Vilnius University Faculty of Law

Department of Private Law

Naomi Mnena Kakwagh

II Study year, international and European Law Programme Student

Master's Thesis

The Impact of International Economic Sanctions on the Performance of Contract

Supervisor: Lect. Albertas Šekštelo

Reviewer: dr. Inga Martinkutė

Vilnius

2022

ABSTRACT AND KEY WORDS

Restrictive measures are an increasingly popular tool of foreign policy, and economic sanctions are always present in the sphere of international trade. This work analyses the principles of international economic sanctions and the primary aspect of the impact these sanctions have on the contractual sphere of parties, it also highlights the differences between invalidity and impossibility of performance of contract affected by economic sanctions. The impact of economic sanctions is evaluated in conjunction with the fundamental pronouncements of courts and arbitral tribunals when deliberating on contracts affected by sanctions.

Keywords. Compliance, restrictive measures, contractual obligations, invalidity of contract, and sanction regulations.

Table of Content

Introduction

Relevance of the Topic. The advent of the use of restrictive measures, (often time referred to as sanctions) dates back to end of the cold war, these restrictive measures have different legal consequences ranging from economic, political and social effects. Restrictive measures can also be broken down into different categories based on their intended outcomes, and regardless of their nature, these restrictive measures have an impact on various contract forms. From the perspective of the sanctioned business entities it raises multiple legal challenges, this is because as soon as sanctions are adopted, extensive compliance obligations are imposed on companies, their financial institutions and their advisors. As a result, the need to take, refrain from or neglect certain actions can give rise to legal disputes: with business partners, with intermediaries and transaction advisors, or with public administrations of the relevant countries.

It is noted that most restrictive measures regulations frequently fall short in regulating the impact of these measures on the private contractual obligations of the target countries, entities or individuals. Consequently, it is still within the purview of domestic courts and arbitral tribunals to decide whether the pertinent measures are acceptable justification for non-performance of the contract or a ground for contractual invalidity based on the applicable rules of law.

The topic of economic sanction has been a critical discourse in the international scene, and deliberations on the sustainability or otherwise of economic sanctions have continued to grow exponentially with different authors proposing various solutions to the lapses which avails in the relevant sanction regulations. In the opinion of the author, the frequency with which economic sanctions are been imposed and been used for foreign policy purposes and the resultant effect of these restrictive measures on private contractual obligations, makes the topic relevant for legal academic consideration.

The aim of the thesis is to examine the impact of international economic sanction on the performance of contracts, as the prevalence of sanctions will undoubtedly have an effect on the development of international private law as well as contract law.

Whilst there are various international sanctions adopted by different countries, this thesis will focus on the sanctions adopted by the European Union targeting economic relations with Russia following the conflict in Ukraine and subsequent political developments. Nonetheless,

references to sanctions imposed by the United Nations, the United States of America and other countries will be made as needed.

The tasks and objectives. The main method of international pressure that does not include the use of force is international economic sanctions, but from the standpoint of the sanctioned entities, it poses numerous legal problems. This thesis provides insight on the concept of international economic sanctions, the objective of the thesis is to analyze the development of EU economic sanctions and examine the impact of the sanctions on the performance of contractual obligations in a private contract. In achieving this, the thesis formulates and aims to deal with the following issues

1. To analyze the fundamental principles and essence of economic sanctions;
2. To examine the position of courts and arbitral tribunals concerning restrictive measures and their impact on contractual obligations;
3. Determining whether, in addition to the impossibility to perform and the invalidity of a contract, other issues arise in international trade as a result of imposed restrictive measures;
4. Analyzing the avenues of mitigating breach of performance of contract affected by sanctions.

The existence of imposed sanctions continues to impact contracting parties and thereby making the performance of contractual obligations impossible and, in some cases, rendering the entire contract invalid. This thesis does not focus on the contracts which have been prohibited by sanctions rather on those contracts whose performance has turned out to be onerous or impossible as a result of sanctions.

Method of research. The scope of the thesis includes comparative and doctrinal research methodology. The research strategy of the thesis is the doctrinal approach, as it examines several sanction regulations as well as legal literature that bothers on restrictive measures, and specifically economic sanctions. Additionally, the thesis adopts a comparative method, where appropriate to examine the mechanisms in the European Union sanction regulation in conjunction with the sanctions imposed by the United Nations to determine the collective impact on the performance of contract. Furthermore, while analyzing the concept of performance of contract, the linguistic method was used to determine the meaning of several concepts.

Originality. Sanctions are measures that have unanticipated and in certain instances, unwanted outcomes. A classical example is how sanctions exacerbated Haiti's economic distress,

resulting in a dangerous migration of Haitians to the United States. While there have been works that expand on the nature of international economic sanctions, they do not delve into their potential impacts on contract performance, as well as mechanisms for addressing the aspect of invalidity of contract whether in full or in part. This will be one of the goals of the thesis. Furthermore, there are several literatures on economic sanctions as a tool of international relations, however the scope of these works are generally limited to the motives of the country or international organization imposing the sanctions. In this work, there will be discussion on the limitations on the use and utility of sanctions. The originality of the work is determined by its general focus on fundamental rules provided for in sanctions regulations and the impact on the performance of contractual obligations with parties affected by the sanction.

Main sources. The primary source of material used in this work is the European Union Council Implementing Regulation No. 269/2014 and other relevant Regulations amending and implementing this Regulation. The Principles of European Contract Law 2002 has also been relied upon due to its founding work in the integration of European private law. Additionally, several case laws has been relied upon, majority of the relevant examples are drawn from the decisions of the EU courts as well as those of the US courts.

Furthermore, several books such as “Economic Sanction Reconsidered” by Hufbauer et. al. (2007) and “The Political Economy of Economic Sanctions Handbook of Defence Economics” by Williams kaempfer and Anton Lowenberge (2007) along with articles such as “Contracts affected by Economic Sanction Russian and International perspective” by Kotelnikov A (2021) have been used to create the work's literature base.

While the above scholarly researches are important to this thesis, it is the intention of the author of this thesis to fill all the gaps as established in the other research by further bringing to bare the impact of international economic sanctions on the performance of contract.

CHAPTER ONE: THE CONCEPT AND EFFECT OF RESTRICTIVE MEASURES

1.1 Legal Framework and General Theory of Restrictive Measures

Restrictive measures, also referred to as sanctions [some scholars are of the opinion that these terms can be used interchangeably (Giumelli, 2013 p. 7)] are legally binding measures that can be taken against individuals, entities or countries.

International economic sanctions appear to be a frequent and common feature of foreign policy interactions between states(Caruso, 2003 p. 1). In particular, the United States is the country that has most frequently applied several economic sanctions after World War II. Similarly, multilateral organizations like the United Nations and also the European Union have also issued numerous restrictive measures.

International economic sanctions are threats of, or actual restrictions of economic relations taken by one or more states with another to coerce a change in the latter's behaviour. Three things are worthy of note in this definition (Siamack, 2013 p. 24). Firstly, sanctions have to do with at least one sanctioning state and sanctioned state. The sanctioning state is referred to as the "sender" while the sanctioned state is referred to as the "target." Secondly, economic sanctions restrict economic relations between the sender and target state, including trade, financial, and foreign aid relationships. The restrictions can take different forms, such as restrictions on exports and/or imports from the target and the termination of foreign aid, asset freezes and travel bans. Thirdly, sanctions are accompanied by demands by the sender to alter the policy of the target state (Siamack, 2013 p. 24).

Similarly, sanctions are actions initiated by one or more international actors (the 'senders') against one or more others (the 'targets') with either or both of two purposes: to punish the targets by depriving them of some value and / or to make the targets comply with certain norms the senders deem important. Economic sanctions seek to reduce trade in order to coerce the target government into changing its political behavior. This measure may be used as a tool, directly or indirectly, to impose costs on the economy as a whole (Shin, 2016 p 6).

The modern theory of sanctions has its offshoot from the creation of the League of Nations. Allowing the use of coercive measures, nonmilitary measures included as an alternative to the use of force, a formal legal discussion of the legitimacy of pacific blockades started within the League of Nations. Article 16 of the Covenant of the League of Nations constituted the root of

power for deploying sanctions in the case of the League of Nations. Four collective sanctions episodes were undertaken under the League of Nations against Yugoslavia in 1921, Greece in 1925, Paraguay and Bolivia between 1932 and 1935 and Italy in 1935-1936. The League of Nations was taken over by the United Nations after World War II. Since the 1970s, economic statecraft won back its popularity as a tool of foreign policy (Bergeijk, 1994 p 54).

Today, international economic sanctions are used as a common and recurring feature of international relations. For example, prior to 1990 which is the cold war period, the UN Security Council approved only two mandatory sanctions against Rhodesia and South Africa. Thereafter, the 1990s became the decade of sanctions. For example, no less than 15 cases were registered, against Iraq, the former Yugoslavia, Libya, Haiti, Somalia, and Liberia, the UNITA faction in Angola, Rwanda and Sierra Leone(Doxey, 1983 p. 38).

Since 1990, the United Nations Security Council (UNSC) which has the primary responsibility for maintenance of international peace and security, has made increasing use of its broad powers under Chapter VII of the Charter of the United Nations 26 June 1945. Article 39 of the UN Charter, which is the trigger to further action under Chapter VII provides that, any threat to the peace, violation of the peace, or act of aggression must be determined by the Security Council, who then recommends or decides what actions must be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.

The part of defining the concept of restrictive measures lies in the notion that it is not required that the other party had breached legal regulation, various cases throughout the history shows that sanctions or restrictive measures can be used both in order to prevent the breach of international norms or to enforce a certain behavior of another party and it is entirely in line with UN charter which gives UNSC discretion to apply measures in order to maintain or restore international peace and security (Farral, 2007 p. 7).

Coercive economic sanctions developed as a conceptual and policy bridge between diplomacy and force for ensuring compliance with UN demands (Kofi, 1998 p.64). Due to its distinctive function as the provider of international legitimacy, the United Nations has played a significant part in the mechanisms for the imposition and execution of sanctions (Thakur, 2006 p. 134).

In the United States, the Office of Foreign Assets Control ("OFAC") of the US Department of the Treasury oversees and implements economic and trade sanctions based on US foreign policy and national security goals against specific foreign nations and regimes, terrorists, global drug traffickers, those involved in activities related to the proliferation of weapons of mass

destruction, and other threats to national security, foreign policy, or economy of the United States. Furthermore, certain sanctions are also issued by the Bureau of Industry and Security (BIS).

Whereas, the European Union (EU) employs sanctions in connection with measures agreed upon within the framework of the Common Foreign and Security Policy (CFSP) which is routinely adopted by unanimity in the Council in the form of a 'common position' or 'decision' on the basis of a provision under Title V of the Treaty on European Union (TEU) (1992), which is then implemented through a regulation based on Article 215 Treaty on the Functioning of the European Union TFEU (2012).

In a debate in the UNSC in April 2000, France and Russia issued a call for sunset clauses that would require complete reviews rather than periodic rollovers of sanctions once imposed by the Council. Britain and the USA argued that sanctions should remain in place until the target regime changes behaviour (Crossette, 2000 p. 13). Johan Galtung long ago postulated a theory of sanctions, according to which economic pain in the target countries would mysteriously produce political gain for the sanctions-imposing countries (Galtung, 1967 p. 376).

According to Johan, sanctions have either or both of two purposes; to punish the receivers by depriving them of some value and/or to make the receivers comply with certain norms the senders seem important (Galtung, 1967 p. 378).

Economic sanctions cover four different types of trade limitations, such as restrictions on the flow of goods; restrictions on the flow of services; restrictions on the flow of money; control of markets in order to reduce or eliminate the target's chance of gaining access to them (Doxey, 1983 p 18). Some of the forms of economic sanctions are, boycotts, embargoes, freezing or blocking of financial assets, weapon and military technology, travel-and visa restrictions (HufBauer et al., 2009 p 20).

The goal of boycott is to achieve economic and social isolation of an individual, a group of individuals or a state. Embargoes puts a ban on transports of goods to another state via air, sea or land. Embargoes are seen as a more hostile form of sanctions because property belonging to another state can be confiscated (Doxey, 1983 p 13). The basic idea of economic sanction is that the burden of economic hardship will become intolerable to the people of the targeted state, who in return will pressure the leaders to change the policies (HufBauer et al., 2009 p 44).

Economic sanctions can also be considered in light of its objective, actors involved and object of sanctions. As regards objectives of sanctions, it is possible to group them into three categories: the primary, secondary and tertiary objectives. The primary objectives have to do with the actions and behaviour of the sender to the target. The secondary objectives are related to status, behaviour and expectations of sender. The tertiary objectives are concerned with the broader international considerations, relating either to the structure of international system as a whole, or to some parts of it. These three categories do not exclude each other but can coexist and overlap in some cases (Caruso, 2003 p 4).

As regards the number of actors involved, most of the times the initiative in imposing international sanctions rests on one government. They can also take the shape of both unilateral and multilateral. It is unilateral when sanctions are imposed by only one country against a target country while it is multilateral when sanctions are imposed by more than one country. On one hand, it is possible that other countries follow a 'promoter' country. Otherwise, the choice of an economic punishment can be adopted within the framework of an international organisation (Caruso, 2003 p 5).

As regards the object of sanctions, it can be distinguished into three kinds of sanctions: boycotts, embargoes and financial sanctions. A boycott is a restriction of imports of one or more goods from the target country. It takes place to lower the demand for certain products from the target country. Similarly, it attempts to reduce the target's foreign exchange earnings and therefore its ability to purchase goods. It also aims to induce a damage to a particular industry or sector of the target country. An embargo restricts exports of certain products to the target country. This is the most common technique. The prohibition on exports may be partial or complete. Finally, financial sanctions restrict or suspend lending and investing into the target economy. They also impose additional restrictions on international payments in order to prevent sanctions-busting. Similarly, foreign assets of the target economy may be frozen (Doxey, 1983 p 20).

1.2. The EU's Approach to Economic Sanctions

Traditionally, the European Union (EU) refers to restrictive measures as 'sanctions'' this can be depicted from several official documents where the words sanctions and restrictive measures are used interchangeably. The European Union sanctions practice has 3 distinct strands. The first is, the EU can decide and implements its own autonomous sanctions in the absence of a United Nations Security Council (UNSC) mandate, examples are the EU sanctions against

Syria[1], Venezuela, and Russia. Secondly, the EU can implement sanctions regimes decided on by the UNSC, which are transposed into EU law. Finally, the EU can and frequently does supplement UNSC regimes with sanctions that go beyond the letter of UNSC resolutions by imposing stricter and additional measures (Portela, 2014 p.1).

On 27 May 2016, for the first time, the Council of the EU adopted additional autonomous restrictive measures in relation to North Korea on the grounds that its actions pose a grave threat to regional and international peace and security.

Because of the critical political situation in Ukraine, the Council of the European Union on the 17th March 2014 by Decision 2014/145/PESC followed by the Regulation No. 269/2014 (the "Regulation 269"), introduced certain restrictive measures against individuals, entities, or bodies deemed responsible for actions undermining or threatening Ukraine's territorial integrity, sovereignty, and independence. Annex I of Regulation 269 provides for the list of persons, entities or bodies at the time of writing this work, there are about 1229 persons and 110 entities on the list in Annex I (Art. 1 EU Regulation 2022/1270).

While economic sanctions may be attractive policy tools for governments wanting to express discontent with a country's behaviour, it is debatable whether sanctions can achieve the change that is frequently envisioned through the punitive measures taken (Smeets, 2018 p. 3). Both the EU and the individual EU countries are members of the World Trade Organization.

The most notable feature of the World Trade Organization (WTO) dispute settlement system is the ability to levy economic sanctions against a scofflaw member government, however, this feature is a mixed blessing; on the one hand, it strengthens WTO rules and promotes their observance. On the other hand, it undermines the free trade principle and causes "sanction-envy" in other international organizations (Smeets, 2018 p. 3).

According to Hufbauer, Schott, and Elliot, economic sanctions have a very limited capacity to achieve their intended goals, and presently, the EU prefers to employ the concept of 'targeted' sanctions in which the economic pain is inflicted upon the target and not everybody (Hufbauer et al, 1990 p. 137).

[1] The interactive EU sanctions map, after selecting a relevant country, provides links to all EU legislation on sanctions applicable in respect of the selected country. The EU official Journal 'EUR-Lex' also provides up-to-date information on the EU legislation adopted with regard to restrictive measures, including information on persons, entities and activities subject to EU restrictive measures.

The legitimacy of the EU rests to a considerable degree upon its ability to integrate a very diverse family, with historically very diverse rule making traditions and techniques. The most active part of the integration machinery and at the same time least visible, has been labelled European Governance, meant here in the sense of an umbrella term for soft law techniques.

1.3. EU Best practices for effective Interpretation of Restrictive Measures

The EU Council and the Foreign Ministry, makes Guidelines and Instructions on the interpretation of each sanction provisions that is imposed by them. However, these Guidelines and Instructions are only but suggestions and recommendations as to how best to interpret any restrictive measures imposed by the EU. Binding interpretation of sanction regulations can only be made by courts of law.

Some of the Guidelines and Instructions made by the EU Council and the Foreign Ministry are:

1. Commission Guideline Note concerning North Korea on the Import and Export Ban of Luxury Goods.
2. Commission FAQ on EU Restrictive Measures in Syria
3. EU Best Practice for Effective Implementation of Restrictive Measures
4. EU Guidelines Concerning the Prohibition on Making Funds Indirectly Available to Designated Persons and Entities
5. Commission Guidance Note on the Implementation of Certain Provisions of Regulation (EU) No 833/2014

As noted earlier, these guidelines and instructions are only but a guide as to how restrictive measures should be viewed and interpreted. They are not binding. Only a court of law can make binding pronouncement concerning the interpretation of the provisions of any restrictive measures imposed by the European Union.

1.4. National Implementation of Restrictive Measures

EU sanctions apply directly to every company and every individual within the EU. The sanctions must be observed by the EU citizens even if they are located in a non-EU country, (e.g. employees posted to subsidiaries in China). The same is true for entities established or registered under a member state's law and operating in a non-EU country, non-EU companies are subject to the sanctions regulations only if they conduct business in the EU (Schrader et.al. 2022, p.1).

UN Security Council resolutions, EU Regulations and decisions that implement UN Security Council resolutions, autonomous EU restrictive measures, autonomous Member State regimes, and third-country regulations, such as US sanctions and export controls, are examples of relevant sanctions regimes for the EU (Zelyova, 2021 p.162). Member states are bound by UN Security Council Resolutions and EU CSFP decisions. They are not, however, directly applicable to natural persons. UNSC Resolutions must thus be implemented by UN Member States in the application of sanctions to the targets. However, once the EU issues UN Security Council Implementing Regulations and EU Regulations giving effect to Council Decisions, the measures become binding on EU nationals because EU regulations are directly applicable in EU Member States, and the restrictive measures become applicable to nationals of the relevant Member States(Zelyova, 2021 p.162).

The Court of Justice of the European Union (CJEU) in the case of *Bank Melli Iran v Telekom Deutschland Gmb* (Case Case C-124/20) protection from the effects of extraterritorial application of legislation adopted by a third country, restrictive measures taken by the United States of America against Iran, secondary sanctions adopted by that third country prohibiting people from engaging in business relationships with certain Iranian undertakings outside of its territory, prohibition on complying with such a law, and exercise of the right of ordinary termination, the Court held that Articles 5 and 9 of the Blocking Regulation, read in light of Articles 16 and 52 of the Charter of Fundamental Rights of the EU do not prevent a party in a contractual or civil dispute, from annulling any termination of a contract with a sanctioned entity, provided that annulment does not entail disproportionate effect on the party concerned.

Worthy of discourse also, is the case of *Yassin Abdullah Kadi v Council of the European Union & Commission of the European Communities (*Judgment of 21 September 2005,). The facts of the case are that on October 15, 1999, the United Nations Security Council passed Resolution 1267 (1999), which condemned the fact that Afghan territory was still being used for terrorist sheltering, training, and planning. Furthermore, the Security Council demanded that the Taliban hand over Usama Bin Laden. To ensure compliance with that demand, paragraph 4(b) of the Resolution mandated that all States, in particular,

> ‘'freeze funds and other financial resources, including money created or derived from property that is directly or indirectly owned or controlled by the Taliban, or from any business that is owned or controlled by the Taliban [...].

The applicant, who was subject to a freezing of funds, challenges Regulation (EC) No 2062/2001 of 19 October 2001, amending Council Regulation (EC) No 467/2001, and seeks annulment insofar as it relates to him, citing a violation of the applicant's fundamental rights and a lack of competence on the part of the Council. The latter ground of annulment was later dropped following the repeal of Regulation 467/2001, but the Court decided to consider the Council's competence nonetheless.

Since the Taliban regime fell following the international coalition's armed intervention in Afghanistan, the Court determined that Articles 60 and 301 EC did not provide a sufficient legal basis for the contested regulation. Concerning the violation of the applicant's fundamental rights, the Court first determined whether they were within the scope of its judicial review. Obligations of United Nations Member States under the United Nations Charter supersede all other obligations of domestic or international treaty law, including obligations under the ECHR and the EC Treaty (para 181).

The Court continued by thoroughly analyzing the fact that any judicial review of the contested Regulations with regard to the protection of fundamental rights and a subsequent annulment of these would "indirectly mean that the Security Council concerned resolutions themselves infringe upon those fundamental rights" (paras 212-216). The court therefore went ahead to dismiss the case.

It is significant to note from the aforementioned judgment that responsibilities of Member States of the United Nations under the United Nations Charter take precedence over any other commitments of domestic law or international treaty law. However, if a state is not a member of the United Nations or a recipient of Security Council resolutions, it is not directly bound by the United Nations Charter

1.5. Effect of Sanctions on Contracts – A Crossroad between Public International law and Private International Law

According to Rebecca Wallace, Public international law refers to the rules and norms that govern the behavior of states and other entities that are recognized as having international personality at any time (Wallace, 2005 p. 1), Whilst, private international law is a system of law, which is part of state’s domestic law and which is utilised to determine how conflicts of laws and jurisdictions are to be resolved.

The Paris Court of Appeal in a case between a French company and an Iranian company (ICCP-CA RG no19/07261 delivered on 3 June 2020), recalled that resolutions adopted by the UNSC under Chapter 7 of the UN Charter constitute norms of international law, which Member States undertake to accept and apply, and that as such, the fact that they have not been directly transposed into French legal order is not sufficient to deny any effect. In the said case, the Court found that the UN resolutions at issue constitute foreign and/or truly international overriding 'mandatory rules' and that these resolutions, in aiming to preserve peace and international security, carry rules and values which fall within French international policy.

The long debate over the effectiveness of economic sanctions, initiated by US President Woodrow Wilson in response to the atrocities of World War I, continues to this day (Hufbauer et.al. 2009, p,1). President Woodrow who recommended economic sanctions as strategy, considered them to be faster, less filthy and more efficient than regular war. In his words, he has this to say:

> "A boycotted nation is a nation on the verge of surrender. There will be no need for force if this economic, peaceful, silent, and lethal remedy is used. It's a terrible cure. It does not cost a life outside the boycotted nation, but it puts pressure on that nation that, in my opinion, no modern nation could withstand"(Ruys, 2016 p. 88).

Economic sanctions remain an important but contentious foreign policy tool at the start of the twenty-first century, just as they did a century ago (Hufbauer et.al. 2009, p,1). To put these into perspective, we would deliberate on the implications of these restrictive measures to both the target and sender countries. The term Sender refers to a country that pursues foreign policy goals in part by threatening or imposing economic sanctions. The term "sanctioner" is frequently used interchangeably in the literature (Hufbauer et al, 2009 p. 88),

A contractual obligation cannot exist in vacuo, it must draw its existence from a legal system which specifies that in the particular circumstances a contract exists This law which creates and governs the contract, is usually termed the proper law of the contract (Brown, 2001 p. 148). International law is divided into two categories: conflict of laws (also known as private international law) and public international law (usually just termed international law) (Shaw, 2014 p. 1). The former addresses cases within specific legal systems in which foreign elements

intrude, raising concerns about the application of foreign law or the role of foreign courts (Shaw, 2014 p.3).

In international law, there is no unified system of sanctions in the same way that there is in municipal law, but there are circumstances in which the use of force is considered justified and legal(Shaw, 2014 p.3). Within the United Nations System, sanctions may be imposed by the Security Council upon the determination of a threat to the peace, breach of peace or act of aggression, and such sanctions may be economic (Reisman, 1971 p. 273).

Since it is difficult to discover the nature of international law by referring to a definition of law based on sanctions, the character of the international legal order must be examined in order to determine whether states feel obligated to obey the rules of international law and, if so, why. If the answer to the first question is no, that states do not feel compelled to act in accordance with such rules, then there is no such thing as a system of international law(Shaw, 2014 p.4). Some writers are of the opinion that the division between public and private law is not relevant (Shaw, 2014 p.3).

One of the principles of private law is the freedom of economic activity, however, when a sanction is imposed against an individual, state or legal entity, that invariable hinders the freedom of economic activity, and this has gradually tolled into the lines of international law. Thus, public and private law are viewed as distinct disciplines, as two separate intellectual streams running in parallel (Mills, 2009 p. 87).

Most sanctions include non-circumvention clauses, a classical example of this is Article 12 Council Regulation (EU) No 833/2014 which provides for anti-circumvention clause and prohibits the participation, knowingly and intentionally in activities that are meant to circumvent the prohibitions. It is noted that this clause is also applicable if the restrictive measures have not been breached; it is enough to participate in schemes created to that end (Queritus, 2022 p. 32)

Various accounts of the international legal environment indeed emphasize the existence of overlapping, multi-tiered and intersecting levels of authority. This gives the impression that the main problems are how to manage the multiple jurisdictional claims which may arise, how to deal with the potential conflict of applicable authority, and how to encourage deference by one site of accountability to a more appropriate one through principles like comity or complementarity (Berman, 2007 p. 115)

To conclude the first part, it should be pointed out that, coercive economic sanctions developed as a conceptual and policy bridge between diplomacy and force for ensuring compliance with the demands of a Nation. Economic sanction however, has an intersection between Public International Law and Private International Law in its application. The European Union sanctions practice has 3 distinct strands. The first is, the EU can decide and implements its own autonomous sanctions in the absence of a United Nations Security Council (UNSC) mandate, secondly, the EU can implement sanctions regimes decided on by the UNSC, which are transposed into EU law and finally, the EU supplements UNSC regimes by imposing stricter and additional sanctions that go beyond the letter of UNSC resolutions.

In other to ensure effective interpretation of these sanctions, the EU Council and the Foreign Ministry, makes Guidelines and Instructions on the interpretation of each sanction provisions that is imposed by them. However, binding interpretation of sanction regulations are only made by the courts of law as these Guidelines and Instructions serves only as suggestions and recommendations as to how best to interpret any restrictive measures imposed by the EU.

CHAPTER TWO: CONCLUSION AND PERFORMANCE OF CONTRACT AND THE IMPACT OF SANCTIONS THEREON

2.1. **Performance of a Contract**

A contract imposes a legal obligation on the contracting parties to keep their mutual promises until the contract is discharged or terminated, the most natural and common way of fulfilling a contract is to perform it (Yasoda, 2020 p.23). A person who fulfills a contract in accordance with its terms is released from further obligations. In most cases, such performance entitles him to the other party's performance (Yasoda, 2020 p.23).

The term "performance of a contract" refers to the completion of a contractual obligation that releases the performer from all present and future obligations. (Garner, p.1252). It connotes fulfilment of the terms of the agreement of respective parties to a contract.

The contract comes to an end when both parties have given exact and complete performance(Yasoda, 2020 p.25). For performance to be exact, it must adhere to the contractual duties, and for a performance to be complete, the task must be finished in accordance with the obligations. Additionally, a contract must be carried out according to the time frame and date agreed upon by the parties, when this is done, the parties are discharged automatically and the contract is discharged eventually (Yasoda, 2020 p.25).

By the contract, the parties specify their rights and obligation in the contract and each of them is bound to follow what they have prescribed in the contract. Where any party fails to abide by any term or terms of the contract, the party not at default will be entitled to any of the remedies for breach of contract (Yasoda, 2021 p.25).

According to Article 11 of EU Regulation 269, the parties specified in Annex I are not permitted to assert any claims with respect to any contract or transaction in which the performance has been adversely affected, directly or indirectly, in whole or in part, by the Regulation's requirements.

Ascertaining the impossibility to perform an obligation requires that the sanctions must enter into force after the conclusion of the contract, and their introduction must indeed constitute an obstacle to its proper performance.

According to Art 119 of the Swiss Code of Obligations, an obligation is discharged where its performance became impossible by circumstances for which the debtor cannot be made responsible. The adoption of acts by public authorities that prohibit the actions forming part of the debtor's obligations under the contract, as a rule, falls under this definition of a supervening impossibility. At the same time, there is a condition for the application of this rule, namely that the debtor did not and could not foresee the events which would make it impossible to perform its obligations under the contract. In one of the cases decided in 1985 by the Federal Tribunal, a Swiss company agreed to build and deliver the atomic installation 'Mini 8067' to Pakistan. Subsequently, the Federal Office of Energy imposed a ban on the delivery of a similar installation '8062 Micro', and the seller did not perform its obligation on the ground that it has become impossible to do so under art 119 of the Code. The Federal Tribunal rejected this argument and pointed out that the debtor is responsible for the legal impossibility of performance where he knew or should have known, having investigated the matter with due diligence at the time of conclusion of the contract, that the circumstances preventing the proper performance could arise. In the present case, the adoption of such a ban was foreseeable for the debtor. The provisions of the law give the Federal Office of Energy the right to impose such a ban at any time. Exporter of nuclear technology must always expect that the Federal Council may, due to unforeseen political events in the world, introduce some restrictions in the energy industry (Kotelnikov, 2020 p. 14).

The Uniform Commercial Code (UCC) of the United States provides that a seller's delay in delivery or non-delivery in whole or in part is not a breach of his duty under a contract for sale if performance as agreed has been rendered impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether late or not.

These provisions of the Uniform Commercial Code were accepted in judicial practice and became known as 'commercial impracticability'. In *Harriscom Svenska v Harris Corp (judgment of the United States District Court, delivered in 1993)*, the court applied this doctrine to excuse non-performance of an obligation, even when the relevant government regulation

was not formalised in the form of a binding legal act, but constituted merely a recommendation. In this case, it was a recommendation not to supply military equipment to Iran (Bergeijk, 1994 p. 8).

In England, supervening illegality is a well-recognised head of frustration, which entails the discharge of a contract, bringing the contract to an end. Where English law governs a contract, it will be discharged by frustration when something occurs after its formation rendering the fulfilment of the contract legally impossible, or transforming the obligation to perform into a radically different obligation. However, where one or even both parties are affected by sanctions, it does not automatically mean that the contract has become frustrated. Where the regulations make it possible for a designated person to request a license from a competent authority to perform an otherwise forbidden operation, such as a transfer of funds, an additional enquiry is in order. In circumstances where the relevant persons did not even apply for a licence, they must satisfy the Court that it was no use attempting to make an application. Thus, the contract will only be frustrated if the relevant party failed to obtain a licence despite the exercise of best endeavours, or if there is proof that the licence was unobtainable in principle (Kotelnikov, 2020 p. 14).

As a result, English courts have construed the doctrine of frustration narrowly in such cases. For example, summary judgment was granted in favour of an Iranian bank in relation to the fees due from its customer under a facility agreement. The agreement was concluded before the sanctions entered into force and contemplated that it was for the customer to do what was necessary for the performance of the obligations. Since no application was ever made, and in the absence of evidence that such application would not be granted, the court ruled in favour of a sanctioned entity. In another case, the court explained that awarding a sum of money in favour of two sanctioned entities would not constitute a circumvention of the sanctions regulations, because it would merely lead to crediting their frozen accounts – provided those accounts remain frozen.

Similarly, Art 416 of the Civil Code of the Russian Federation 1994 provides that the subsequent impossibility of performance shall terminate the obligation where it is due to circumstances for which none of the parties is responsible. A specific ground for the termination of obligations is laid down in Art 417 of the Civil Code. This article stipulates that where the performance of an obligation becomes impossible in whole or in part as a result of an act by a State or a local authority, theobligation is terminated in whole or in relevant part.

Given that the termination under art. 417of the Civil Code entails the possibility for the contracting parties to recover the resulting damages from the relevant public authority under certain circumstances, it is logical to apply this ground only to the acts of the Russian Federation, its regional government authorities and local authorities. Therefore, in cases where the impossibility of performance is due to the enactment of a restrictive measure by a foreign State, obligations of the parties shall terminate according to art. 416 of the Civil Code and not art. 417.

In the context of public procurement, a Russian commercial court has considered the impossibility of importing the relevant goods as a sufficient ground to refuse the claim for contractual penalties (liquidated damages). In this case (case number A40-6478/2016), a state psychiatric hospital sought to recover the contractual penalties from its supplier who refused to deliver washing powder relying on the Presidential Decree No. 560 of 6 August 2014. According to the relevant Russian statute governing the performance of contracts resulting from public procurement, a party does not have to pay the contractual penalties or liquidated damages if the failure to perform was caused by a *force majeure* event. Refusing the claim, the commercial court pointed out that the evidence has supported the conclusion that the import restrictions applied to the goods in question, which constituted the relevant *force majeure* event and made the delivery impossible.

In a similar context, it seems uncontroversial that Russian state courts will consider the contravention to the Russian counter-sanctions regime as a ground to recognise the impossibility of carrying out the prohibited commercial activity. In an Intellectual Property Court cases decided in 2018, *Danone Russia* (the plaintiff) requested the Court to cancel the registration of a trademark belonging to *Molkerei Alois Muller GmbH & Co. KG* (the defendant) on the grounds that it was unused in Russia for three consecutive years (2014-2017). While agreeing that *Danone* has established its valid legal interest in contesting the trademark, The court emphasized that, in accordance with article 19 of the TRIPs Agreement, circumstances arising independently of the will of the trademark owner that pose a barrier to use, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be acknowledged as valid grounds for non-use. Since the defendant was a German company, and the Presidential Decree No. 560 of 6 August 2014 prohibited the importation of milk and dairy products from the EU, the use of defendant's trademark in Russia was impossible during the relevant period. Therefore, the court refused to cancel the trademark and ruled in favour of the defendant.

Many Russian courts have also considered the EU economic sanctions against Russia as a ground that can excuse the non-performance of contracts requiring the import of affected products into Russia from the EU Member States. Other Russian courts, however, refused to consider the sanctions against Russia as *force majeure*. For example, in 2015 decision of the Eighteenth Commercial Court of Appeal (Case number A07-12459/20150), the court relied on the lack of evidence confirming that the relevant EU sanctions indeed prevented the import of goods into Russian Federation, particularly because the seller's Czech counterparty has eventually overcome this obstacle and performed the delivery, albeit much later than required by the contract. It remained unclear from the text of the decision whether the Czech company has done so by obtaining an authorisation from the competent authorities, which could arguably be relevant for the assessment under art 401 of the Civil Code. In a similar situation, the Commercial Court for the North-Caucasian Circuit declined to consider the EU economic sanctions as a *force majeure* event, explaining (somewhat cryptically) that the imposition of economic sanctions does not in itself indicate that this very circumstance led to the lateness in delivery of goods, and also cannot release the defendant from the obligation to deliver the goods within the timeframe established by the contract. As in the previous case, the goods in question (industrial equipment) were eventually delivered to their destination in the Russian Federation, albeit with a significant delay; the reasons for the delay, however, were not explained in the decision any further. This demonstrates some inconsistency of court practice on this question but also highlights the extensive number of circumstances the courts should consider when deciding whether the *force majeure* defence is available in every individual case (Kotelnikov, 2020 p. 17).

The Russian commercial courts have also taken into account instances where it should have been reasonable for the parties to contemplate the possibility of sanctions given the nature of the contract and their respective businesses. As in Switzerland, this directly affects the feasibility of the *force majeure* defence. In a case before the Commercial Court of the City of Moscow (Case No A40-51145/2019, delivered on 30 May 2019), a buyer sought to recover the contractual penalties due to the failure of the seller to deliver the goods in accordance with the contract. The goods in question included a gas chromatograph mass spectrometer with a mass analyser to be imported from Germany; the buyer was a government enterprise whose products and activities were mostly of a military character. The German authorities failed to issue an export license required for the timely delivery of the spectrometer, which led to the dispute between the parties. The court took into account that the possibility of the contract being

affected by the EU sanctions was reasonably foreseeable for the parties. It also pointed out that, although the goods originated in Germany, the seller's own supplier was another Russian company (an intermediary). Thus, the court decided in favour of the plaintiff and recovered the contractual penalties. It did, however, reduce their amount substantially as it considered the originally claimed amount unreasonable and excessive.

It is noteworthy that, for the establishment of the impossibility of contractual performance, it usually does not matter whether the economic sanctions in question were a part of the proper law of the contract. Indeed, to declare the contract void, it is necessary to understand whether the compliance with a government prohibition was legally binding on the parties. Conversely, to determine whether it was impossible to perform the contract, it is more important to understand how significant was the practical effect of this prohibition on the contractual performance. For example, a contract between two Russian companies governed by Russian law may require the parties to carry out some activity in the territory of China. If later on, the Chinese government enacts a regulation expressly prohibiting such activity, there can be no doubt that it will have become legally impossible to perform the obligations (Pala, 2021 p. 34).

In a 2017 ruling, the Supreme Court of Russia (case No 301-ES16-18586, case No A39-5782/2015) considered a claim for termination of the contract by the VTB Bank. The Bank relied on the introduction of US, Canadian and EU sanctions against it and the resulting losses it incurred to argue that it became necessary to close a number of branch offices across Russia, making unnecessary, the long-term lease contract with the owner of an office in the city of Saransk that the Bank earlier concluded. Reversing the decisions of lower courts that supported the Bank's position, the Supreme Court did not engage in any discussion of the sanctions' applicability in the territory of Russia, but instead ruled that when deciding to close the office located in the disputed premises, the Bank was guided by the considerations of economic feasibility. Entrepreneurial activity implies a risk, which the Bank, being a professional participant of the financial services market, could not ignore when concluding the lease agreement. With due diligence, the Bank, entering into contractual relations on its own initiative, should have foreseen a possibility of such an economic situation. Thus, there were no grounds for terminating the contract. Since the contract did not name the sanctions under its *force majeure* provisions, the contractual grounds for terminating the contract were unavailable as well.

There have been reported cases where a reference to economic sanctions was regarded only as an excuse and not a genuine reason for non-fulfilment of the contractual duties. Thus, in the decision of the Commercial Court of the Sverdlovsk region of 3 April 2015 (case No. A60-825/2015) the parties made a contract for the sale of pink salmon, which the defendant failed to fulfill. As a reason for non-fulfilment of contractual obligations, the defendant referred to the Presidential Decree No. 560 of 6 August 2014 'On the implementation of certain special economic measures to ensure the Russian Federation's security' and the subsequent Decree of the Russian Government. These legal instruments listed the agricultural products, raw materials and foodstuffs prohibited for import into the territory of the Russian Federation. The consequence of these Russian countermeasures was a significant increase in the price of the fish which the defendant undertook to deliver to the plaintiff. These circumstances were purportedly *force majeure* (unforeseeable and insurmountable) since without making the performance of the contract impossible as such, they significantly increased the cost of purchase of the goods from the manufacturer. The Court rejected this argument, pointing out that according to art 2 (1) of the Civil Code, business activities are carried out independently, at one's own risk, and aim at systematically deriving a profit. Therefore, having entered into a contract with the plaintiff for the supply of frozen fish, the defendant, not being the manufacturer of the product, accepted all possible risks, including that of an increase of the costs.

This is consistent with international practice. For example, in the ICC case 1782/1973,91 a German and a Yugoslav company signed a contract for the supply and maintenance of trucks in three Arab countries. After these countries introduced sanctions against Israel, it became impossible for the defendant's employees who were Israeli citizens to obtain visas to carry out services under the contract. The respondent submitted that these circumstances amount to *force majeure* and make the performance of the contract impossible. The tribunal rejected this argument, pointing out that it does not explain the 26-month delay in fulfilling the obligations under the contract. As a company, respondent also had the right to hire nationals of other countries to perform the works (Kotelnikov, 2020 p. 18). It can be gathered from the reasoning of the court that even though the performance of a contract might be hampered by sanction, where however, there are other ways the contract can be performed legitimately, the defence of *force majeure* cannot avail such a person.

2.2.1. Types of Performance

Before delving into the discussion on sanction, it is important to discuss the various types of performance of contract. This is pertinent because, it will give a background as to how and at what stage does an imposed sanction has effect on the performance of a contract. The types of performance are discussed below:

Actual Performance

The contract is said to have been actually performed when the parties to it have fulfilled their obligations in accordance with the terms of the contract (Afesorgbor, 2016 Pg. 15). Actual performance discharges the contract, and the party who has performed his part of the obligation is no longer liable. The contract is said to have been actually performed when the parties to it have fulfilled their obligations in accordance with the terms of the contract. Actual performance discharges the contract, and the party who has performed his part of the obligation is no longer liable. (Afesorgbor, 2016 Pg. 15)

Part Performance

This is the accomplishment of some but not all of one's contractual obligation. It occurs when one party partially performs the contract and the other party expresses willingness to accept the portion performed. Part performance can occur when goods are not delivered on time or when a service is not completed completely. (Afesorgbor, 2016 Pg. 15).

Substantial Performance

This is the performance of the primary, necessary terms of the contract but not all of the terms of the contract. What the court does is to order that the money be paid for the work done less what is remaining to be done. Substantial performance is only applicable if the contract is severable and not an entire contract(Caruso, 2003 Pg. 14). The doctrine of substantial performance was created to avoid the possibility of one party evading his liabilities by claiming that the contract had not been completely performed(Caruso, 2003 Pg. 14). However, what constitutes substantial performance is a question of fact that must be resolved based on the facts of each case. It will be largely determined by what remains undone and its relative value to the contract as a whole. (Caruso, 2003 Pg. 14).

There is a fine line between substantial and part performance. Part performance must be accepted by the other party, which means that the party receiving the partial performance has a genuine choice between accepting and rejecting it. substantial performance, on the other hand, is legally enforceable against the other party.

Defective Performance

Defective performance is a performance that whether partial or full, does not wholly comply with the contract.

2.1.2. Remedies for breach of Performance

The breach of performance leads to a breach of contract. Usually, where there is a breach of performance, remedies available includes (Yasoda, 2020 Pg. 13-14):

1. **Specific Performance**

Specific performance is a type of remedy for breach of contract by which the court orders the party in breach to perform his/her own part of the contract. Even though monetary damages is most preferred to specific performance, however, specific performance can be valuable when monetary damages will not be adequate to compensate the innocent party.

2. **Rescission**

This allows a party that is not in breach to cancel the contract. Instead of seeking monetary damages, the innocent party can simply refuse to complete his/her own obligation. Rescission puts the parties back to the position they would have been if they had not entered the contract. However, in order for rescission to be justified, the breach must be material in the sense that it affects the core of the contractual agreement.

3. **Quantum Meruit**

This means "as much is earned". When a party is stopped from finishing a contract, he/she has already begun by the other party, that party can claim for quantum meruit. By this the party will be paid a sum to the value of the part of the contract that he/she has already performed.

4. **Damages**

This is one of the most common remedies for breach of contract. It is the monetary compensation for the breach of contract. Damages is calculated based on the actual loss the innocent party has sustained as a result of the breach of the contract. Damages can be general or consequential. Damages are general if they are those that result directly form the breach of the contract. However, consequential damages are those damages that flow as a natural consequence of the breach of the contract.

2.2. Impact of Sanctions on Various Stages of a Contract

The impact of sanctions on precontract, contract and post contract stage is determined by the sanction imposed by the sanctioner. Where sanction has been imposed and parties intend to enter into a contractual relation (precontract stage), such is already caught up by the sanction already imposed. Therefore, the fact that parties are at the pre contract stage, the moment there is already a sanction in place and that sanction is legally applicable to the category of contract to be entered into, it is caught up by the sanction. Same is applicable to the contract and post contract stage of contractual relation. Such contract is invalid.

National legislation in many countries specifies that a contradiction to the law is a sufficient basis to render the contract null and void. For example, in Switzerland, the contract may be declared invalid under art 20 (1) of the Code of Obligations, which stipulates that a contract shall be void if its terms are impossible, unlawful or immoral. This effect occurs, for example, if the contract provides for the supply of goods prohibited by the regulation imposing sanctions, or the transfer of money to the person from the relevant 'blacklist'. In this case, the contract will only be invalid when the statutory enactment expressly states that transactions which contravene its requirements will be void, or when the object and purpose of such a prohibition require such an effect as the nullity of the contract. For instance, in 1968 the Zurich Commercial Court held contrary to good morals and thus null and void a contract where the parties agreed to smuggle goods in breach of Italian law (Kotelnikov, 2020 p. 19).

In the US, the courts will refuse to enforce a contract concluded in breach of the law. As in Switzerland, not every contradiction to the law will be considered a sufficient ground for doing so. The court always has a possibility in its sole discretion to provide judicial protection to the contract which, despite a formal violation of the law, does not expressly provide for the commission of prohibited actions. In *Bassidji v Simon Soul Sun Goe* the United States Court of Appeals for the Ninth Circuit held as follows:

> '... whatever flexibility may otherwise exist with regard to the enforcement of 'illegal' contracts, courts will not order a party to a contract to perform an act that is in direct violation of a positive law directive, even if that party has agreed, for consideration, to perform that act.'

In England, the illegality of a contract generally makes it unenforceable. The illegality can arise either by operation of statute or the common law. Where the contract itself is not expressly prohibited by statute, the court has to perform a balancing exercise: the issue is whether public

policy requires that a contract should not be enforced because it is tainted with illegality. The notion of public policy has been criticised in England for its vagueness. However, it remains a powerful mechanism for ensuring that the contracts are not misused to contravene the principles of law and statutory prohibition (Kotelnikov, 2020 p. 18).

The impact of economic sanctions enacted before the conclusion of the contract but not forming part of the applicable law is not as straightforward. Theoretically, if there is a sufficient connection between the object of the contract and the parties' obligations, and the country which adopted the economic sanctions, the court may also conclude that a contract is invalid and refuse to enforce it. To take one international example, in the English case *Regazzoni v Sethia Ltd.*, the contract between the parties was for the sale and delivery of jute bags from India to Italy for their subsequent resale in South Africa. Parties at the time of contracting knew that the export of jute to South Africa was illegal under the Indian laws; the English law governed the contractual relationship. The seller refused to perform the contract, and the buyer sought damages. The House of Lords decided that the contract was unenforceable and the buyer could not recover damages where the agreement was contrary to the law of a friendly and foreign State. This conclusion had its roots in considerations of public policy and international comity. As Viscount Simunds pointed out in his speech in the House of Lords, an English court will not entertain a suit by a foreign State to enforce its laws of a penal, revenue or political character. It is, on the other hand, nothing else than comity to refuse as a matter of public policy to enforce or to award damages for the breach of, a contract which involves the violation of foreign law on foreign soil (Houtte, 1997, pg 168).

It is hard to dispute that the restrictive measures originating in the relevant decision of the UN Security Council must be applied to contracts, even if the government of the target country attempts to neutralise their effect through its domestic law - as Iraq did in 1990. In this case, one could argue that given the hierarchy of the law, the UN sanctions constitute a part of Iraqi law as international peremptory norms, and the compliance with them remains an international legal obligation of Iraq despite the adoption of conflicting domestic legislation (Schaefer 2010, pg. 134).

The possibility that noncompliance with other types of economic sanctions, i.e. those which are not based on the UN Charter and do not form a part of the proper law of the contract might also lead to the invalidity of the contract is quite controversial. An international arbitral tribunal or a court is likely to view the arguments on the applicability of such sanctions with some

scepticism. For example, in *Shipyard, AB Götaverken (Sweden) v Libyan General Maritime Transport Organization (GMTO) (Libya), General National Maritime Transport Company (GMTC) (successor First Defendant) (Libya)* the contract for the supply of three oil tankers between the Swedish seller and the Libyan buyer was governed by Swedish law. The buyer refused to accept the delivery citing the Libyan boycott extending to all commercial relations with Israel. The arbitral tribunal considered these restrictive measures to be irrelevant for the resolution of the dispute, except to the extent that the contract itself provided for their applicability. The only mention of these sanctions in the agreement was the seller's obligation to provide a certificate confirming that the construction of the ships did not involve the use of materials and equipment manufactured in Israel. The seller provided such a certificate, so the buyer had no grounds for a refusal to perform the contract.

2.3 Impact of Sanctions on Enforcement of Arbitral Awards and Court Decisions

When sanctions are imposed that prevent contract completion, both sanctioned parties and interested parties (e.g., contractual counterparties) face breach of contract disputes. Contract defendants may assert, among other things, force majeure defenses (which sometimes expressly cover the imposition of sanctions), contract illegality, compliance with contract representations, and frustration. (DeLele and Erb, 2022 p.3). The High Court of England's recent decision in *Lamesa Investments Limited (LIL) V. Cynergy Bank Limited (*judgment delivered in 2019*)* provides direction on these matters. In contrast to the default position under English law, the ruling takes into account the necessity of careful drafting if parties desire to excuse contractual performance by reference to a law that is not applicable to the contract or the location of performance. Due to a clause in the facility agreement that stated that performance must adhere to "mandatory provisions of law," which the court interpreted to mean compliance with applicable US sanctions, the court released the defendant debtor from responsibility for any damages that resulted from its failure to pay its sanctioned party lender. Consequently, the defendant was not in breach of its English Law facility agreement by neglecting to make payments when doing so would have resulted in a fine under new US sanctions (Balmain, 2019 p. 36).

Sanctioned party defendants face many typical causes of action in litigation, such as breach of contract claims (DeLelle, 2022 p.4). But one overarching claim is for the enforcement of awards or judgments against the blocked assets of sanctioned parties. Claire DeLelle, portals a phenomenal illustration of the recent US litigation involving Venezuela and its national oil

company and how it depicts the ways in which sanctions may affect arbitral award enforcement proceedings. In the case of *Crystallex Int'l Corp. v. Bolivarian Republic of Venez*, the judgment holder sought to attach shares of the US subsidiary of Venezuela's state-owned oil company Petróleos de Venezuela, SA (PDVSA) the shares in question were the subject of US Executive Order restricting transfer of Venezuelan or PDVSA- controlled assets in the Unites States, 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'

2.4 **Duration of Sanctions**

The life span of a sanctions is hardly defined with precision. The ending may be misty which gradually yields to normal commercial relations rather than a sharp ending. Therefore, economic sanction is viewed to have ended when the sender or the target country changes its policies in a significant way or when the campaign simply withers away (Biersteker, 2020 p. 24).

Council Regulation (EU) No. 269/2014 and Council Regulation (EU) No. 833/2014 did not make express provisions for the lifespan of the sanction. However, in the case of Council Regulation (EU) No. 269/2014, the Commission by Article 13, is empowered to amend Annex is based on the information provided by the member states.

From the above, it is obvious that there is no sharp end to an imposed economic sanction. It is regarded as haven ended when the sender or the target country changes its policies in a significant way or when the campaign simply withers away and the names of those sanctioned are removed from the Annex.

There is a weak correlation between economic deprivation and political willingness to change (Hufbauer et.al. 2008, p. 162). The economic impact of sanctions may be pronounced, especially on the target, but other factors in the situation often overshadow the impact of sanctions in determining the political outcome (Hufbauer et.al. 2008, p. 162). It is clear that sanctions sometimes bear fruit but only when planted in the right soil and nurtured properly (Hufbauer et.al. 2008, p. 161).

According to study conducted by Hufbauer, Schott, Elliott, and Oegg, economic sanctions lose a significant amount of their effectiveness during the first and second year, which accounts for

55% of successful sanction events. There is then a rapid fall in effectiveness after that (Hufbauer et.al. 2008, p. 162).

Dizaji's and van Bergeijk's empirical analysis establishes that economic sanctions can be successful in the first two years following the implementation of sanctions (Smeets 2018, quoted, Dizaji 2013, p. 7). They discovered "strong and consistent evidence for an initially large economic impact of sanctions on government consumption per capita, imports per capita, gross capital creation per capita, and GDP per capita that wanes at the conclusion of the simulation period" (Smeets 2018, quoted, Dizaji 2013, p. 7).

International organizations such as the EU, the WTO, the ILO or even the UN derive their legitimacy, first of all, from their function as a correcting mechanism for a systematic nation-state protection. According to Christian Joerges, they foster the right to justification by making inter-dependent nation- states systematically aware of one another, by helping to pool resources that are necessary for tacking pressing cross-border problems, and by providing organisational setting, in which the responsibility to take the concerns of other states seriously is transformed into legal obligations (Joerges, 2006 p. 20.).

To conclude the second part, economic sanctions cover trade limitations, such as restrictions on the flow of goods; restrictions on the flow of services; restrictions on the flow of money; control of markets in order to reduce or eliminate the target’s chance of gaining access to them. These restrictions have an effect on the performance of contracts. However, this is based on whether the subject matter of the contract is one that the restriction covers. Similarly, it depends on which point of the contract the restriction was imposed.

CHAPTER THREE. IMPACT OF SANCTION ON THE VALIDITY OF CONTRACT

3.1 Navigating the Contractual Principles of 'Good Faith' and 'Reasonable Measures' in the face of Economic Sanctions

Every contract contains an implied covenant of good faith and fair dealing with regard to the parties' performance and enforcement of the agreement. The covenant requires parties to act in good faith and fairly with other contract parties, even though this duty is not expressly stated in the agreement. The Principles of European Contract Law (PECL) recognises the concept of good faith and in this regards, Article 1:201 PECL provides that each party must act in accordance with good faith and fair dealing, and the parties may not exclude or limit this duty.

The principle of good faith is also recognised under the UNIDROIT Principles of International Commercial Contracts 2016, as well as the United Nations Convention on Contract for the International Sale of Goods (CISG). The applicable concept of good faith under both the CISG and the UNIDROIT Principles is not based on any specific national good faith concept, but rather on an international trade standard (Magnus, 1998 P. 3). Both texts emphasize this point explicitly.

On the subject of acting in good faith, Article 10 of Council Regulation 269/2014 provides that:

> "The freezing of funds and economic resources or the refusal to make funds or economic resources available, **carried out in good faith** on the basis that such action is in accordance with this Regulation, shall not give rise to liability of any kind on the part of the natural or legal person or entity or body implementing it, or its directors or employees, unless it is proved that the funds and economic resources were frozen or withheld as a result of negligence".

Restrictive measures are now a widely recognized pressure valve in international relations, and a seemingly nonviolent measure that is used to influence state and, increasingly, individual behavior and punish law violations (Chachko et al 2022, P.137). Most sanctions include non-circumvention clauses, such as Article 12 of Council Regulation (EU) No 833/2014, which provides that it is prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions referred to in the Regulation.

Subject to the terms of the contract, a party may lose its rights to payments (due from a contract) even if this action violates the terms of the agreement. This would be possible in order to comply with sanctions in place (Vishnyakov 2021, P. 2). Does this negate the principles of good faith? It is important to note that contracts entered into in violation of existing sanctions are null and void, and the failure to abide by sanctions may result in grave repercussions.

The Court of Appeal of England in the case of *MUR Shipping BV v RTI Ltd* (2022) which pertained to a situation in which a contractual party was subject to US financial sanctions, and there was a disagreement over what constituted a "reasonable endeavour" on the part of the parties to the contract to avoid the sanctions from impairing contract performance. The Court was asked to rule on whether the affected party had to accept performance of a contractual obligation in a way that was different from what was intended by the contract as part of the requirement to use reasonable endeavours (to overcome the force majeure event). The Court held that, the party that invoked force majeure could not rely on the force major clause to suspend performance, because they should have accepted payment in Euros rather U.S. Dollars, (as stipulated in the contract), as doing so would have negated the impact of the force majeure event, and in order to overcome the state of affairs caused by the sanctions imposed on the parent company of the other party.

The prohibitions imposed by sanctions also extend to companies that are owned or controlled directly or indirectly by sanctioned individuals. Hence, the test of ownership and control would also need to be fulfilled. On this front, the EU's best practices for the effective implementation of restrictive measures provide several criteria to be taken into account. The ownership criteria would be satisfied if the sanctioned person is in possession of more than 50% of the proprietary rights of an entity or has a majority interest in it, whereas, the control criteria would be satisfied if the sanctioned person holds the right to appoint or remove a majority of the board of directors. Nevertheless, it also provides that the fulfilment of the ownership or control criteria may be challenged on a case-by-case basis.

3.2. Frustration of Contract

When the performance of a contract becomes impossible because of the imposition of sanctions, such a contract becomes frustrated by virtue of the sanction. Frustration of a contract occurs whenever the law recognises that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract (Afesorgbor 2016, P.16)

If the contract is silent as to the consequences of sanctions, the doctrine of frustration may apply. (Vishnyakov 2021, P. 2). The doctrine of frustration is used to excuse a contracting party from performing, not because it is more difficult or impossible to perform, but because the anticipated value of the other party's counter-performance has become pointless for some reason (Schwartz 2009, P. 15). In contrast to force majeure clauses, which focus on the parties' express intention on how to deal with supervening events, frustration is implied by law and thus would be considered only in the absence of an express force majeure clause (Jayabalan 2020, P.1). There exist incidences of self-induced frustration. The doctrine of frustration only

applies if the frustrating event occurs without either party's fault, as a party cannot assert that the contract is frustrated if it was his own actions that made the performance of the contract impossible (Jayabalan 2020, P.5).

If it becomes impossible to perform or if the obligation to perform changes significantly from what was agreed upon at the time the contract was entered into, the doctrine of frustration operates to discharge the contract (Vishnyakov 2022, P. 3). Given that it may not always be clear whether the imposition of sanctions will prevent performance and financial sanctions are frequently regarded as temporary solutions, it may be challenging to determine whether a contract has been frustrated by the imposition of sanctions or whether it will be frustrated in the future if the sanctions are not lifted (Vishnyakov 2022, P. 3).

Some of the ways of mitigating the impact of economic sanction on the performance of contracts are:

1. Including contractual terms in the contract that relates to economic sanctions

It is possible to include in a contract, a provision that contemplates the occurrence of an economic sanction. This provision can take the form of an express term that covers economic sanction or a term that demonstrates that the parties contemplated the possibility of an economic sanction and allocate the risk that it would occur (Kotelnikov p.20)

Even though such terms will not deprive the relevant sanctions of effect, the terms seek to address their consequences (for example, by providing for the suspension or termination of obligations, or alternative performance). Without a doubt, even the provisions of the contract that addresses the consequence will themselves also be subject to the sanctions. For example, one of the terms might be for the repayment of the deposit. However, where the sanction has to do with the freezing of the account, it might render this impossible.

The contract can be made "subject to any economic sanction to be imposed before the performance of the contract". This does not prevent the formation of the contract, but means that there is a condition of the imposition of a sanction and none of the party is to be held liable under the contract where before its performance, a sanction is imposed.

In the alternative, the contract can be made to include an express (or implied) term stipulating alternative legal modes of performance if a sanction is imposed.

2. Including a force majeure provision in the contract

A force majeure is used to allow one or both parties to cancel a contract, or otherwise be excused from performance either temporarily or permanently, on the happening of specified events or events beyond the party's (or parties') control (Yasoda 2020, P. 18). The burden of proving that an event falls within the provision of the force majeure, is on the party relying on it and the party must also prove that the non-performance of an obligation was due to that event (Yasoda 2020, P. 18).

However, even when included in a contract, for a force majeure clause (at least one in usual terms relating to events "beyond the control of the relevant party") to be effective, the party relying on it must show that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences (Pala 2021, P. 20).

For example, Article 2 of Council Regulation 833/2014, prohibits the sell, supply, transfer or export of dual-use goods and technology to Russia or for use in Russia. However, that same Article makes a provision for request for authorization to be made by an exporter to the competent authority to be allowed to sell, supply, transfer or export of dual-use goods and technology to Russia or for use in Russia. If, however a party to the contract falls under the category of persons that can seek authorisation to enable it perform its obligation and the party did not seek such authorisation, the party cannot rely on the doctrine of force majeure to evade the performance of its obligation.

Similarly, by the provisions of Article 11 of Council Regulation 269/2014, a party has the right to seek judicial review of the legality of the non-performance of contractual obligation in accordance with the Regulation. Where the party fails to make use of this opportunity of judicial review, such party cannot lay claim to force majeure.

3. Relying on some of the provisions of the Regulation that imposed the sanction.

Some Regulations that imposed the sanction makes some provisions that can water down the effect of liability for non-performance of a contract due to the sanction imposed by the Regulation. An example is in Article 10 of Council Regulation 269/2014 which provides that a natural or legal person, entity, or body implementing this Regulation, or its directors or employees, shall not be held liable of any kind for the freezing of funds and economic resources or the refusal to make funds or economic resources available, when done in good faith on the basis that such action is in accordance with this Regulation, unless it is established that the freezing of funds and economic resources or withholding thereof was the result of negligence. The Article further provides that, natural or legal persons, shall bear no liability of any kind if they did not know, and had no reasonable cause to suspect, that their actions would violate the provisions of this Regulation.

Article 10 provides a defence from liability for breach of contract due to non-performance as a result of an imposed economic sanction. Therefore, it is important that parties to the contract take advantage of some of these provisions to water down the impact of an imposed economic sanction.

3.3. Invalidity of Contract v. Impossibility of Contract

Economic sanctions can have two major impacts on the parties' contractual relations. The effects are: invalidity of the contract and the impossibility of its performance. However, for

each of these to occur, some circumstances must be in place (Mcgee, 2004, P 104). These effects are discussed as follows:

1. **Invalidity of Contracts**

For a contract to be annulled on this ground, the parties must have entered into the contract after the enactment of the sanctions, and the sanctions should be legally applicable to the contract. In Switzerland, for example, the contract may be declared invalid under art 20 (1) of the Code of Obligations, which stipulates that a contract shall be void if its terms are impossible, unlawful or immoral. This effect occurs, for example, if the contract provides for the supply of goods prohibited by the regulation imposing sanctions, or the transfer of money to the person from the relevant 'blacklist'. In this case, the contract will only be invalid when the statutory enactment expressly states that transactions which contravene its requirements will be void, or when the object and purpose of such a prohibition require such an effect as the nullity of the contract. For instance, in 1968 the Zurich Commercial Court held contrary to good morals and thus null and void a contract where the parties agreed to smuggle goods in breach of Italian law (Kotelnikov, 2020 p. 19).

In the US, the courts will refuse to enforce a contract concluded in breach of the law. As in Switzerland, not every contradiction to the law will be considered a sufficient ground for doing so. The court always has a possibility in its sole discretion to provide judicial protection to the contract which, despite a formal violation of the law, does not expressly provide for the commission of prohibited actions. In *Bassidji v Simon Soul Sun Goe* the Court of Appeals for the Ninth Circuit held that whatever flexibility may otherwise exist with regard to the enforcement of 'illegal' contracts, courts will not order a party to a contract to perform an act that is in direct violation of a positive law directive, even if that party has agreed, for consideration, to perform that act.

In England, the illegality of a contract generally makes it unenforceable. The illegality can arise either by operation of statute or the common law. Where the contract itself is not expressly prohibited by statute, the court has to perform a balancing exercise: the issue is whether public policy requires that a contract should not be enforced because it is tainted with illegality. The notion of public policy has been criticised in England for its vagueness. However, it remains a powerful mechanism for ensuring that the contracts are not misused to contravene the principles of law and statutory prohibition (Kotelnikov, 2020 p. 18).

In Russia, art 168(1) of the Civil Code makes the transactions violating the requirements of the law or other legal act voidable, which means that they become invalid only if and when a court declares them to be null and void. However, according to Part 2 of the same article *a transaction that violates the requirements of the law or other legal act and thus infringes upon public interests or the rights and legitimate interests of third parties is void.* This rule is subject to a caveat that even in a latter case the law may directly specify that such a transaction is voidable, or provide for other consequences of the violation of the law other than the invalidity of the transaction. This distinction between voidable and void transactions (contracts) is important for Russian law and is known in other countries as well.

Another ground that could be applied to the invalidity of contracts that contravene a sanctions regime is art 169 of the Civil Code of the Russian Federation. According to this article, a transaction made for a purpose that is obviously contrary to the foundations of law and order or morality is void. In cases provided for by law, the court may confiscate in favour of the Russian Federation everything received on such a transaction by parties who acted intentionally, or apply such other consequences as established by law.

2. **Impossibility of Performance**

Ascertaining the impossibility to perform an obligation also requires that the sanctions must enter into force after the conclusion of the contract, and their introduction must indeed constitute an obstacle to its proper performance. Article 2 of Regulation 269/2014 freezes all funds belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them that are listed in Annex I. such funds shall not be made available to them either directly or indirectly.

By this provision, where economic resources belonging to these persons is needed for the purpose of the performance of a contract, such economic resources will not be made available to them by any EU member state where this Regulation is applicable. This means that the performance of such contract will be hampered with.

However, Article 6 provides an exception as regards payment that is due under a contract before the person is listed in Annex I. Article 2(2) shall not apply to payment by a natural or legal person, entity or body listed in Annex I that is due under a contract or agreement that was concluded by, or under an obligation that arose for the natural or legal person, entity or body concerned, before the date on which that natural or legal person, entity or body was included in Annex I.

The importance of this potential exemption was considered by the English High Court in the context of the Iran sanctions regime *in DVB Bank SE v Shere Shipping Company Limited* (2013) EWHC 2321. The fact of the case is that in 2006, DVB and another bank advanced US$50 million to four Maltese registered shipping companies. The borrowers' obligations under the loan agreement were guaranteed by Working Shipping Investments Ltd and Islamic Republic of Iran Shipping Lines. The US$100 million made available under the loan agreement provided post delivery financing in respect of the acquisiation costs of four vessels. Between 2009 and 2012, the borrowers, the guarantors and the syndicate banks all became sublect to

certain EU sanctions against Iran. Despite being subject to sanctions, the borrowers continued to perform their repayment obligations under the loas agreement for four months until September 2011. In September 2011, the borrowers stopped making payments of interest and principal. The borrowers defence was that the obligations in the loan agreement became discharged and/or unenforceable and/or were frustrated and/or were suspended by reason of supervening illegality due to the operation of the sanction imposed. The court however held that the regulation was not drafted so as to allow the designated entities to suspend or avoid repayment of monies which were advanced before the regulation came into force. Although the monies might be frozen, debts owed to designated entities like the syndicate banks, they are still payable despite the regulation.

Therefore, where a payment is due to any of the persons listed in Annex I before they were included in the list, this Regulation shall not apply to them as they can access their economic resources to aid the performance of any contract or obligation. However, any sum that is due after the inclusion of the person in the list, cannot be released. This fact was also emphasised by Article 7(2).

Furthermore, a persons listed in Annex I cannot make any claim in connection with any contract or transaction in which the performance has been affected directly or indirectly in whole or in part by the measures imposed by the Regulation. However, the burden of proving that a claim is not prohibited lies on the person seeking the enforcement of that claim and such persons have a right to seek judicial review of the legality of the non-performance of any contractual obligation as provided for in the Regulation.

Even though Article 2(1) prohibits the sell, supply, transfer or export of dual-use goods and technology to Russia or for use in Russia, however, Article 2(1) provides to the effect that where the export concerns the execution of an obligation arising from a contract or an

agreement that was concluded before 1st of August 2014, the competent authority may grant authorization base on the supply of all relevant information by the exporters to the competent authority.

The implication of this provision is to the effect that contracts concluded before 1st of August 2014 can be performed. However, such performance or the enforcement of its performance or any benefit to be derived form it can only be done by the authorization of the competent authority. Conversely, any contract that was concluded after the 1st of august 2014, cannot be performed or executed.

Article 5 also prohibits the purchase, sell, provide brokering or assistance in the issuance of, dealing with transferable securities and money-market instruments with a maturity exceeding 90 days, issued after 1st August 2014 by some legal persons and institutions.

As regards claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under the Regulation, the Article 11 provides:

> 11(1) No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:
>
> (a) entities referred to in points (b) or (c) of Article 5, or listed in Annex III;
>
> (b) any other Russian person, entity or body;

(c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) or (b) of this paragraph.

2. In any proceedings for the enforcement of a claim, the onus of proving that satisfying the claim is not prohibited by paragraph 1 shall be on the person seeking the enforcement of that claim.

3. This Article is without prejudice to the right of the persons, entities and bodies referred to in paragraph 1 to judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation.

The categories of persons as listed in the Regulation, cannot make any claim in connection with any contract or transaction in which the performance has been affected directly or indirectly in whole or in part by the measures imposed by the Regulation. However, the burden of proving that a claim is not prohibited lies on the person seeking the enforcement of that claim and such persons have a right to seek judicial review of the legality of the non-performance of any contractual obligation as provided for in the Regulation.

Conclusively, the Current sanctions against Russia has considerable impact on the contracts, and these effects ranges from illegality of the contract and the impossibility of its performance. While these affects parties from meeting up to their obligation under a contract, there are ways in which parties can however, contracting parties can find a way of mitigating these effects. This can be by including terms in the contract that envisages sanctions, including a force majeure provision in the contract and a careful study of the regulation that imposed the regulation to see if there are some provisions that can be relied upon.

CONCLUSIONS AND PROPOSALS

Conclusion

The following are the conclusions drawn from this thesis:

1. Restrictive measures are often necessary in a wider economic, political and military context. As such, international economic sanctions invariably has a significant impact on the contractual activities of parties. Whilst sanctions which are product of foreign policy are distinct from commercial disputes, they nevertheless give rise to complex legal issues pertaining to a contract affected by the sanction regime.
2. The impact of sanctions on contracts are widespread, they extend beyond business transactions with sanctioned individuals, entities, or trading in goods and services affected by sectoral sanction to include transactions with sanctioned nations. However, the effect of sanction on the performance of a contract is analysed and evaluated on a case-by-case basis.
3. Performance of a contract connotes fulfilment of the terms of the agreement of respective parties to a contract. Upon the imposition of a sanction and that sanction is legally applicable to the category of contract to be entered into, or already entered into (except were exempted by the Regulation imposing the sanction), such contract is caught up by the sanction.
4. If sanctions affect a contract, a thorough examination of the situation is required. If a party seeks to rely on a contractual clause to avoid performing a contract due to sanctions, it must ensure that all of the clause's requirements are met. If such clauses are not included in the contract, considerable uncertainty may arise, including whether the contract may be (or may become) terminated (by frustration).
5. The impact of sanctions on precontract, contract and post contract stage are determined by the sanction imposed by the sender. Where sanction has been imposed and parties intend to enter into a contractual relation (precontract stage), such is already caught up by the sanction already imposed. Same is applicable to the contract and post contract stage of the contractual relation, thus, (except were exempted by the Regulation imposing the sanction) such a contract cannot be performed because of the sanction imposed.

6. Commercial disputes involving sanctions as a basis for invalidity of a contract are relatively rare, however, case law dealing with sanctions as an obstacle to the performance of contract predominates in this area.
7. Particularly in the movement of capital and payments, it is crucial to differentiate between measures pertaining to specific economic sectors and individual sanctions. Terms of sanctions are continuously tightened and attention should be paid to the sanction regulation's general compliance structures.

Proposals

While sanctions are seen as a most preferred form to coerce a change in another's behaviour rather than engage in war, this, as already discussed above, has an adverse effect on the performance of contractual obligations entered into by contracting parties. Therefore, it is recommended thus:

1. It is recommended policy change that sanctions be imposed alongside the duration, which can be extended as needed. When sanctions are imposed against a country, individual, or entity, the measures are widely publicized; however, little information is provided once the sanctions have been lifted, as sanctions are easier to impose than to remove. Over time, the issues that prompted the imposition of sanctions lose their sting, and international compliance tends to deteriorate.
2. Parties going into contractual relations, especially in the international scene, should include in the contract, contractual terms that contemplate the imposition of economic sanctions and the resultant effect on the contract, this can be achieved through closing conditions (conditions precedent) or indemnification clauses. In addition, attention should be paid to the post-closing phase. Existing or future sanctions can be adequately taken into account in new contracts, e.g. by including sanction clauses.
3. The anticipated findings to be gotten from the due diligence exercise should not only focus on the sanctioned individuals or entities, but to also consider and analyze the ownership and control structures.

LIST OF REFERENCES

Special Literature

1. Afesorgbo, S. (2016). The Impact of Economic Sanctions on International Trade: How do Threatened Sanctions Compare with Imposed Sanctions? *EUI Working paper MWP 2016/15.*
2. Bergeijk, P. (1994). The Impact of Economic Sanctions in the 1990s. *A Paper Presented at the 40th General Assembly of the Atlantic Treaty Association*, p. 443-453. Internet access
3. Biersteker, T. and Bergeijk, P. How and When do Sanctions Work? *The Evidence, ISS Report* No. 25.
4. Brown, I. (2001) *Conflict of Laws.* 2nd ed. UK; Old Bailey Press Ltd.
5. Caruso, R. (2003). The Impact of International Economic Sanctions on Trade: An Empirical Analysis. *Being a paper prepared for the European Peace Science Conference, Amsterdam.* https://doi.org/10.2202/1554-8597.1061.
6. Chachko, E. and Heath, J. (2022). A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield. *AJIL Unbound*, 116, 135-139. https://doi.org/10.1017/aju.2022.21.
7. Crossette, R. (2000) UN to Take a Hard Look at Sanctions. *International Herald Tribune*.
8. Doxey, M. (1983) International Sanctions in Theory and Practice. *Case Western Review Journal of International Law* 15(2), p. 273-288.
9. Farral, J. (2007) *United Nations Sanctions and the Rule of Law*. Cambridge: Cambridge University Press.
10. Galtung, J. On the Effect of International Economic Sanctions: With Examples from the Case of Rhodesia. *World Politics*. 19(3), p. 378–416 https://doi.org/10.2307/2009785
11. Giumelli, F. (2013) How EU sanctions work: a new narrative. *Chaillot Paper*. 2013, p. 129. Internet access https://www.iss.europa.eu/sites/default/files/EUISSFiles/Chaillot_129.pdf [Accessed on 17 November 2022].
12. Houtte, V. (1997). Trade Sanctions and Arbitration. *International Business Law* 1997 .Vol. 25, p. 166–170. https://repub.eur.nl/pub/21535/impact%20of%20economic%20sanctions. [Accessed on 3 October 2022].
13. Hufbauer, G. et al. (2009). *Economic Sanctions Reconsidered*. 3rd ed. Washington: Peter G. Peterson Institute for International Economics.

14. Jayabalan, S. (2020). A The Legality of Doctrine of Frustration in the Realm of Covid-19 Pandemic. Sociological Jurisprudence Journal. 3(2). 84-90. https://doi.org/10.22225/scj.3.2.1900.84-90
15. Joerges, C. and Neyer, J. (2006) European Law as Conflicts of Law in: Deliberative Supranationalism. *EUI working papers. 8 European Law Journal.*
16. Kofi, A. (1998) Partnerships for Global Community. *Annual Report on the Work of the Organization*. Internet access https://digitallibrary.un.org/record/262109?ln=en [Accessed on 3 October 2022]
17. Kotelnikov, A. (2020) Contracts Affected by Economic Sanctions: Russian and International Perspectives. *Transnational Dispute Management Journal*, Vol 17(1)
18. Magnus, U. (1998). Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts. *Pace International Law Review*. Vol.10, p. 89-95.
19. Mills, A. (2009). *The Confluence of Public and Private International Law*. Cambridge: Cambridge university press.
20. Paul Berman, P. (2007) Global Legal Pluralism. *Southern California Review*, Vol. 80, p. 1155-1238.
21. Portela, C. (2014). The EU's Use of 'Targeted' Sanctions: Evaluating effectiveness. *CEPS Working Document No. 391.*
22. Reisman, W. (1971) *Sanctions and Enforcement in the Future of International Legal Order* (ed. C. Black and R.A. Falk) New York.
23. Ruys, T. (2016). Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework. *Research Handbook on UN Sanction and International Law* edited by Herik, L.
24. Schaefer, J. (2010) Beyond a Definition: Understanding the Nature of Void and Voidable Contracts. *Campbell Law Rev*. Vol. 33
25. Schwartz, A. (2010) A 'Standard Clause Analysis' of the Frustration Doctrine and the Material Adverse Change Clause. *UCLA Law Review*, Vol. 57. Working Paper Number 09-15.
26. Shaw, M. (2021) *International Law*. 9th ed. Cambridge: Cambridge University Press.
27. Shin, G. (2016). Do Economic Sanctions Impair Target Economies? *International political science review* Vol 37(4).

28. Siamack, S. and Patricia, R. (2013). Effectiveness of Economic Sanctions: Empherical Research Revisited. *International Business and Economics Research Journal.*
29. Smeets, M. (2018). Can Economic Sanctions be Effective? *World Trade Organization, Staff Working Paper ERSD-2018-03.*
30. Thakur, R. (2006). *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*. Cambridge: Cambridge University Press.
31. Wallace, R. (2005). *International Law*. 5th ed. London: Sweet & Maxwell Limited, 2005.
32. Yasoda, W. (2020) Non-performance of Contractual Obligations in International Commercial Contracts in the Wake of Coronavirus: A Legal Perspective. *3rd Research Conference on Business Studies.*
33. Zelyova, N. (2021) Restrictive measures - sanctions compliance, implementation and judicial review challenges in the common foreign and security policy of the European Union, 2021. *ERA Forum.* 22:159–181. https://doi.org/10.1007/s12027-021-00658-6

Court Jurisprudence

34. *Bank Melli Iran v Telekom Deutschland Gmb* (CJEU) (Case C-124/20).
35. Decision of the Commercial Court of Sverdlovsk region of 3 April 2014 in case No. A60-825/2015)
36. *DVB Bank SE v Shere Shipping Company Limited* (2013) EWHC 2321
37. *Harriscom Svenska v Harris Corp* (1993) (judgment of the United States District Court).
38. Judgement of the Commercial Court of Appeal of the Russian Federation (2015) (Case number A07-12459/20150).
39. Judgment of the Commercial Court of the City of Moscow (Case No A40-51145/2019, delivered on 30 May 2019).
40. Judgment of the Ninth Appeal Court of the Russian Federation, of 21 June 2016, (case number A40-6478/2016.
41. *Lamesa Investments Limited (LIL) V. Cynergy Bank Limited (*2019*)* England and Wales High Court. Case No: CL-2018-000826
42. *Lamesa Investments Limited (LIL) V. Cynergy Bank Limited (*2019) EWHC 1877.
43. *Massoud Bassidji v. Simon Soul Sun Goe,* U.S. Court of Appeals for the Ninth Circuit - 413 F.3d 928 (9th Cir. 2005).
44. Mcgee, R. (2004). Trade Sanctions as a Tool of International Relations. *Commentaries on Law and Publicity.* vol 2.

45. MUR Shipping BV v RTI Ltd (2022) Judgment of the High Court of England and Wales 467 (Comm).
46. Pala, T. (2021). The Effectiveness of Economic Sanctions: A Literature Review. *The Nispacee Journal of Public Administration and Policy*. Vol XIV (1).
47. Paris Court of Appeal in a case between a French company and an Iranian company (ICCP-CA RG no19/07261 delivered on 3 June 2020).
48. *Regazzoni v Sethia, (1944)* (Judgment of the House of Lords of England).
49. Ruling of the Supreme Court of Russia (2017) (case No 301-ES16-18586, case No A39-
50. *Shipyard, AB Götaverken (Sweden) v Libyan General Maritime Transport Organization (GMTO) (Libya),General National Maritime Transport Company (GMTC) (successor First Defendant) (Libya)* Award in Case Nos. 2977, 2978 and 3033 in 1978, ICC Award No. 2977. Yearbook Commercial Arbitration 1981, 133.
51. *Yassin Abdullah Kadi v Council of the European Union & Commission of the European Communities* [2005] (CJEU) T-315/01

Regional Instruments

52. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01 of 26 October 2012.
53. Council Implementing Regulation (EU) 2022/1270 of 21 July 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. ST/11449/2022/INIT OJ L 193.
54. Council Regulation (EC) No 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea.
55. Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
56. Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine OJ L 229.
57. Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 of February 1992, Official Journal C 325/5.

Electronic Publications

58. Balmain, C. Hassan, R. and Higham, C. (2019) *Sanctioned default? The English High Court considers the effect of foreign illegality on English obligations*. (blog)

www.whitecase.com/publications/alert/sanctioned-default-english-high-court-considers-effect-foreign-illegality. [Accessed on 5 December 2022]

59. DeLelle, C. and Erb, N. (2022) *Key Sanctions Issues in Civil Litigation and Arbitration (*blog) https://globalinvestigationsreview.com/guide/the-guide-sanctions/third-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration [Accessed on 10 November 2022]
60. European Union Sanctions Map. Internet access https://www.sanctionsmap.eu/#/main [Accessed on 17 November 2022]. https://www.dfa.ie/our-role-policies/ireland-in-the-eu/eu-restrictive-measures/ [Accessed on 17 November 2022]
61. Ireland, Department of Foreign Affairs. Internet access
62. Queritius. *Sanctions on Russia and Belarus – contract and dispute settlement toolkit.* (blog) Internet access https://queritius.com/international-economic-sanctions-and-international-disputes-settlement/ [Accessed on 5 December 2022].
63. Schrader, M. Schmidt, J. and Peitzmeier, F. (2022) *Five Rounds Of EU Sanctions Against Russia – A Basic Guide For German Companies. (blog)* https://www.mondaq.com/germany/export-controls-trade-investment-sanctions/1185512/five-rounds-of-eu-sanctions-against-russia-a-basic-guide-for-german-companies [Accessed on 4 November 2022].
64. Vishnyakov, M. (2021) Financial sanctions and English law contracts – what's the potential impact for business? (blog) https://cyklaw.com/news/financial-sanctions-and-english-law-contracts-whats-the-potential-impact-for-business/ [Accessed on 17 December 2022]

Regulatory Legal Acts

65. Charter of the United Nations (1945) 1 UNTS XVI
66. Uniform Commercial Code of the United States of America, first published in 1952.
67. Civil Code of the Russian Federation, (1994) No. 51-FZ (as amended on 25-02-2022)
68. Covenant of the League of Nations (1919) (see: https://www.ungeneva.org/en/library-archives/league-of-nations/covenant#:~:text=The%20Covenant%20constituted%20of%20a,achieve%20international%20peace%20and%20security%E2%80%9D. [Accessed on 11 October 2022]
69. The Principles of European Contract Law. Accessed at https://www.trans-lex.org/400200 [Accessed on 11 October 2022]

70. United Nations Convention on Contract for the International Sale of Goods (1980) accessed at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf [Accessed on 5 November 2022]
71. UNIDROIT Principles of International Commercial Contracts (2016)
72. Switzerland Code of Obligations of 30 March 1911

Other Documents and Reports

73. European Union (2022) EU Best Practices for the effective implementation of restrictive measures

Summary

The Impact of International Economic Sanctions on the Performance of Contract

Naomi Mnena Kakwagh

Contracts entered into in violation of existing legal prohibitions are null and void, and the failure to comply with the imposed restrictive measures would result in grave repercussions. Economic sanctions can have several impact on a contract, ranging from, invalidity of the contract to impossibility of its performance. However, for each of these to occur, certain circumstances must be in place.

Ascertaining the impossibility to perform an obligation requires that the sanctions must enter into force after the conclusion of the contract, and their introduction must indeed constitute an obstacle to its proper performance.

When sanctions are imposed that prevent contract completion, both sanctioned parties and interested parties (e.g., contractual counterparties) face breach of contract disputes. Contract defendants may assert, among other things, force majeure defenses (which sometimes expressly cover the imposition of sanctions), contract illegality, compliance with contract representations, and frustration. Sanctioned party defendants face many typical causes of action in 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.

Even though the performance of a contract might be hampered by sanction, where however, there are other ways the contract can be performed legitimately, the defence of force majeure cannot avail such a person. It is important to note that contracts entered into in violation of existing sanctions are null and void, and the failure to abide by sanctions may result in grave repercussions.

The prohibitions imposed by sanctions also extend to companies that are owned or controlled directly or indirectly by sanctioned individuals. Hence, the test of ownership and control would also need to be fulfilled.