_IdentificationofProhibitedTransactionsUpdatedInjunctionOGC.pdf.

66 These Executive Orders were ultimately revoked by President Biden's Executive Order 14034 of 9 June 2021. See Executive Order 14,034, 86 Fed. Reg. 31423 (9 June 2021); Executive Order 14,032, 86 Fed. Reg. 30145 (3 June 2021).

The plaintiffs challenged the WeChat prohibitions in one case, and the TikTok prohibitions in two separate cases.[67] All plaintiffs sought preliminary injunctions, alleging that the prohibitions violated the plaintiffs' constitutional rights, violated the APA and exceeded Executive Branch authority under IEEPA.[68] In the *WeChat* case, the district court granted a preliminary injunction based on the plaintiffs' likelihood of success in showing a First Amendment violation – namely, that the prohibitions 'are the equivalent of censorship of speech or a prior restraint on it'.[69] The case was eventually appealed to the Ninth Circuit, where it was dismissed in August 2021.[70] In the two *TikTok* cases, both district courts issued a preliminary injunction based on the plaintiffs' likelihood of success in showing that the prohibitions violate IEEPA's 'Berman Amendment', which expressly 'exempt[s] the regulation of informational materials from the Executive's congeries of powers'.[71] One court further found that the plaintiffs were likely to succeed in showing violations of IEEPA's prohibition on the regulation of personal communications,[72] as well as in showing that the prohibitions were arbitrary and capricious under the APA.[73] In both *TikTok* cases, the courts declined to reach the plaintiffs' constitutional arguments, but noted that constitutional issues were

67 The WeChat prohibitions were challenged by a non-profit and individual and business users of the app. See *US WeChat Users All. v. Trump*, 2020 U.S. Dist. LEXIS 172816, at *2 (N.D. Cal. 19 September 2020). The TikTok prohibitions were challenged in separate litigation by (1) ByteDance and its US subsidiary TikTok Inc. (see Complaint for Injunctive and Declaratory Relief at 6, *TikTok v. Trump*, No. 1:20-cv-02658 (D.D.C. 18 September 2020)); and (2) individual users of the TikTok app (see Complaint for Injunctive and Declaratory Relief at 1–2, *Marland v. Trump*, No. 2:20-cv-04597 (E.D. Penn. 18 September 2020)).

68 See *Tiktok v. Trump*, 2020 U.S. Dist. LEXIS 232977, at *14 (D.D.C. 7 December 2020); *Marland v. Trump*, 2020 U.S. Dist. LEXIS 202572, at *13–15 (E.D. Penn. 30 October 2020); *US WeChat Users All.*, 2020 U.S. Dist. LEXIS 172816, at *3. The WeChat plaintiffs also included a claim under the Religious Freedom Restoration Act. *US WeChat Users All.*, 2020 U.S. Dist. LEXIS 172816, at *3.

69 *US WeChat Users All.*, 2020 U.S. Dist. LEXIS 172816, at *3. The court reasoned that the government had not shown that 'its effective ban of WeChat for all US users addresses [national security concerns]', or why it had not adopted any 'obvious alternatives to a complete ban'. id. The court held that the remaining claims were either not ripe, or that it could not conclude that the plaintiffs were likely to succeed in their claims based on the record before the court. id. at 24–31.

70 See *U.S. Wechat Users All. v. Trump*, 2021 U.S. App. LEXIS 30335, at *1–2 (9th Cir. 2021).

71 *Marland*, 2020 U.S. Dist. LEXIS 202572, at *19–30; *Tiktok*, 2020 U.S. Dist. LEXIS 232977, at *34–38.

72 *Tiktok*, 2020 U.S. Dist. LEXIS 232977, at *30–34.

73 id. at 38–44.

present.[74] The Trump administration appealed all three preliminary injunctions, and the government successfully petitioned to hold the appeals in abeyance as the Biden administration 'conducts an evaluation of the underlying record justifying these prohibitions'.[75] After the Executive Orders were repealed under President Biden, the two cases were dismissed at the request of both parties.[76]

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 EU Council decisions imposing asset freezes. Following the *Kadi* precedent, the Council must provide 'individual, specific and concrete' grounds to justify each asset freeze. In addition, a 'sufficiently solid factual basis' must exist to substantiate the grounds for listing.[77] However, actions for asset freeze annulment have not necessarily provided substantial assistance to sanctioned plaintiffs, as the Council regularly relists those plaintiffs even if annulment is granted by the Court, by simply providing additional grounds for their relisting. This risk of redesignation, coupled with the lengthy CJEU procedures to obtain initial annulment, 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 blocked assets of sanctioned parties.[78]

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74 id. at 45 n.6; *Marland*, 2020 U.S. Dist. LEXIS 202572, at *24 n.6.

75 See Unopposed Motion to Hold Appeal in Abeyance at 2, *Marland v. Biden*, No. 20-3222 (3rd Cir. 10 February 2021); see also Unopposed Motion to Hold Appeal in Abeyance, *TikTok v. Biden*, No. 20-5381 (D.C. Cir. 10 February 2021); Defendants-Appellants' Unopposed Motion for Abeyance, *US WeChat Users Alliance v. Biden*, No. 20-16908 (9th Cir. 11 February 2021).

76 See *Marland v. Trump*, No. 2:20-cv-04597 (E.D. Penn. 14 July 2021); *Tiktok Inc. v. Biden*, No. 20-cv-02658 (D.D.C. 21 July 2021).

77 See Judgment of the Court (Grand Chamber) of 18 July 2013, *Kadi II*, Joined Cases C584/10 P, C593/10 P and C595/10 P, EU:C:2013:518.

78 See, e.g., *Calderon-Cardona*, 770 F.3d at 995 (2d Cir. 2014) (plaintiffs 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).

Recent US litigation involving Venezuela and its national oil company illustrates how sanctions may affect arbitral award enforcement proceedings. In the *Crystallex* case, the judgment holder sought to attach shares of the US subsidiary of Venezuela's state-owned oil company Petróleos de Venezuela, SA (PDVSA).[79] The shares in question were the subject of Executive Orders restricting transfer of Venezuelan or PDVSA-controlled assets in the United States.[80] Although the Third Circuit held that the judgment holder could attach the subsidiary's shares in satisfaction of its arbitral award against Venezuela, the Third Circuit also held that, in keeping with OFAC guidance, any attachment and execution of the shares would 'likely need to be authorised by [OFAC]'.[81] After various proceedings on remand, the district court ordered that procedures for the sale of the shares could be established and followed to 'the maximum extent that can be accomplished without a specific license from OFAC'.[82]

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79 See *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.* (*In re Petroleos de Venezuela, S.A.*), 932 F.3d 127 (3d Cir. 2019), cert. denied sub nom. *Bolivarian Republic of Venez. v. Crystallex Int'l Corp.*, 140 S. Ct. 2762 (2020).

80 id. at 135. Executive Order 13,850, 83 Fed. Reg. 55243 (1 November 2018) blocks all property and interests in property of Petróleos de Venezuela, SA (PDVSA) and entities owned 50 per cent or greater by PDVSA and other blocked persons. This prohibition captured the US subsidiary at issue, which was wholly owned by PDVSA. Note that Executive Order 13,884, 3 C.F.R. § 13884 (5 August 2019), blocking all property and interests in property of the 'Government of Venezuela' (defined to include subsidiaries such as the US subsidiary at issue), was issued after the Third Circuit's July 2019 decision.

81 id. at 149–51. The decision noted that '[w]hether that [OFAC guidance] is legally binding, Crystallex has committed' to seeking a licence to cover an eventual execution sale. id. In subsequent litigation, the parties further agreed at oral argument that 'the current sanctions regime does appear to block issuance of new writs of attachment on Venezuelan assets in the United States without an OFAC license'. *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 17-mc-151, 2021 U.S. Dist. LEXIS 7793 at *23–24 (D. Del. 14 January 2021).

82 *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, No. 17-mc-151, 2021 U.S. Dist. LEXIS 7793, at *50 (D. Del. 14 January 2021), appeal dismissed, Nos. 21-1276, 21-1277, 21-1289, 2022 U.S. App. LEXIS 1273 (3d Cir. 18 January 2022) (dismissing for lack of jurisdiction because the litigation remains ongoing in the District Court). See also *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, No. 17-151-LPS, 2022 U.S. Dist. LEXIS 36630, at *25, *26 (D. Del. 2 March 2022) (rejecting the defendants' argument that, notwithstanding the court's January 2021 order 'to follow [the sales procedures] to the maximum extent that can be accomplished without a specific license from OFAC', the court cannot initiate a sale process without a licence from OFAC).

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 certain assets of the state held in the United States by the state, its agencies or instrumentalities, or third parties. Such plaintiffs may invoke the Terrorism Risk Insurance Act (TRIA)[83] to seek attachment or execution of any blocked assets of the state or its agencies or instrumentalities.[84] Iran has appeared in several such actions to defend its interests.[85] Plaintiffs are increasingly invoking TRIA in novel ways in their efforts to enforce their terrorism-related default judgments against third parties.[86]

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83 See Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297 § 201, 116 Stat. 2322, 2337–40.

84 See, e.g., *Levin v. Islamic Republic of Iran*, 523 F. Supp. 3d 14 (D.D.C. 2021), appeal docketed sub nom. *Levin v. Wells Fargo Bank, N.A.*, Docket No. 21-07036 (D.C. Cir. 26 April 2021).

85 In one such case, Iran's central bank, Bank Markazi, challenged the constitutionality of new legislation that aided plaintiffs to enforce their terrorism judgments. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). During the pendency of enforcement proceedings in the lower courts, 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. 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 1317, 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 United Nations General Assembly, Report of the International Court of Justice 1 August 2018–31 July 2019, ¶¶166–75, U.N. Doc. A/74/4 (2019). In another case, *Rubin v. Islamic Republic of Iran*, the Supreme Court found in Iran's favour, concluding that the plaintiffs had no right under the immunity provisions of the Foreign Sovereign Immunities Act (FSIA) to enforce their default judgments against Iranian antiquities on loan to a US university. 138 S. Ct. 816, 821 (21 February 2018). In *Greenbaum v. Islamic Republic of Iran*, the plaintiffs tried to enforce judgments against Iran for injuries suffered in terrorist attacks by attaching Iranian oil seized by, and forfeited to, the United States. No. 1:02-cv-2148-RCL, 2022 U.S. Dist. LEXIS 60041 (D.D.C. 1 March 2022). The plaintiffs relied, in part, on *Rubin*'s holding to argue that the United States abrogated its own sovereign immunity when Congress passed the Terrorism Risk Insurance Act (TRIA), thus permitting the plaintiffs to attach the formerly Iranian property now held by the United States. id. at *13–14. However, the court disagreed and held that the United States had not waived its federal sovereign immunity, noting that *Rubin*'s holding was limited to foreign property and that the Supreme Court had not considered matters of federal sovereign immunity. id. at *15.

86 See, e.g., *Caballero v. FARC*, No. 20-MC-40-LJV, 2021 U.S. Dist. LEXIS 17637 (W.D.N.Y. 29 January 2021). The plaintiffs in this case are judgment creditors of the Colombian terrorist organisation Fuerzas Armadas Revolucionarias de Colombia (FARC) against which the plaintiffs hold a default judgment under the Anti-Terrorism Act. These plaintiffs are using TRIA to argue that the assets of Venezuela's national oil company, PDVSA, and its

One particularly novel and controversial use of TRIA has recently emerged in the litigation pending before the US District Court for the Southern District of New York brought by the plaintiff victims of the September 11 attacks, known as *In Re: Terrorist Attacks on September 11, 2001* (the *9/11* action).[87] In that action, various plaintiffs are invoking TRIA to compel the turnover of US$3.5 billion in assets of Da Afghanistan Bank (DAB), Afghanistan's central bank, held at the Federal Reserve Bank of New York and blocked by the United States pursuant to an Executive Order.[88]

These plaintiffs hold default judgments against the Taliban, finding the Taliban liable for the attacks on 9/11 and awarding these plaintiffs hundreds of millions of dollars in damages. These plaintiffs are now seeking to enforce their default judgments against DAB's assets under the theory that DAB is an 'agency or instrumentality' (as that phrase is used in TRIA) of the Taliban and is therefore liable to pay the default judgment. Numerous other plaintiffs groups in the *9/11* action and other terrorism-related cases are also trying to position themselves in respect of DAB's assets at the Federal Reserve.

Although the United States has not taken a position at this stage in the proceedings, the United States filed a Statement of Interest for the court's consideration highlighting certain legal defences against turnover of DAB's assets under the Foreign Sovereign Immunities Act (FSIA) and TRIA (which is codified as a note in one of the attachment provisions of the FSIA).[89] These defences include

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subsidiaries that have been protectively blocked by the United States are available to them under TRIA. In particular, the plaintiffs are arguing that PDVSA and its subsidiaries are each an 'agency or instrumentality' of the FARC, as that phrase is used in TRIA. As such, they argue that PDVSA's and its subsidiaries' blocked assets are available for turnover in satisfaction of the *FARC* default judgment. The plaintiffs initially obtained *ex parte* relief against PDVSA and its subsidiaries, which is now being actively challenged before the court along with the legality of the plaintiffs' use of TRIA. In full disclosure, the authors represent PDVSA and its subsidiaries in this and other similar US litigations.

87 Case No. 03-md-01570 (S.D.N.Y.).

88 On 11 February 2022, President Biden issued Executive Order on Protecting Certain Property of Da Afghanistan Bank (DAB) for the Benefit of the People of Afghanistan. On that same day, OFAC issued a licence in respect of US$3.5 billion of the US$7 billion of DAB's blocked assets in an effort to protect that US$3.5 billion for humanitarian aid for the Afghan people. The United States submitted arguments to the court in the *9/11* action to explain that the Executive Order and OFAC licence prevent the *9/11* plaintiffs from obtaining the OFAC-licensed US$3.5 billion for the *9/11* plaintiffs. As a result, the court issued an order on 25 February 2022, holding that the OFAC-licensed portion of DAB's assets were not judicially restrained and therefore unavailable for attachment and execution under TRIA. Order, *In re Terrorist Attacks on September 11, 2001*, 03-md-1570 (S.D.N.Y. 25 February 2022).

89 Statement of Interest of the United States, 03-md-1570 (S.D.N.Y. 11 February 2022).

whether: (1) DAB's assets are property 'of' a 'terrorist party', as required for turnover under TRIA; (2) the phrase 'agency or instrumentality' under TRIA includes an 'agency or instrumentality of a foreign state', as that phrase is defined in the FSIA;[90] (3) the special immunity protections afforded to assets of central banks under Section 1611(b)(1) of the FSIA prevent turnover of DAB's assets; and (4) principles of recognition of foreign governments by the United States and principles of sovereign immunity prevent turnover.[91]

The proceedings are in their preliminary stages and DAB has not yet appeared to assert defences, but the case will be watched closely for its novel sanctions, sovereign immunity and US foreign policy implications.

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 APA grounds. For example, in *Exxon Mobil Corp v. Mnuchin*, Exxon challenged a US$2 million civil penalty for allegedly violating OFAC's Ukraine-related sanctions regulations.[92] OFAC had found that Exxon committed a sanctions violation by dealing with SDN Igor Sechin when he signed a contract with Exxon in his capacity as president of Rosneft OAO, a non-designated entity.[93] The district court vacated the penalty, ruling that public statements from the Executive Branch and guidance from OFAC did not provide fair notice that Exxon's conduct would be viewed as illegal, and hence the penalty violated Exxon's Fifth Amendment Due Process rights.[94]

Notably, the court considered Exxon's failure to seek OFAC's guidance a relevant factor, but not dispositive, because OFAC ultimately bears the burden of conveying its interpretation to the public.[95]

In another case, *Epsilon Electronics, Inc v. United States Department of the Treasury*,[96] the plaintiff brought a successful APA claim against part of a civil penalty assessed by OFAC for alleged violations of the Iranian Transactions

90 Under this defence, DAB is an 'agency or instrumentality' of Afghanistan and TRIA permits turnover of blocked assets of agencies or instrumentalities of foreign states that have been designated as state sponsors of terrorism, but Afghanistan has never been so designated.

91 Statement of Interest of the United States, 03-md-1570 (S.D.N.Y. 11 February 2022), at 19–27.

92 430 F. Supp. 3d 220, 225 (N.D. Tex. 2019).

93 id. at 226–28.

94 id. at 229, 237–43.

95 id. at 237.

96 857 F.3d 913 (D.C. Cir. 2017).

and Sanctions Regulations (ITSR). The court held that for five of 39 penalised transactions, OFAC violated the APA's arbitrary-and-capricious standard in determining that the plaintiff had reason to know that several shipments of its goods would violate the ITSR, despite the existence of countervailing evidence.[97]

Contract disputes

Both sanctioned parties and interested parties (e.g., contractual counterparties) face breach of contract disputes when the United States, the European Union or the United Kingdom 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 appellate court held in *Kashani v. Tsann Kuen China Enterprise Co* that the non-performance of contract requiring shipment of US-manufactured computers to Iran did not give rise to a claim because the agreement was illegal under US sanctions and against public policy.[98] 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.[99] 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 requirement that performance should comply with 'mandatory provisions of law', which the Court interpreted to include compliance with the applicable US sanctions.[100]

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97 id. at 927–28. The court did not rule that OFAC could not have imposed liability for these five transactions, but held instead that OFAC failed to address at all the evidence presented by the plaintiff demonstrating that it did not have reason to know that the goods were specifically intended for re-export to Iran. The plaintiff and OFAC ultimately settled the case in 2018. See 'Epsilon Electronics, Inc. Settles Potential Civil Liability for Alleged Violations of the Iranian Transactions and Sanctions Regulations and Related Claims, 2018 Enforcement Information', OFAC (13 September 2018) (settling Epsilon's remanded penalty at US$1.5 million), https://home.treasury.gov/policy-issues/financial-sanctions/civil-penalties-and-enforcement-information.

98 See *Kashani v. Tsann Kuen China Enterprise Co.*, 118 Cal. App. 4th 531, 536–37 (Cal. Ct. App. 2004).

99 See id., at 550–52.

100 [2019] EWHC 1877 (Comm); 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 LLP (7 October 2019), at www.whitecase.com/publications/alert/sanctioned-default-english-high-court-considers-effect-foreign-illegality.

The EU Blocking Regulation, which prohibits EU and UK[101] 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 and the United Kingdom.[102] The Blocking Regulation affords EU and UK persons protection from enforcement of judgments relating to covered US sanctions in the European Union and the United Kingdom and provides the right to recover legal costs and damages caused by actions based on, or resulting from, such sanctions.[103]

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.[104] 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.[105]

Notably, on 21 December 2021, the CJEU rendered its first judgment assessing the Blocking Regulation, 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.[106] The CJEU ruled, inter alia, that it is possible for an EU person to terminate contracts with an

101 Following the end of the 'Brexit' transition period on 31 December 2020, the EU Blocking Regulation is no longer directly applicable in the United Kingdom, but is part of retained EU law applying in the United Kingdom through the Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2020. These laws, and other related UK laws, together form the UK's 'Protection of Trading Interests Legislation'.

102 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 (for the UK, see further details above) maintain similar laws.

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

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

105 ibid.

106 See Judgment of the Court (Grand Chamber) of 21 December 2021, *Bank Melli Iran v. Telekom Deutschland GmbH*, Case C-124/20, ECLI:EU:C:2021:1035.

Iranian counterparty without providing specific reasons, but that, in the context of civil proceedings, it would have the burden of proving this was not done to comply with US sanctions. See Chapter 2 for further details on this case. This judgment is expected to have a significant effect on both EU law arbitrations and cases pending before national EU Member State 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, UK 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 because EU, UK and Canadian blocking regulations compelled defendants' exports to Cuba in contravention of US sanctions.[107]

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 Trump administration lifted the suspension of the private right of action.[108] 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.[109] 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, the law's complex requirements present significant hurdles for plaintiffs.[110]

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107 174 F. Supp. 2d 294 (E.D. Pa. 2001).

108 Michael R. Pompeo, Remarks to the Press, US Dep't State (17 April 2019), https://2017-2021.state.gov/remarks-to-the-press-11/index.html.

109 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021–91. The Helms-Burton Act is also known as the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996.

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

For example, in *Gonzalez v. Amazon.com*, the plaintiff alleged he was the rightful owner of land that had been confiscated from his family in 1964, and that the defendants began selling charcoal produced on that land in 2017.[111] The court dismissed the claim in March 2020, without prejudice and with leave to amend, for failure to allege an actionable ownership interest and failure to allege that defendants knowingly and intentionally trafficked in the agricultural property.[112] The plaintiff filed an amended complaint containing additional information about the history of his family's property interest.[113] In May 2020, the court dismissed the claim again, but with prejudice, for failure to allege an actionable ownership interest.[114] The court held that the plaintiff failed to show, as Title III requires, that he had acquired the property before 12 March 1996. On appeal, the Eleventh Circuit affirmed the district court's decision in a brief, *per curiam*, unpublished opinion.[115] Although *Gonzalez* provides useful precedent for evaluating ownership claims under Title III, neither the district court nor the Eleventh Circuit provided guidance for addressing claims that a person 'traffics' in confiscated Cuban property.

More than 40 lawsuits similar to *Gonzalez* have been filed under Title III, most of them in the Southern District of Florida. These cases largely feature claims that US and EU defendants allegedly benefit in some way from commercial activities involving the plaintiffs' purported confiscated property. Defendants have sought dismissal on grounds including subject matter and personal jurisdiction, standing and failure to satisfy Title III requirements. As in *Gonzalez*, district courts in some cases have granted motions to dismiss.[116] In at least four Title III

111 No. 1:19-cv-23988, 2020 U.S. Dist. LEXIS 41718, at *1–3 (S.D. Fla. 10 March 2020), aff'd, 835 F. App'x 1011 (11th Cir. 2021).

112 id. at *3–7.

113 id. at *1–3.

114 *Gonzalez*, 2020 U.S. Dist. LEXIS 82296, at *4–7.

115 *Gonzalez v. Amazon.com, Inc.*, 835 F. App'x 1011 (11th Cir. 2021).

116 In some cases, courts have dismissed suits for lack of statutory standing (Title III states that '[i]n the case of property confiscated before March 12, 1996, a [US] national may not bring an action . . . unless such national acquires ownership of the claim before March 12, 1996'. 22 U.S.C. § 6082(a)(4)(B)). See, e.g., *Gonzalez*, 2020 U.S. Dist. LEXIS 41718; *Garcia-Bengochea v. Royal Caribbean Cruises, Ltd.*, No. 1:19-CV-23592 (S.D. Fla. 15 October 2020) appeal docketed; 20-14251 (11th Cir. 15 April 2022); *Glen v. Am. Airlines, Inc.*, No. 20-10903, 2021 U.S. App. LEXIS 22847 (5th Cir. 2 August 2021) (vacating the district court's dismissal of the case for lack of Constitutional standing, but nonetheless rendering judgment for the defendant because of the plaintiff's lack of statutory standing), cert. denied, 142 S. Ct. 863 (2022). Courts have also dismissed suits for lack of personal jurisdiction. See, e.g., *Iglesias v. Ricard*, No. 20-20157-CIV-WILLIAMS, 2021 U.S. Dist. LEXIS 138030 (S.D. Fla. 17 June 2021);

cases involving the plaintiff Havana Docks Corporation, however, the court has allowed the cases to proceed.[117] Notably, Title III provides that the re-suspension of the right of action by the President shall not affect suits commenced before the date of such suspension.[118] Therefore, any re-invocation of the waiver by President Biden likely would not extinguish claims that have already been filed.

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

The US and other sanctions regimes are often implicated in suits brought under US statutes creating private rights of action for terrorism-related claims.[119] Such claims are typically brought by victims of terrorism or their estates or survivors,

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Del Valle v. Trivago GMBH, No. 19-22619-Civ, 2020 U.S. Dist. LEXIS 92395 (S.D. Fla. 22 May 2020) appeal docketed, Nos. 20-12407-DD, 20-12960-BB, 20-14251-BB, 2021 U.S. App. (11th Cir.).

117 See *Havana Docks Corp. v. Carnival Corp.*, No. 19-cv-21724, 2022 U.S. Dist. LEXIS 49976, at *5–6 (S.D. Fla. 21 March 2022).

118 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 § 306(c)(3), 22 U.S.C. § 6085(c)(3).

119 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). Initially this provision provided civil relief only against principals perpetrating 'acts of international terrorism'. A 2016 amendment expanded 18 U.S.C. § 2333 to create civil liability for any person who 'aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed' an act of international terrorism. 18 U.S.C. § 2333(d)(2); see also *Weiss v. Nat'l Westminster Bank PLC*, 381 F. Supp.3d 223, 230 (E.D.N.Y. 2019) (*Weiss II*). This expansion has spurred a new wave of aiding-and-abetting and conspiracy claims. See, e.g., *Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217 (2d Cir. 2019); *Bartlett v. Société Générale de Banque au Liban Sal*, No. 1:19-cv-7, 2020 U.S. Dist. LEXIS 229921 (E.D.N.Y. 25 November 2020).

and may involve allegations that the defendants caused terrorist acts or provided support for such acts. The defendants in such actions may include private entities (particularly including financial institutions),[120] as well as sovereign states.[121]

The sanctions designation of an entity may satisfy a precondition for a terrorism-related action,[122] or otherwise bear on questions of scienter, for example, whether a defendant knew it was providing material support to a terrorist organisation in violation of US law.[123] However, in the context of terrorism-related claims against financial institutions, courts have held that a counterparty's status as designated entity alone is not sufficient to establish scienter,[124] or to establish liability under an aiding-and-abetting or conspiracy theory.[125]

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120 See, e.g., *Weiss II*, 381 F. Supp.3d at 226; *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018).

121 See, e.g., Complaint, *Bowrosen v. Kingdom of Saudi Arabia*, No. 1:16-cv-8070 (S.D.N.Y. 16 October 2016); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, No. 19-CV-3142, 2022 U.S. Dist. LEXIS 69627 (E.D.N.Y. 13 April 2022).

122 For example, providing material support to a foreign terrorist organisation with knowledge that such organisation is a 'designated terrorist organisation' is criminalised under 18 U.S.C. § 2339B(a)(1); conduct that would give rise to criminal liability under 18 U.S.C. § 2339B may in turn give rise to civil liability under 18 U.S.C. § 2333. See, e.g., *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1015 (7th Cir. 2004); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 706–07 (7th Cir. 2008) (en banc) (Rovner, J., concurring in part and dissenting in part). But note that the 'designation' at issue in 18 U.S.C. § 2339B(a)(1) refers to designation as a foreign terrorist organisation (FTO) by the US Secretary of State and not by OFAC. See also *Weiss II*, 381 F. Supp.3d at 233.

123 See, e.g., *Weiss v. Nat'l Westminster Bank PLC*, 768 F.3d 202, 211-12 (*Weiss I*); *Bartlett*, 2020 U.S. Dist. LEXIS 229921 at *52–61.

124 See, e.g., *Weiss II*, 381 F. Supp.3d at 235–36, 239 ('[e]vidence that Defendant knowingly provided banking services to a terrorist organization, without more, is insufficient to satisfy [the] scienter requirement [under 18 U.S.C. § 2333(d)(2)]'); aff'd, 993 F.3d 144 (2nd Cir. 2021), petition for cert. filed, Docket. No. 21-381, (U.S. 8 September 2021); see also *Linde v. Arab Bank, PLC*, 882 F.3d 314, 326 (2d Cir. 2018) (rejecting the argument that providing material support to a known FTO in violation of § 2339B invariably satisfies the predicate necessary for civil liability); *Honickman v. Blom Bank SAL*, 432 F. Supp. 3d 253, 263–64 (E.D.N.Y. 2020), aff'd, 6 F.4th 487 (2d Cir. 2021).

125 See, e.g., *Siegel*, 933 F.3d at 224 (declining to find liability under an aiding-and-abetting theory); *Linde v. Arab Bank, PLC*, 882 F.3d 314, 329 (2d Cir. 2018) (remanding an aiding-and-abetting claim for retrial, and providing a test to determine liability); *Freeman v. HSBC Holdings PLC*, 413 F. Supp.3d 67, 97–98 (E.D.N.Y. 2019) (*Freeman I*) (declining to find liability under a conspiracy theory). But note, a petition for certiorari questioning the limited scope of secondary liability available under the Anti-Terrorism Act, as amended, is currently pending before the US Supreme Court. See *Strauss v. Credit Lyonnais, S.A.*, Docket No. 21-382 (U.S. 9 September 2021); *Weiss v. National Westminster Bank, PLC*, Docket No. 21-381 (U.S. 8 September 2021). Courts have also declined to equate alleged conspiracy to violate sanctions with conspiracy to commit acts of terror. See *Shaffer v. Deutsche*

In suits where the designated entity itself is the defendant, courts have also held that designation is not sufficient in itself to establish that a designated entity purposefully engaged in misconduct for the purpose of furthering terrorist aims.[126]

In *Linde v. Arab Bank PLC*, the Second Circuit established a three-element test for determining aiding and abetting liability in the context of terrorism-related suits.[127] Some courts have since held that claims against financial institutions satisfy the *Linde* test,[128] while other courts have held that the banking activities of financial institutions failed to satisfy the *Linde* test.[129] The question of what level of publicly available information regarding activities of a terrorist counterparty may establish liability of a financial institution under an aiding-and-abetting theory has been certified for interlocutory appeal.[130]

Bank AG, No. 3:16-cr-497, 2017 U.S. Dist. LEXIS 220198, at *13, aff'd sub nom. *Kemper v. Deutsche Bank AG*, 911 F.3d 383, 394–95 (7th Cir. 2018) ('[A]t most, . . . Deutsche Bank joined a conspiracy to evade sanctions. . . . But no facts suggest that Deutsche Bank agreed to facilitate any wrongful conduct beyond this').

126 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), aff'd in part, vacated in part on other grounds sub nom. *O'Neill v. Asat Trust Reg.*, 714 F.3d 659 (2d Cir. 2013); see also *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 'warrant[s] some deference' in determining whether a defendant 'purposefully directed its activities at the United States' in jurisdictional analysis).

127 882 F.3d at 329. The test requires showing '(1) the party whom the defendant aids [has] perform[ed] a wrongful act that cause[d] an injury, (2) the defendant [was] generally aware of [its] role as part of an overall illegal or tortious activity at the time that [it] provide[d] the assistance, and (3) the defendant . . . knowingly and substantially assist[ed] the principal violation.' id. (citing *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983)).

128 See, e.g., *Freeman v. HSBC Holdings PLC*, No. 1:18-cv-7359, 2021 U.S. Dist. LEXIS 3452, at *30–45 (E.D.N.Y. 7 January 2021) (*Freeman II*); *Estate of Henkin v. Kuveyt Türk Katilim Bankasi A.Ş.*, No. 1:19-cv-5394, 2020 U.S. Dist. LEXIS 194217, at *35–36 (E.D.N.Y. 20 October 2020) (*Henkin I*).

129 See *Honickman v. BLOM Bank SAL*, No. 20-575, 2021 U.S. App. LEXIS 22480, at *27–28 (2d Cir. 29 July 2021) (affirming dismissal where allegations failed to support inference that the bank was aware its customers had ties to a terrorist organisation before attacks at issue); *Weiss v. Nat'l Westminster Bank*, 993 F.3d 144, 2021 U.S. App. LEXIS 9979, at *46–47 (2d Cir. 2021) (*Weiss III)* (affirming grant of summary judgment in the bank's favour); *Siegel*, 933 F.3d at 224 (affirming grant of motion to dismiss); *O'Sullivan v. Deutsche Bank AG*, No. 17-cv-8709, 2019 U.S. Dist. LEXIS 53134, at *38–39 (S.D.N.Y. 28 March 2019) (granting motion to dismiss).

130 See *Estate of Henkin v. Kuveyt Türk Katilim Bankasi A.Ş.*, No. 19-cv-5394, 2020 U.S. Dist. LEXIS 212723 (E.D.N.Y. 13 November 2020) (*Henkin II*). The Second Circuit granted leave

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.[131] These criminal proceedings typically involve charges including violating or conspiring to violate one or more of OFAC's authorising statutes (such as IEEPA), or additional financial crimes charges such as bank fraud and money laundering.

In *United States v. Huawei Technologies Co, Ltd*,[132] the Chinese telecommunications company Huawei and co-defendants, including company chief financial officer Meng Wanzhou, faced charges including alleged violations of US Iran-related sanctions in the early 2010s. In September 2021, Meng entered into a deferred prosecution agreement in which she admitted to knowingly making false statements regarding Huawei's business in Iran to a global financial institution, causing the institution to continue to do business with Huawei in violation of US sanctions.[133] Meng, who was facing extradition to the US from Canada, was allowed to return to China. The case against Huawei and other co-defendants remains ongoing.

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to appeal. Order, *Kuveyt Türk Katilim Bankasi A.Ş. v. Henkin*, No. 20-cv-03939 (2d Cir. 4 March 2021).

131 See, e.g., Final Verdict Form, *United States v. Nejad*, No. 1:18-cr-224 (S.D.N.Y. 12 March 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. 16 March 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*, No. 1:18-cr-224, 2020 U.S. Dist. LEXIS 101749, at *1–2 (S.D.N.Y. 9 June 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).

132 No. 1:18-cr-00457 (E.D.N.Y. filed 22 August 2018).

133 No. 1:18-cr-00457 (E.D.N.Y. 24 September 2021); 'Huwawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution', US Dep't Justice (24 September 2021), www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution.

The United States has also prosecuted numerous individuals and Turkish state-owned bank Halkbank for an alleged scheme to violate US Iran-related sanctions.[134] The district court hearing the case rejected Halkbank's argument that, as an instrumentality of a foreign state, it is immune from prosecution under the FSIA.[135] The case is currently on appeal.[136]

Other notable recent developments include criminal prosecutions against persons accused of: (1) providing cryptocurrency services to North Korea in violation of US sanctions;[137] (2) violating US blocking sanctions imposed on an individual Russian oligarch;[138] and (3) attempting to export an industrial micro-

134 See 'Former Turkish Minister of the Economy, Former General Manager of Turkish Government-Owned Bank, and Two Other Individuals Charged With Conspiring to Evade U.S. Sanctions Against Iran and Other Offenses', US Dep't Justice (6 September 2017), www.justice.gov/usao-sdny/pr/former-turkish-minister-economy-former-general-manager-turkish-government-owned-bank; 'Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme', US Dep't Justice (15 October 2019), www.justice.gov/opa/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar-iranian. To date, one individual defendant has pled guilty, and another individual defendant has been convicted, with the Second Circuit affirming the conviction. See Decision and Order at 2, *United States v. Halkbank*, 15-cr-867 (S.D.N.Y. 1 October 2020).

135 Decision and Order at 7–10, *United States v. Halkbank*, 1:15-cr-867 (S.D.N.Y. 1 October 2020). The court held that FSIA does not grant immunity in criminal proceedings, and even if it did, FSIA's commercial activity exception would allow prosecution. See id.

136 See *United States v. Zarrab (Turkiye Halk Bankasi)*, No. 20-3499 (2d Cir. filed 9 October 2020).

137 See 'Two European Citizens Charged for Conspiring with a U.S. Citizen to Assist North Korea in Evading U.S. Sanctions', US Dep't Justice (25 April 2022), www.justice.gov/opa/pr/two-european-citizens-charged-conspiring-us-citizen-assist-north-korea-evading-us-sanctions (announcing indictments against a Spanish citizen and a UK citizen for providing cryptocurrency and blockchain services to North Korea and for planning a cryptocurrency conference in North Korea in violation of US sanctions). A US citizen likewise pleaded guilty for planning to attend and present at the same conference and was sentenced to 63 months' imprisonment. See *United States v. Griffith*, No. 1:20-cr-15 (S.D.N.Y. 13 April 2022).

138 Sealed Indictment, *United States v. Malofeyev*, 1:21-cr-00676 (S.D.N.Y. 5 April 2022); see also, 'Russian Oligarch Charged with Violating U.S. Sanctions', US Dep't Justice (6 April 2022), www.justice.gov/opa/pr/russian-oligarch-charged-violating-us-sanctions. The indictment alleges that Russian oligarch Konstantin Malofeyev, blocked since his designation in 2014, violated US sanctions by continuing to employ, after his designation, a US citizen to operate television networks in Russia and Greece). The US citizen working for Mr Malofeyev was also charged. Sealed Indictment, *United States v. Hanick*, 1:21-cr-00676 (S.D.N.Y. 4 November 2021); see also 'TV Producer for Russian Oligarch Charged with Violating Crimea-Related Sanctions', US Dep't Justice (3 March 2022), www.justice.gov/opa/pr/tv-producer-russian-oligarch-charged-violating-crimea-related-sanctions.

wave system and counter-drone system from the United States to Iran without obtaining the requisite licence from OFAC.[139]

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.[140] Under the EU or UK 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 or the United Kingdom.

The ITSR contain a unique authorisation for 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.[141] 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; (2) 'contemplated under an international agreement'; or (3) involve the enforcement of awards, decisions or orders resulting from point (1) or point (2).[142] OFAC does not provide formal guidance on the meaning of arbitral proceedings 'contemplated under an international agreement' in this general licence. The phrase could be construed to cover treaties that specifically contemplate the arbitration at issue (e.g., if two countries establish an arbitral venue for specific claims). It might also cover proceedings contemplated under multilateral treaties establishing arbitral bodies, such as the International Centre for Settlement of Investment Disputes 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.

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139 Plea Agreement, *United States v. Fakih*, 1:18-cr-00134 (D.D.C. 25 January 2022); see also, 'Indictment and Guilty Plea Entered in Iranian Export Case', US Dep't Justice (27 January 2022), www.justice.gov/opa/pr/indictment-and-guilty-plea-entered-iranian-export-case (stating that one individual pleaded guilty and four additional individuals were indicted for violating IEEPA and US sanctions by transferring dual-use technology to Iran without a licence).

140 See, e.g., 31 C.F.R. § 583.506(a)(2)–(3), (b) (the Global Magnitsky Sanctions Regulations); 31 C.F.R. § 598.507(ba)(2)–(3), (b) (the Foreign Narcotics Kingpin Sanctions Regulations).

141 See 31 C.F.R. § 560.525(a)(5) (the Iranian Transactions and Sanctions Regulations).

142 31 C.F.R. § 560.525(a)(5)(i)–(iii) (the Iranian Transactions and Sanctions Regulations).

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

US persons serving as arbitrators may need a specific licence, depending on the specific restrictions applicable to the sanctioned party.[143] Although OFAC has not issued formal guidance on the subject, it 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 and UK 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 or UK 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, UK and US licences may be needed for the parties' payment of the sanctioned arbitrator's fees.

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 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

143 See *United Media Holdings, NV v. Forbes Media, LLC*, No. 16 Civ. 5926 (PKC), 2017 U.S. Dist. LEXIS 222249, at *10 (S.D.N.Y. 9 August 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"').

agents at the border, carrying laptops or other technology into the country, and paying for essentially anything in the country, such as accommodation, taxis and food.[144]

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,[145] the US Department of State restricts the use of US passports to travel into, in or through North Korea absent special validation,[146] effectively prohibiting US persons from travelling to North Korea. Unlike the United States, the European Union and United Kingdom do 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'.[147] Sanctioned parties have successfully overcome this public policy defence, which applies only to awards that 'would violate the forum state's most basic notions of morality and justice'.[148] For example, in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc*, an award in favour of the sanctioned creditor, Iranian Ministry of Defence, 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

144 See, e.g., 31 C.F.R. §§ 515.210, 515.560 (the Cuba Sanctions Regulations); §§ 510.206 (the North Korea Sanctions Regulations); 542.207 (the Syrian Sanctions Regulations).

145 31 C.F.R. § 510.213(d) (the North Korea Sanctions Regulations).

146 See id., note 2; see also 22 C.F.R. § 51.63.

147 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, 21–22 (2008) (Article 36(1)(b)(ii)).

148 See *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 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)).

of the award (where the award would not frustrate sanctions).[149] Courts have also relied on OFAC's ability to prevent award payments,[150] or OFAC's licensing of legal proceedings or arbitral awards,[151] in declining to find that payment of an award would violate public policy.[152]

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.

149 See id. at 1096–99 (reasoning, additionally, 'We should not refuse to confirm an arbitration award because payment is prohibited when payment may in fact be authorised by the government's issuance of a specific license.').

150 See *Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 820 (D. Del. 1990) (reasoning that the Executive could prevent payment of an award if it so chose).

151 See id. (given, inter alia, the specific permission from the Administration to Libya to litigate the current proceeding, the court could not find that enforcing a validly obtained award in favour of the Libyan government would violate the United States' 'most basic notions of morality and justice'); *United Media Holdings, NV*, 2017 U.S. Dist. LEXIS 222249, at *27, *34 (S.D.N.Y. 9 August 2017) (holding that OFAC's licence for issuance of an award was a factor showing that enforcing the award would not violate public policy, especially since the award appeared 'to further the goal of the sanctions laws').

152 Courts have also found that sanctions blocking the property of foreign states in the US do not prevent the enforcement of awards against the sanctioned states. See *Tenaris, S.A. v. Bolivarian Republic of Venezuela*, 2021 U.S. Dist. LEXIS 59126, at *9–11 (D.D.C. 29 March 2021) (finding that staying enforcement of an arbitral award against Venezuela 'may violate' the full faith and credit owed to International Centre for Settlement of Investment Disputes (ICSID) awards under the ICSID implementing statute, and that in any event a stay would be 'redundant' since OFAC regulations 'currently prohibit[] [petitioners] from attaching or executing on any Venezuelan assets in the United States without first obtaining a license to do so from OFAC.').

APPENDIX 2

About the Authors

Claire A DeLelle
White & Case LLP

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 litigation 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 and the Anti-Terrorism 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 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.

Claire recently represented the Transitional Government of the Republic of the Sudan in terrorism litigation, including before the US Supreme Court, and brokered a bilateral claims settlement agreement between Sudan and the United States, resulting in Sudan's removal from the US State Sponsors of Terrorism List. She is currently representing Petróleos de Venezuela, SA (PDVSA), Venezuela's national oil company, through the ad hoc board of directors of PDVSA, appointed by Venezuela's Interim President Juan Guaidó, in terrorism litigation under the Terrorism Risk Insurance Act.

Nicole Erb
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Nicole Erb co-leads the international sanctions and export controls practice at White & Case. 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, 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 typically involve questions under the Foreign Sovereign Immunities Act, the International Organizations Immunities Act, the Anti-Terrorism Act, the Alien Tort Statute, the Terrorism Risk Insurance Act, the International Emergency Economic Powers Act, the Trading With the Enemy Act, various US executive orders and sanctions authorities, and the act of state and political question doctrines.

Nicole routinely represents clients before the US Department of the Treasury's Office of Foreign Assets Control, the Department of Justice and the Department of State. She advises clients on US sanctions relating to, among others, Crimea, Cuba, Iran, Nicaragua, North Korea, Russia, South Sudan, Syria and Venezuela.

Nicole recently represented the Transitional Government of the Republic of the Sudan in terrorism litigation, including before the US Supreme Court, and brokered a bilateral claims settlement agreement between Sudan and the United States, resulting in Sudan's removal from the US State Sponsors of Terrorism List. She is currently representing Petróleos de Venezuela, SA (PDVSA), Venezuela's national oil company, through the ad hoc board of directors of PDVSA, appointed by Venezuela's Interim President Juan Guaidó, in terrorism litigation under the Terrorism Risk Insurance Act.

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We live in a new era for sanctions, more than ever, it seems. More states are using them, in more creative (and often unilateral) ways. They've become many states' first line of response.

This, alas, creates a degree of complication for everyone else. Hitherto no book has addressed those issues and the proliferation of sanctions regimes and investigations in a structured way. GIR's *The Guide to Sanctions* solves that. Written by contributors from the small but expanding field of sanctions enforcement, it dissects the topic in a practical fashion, from every stakeholder's perspective, and is an invaluable resource.

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