CHOICE OF ARBITRATION VENUE IN LIGHT OF SANCTIONS AGAINST RUSSIA

Irina Moutaye
advocate of the Moscow Region Chamber of Advocates
LL.M. (Manchester), PhD
Elena Billebro
advocate of the Moscow City Chamber of Advocates
LL.M., Stockholm University
LL.M., Central European University

Introduction

In March 2014 the United States, the EU and several other countries, including Australia,[1] Canada,[2] Switzerland,[3] imposed sanctions against Russia "in connection with the situation in Ukraine". Ukraine also imposed sanctions against Russia and defined the status of Crimea and Sevastopol as "temporarily occupied territory"[4]. Russia responded with a ban on the import of certain goods from a number of countries that adopted sanctions against Russia.[5]

At this background with the sanctions, the true panic arose in the market of arbitration services that led to the calling for mass amendment of arbitration clauses, abandonment of traditional venues in Paris, London and Stockholm, and for inclusion into arbitration clauses references to the *terra incognita* venues for Russian companies such as Hong Kong and Singapore.

In this paper, the authors aim to examine some questions on the choice of traditional European arbitration venues (London, Paris, Stockholm, and Geneva) in light of the sanctions.

Since arbitrations involving Russian companies in the USA arbitration institutions is rather an exception, than a rule, the authors do not consider in this paper the risks of choosing arbitration venues in the USA.

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[1] Autonomous Sanctions (Designated Persons and Entities and Declared Persons — Ukraine) Amendment List 2014; Available at http://203.6.168.66/sanctions/sanctions-regimes/ukraine.html (last viewed 28 February 2015).

[2] Special Economic Measures (Russia) Permit Authorization Order (SOR/2014-59), Special Economic Measures (Russia) Regulations (SOR/2014-58) *etc*.; www.international.gc.ca/sanctions/countries-pays/russia-russie.aspx?lang=eng (last viewed 28 February 2015).

[3] Ordonnance instituant des mesures visant à empêcher le contournement de sanctions internationales en lien avec la situation en Ukraine du 27 août 2014 (Etat le 16 décembre 2014); Available at www.admin.ch/opc/fr/classified-compilation/20142202/index.html (last viewed 28 February 2015).

[4] See: The Law of Ukraine "On securing of the rights and freedoms of citizens on the temporarily occupied territory of Ukraine" *etc*.; translation into Russian is available at http://jurinform.com.ua/poleznaya-informaciya/zakonodatelstvo-ukrainy/zakony-ukrainy/188-zakon-ukrainy-ob-obespechenii-prav-i-svobod-grazhdan-na-vremenno-okkupirovannoy-territorii-ukrainy.html (last viewed 28 February 2015).

[5] The Decree of the President of the Russian Federation dated 06 August 2014 № 560 "On application of some special economic measures for ensuring the security of the Russian Federation" in: Sobranie zaknodatel'stva. 2014. № 32. P. 4470.

I. Sanctions against Russia

A detailed analysis of the nature of the sanctions and the questions of their legality are not the subject of this paper. Nevertheless, it is necessary to give an overview of some of the sanctions to understand their impact on the international commercial arbitration market in Europe.

Altogether sanctions include publication of the list "of prohibited persons" (in this case, the sanctions are directed against specified individuals and legal entities) and sectoral sanctions (measures against the bank, military, and energy sectors of the Russian economy).[1]

Following the USA, the EU imposed sanctions against Russian individuals and businesses.

June 25, 2014 the EU imposed sanctions against the Crimea and Sevastopol.[2]

Sectoral EU sanctions also affected the oil and gas and the financial sector of the Russian Federation and are aimed at the introducing of the licensing procedure.[3]

In the **oil and gas sector,** the EU introduced licensing for supply and maintenance of equipment listed in Annex II of the Regulation of the EU. If such technology is to be used in the Russian Federation, the license may be issued in case of the performance of obligations from a contract concluded before August 1, 2014. Some services in the oil and gas sector and supply of special crafts for them are also banned.

In the **financial sector** the EU introduced bans for certain Russian persons to purchase, sell, provide investment services or help in the release, getting involved in other transactions in respect of securities with a maturity of over 30 days, and released after the September 12 2014; to issue new loans, or loans for prohibited persons, except for loans with special documented goal to provide financing to non-prohibited import and export of goods and non-financial services between the EU and Russia.[4]

In the military sector, the EU banned import and export to Russia of weapons and related materials, and dual-use goods (with some exceptions).

Separately, the EU sanctions prohibit satisfying any claims in connection with any contract or transaction, directly or indirectly, in whole or in part affected by the sanctions, including claims for compensation or any other similar claims, if such claims are filed by Russian persons, their affiliated persons or persons acting on their behalf.[5]

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[1] The US sectoral sanctions, inter alia, are enacted by: Directives 1 and 2 Pursuant to EO 13662 (Issued July 16, 2014 *etc.* Available at www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx (last viewed 8 February 2015).

[2] Council Decision (EU) № 629/2014 of 23 June 2014, Council Regulation (EU) № 692/2014 of 23 July 2014.

[3] Council Regulation (EU) № 833/2014 of 31 July 2014, Council Decision № 2014/659/CFSP of 08 September 2014, Council Regulation № 960/2014 of 08 September 2014. See also, Council Decision 2014/145/CFSP of 14 February 2014 and Annex I to Council Regulation (EU) 269/2014.

[4] 5 December 2014 the European Union authorized the European subsidiaries of Russian banks, which came under the sanctions, to attract loans for more than 30 days, if they need the "emergency financing". See, Council Decision (EU) 2014/872/CFSP of 4 December 2014.

[5] See *e.g.*, Art. 6 of Council Regulation (EU) № 692/2014 23.06.2014 and Art. 11 of Council Regulation № 833/2014 31 July 2014.

August 27, 2014, Switzerland also imposed sanctions against Russia.[1] Swiss sanctions provide similar bans and restrictions without retroactive effect, a complete ban on investment activity in Crimea, an obligation to notice the State Secretariat for Economics (SECO) on certain types of transactions, and the prohibition to enter into business relations. At the same time, the existing business relationships with Crimean companies are not prohibited.

The general characteristics of the sanctions, which could be derived from the foregoing description of the sanctions:

1) not all sanctions have retroactive effect;[2]

2) sanctioned activity could be permitted under the license;

3) sanctions are targeted and do not apply to all economic activity pertaining to Russian persons;

4) interpretation of the sanctions legislation can be highly variable and it is in the competence of the national authorities of the relevant Member State;

5) the US, EU and other countries' sanctions are similar in subject matter, but different in content;

6) EU sanctions apply to "EU persons". A literal interpretation of those rules does not allow extending the concept of "EU persons" on subsidiaries of American or European corporations or companies with European capital registered in the third countries. There is, though, a reasonable view in the EU, that in light of the notion of "direct or indirect" subsidiaries of the EU companies should comply with the EU sanctions;[3]

7) sanctions do not apply to situations when it is necessary to prevent a threat to human health and life or to the environment.[4]

These characteristics of the sanctions may underlie the approach to the choice of the arbitration venue.

Thus, the sanctions are targeted and they do not directly affect a large scale of commercial activities. In case of the EU, they also do not apply to disputes out of the contracts concluded before the introduction of the relevant sanctions, the disputes related to actions undertaken to prevent the threat to human health or the environment, disputes arising out of the licensed actions.

In all other cases, it is appropriate to analyze the effect of overriding mandatory provisions and public policy considerations on possibility to have arbitration and to have an arbitral award enforced.

II. Arbitration in Europe in light of sanctions

Against the background of the situation with the sanctions, the proposals on amending of arbitration clauses and transferring of arbitrations involving Russian parties from European (London, Paris, Stockholm, Geneva) into Asian venues (Hong Kong, Singapore) became persistent. These proposals were based on the following hypotheses:

1) the sanctions block the mere possibility to arbitrate;[1]

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[1] Ordonnance instituant des mesures visant à empêcher le contournement de sanctions internationales en lien avec la situation en Ukraine du 27 août 2014 (Etat le 16 décembre 2014); Available at www.admin.ch/opc/fr/classified-compilation/20142202/index.html (last viewed 28.02.2015).

[2] See part 2 of Art. 3(a) of Council Regulation (EU) № 833/2014.

[3] Russian Manual. Doing business with Russia, dealing with sanctions, The Netherlands Ministry of Foreign Affairs, 27 August 20914, p. 19.

[4] Part 3 Art. 3(a) of Council Regulation (EU) № 833/2014.

2) the relations between a natural person or a legal entity on the one hand and arbitration institution, arbitrators and legal counsels on the other hand could be deemed a transaction or even "technical assistance" in the meaning of the sanction legislation, and thus:

— arbitrators will resign due to the threat of criminal liability for "technical assistance";

— legal counsels will refuse to represent "sanctioned" parties due to prohibition on commercial transactions with such parties;

3) an arbitral award in favor of a "sanctioned" party will not be enforceable due to the public policy consideration in the EU and the USA.

These arguments — and at the same time implied risks — could be divided into two categories:

a) the risks associated with the mere possibility to arbitrate, and

б) the risks associated with enforceability of arbitral awards.

1. Risks associated with vagueness and wide interpretation of sanction legislation

The important point is that it is the national authority of each EU Member State which is in charge of issuing licenses to engage in activities prohibited by the sanctions, which means that the interpretation of the EU sanctions legislation, in addition to the EU Authorities, will be carried out by competent national authority of each Member State.

Two provisions of the sanctions legislation are of the greatest interest: the so called "no claim provision" (the provision on prohibition of the satisfaction of claims arising from contracts subject to sanctions) and the provision on "technical support."

1.1. Possibility to arbitrate

Prohibition on satisfying the claims arising out of the contracts subject to sanctions is set in Article 11 of Council Regulation (EU) № 833/2014. Swiss sanctions do provide nothing like this.

The main question, arising when interpreting this Article is the meaning of the term "claim": does it mean the "claim" addressed towards a party or a third person (*e.g.* a guarantor) or does the "claim" mean a request for arbitration or a statement of claim (in arbitration or litigation) and thus who is the addressee of this Article? The additional difficulty in interpretation is caused by the fact that in contrast to Council Regulation (EU) № 833/2014 (sectoral sanctions), Council Regulation (EU) № 692/2014 (Crimea sanctions) in Article 1 does define the term "claim".

According to Article 1 of Council Regulation (EU) № 692/2014 "claim" means any claim, whether asserted by legal proceedings or not, made before or after 25 June 2014, under or in connection with a contract or transaction, and includes in particular:

(i) a claim for performance of any obligation arising under or in connection with a contract or transaction;

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[1] See *e.g.*, *Dmitry Kurochkin*, *Francesca Albert* The Future of Commercial Arbitration with Russian Parties in the World of Sanctions. Available at http://whoswholegal.com/news/features/article/32061/the-future-commercial-arbitration-russian-parties-world-sanctions (last viewed 28 February 2015)

(ii) a claim for extension or payment of a bond, financial guarantee or indemnity of whatever form;

(iii) a claim for compensation in respect of a contract or transaction;

(iv) a counterclaim;

(v) a claim for the recognition or enforcement, including by the procedure of exequatur, of a judgment, an arbitration award or an equivalent decision, wherever made or given;

Based on this definition of the term “claim” given under Council Regulation (EU) № 692/2014 “claim” means both the request for arbitration or a statement of claim in litigation, and a claim directed to the party (the third person).

It remains unclear why a similar Article with definition of the term “claim” is not included into the Council Regulation (EU) № 833/2014 (sectoral sanctions), especially considering that the Regulation was adopted after the Council Regulation (EU_ № 692/2014. On the one hand, the above could be attributed to "forgetfulness" of the legislator, on the other hand - to its conscious choice, due to the fact that Crimea sanctions are more stringent than sectoral sanctions. It can be assumed, however, that before the EU official Authorities give any official commentaries on this issue the relevant Member States Authorities will be inclined to interpret the term "claim" under Council Regulation (EU) 833/2014 in the same manner as it is defined under Council Regulation (EU) № 692/2014.

If one presumes that the “claim” within the framework of the above legislation is interpreted *inter alia* as a request for arbitration or a statement of claim (in litigation), could Articles 6 and 11 of the Council Regulation (EU) № 692/2014 and Council Regulation (EU) №833/2014 respectively be interpreted as prohibiting filing such a request for arbitration or a statement of claim. Is there a risk that arbitration institutions will refuse to accept the request for arbitration based on the above legislation?

Some authors come to such conclusions (that it is prohibited to file a claim[1]), which hardly could be found justified.

Conclusion on prohibition to file the request for arbitration is not supported even by literal (textual) interpretation of the Articles in hand. Part one of the Articles provides that "claims” “should not be satisfied," but not "cannot be filed". Thus the literal (textual) interpretation of the said Articles leads to the conclusion that the mere submission of such a claim (request for arbitration) and arbitration itself is not prohibited, but the arbitrators are obliged to deny a claim subject to sanctions.

If one agrees that Article 11 of the Council Regulation(EU) 833/2014 obligates arbitrators to deny a claim in a dispute involving a “sanctioned” party, it could be firmly presumed that there will be no pioneers who are willing to set a precedent in one of the European arbitration institutions that eliminates the collision between the European Constitutional Law and Article 11 of the Council Regulation (EU) 833/2014. Even if the risk of an unfavorable outcome of arbitration due to Article 11 of the Council Regulation (EU) 833/2014 will be low, there is no doubt that the party may choose any other non-EU arbitration venue (Hong Kong, Singapore, Israel, UAE, etc.), and will be right in doing so. However, it shall be noted that Article 11 of the Council Regulation (EU) 833/2014 will not affect the choice of the arbitration venue Switzerland.

[1] See *e.g.*, *Dmitry Kurochkin*, *Francesca Albert* The Future of Commercial Arbitration with Russian Parties in the World of Sanctions. Available at http://whoswholegal.com/news/features/article/32061/the-future-commercial-arbitration-russian-parties-world-sanctions (last viewed 28 February 2015).

Therefore, the sanctions do not ban arbitration in European arbitration institutions and the latter, with high probability, will apply for a license, although this procedure in many ways seems to become just a formality, and, in addition, is not applicable in Switzerland. Nevertheless, there could be some practical considerations in choosing arbitration venues outside of the EU for disputes subject to sanctions.[1]

1.2. Risks associated with application of sanction legislation to arbitration institutions, arbitrators and legal counsels

The question of whether the terms "technical assistance" and "related services" used in the sanctions legislation include also arbitration institutions, arbitrators and legal counsels services and their interaction with the "sanctioned persons", is of particular interest.

Exactly this factor is one of the key objectives for the choice of the arbitration venue. What if arbitrators or counsels involved in the proceedings come to the conclusion that the terms "related services" and "technical assistance" cover their services? Would they refuse to take assignments or resign?[2]

Arbitration institutions registered in the EU, are subject to compliance with sanctions regulations, which is not an obvious case with arbitrators and legal counsels (non-EU citizens who do not practice in the EU). There is, however, the risk of a broad interpretation of the rules on "technical support" and "related services" as applicable to services of arbitrators and legal counsels when the seat of arbitration or the place of supply of services is within the territory of the EU.

The Regulations define the term "technical assistance" as follows: "any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services; including verbal forms of assistance".[3] The term "related services" in the sanctions legislation is not defined.

At the first glance, the activity of legal counsels and arbitrators obviously have a completely independent subject matter in relation to the transactions prohibited by sanctions. Dispute resolution neither formally, nor in substance involves deep or Arctic drilling, and is not directly related to the shell projects within the meaning of prohibited "related services".

However, given the lack of experience in this field, there is a tendency to broad interpretation of these rules. For example, according to an explanation of the UK Department for Business Innovation & Skills on the sanctions, the services of the staff who are on secondment in Russian projects, are falling under the term "related services". It could be rather logical to interpret the explanations of the UK Department for Business Innovation & Skills as referring to purely technical staff, but the commentaries do not contain such a clarification.

The legal community and arbitration institutions themselves consider their services as legal services falling under the exemption from sanctions.

As mentioned above, this difficulty in the EU arbitration institutions is resolved by the application for a license, and no such difficulty arises in arbitration institutions in Switzerland. Similarly, the issue of contracting for legal services is resolved. In this case it is not the

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[1] Different approaches towards the obligation of arbitrators to apply overriding mandatory EU provisions will be considered further.

[2] See *R.Khodykin.* Results of the year 2014: hypothesis, disposition, sanctions…, Legal insight. 2014. № 10 (36). P. 64.

[3] See *e.g.,* Art.1 Council Regulation (EU) № 833/2014 (amended by Council Regulation (EU) № 960/2014).

"sanctioned" company but the legal consultants will need to apply for a license and such an application will rather be a formality, than a serious impediment.

In any case, transferring arbitration outside of the EU can be very unproductive: a number of difficulties which arbitrators face in European venues and which are connected with controversial interpretation of such terms as "technical assistance" and "related services", inevitably will arise in front of a significant number of arbitrators in other forums, including Hong Kong and Singapore, due to the fact that many of the arbitrators working in such venues are naturalized in the countries that introduced sanction against Russia (in the US, Australia, UK, etc.).

At the same time, the possibility of a non-EU arbitration institution to receive an EU license is not envisaged by sanctions legislation. Accordingly, it is logical to conclude that in case of an arbitration venue outside the EU and the USA, if arbitrators are naturalized in the EU or the USA, receiving a particular license in relation to their services as arbitrators, becomes their personal issue, which could complicate the case.

It should be noted that the sanctions in the world history are imposed on regular bases, but cases of interpretation of arbitrators' and arbitration institutions' services as a prohibited technical assistance, supported by judiciary, are still not known.

The difficulties in this part can be resolved by an alternative arbitration clause with the primary choice of traditional arbitration venues, and another arbitration venue outside of the EU as an alternative in case of arbitrators resignation or refusal of an arbitration institution in the EU to administrate the proceedings due to the sanctions.

Thus, transferring arbitration from the EU to other countries might fail to resolve the problem of access to arbitration. It will most probably be no problem for an EU arbitration institution to obtain a license in the EU. To the contrary, if the appointed arbitrators for arbitration in Asia are naturalized in the USA or the EU, it is likely that they will need to address the issue of licensing individually.

2. Risks associated with application of sanction legislation by arbitrators

Under Article 288 of the TEU Regulations are directly applicable in the EU Member States and are part of their legal systems.

There are two main options to qualify the sanctions provisions: as overriding mandatory provisions (Article 9 of the Regulation (EU) № 593/2008 of 17 June 2008 "On the law applicable to contractual obligations" (analogue Article 1192 of the Civil Code of the Russian Federation), or the public policy provisions (Article 21 Regulation (EU) № 593/2008 "On the law applicable to contractual obligations" (analogue Article 1193 of the Civil Code).

There are more arguments to favor the approach, that the sanctions provisions are overriding mandatory provisions, rather than public policy provisions. As rightly pointed out by V. Shaleva: "All the rules of public policy are necessarily by their nature are overriding mandatory provisions, for they reflect the basic foundations of morality and justice. But not all overriding mandatory provisions reach the level of public policy, as the interests they protect may not relate to the fundamental values of a particular society".[1]

In addition to the provisions on public policy in Article 21 of the above mentioned Regulation, the most relevant in light of the situation with sanctions is the provision on public

[1] *Shaleva V.* The "Public Policy" Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia, Arbitration International. 2003. Vol. 19. № 1. P. 72.

policy contained in the New York Convention, 1958.[1] The question of whether the sanctions provisions are covered by the concept of public policy will be discussed below.

When analyzing the risks of an EU arbitration (seat of arbitration is in the EU), one of the main issues, which obviously arises is the issue of whether arbitrators are obliged to apply the sanctions legislation of the EU as part of the law of the place of arbitration *(lex arbitri)*, even if the substantive applicable law is the law of a third country.

The answer to this question could vary depending on whether the sanctions provisions are deemed to fall under the category of "overriding mandatory provisions" or under the category of "public policy" of the country that imposed sanctions.

If the sanctions provisions are deemed to fall under the category of "overriding mandatory provisions", the question of whether arbitrators are obliged to apply overriding mandatory provisions of the country of the seat of arbitration *(lex arbitri)* depends in its turn on which doctrinal approach to the nature of international commercial arbitration prevails in the country of the seat of arbitration[2]:

1) **monolocal approach** to arbitration implies that "... overriding mandatory provisions of the *lex arbitri* is mandatory for application in arbitration"[3];

2) **multilocal approach** also implies that overriding national mandatory provisions are to be taken into account;

3) **transnational** approach pursues that arbitrators should be guided only by the rules of the so-called transnational (truly international) public policy, but not by national overriding mandatory provisions of individual countries[4].

If it is recognized that sanctions provisions fall under the category "overriding mandatory provisions" under the transnational approach it can be concluded the arbitrators are not required to apply the sanctions if the seat of arbitration is in the country that imposed such sanctions. If it is acknowledged, however, that the sanctions provisions fall under the category of "public policy", the prevailing opinion is that the sanction provisions are to be applied by arbitrators.[5]

Some authors, however, believe that if the overriding mandatory provisions of the country of the seat of arbitration are disregarded, it may lead to the award being set aside, which in its turn could further on prevent recognition and enforcement of such award in other countries.[6]

Although the risks of the award being set aside if arbitrators ignore overriding mandatory provisions of the country of the seat of arbitration is not considered in detail in this paper, two points are to be paid attention to.

Firstly, the issue of setting aside of an arbitral decision is governed by the law of the country of the seat of arbitration (*lex arbitri*), it is necessary to familiarize oneself with *lex arbitri*, including the case law, before making a choice of an arbitration venue. Most European countries have incorporated UNCITRAL Model Law on Arbitration,[7] which does not contain

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[1] New York Convention, 1958 "On recognition and enforcement of foreign arbitral awards" // Consultant +.

[2] More in detail on these approaches see *e.g., A.Asoskov.* Conflict of laws rules for contractual obligations // Consultant +.

[3] *A.Asoskov.* Op. cit.

[4] Ibid.

[5] Ibid.

[6] See *e.g,* Art. V.1 'e' of the New York Convention, 1958; *A.Asoskov.* Op. cit.

[7] See *e.g.,* Art. 24 of the Law of the RF "On international commercial arbitration" № 5338-1 dated 7 July 1993.

such a ground for setting aside of an award as the non-application by arbitrators of overriding mandatory provisions of the country of the seat of arbitration.[1]

Secondly, under Article IX of the Geneva Convention, 1961[2] recognition and enforcement can be refused under Article V (1) (e) of the New York Convention, 1958, only if an arbitral award was set aside under the grounds set by Article IX of the Geneva Convention, 1961. In its turn, Article IX of the Geneva Convention, 1961 does not contain such grounds as violation of overriding mandatory provisions or public policy.[3]

This suggests that, in theory, on the basis of a transnational approach to the nature of arbitration, the parties concerned are able to justify non-application of overriding mandatory provisions to the dispute under a specific contract, even in case of arbitration in the EU, but it is doubtful that there are arbitrators who would be willing to ignore the overriding mandatory provisions of the country of the seat arbitration.

3. Risks associated with enforcement of arbitral awards

The issue of enforceability in light of the sanctions is related, in the first place, to such ground for refusal and recognition under the New York Convention, 1958 as violation of public policy.[4]

Up to date, it is generally recognized that the public policy argument is the last resort to refuse recognition and enforcement of arbitral awards, which is used in extraordinary circumstances and in the absence of any other arguments on other grounds for refusing recognition and enforcement.[5]

Nowadays there is no uniformity as to whether provisions of the New York Convention, 1958 on public policy also cover overriding mandatory provisions.

According to the first approach, public policy ground under Article V(2)(b) of the New York Convention should include violation of overriding mandatory provisions.

For example, A.Asoskov points out: "First of all, if overriding mandatory provisions are ignored, recognition and enforcement of an arbitral award could be refused. There is no direct indication in the New York Convention, 1958 that the violation by arbitrators of overriding mandatory provisions could be a ground for refusing recognition and enforcement of a foreign arbitral award. It seems quite natural, given the fact that in the 50-ies the concept of overriding mandatory provisions was still in its infancy, and by than was not widespread. Nevertheless, the recent case law taking into account the close relationship between the concept of overriding mandatory provisions and public policy, proceeds from the fact that recognition and enforcement of an arbitral award could be refused due to violation of overriding mandatory provisions on the ground of violation of public policy of the state where enforcement is thought".[6]

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[1] At the same time A.Asoskov refers to non-unified case law when arbitral awards are refused recognition and enforcement on the public policy violation grounds when arbitrators ignored overriding mandatory provisions (see *A.Asoskov.* Op. cit.

[2] European Convention on international commercial arbitration (Geneva, 21April 1961) // Consultant +.

[3] Nowadays 31 countries ratified the Geneva Convention, 1961, including Austria, Belgium, Bulgaria, France, Germany, Italy, Luxembourg, Poland *etc.* The Convention is not ratified *inter alia* by Sweden, the Netherlands and the UK. See more at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en (last viewed 28 February 2015).

[4] The authors are considering in this paper recognition and enforcement only in the EU.

[5] Recognition and Enforcement of Foreign Arbitral Awards / By Herbert Kronke, Patricia Nacimiento. — 2010, P. 365.

[6] See *A.Asoskov.* Op. cit.

The above opinion is supported *inter alia* by Russian case law. For example, in the "Review of practice of consideration by courts of arbitration cases involving the application of the public policy as a ground for refusal of recognition and enforcement of foreign judgments and arbitral awards"[1] public policy is determined as following: "the public policy for the purposes of application of these legal provisions are the fundamental legal principles, which have the highest imperativeness, universality, special social and public importance, which constitute the basis of the state economic, political and legal system. These principles, in particular, include the prohibition on carrying out such actions which are directly prohibited by overriding mandatory provisions of the Russian Federation (Article 1192 of the Civil Code ...), if such actions are detrimental to the sovereignty or security of the State, affect the interests of large social groups, violate constitutional rights and freedoms of private persons".

However, there is the second approach according to which breach of the duty to seek authorization for any action from the public authorities, and even the state of war between two countries does not lead to refusal of recognition and of enforcement of an arbitral award based on the public policy violation ground. This approach is also supported by foreign case law when arbitral awards are recognized despite the sanctions regulations and the public policy ground under the New York Convention is not applied.[2]

Another well-known case is the enforcement by the Swiss Supreme Court of the arbitral award of Iranian Arbitration Institution on the claim of the Iranian company to a Swiss company with Israeli shareholding under the existing UN sanctions against Iran. The award was enforced despite the reference to the risk of criminal liability under the laws of Israel.[3]

In his book B.Karabelnikov is referring to an interesting case. In 2004, "Aeroflot" tried with the reference to the public policy argument to prevent recognition an enforcement in the USA of a Swedish arbitral award in favor of an American company, which provided various services to "Aeroflot". "Aeroflot"'s position was that the transaction in question (and the relevant arbitral award regarding this transaction) violates the US public policy, as the services provided by the American company were related to the "Aeroflot"' activities in Iran and thus violated the US embargo on Iran. The US court decided that even if assumed that the transaction violates the US embargo, "Aeroflot" has failed to prove that the execution of the Swedish arbitral award violates "the most basic concepts of morality and justice" of the USA, and that the violation of the US foreign policy does not violate public policy, as provided for in Article V of the New York Convention.[4]

In connection with the above second approach, some authors believe that it is better for Russian companies in light of sanctions to arbitrate their disputes rather than litigate, for the prospective of recognition of arbitral awards in the USA and UK, as well as in the Swiss courts are very high.[5]

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[1] Para.16 of the Information Order of the Presidium of the Supreme Commercial Court dated 26 February 2013, № 156.

[2] See e.*g*,. the Ministry of Defence of Iran v. Cubic Defense, 665 F.3d 1091 (9th Circ. 2011); [X. Ltd. V. Societe Z., 4 A_250/2013, January 21, 2014. See also A.Akhmedov. Spesifics of "sanctions" arbitration in Switzerland. Available at www.arbitrations.ru/press-centr/news/osobennosti-sanktsionnogo-arbitrazha-v-shveytsarii/ (last access 28 February 2015).

[3] *Leo Szolnoki* Swiss Court Rejects Award Challenge over Iran Sanctions, 6 March 2014.

[4] *B.Karabelnikov* Op. cit. P. 337. See also MGM Productions Group, Inc. v. Aeroflot in: Yearbook Commercial Arbitration. Vol. XXVIII; Parsons & Whittemore Overseas Co. v. Sosiete Generale de L'Industrie du Papier (RAKTA) in: Yearbook Commercial Arbitration. Vol. I (1976). P. 205 (US № 7), cited by B.Karabelnikov Op. cit P. 337.

[5]See also *A.Akhmedov.* Specifics of "sanctions" arbitration in Switzerland Available at www.arbitrations.ru/press-centr/news/osobennosti-sanktsionnogo-arbitrazha-v-shveytsarii/ (last viewed 28 February 2015).

The history of contemporary international Justice knows the cases of absolute – and quite justified – disregard of overriding mandatory sanctions provisions due to their contradiction to international public policy (in the case of a discriminatory boycott by some Arab countries against Israel).[1]

Of particular interest, however, as far as the risks of refusal of recognition and enforcement of arbitral awards in the EU Member States are concerned, are Articles 1 and Art. 6 Council Regulation (EU) № 692/2014.

Under Article 1 of Council Regulation (EU) № 692/2014 (the Crimean sanctions) "claim" which shall not be satisfied under Article 6 of this Regulation includes in particular a claim for recognition or enforcement, including by the procedure of exequatur, of a judgment, an arbitration award or an equivalent decision, wherever made or given.[2]

The question arises how this provision of domestic law of the EU Member States correlates to the international legal obligations of these countries under the New York Convention, and whether we will witness the changes in the interpretation of the New York Convention? Probably not. Up to date the development of European constitutional law, including the regulation of access to justice and alternative methods of dispute resolution, was in line with the spirit and letter of the New York Convention.

Thus, it could not be without any doubt claimed, that the courts of the countries that imposed sanctions would automatically refuse enforcement of awards which are not in compliance with the sanctions. This risk is likely to depend on the interpretation of the concept of "public policy" by every country, on particulars of the case and credibility of the argumentation.

Conclusions

The calling for mass transfer of arbitration venues to other (primarily Asian jurisdictions) do not take into account the following very important points:

1) the legal consequences of sanctions for the EU arbitration institutions are to a big extent exaggerated, for sanctions are targeted at only certain sectors within the individual, although extremely important, projects. Under certain circumstances, some activities could be exempted and there is a silencing procedure, which is rather a formality, which enables to arbitrate disputes in the EU;

2) a significant number of arbitrators on Singapore and Hong Kong arbitration institutions lists are citizens of the USA, the UK and other countries that introduced sanctions, which would lead to exactly the same results the parties sought to avoid by changing the arbitration venue, namely either the risks that arbitrators will resign or that they would need to apply for a silence.[3]

It appears that there are no serious grounds for amending arbitration clauses and abandoning traditional European arbitration venues with respect to:

1) the contracts for which licenses are received and thus which are exempted from sanctions;

2) the contracts concluded before the introduction of sanctions;

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[1] *J.-H. Moitry* L'arbitre international et l'obligation de boycottage impose par en Etat, JDI, 181 (1991). Pp. 349 — 370.

[2] As pointed out before there is no such provision in Council Regulation (EU) № 833/2014 (sectoral sanctions).

[3] At the same time, for example, SCC Arbitration Institute does not have a list of arbitrators and thus parties are not limited when choosing arbitrators.

3) the contracts under which certain actions undertaken/carried out in order to prevent harm to human health or the environment.

In turn, the choice of some other (non-European) arbitration venue for disputes involving sanctioned companies, if monolocal and multilocal approach to international commercial arbitration is applied, will most likely not give significant practical result if:

1) the company violates the provisions of the EU sanctions;

2) the applicable substantive law to the contract is the law of the EU;

3) the award is to be enforced in the EU.

In addition, if the contract provides for the transfer of equipment 25% of which is of the US content, the US sanctions can be applied extraterritorially by the US authorities, regardless of the choice of the arbitration venue. The choice of a non-European arbitration venue in such a case could only worsen the situation as in the EU, in contrast to many other countries, there is legislation blocking extraterritorial application of the US legislation.[1]

Finally, there is a need to warn against some of the "retaliatory sanctions measures", which are discussed in Russia today, such as the prohibition of foreign consultants to advise the Russian state-owned companies or to ban their practice at all.[2] All these measures will not enrich the domestic legal practice, but rather impoverish it, reduce legal practice standards and hinder competition. In conditions when most of the major contracts are governed by foreign substantive applicable law, such a move could turn into a real problem. Most likely, nobody will benefit from such a step.

The advice that can be given in such a difficult situation is rather simple. It is necessary to comply with the applicable EU legislation, including legislation on the sanctions, regardless of the opinion on its constructiveness. If you do not violate the rules for obtaining licenses and rules associated with sanctions and their implementation there will be no need to urgently search for alternative arbitration venues. And if you violate those rules the transfer of arbitration to a non-EU venue with high degree of probability will not help if monolocal or multilocal approach to international commercial arbitration is taken or if the substantive law of one of the EU Member States governs the contract.

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[1] See *e.g.*, Council Regulation 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.

[2] *V.Bagaev*. "This is a question of sovereignty". 20 years of Russian legal services market was celebrated with the proposal wo close the market for foreigners. Available at http://zakon.ru/Blogs/eto_vopros_suvereniteta__20letie_rossijskogo_yurbiznesa_otmetili_predlozheniem_zakryt_rynok_dlya_ino/12333 (last viewed 28 February 2015).