European Commission

III ANNUAL CONFERENCE OF THE LEGAL SERVICE

OF THE EUROPEAN COMMISSION

CONFERENCE REPORT | 2025

Foreword

By the Conference Organising Team

The Third Annual Conference of the Legal Service of the European Commission that took place on 4 April 2025, focused on two topics: the law of sanctions and the interaction between EU law and arbitration. Both topics had generated significant debate, complex legal questions, and numerous judicial proceedings, making them especially timely for discussion.

The purpose of this report is to capture the richness of these exchanges and to make them available to a wider audience. It is intended not only as a record of the conference, but also as a resource for continued reflection and dialogue within the legal community and beyond.

The video recording of the conference is available online at: **https://webcast.ec.europa.eu/annual-conference-of-the-ec-legal-service-2025-04-04**.

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MORNING

Master of ceremony: Mr Mislav Mataija, *Member of the Legal Service of the European Commission*

Welcoming remarks

Opening speech

Mr **Koen Lenaerts**, President of the Court of Justice of the European Union

FIRST SESSION: The Law of Sanctions

Moderator

Ms **Mihaela Carpus Carcea**, Member of the Legal Service of the European Commission

Panellists

AFTERNOON

Master of ceremony: Ms Lorna Armati, *Member of the Legal Service of the European Commission*

Keynote speech

SECOND SESSION: EU law and Arbitration

Moderator

Mr **Tim Maxian Rusche**, Legal Advisor, Assistant to the Director-General of the Legal Service of the European Commission

Panellists

Closing remarks

Mr **Clemens Ladenburger**, Deputy Director-General of the Legal Service of the European Commission

Welcoming remarks

Mr **Daniel Calleja Crespo**

Director-General of the Legal Service of the European Commission

MR DANIEL CALLEJA CRESPO

President of the Court of Justice,
Dear members of the Court,
Dear Advocates-General,
Dear Secretaries-General of the Committee of the Regions and of the European External Action Service,
Dear representatives of the Member States,
Distinguished authorities,
Ladies and Gentlemen,
Dear friends and colleagues,

It is a pleasure to welcome you all here in Brussels and across the world online to the Third Annual Conference of the Legal Service of the European Commission.

This event has once more exceeded all our expectations. Besides the people who are in this room, all the colleagues and friends who are here, we have over 1000 persons following this conference online. I am very happy that so many members of the legal community want to participate in this event, because it shows the importance of the Union of law and it shows also the interest in our daily work.

I think we can now call it a tradition that the Legal Service of the European Commission invites, every year in spring, the legal community. We try to discuss topics of common interest in EU law with eminent experts in their respective field. The audience today reflects a broad spectrum of actors: lawyers in private practice, judges, researchers, professors of law, officials in the national administrations in the Member States, in the European institutions at the highest level in the legal profession. We are going to discuss today two very important subjects, the law of sanctions and the interaction between EU law and arbitration. These two topics have given rise to many legal questions and to numerous legal proceedings. According to the statistics of the Court of Justice, the number of cases concerning restrictive measures has significantly increased in the past years.

As you all know, the number of individuals and entities which are subject to EU restrictive measures is also very high. And beyond the traditional immobilisation of assets or travel bans, there is a broad range of areas which are now covered by EU restrictive measures: from export and import restrictions, bans on financial services, flight bans, to the suspension of broadcasting and even immobilisation of the assets of central banks. Therefore, the range of topics covering restrictive measures is increasing.

As regards our second topic, arbitration, there is a significant trend in arbitration cases. There are increasing interactions between arbitration and EU law and this raises issues. Following the jurisprudence of the Court and recent decisions of the European Commission, I want to mention the recent *Antin* decision.

Like most legal topics, the two topics of this conference raise important questions. This is what we seek today, to better understand these topics and to have a frank and deep exchange on them. I would like to refer first to the issue of restrictive measures. We could think at first glance that this is a rather blunt tool to achieve the Union's foreign policy objectives which include the preservation of peace, the strengthening of international security, democracy, the rule of law and fundamental rights. However, a lot of legal thought has been

put into designing and implementing EU sanctions, but also into their scrutiny and legal review. I would like to highlight two aspects.

The first is compliance with law. Restrictive measures must, of course, comply with Union law, including the Charter of Fundamental Rights and with international law, while at the same time achieving the objectives of the Common Foreign and Security Policy. Meeting the conditions for the lawfulness of this limitation entails that justification of restrictive measures is of fundamental importance in the light of the power of review by EU Courts. This is why, by their very nature, according to the Court, restrictive measures must be reversible and temporary. The limitation of fundamental rights must comply with the principle of proportionality, as illustrated by the Court in the *Kadi I* judgment which demonstrates that considerations relating to foreign policy cannot exempt EU restrictive measures from a judicial review. These are not political questions outside the scope of review. On the contrary, in compliance with Article 19 of the Treaty on the Article 19 TUE, EU Courts must exercise their review powers in full. But sanctions must also comply with international obligations of the Union, including customary international law. They also have to contribute to the development of international law, including the respect of the UN Charter.

The second challenge with sanctions and that we are living in our daily work is implementation in 27 jurisdictions. This is why restrictive measures adopted by the Council under Article 29 TEU are implemented through a Council regulation under Article 215 TFEU upon a joint proposal of the High Representative and the Commission. This is precisely to ensure their effectiveness and uniform application throughout the European Union. EU sanctions are implemented by the Member States as part of their procedural autonomy. The interpretation given by the Court plays a key role for ensuring the uniform application, while the Commission and the Council strive to provide guidance and clarity through soft law instruments.

There is another issue to be further explored, and we will discuss it in this conference, it is the possible role of national sanctions regime to complement the foreign and security policy. Our first panel is going to address these issues, and I think there are some key questions which are in the public debate. Is it appropriate to use economic power as a tool of foreign policy? If so, when should restrictive measures be adopted? And how should we balance the limitation of fundamental rights with the pursuit of EU foreign policy objectives?

I would like to refer to the second subject, and that is arbitration after the Second World War. Professor Bermann is here today. In one of his articles, he said that "arbitration and Union law are like two ships that pass in the night" but nowadays things have changed. There is a great deal of interaction between the two. Arbitration tribunals are called upon to apply Union law in cases of disputes that are brought before them.

In *Achmea* and *Komstroy*, the Court of Justice ruled that arbitration provisions in intra-EU bilateral investment treaties are incompatible with the autonomy of the legal order, with the principle of mutual trust and with the exclusive jurisdiction of the Court under Article 344 TFUE. However, *Achmea* does not reject international arbitration as a whole. It follows from the distinction drawn in the *Achmea* judgment between arbitration based on bilateral investment treaties and commercial arbitration that a dispute may be lawfully submitted to an arbitral tribunal based on commercial arbitration agreement between parties. And in that case, nothing stands in the way of preserving the essential characteristics of EU law through judicial review under the conditions set out in *EcoSwiss*. EU law recognises the necessity and the benefits of arbitration for commercial relations and there are many international agreements concluded by the EU which provide for arbitration between the EU and third countries, and I want to give some examples to clarify that the EU institutions and the Member States use arbitration in their international relations. For example, Article 25 of the EU Turkey Association Agreement, the Ankara Agreement signed in 1963; we have provisions on arbitration in Article 739 of the Trade and Cooperation Agreement concluded between the EU and the United Kingdom; the WTO dispute settlement mechanism is also strongly inspired by state-to-state arbitration procedures. So, this shows that the EU is increasingly making use of arbitration under international agreements to ensure compliance with those agreements.

Two more examples. The 2007 EU-U.S. Open Skies: after waiting for more than two years for the US authorities to give a flight permit to an Irish based subsidiary of a low-cost Norwegian airline, the Commission decided to launch arbitration proceedings against the United States. It was the first time. Very soon after this announcement, the US authorities granted the permit. We did not even have to put in place the arbitral tribunal. Or the agreement with Ukraine, the Deep and Comprehensive Trade agreement: an arbitration panel found in 2020 that export restrictions of certain wood products imposed by Ukraine for exports to the EU were in breach of this agreement. We have even a most recent case which is ongoing, where we are expecting some important developments: the restriction on access to the waters of the United Kingdom to fish sandeel. The EU has launched the first arbitration procedure under the EU – UK agreement, because it considers those restrictions to be inconsistent with the fisheries heading of this agreement. EU law is using arbitration proceedings, but we require that these arbitration proceedings comply with the law of the Union and there are very different mechanisms which we will hear about for the dialogue between arbitrators, the Commission and the Court of Justice.

For commercial arbitration, the arbitrators can enter into a dialogue with the Court of Justice following the *Nordsee* jurisprudence through the *juge d'appui*. For arbitration between the EU and third countries, arbitrators can directly refer preliminary questions to the Court of Justice, and I would like to remind you of Article 174 of the withdrawal agreement with the United Kingdom and Article 322 of the EU - Ukraine association agreement. Today we are going to explore this mechanism, the interaction with Union law, with the main actors, with the key players involved. I am very impressed by the personalities that will participate in the second panel like those in the first panel today.

Of course, there are questions, and I cannot resist putting some for our panellists. Should private investors have the right to sue sovereign states or the European Union before an arbitral tribunal rather than before the Courts? To what extent should arbitrators be allowed to review foreign policy or energy emergency decisions taken by democratically elected governments? What kind of control should national Courts exercise over sports arbitration where the athlete is *de facto* obliged to accept an arbitration clause in order to be able to exercise his or her profession? Is there a right to arbitration as part of the freedom to conclude contracts? To what extent should Courts control commercial arbitration awards resulting from the exercise of that right? Not so easy questions, so we want to have your contribution and to get inspiration for our work.

Ladies and gentlemen, let me conclude with a final reflection. We are presently living through times of turmoil. In these moments of uncertainty and hesitation, it is more important than ever to stick to our values and to our principles: democracy, the rule of law, multilateralism and the rules-based international order. These principles and values are very clear to all of us. We as members of the legal professions have the duty to defend and to protect them, because they are the foundation of our societies. I would like to close with a phrase of our President Ursula von der Leyen in the preamble of our book 70 years of EU Law – a Union for its citizens: "the legal order of the Union is the driver of integration. Our community is a community of law because EU law is the foundation of everything we have achieved and everything we are yet to do".

I would like to wish you all a very exciting conference. ■

The Law of Sanctions

Professor **Roberto Mastroianni**
Judge, General Court of the European Union

1 SESSION

PROFESSOR ROBERTO MASTROIANNI

EU restrictive measures (sanctions) and freedom of expression

Since 2022, sanctions litigation has played an unprecedented role in front of the Court of Justice of the European Union, in particular the General Court, with an average of 76 new cases on sanctions per year, of which 70% concerns actions adopted in the context of the Russia-Ukraine crisis.[1]

	2022	2023	2024	Average number of new cases per year
New cases on sanctions before the General Court	102	63	63	76
New cases on sanctions adopted in the context of the Russia/Ukraine crisis	75	41	47	54

Applicants may bring direct actions for annulment before the General Court, pursuant to Article 275(2) TFEU (and Article 263(4) TFEU), and invoke breaches of their fundamental rights, determined by their inclusion in the sanctions list or the application of sectoral measures to them. Given the significant (and growing) number of litigations in this field of EU law, this contribution intends to shed some light on fundamental rights complaints vis-à-vis restrictive measures and the judicial review conducted in Luxembourg.

Since the *Kadi I* judgment in 2008, the Court of Justice has affirmed the judiciary's imperative role in fully reviewing the lawfulness of all EU acts in the light of fundamental rights (paragraph 326). This includes restrictive measures adopted within the Common Foreign and Security Policy (CFSP). When assessing the legality of EU sanctions, the Court follows two steps: first, it recognises that restrictive measures have, by definition, consequences that affect fundamental rights (*Rosneft*, paragraph 149); second, it acknowledges that the fundamental rights affected are not absolute rights and their exercise can be subject to justified restrictions (*Kala Naft*, paragraph 121).

When contesting the legality of EU sanctions, applicants invoke several fundamental rights before the Court.[2] They often contest economic restrictions, such as asset-freezing measures, and refer to their right to property or freedom to conduct business. In addition, they usually invoke their right to an effective legal remedy and their rights of defence, in order to challenge the motivations behind designations, the procedure followed by the Council or even, by an objection of illegality, the lawfulness of the listing criteria.

The right to freedom of expression and information, protected by the EU Charter of Fundamental Rights (Article 11), is not usually invoked in the context of sanctions litigation. However, in some cases, restrictive measures are directed towards journalists and media owners/outlets, and the Court has had to assess the legality of EU restrictive measures vis-à-vis the right of

1 See Statistics concerning the judicial activity of the General Court, available at https://curia.europa.eu/jcms/jcms/Jo2_7041/en/. In addition, 28 appeals are currently pending before the Court of Justice (25 launched by private parties, 2 by Member States and 1 by the Council of the EU).

2 For instance: right to private and family life (case T-798/22, *Ordre des avocats à la Cour de Paris v. Council*:); right to property (case T-193/22, *OT v. Council*), right to conduct business (case T-235/22, *Russian Direct Investment Fund v. Council*), right to good administration (case T-741/22, *Ezubov v. Council*), right of access to documents (case T-364/22, *Shulgin v. Council*), right to move and reside freely within the territory of the EU (case T-498/22, *Melnichenko v. Council*); right to an effective remedy (case T- 732/22, *Deripaska v. Council*), right of defence (case T-313/22, *Abramovich v. Council*).

MR. MISLAV MATAIJA

free speech and the fact that Article 11 of the Charter does not contain a specific provision on legitimate limitation to this right. In these cases, a key issue for the Court of Justice is therefore how to strike a fair balance between the CFSP objectives pursued by EU sanctions and the protection of free speech.

Three judgments delivered by the General Court illustrate this issue.

The *Kiselev* decision[3], predating the 2022 Russia-Ukraine crisis, first. It concerns the designation by the Council of a Russian journalist as a natural person actively supporting or implementing actions that are either undermining or threatening Ukraine. In the listing grounds, the Council identified the journalist as "appointed by presidential decree as the head of the Russian Federal State news Agency Rossiya Segodnya (RS)" and as a "central figure of the government propaganda supporting the deployment of Russian forces in Ukraine". In its judgment, the General Court held that the designation was not a disproportionate interference with free speech, because the applicant engages in propaganda supporting the actions and policies of the Russian government destabilising Ukraine. Free speech is not an absolute right. In other words, the applicant's right to free speech does not constitute an unfettered prerogative and may, therefore, be limited, under certain conditions. When assessing proportionality, the General Court found that Mr Kiselev was not in a position comparable to other Russian journalists who were not listed. In fact, according to the Court, he "engages in propaganda in support of the actions and policies of the Russian government destabilising Ukraine by using the means and power available to him as Head of RS, a position which he obtained by virtue of a decree of President Putin himself" (paragraph 117).

Moving away from designations against individuals, the next two examples, the *RT France and A2B Connect* judgments delivered by the General Court in 2022 and 2025, relate to the legality of EU sanctions in the form of the temporary suspension of broadcasting activities of certain media outlets operating in the EU but under the control of the Russian government. The contested media ban was introduced by the Council under the Russia sanctions regime on 1 March 2022. It represents an unprecedented ban, an extraordinary measure which, according to the Council, is strongly dependent on the exceptional circumstance of the ongoing war in Ukraine. Since March 2022, the Council has been relying on two designation grounds to target Russian media outlets: on the one hand, it has been focusing on media outlets funded by the Russian government and under its permanent control, and, on the other hand, it has been identifying entities that (allegedly) engage in propaganda actions in support of the military aggression against Ukraine.

In the *RT France* case (T-125/22), the General Court held that the media ban amounts to an interference with the rights to free speech and based its reasoning on the principles of the ECHR case law. It found that the media ban adopted by the Council interfered with Article 11 of the EU Charter (which corresponds to Article 10 ECHR): free speech is one of the essential foundations of a democratic society, applicable not only to information/ideas favourable or regarded inoffensive, but also to those that offend, shock or disturb. Nevertheless, it held that it was not an absolute right: journalists have to act in good faith on an accurate factual basis and provide reliable information. Unlike matters of public interest which is entitled to strong protection, expressions promoting violence, hatred etc cannot normally claim protection. Propaganda of war, in particular, is expressly prohibited by international treaties (Article 20, paragraph 2, UN International Covenant on Civil and Political Rights, adopted in 1966).

In light of Article 52(1) of the EU Charter, the General Court ruled that restrictions on fundamental rights, including free speech, must satisfy four conditions: i) they have to be provided for by law; ii) they must respect the essence of freedom of expression; iii) they must meet an objective of general interest recognised by the EU; and iv) they must be proportionate.

In this case, the General Court considered that these measures were set out in acts having a clear legal basis (1st condition); that these measures were limited in scope, temporary and reversible and that they did not prevent the applicants from carrying out other activities in the EU than broadcasting such as research and interviews (2nd condition); that the Council pursued the twofold objective of general interest of protecting the public order and security of the European Union, threatened by the propaganda campaign at issue, and of exerting pressure on the Russian authorities, so that they bring an end to their military aggression against Ukraine (3rd condition); that the Council considered

3 Case T-262/15, judgment of 15 June 2017.

various items of evidence which demonstrated that before the adoption of the contested acts, the applicants had supported the actions destabilising Ukraine and broadcasted information justifying the military aggression; and that the measures were proportionate with regard to the objectives pursued by the Council, including in the light of the International Covenant on Civil and Political Rights to which all the Member States and Russia are parties and according to which war propaganda should be prohibited by law (4th condition).

The General Court ultimately recognised that the media ban is an exceptional restriction justified by exceptional circumstances. The disadvantages caused to the applicant's right to free speech are not disproportionate with regard to the objectives pursued by the Council, in particular in times of war.

In the recently delivered *A2B Connect* decision (T-307/22), the applicants were three Netherlands-based internet providers who contested the legality of the media ban. They invoked their own rights to freedom of expression but, unlike in *RT France*, they were not designated entities.

Two issues are mainly relevant. First, with regard to jurisdiction, the General Court held that it had no jurisdiction to assess the legality of the contested CFSP Decision, as it only focuses on legality of the Regulation (adopted pursuant Article 215 TFEU). Indeed, the applicants were not designated persons and belonged to a general and abstract category of operators who can challenge the legality of a measure of general application (paragraph 30). Second, on the merits, and the question of free speech, the General Court was asked to assess whether Internet Service Providers enjoyed an autonomous right to impart information or whether they were mere intermediaries with a neutral role in the diffusion of information. The Court did not address directly this question but raised a hypothetical reasoning: even assuming Internet Services Providers might have an independent right to freedom of expression (paragraph 110), a restriction to this right was not disproportionate, because it satisfied the four conditions as listed in the *RT France* case. Moreover, the applicants cannot rely on the right of users to access to information, which they do not own.

In conclusion, freedom of expression is vital to the values enshrined in Article 2 TEU. It is an essential part of democracy, as there can be no correct information on issues of public interest and no free elections without independent and pluralistic media. The centrality of this fundamental right in European society, nonetheless, did not stop the Court from recognising that restrictive measures may legitimately interfere with free speech. Restrictive measures are lawful as long as they remain proportionate (and temporary) and justified by exceptional circumstances. ■


MS MIHAELA CARPUS CARCEA

The Law of Sanctions

1 SESSION

Professor **Dapo Akande**
Chichele Professor of Public International Law, University of Oxford, member of the United Nations International Law Commission

PROFESSOR DAPO AKANDE

Sanctions under International law and the Issue of Asset Seizure

When discussing the legal basis for sanctions under international law, it is sometimes argued by some states that sanctions are not unlawful under international law. However, there are clearly rules that apply to the imposition of sanctions by states. Particular measures that may be described as "sanctions" may not be unlawful, but they are not unlawful just because they are sanctions. The key question is how the legality of any particular measure that may be described as sanction is to be assessed.

Sanctions are measures taken by a state, and in the particular context of this conference, by the EU, in order to respond to the behaviour of other states or, sometimes, the behaviour of individuals or entities, either because that behaviour is regarded as unlawful or because the act of that state or individual or entities in some way is regarded as harmful. In the context of the conference, the measures to be discussed are those that are not taken under the authority of the UN Security Council but described as autonomous or independent sanctions.

There is a broad variety of measures that fall within this definition of "sanctions": these could include freezing of assets of a state; the freezing of assets of individuals or other entities; the closure of airspace or cutting off transport links; travel bans; or trade restrictions. The breadth of the measures that may fall into the category described as sanctions is another reason why it cannot be just said that sanctions are not unlawful. "Sanctions" are not a legal category, nor are there rules of international law that apply to "sanctions" as such.

A framework for assessing the legality of sanctions under international law

To assess the legality of any particular sanction, the first thing to consider is what the precise measure is and then, secondly, to compare that measure with the obligations that the state or entity imposing the measure might have under international law. In very broad and general terms, there are at least four ways in which a sanction measure may be lawful.

First, the measure may be taken in response to a violation of international law, but the measure may not be unlawful because it is not even covered by legal obligations. The act may be unfriendly, but there is legal right to take it. That may be the case with travel bans in relation to foreign nationals, because states do not, as a general matter, have an obligation to allow foreign nationals into their territory.

Secondly, some other measures may be covered by legal obligations, but they are allowed by the relevant rules of the applicable legal regime, and it could be a treaty rule or rule of customary international law. A trade measure may, in principle, be covered by obligations under agreements establishing or concluded within the framework of the World Trade Organization (WTO), but it may be possible to rely on an exception under the WTO Agreements, for example, the Article XXI GATT essential security clause, insofar as the measure complies with that clause. Or, to take another example, a measure adopted against individuals may, in principle, be a restriction of their human rights as set out in a relevant human rights treaty, but that restriction

may, under the treaty, be a lawful limitation of the right in question, because the provision in question allows for limitations of such rights in pursuit of certain legitimate purposes.

The third way in which a measure may be lawful is that it is covered by a legal obligation and the state that has taken the measure has also taken steps to suspend the legal obligation. There are circumstances where a state may suspend a relevant obligation that it may have under a treaty to which it is a party, and the possibility of such suspension is provided for under the treaty itself or is in accordance with the law of treaties as set out in the Vienna Convention on the Law of Treaties (in particular Articles 60-62).

In these first three scenarios where a sanctions measure is not in breach of international law, it is characterised as a retorsion, an unfriendly but lawful act.

However, and this is the fourth scenario, there may be cases where measures which are taken are (a) on their face covered by a legal obligation; (b) in breach of the applicable legal rule; (c) there is no relevant exception within the particular regime; and (d) the rule in question remains in force, because it is not suspended. In those cases, it may be open to the state or other body that is taking the measure to rely on the fact that this measure is a countermeasure. In other words, the measure is one that is taken in response to a prior violation of the other state's obligations and is taken to induce the other state to comply with its obligations.

Applying the framework in considering the legality of the seizure of assets

How then should this framework for assessing the legality of sanctions apply to the immobilisation of assets and in particular, the seizure of assets?

The first question to consider is whether, or not, immobilisation of assets is covered by obligations under international law. In this regard, the most important question is whether, or not, these kinds of interference with the assets of a foreign state, whether freezing or seizing such assets, are inconsistent with obligations that states have to accord immunity to other states. The issue here is the immunity accorded to foreign states from the enforcement jurisdiction of other states and how that relates to the seizure of property.

The key question that must be considered is whether the rule of international law which accords immunity from execution or enforcement applies to executive or legislative acts, or whether that principle only applies to measures that are taken in connection with judicial proceedings. This question is important in the debate relating to immobilization of assets as the freezing or seizure of assets as a sanction measure will typically be carried out by an act of the executive branch or occasionally by a legislative measure. The debate about whether immobilisation of assets by executive conduct or by legislation, could even breach the rule of immunity from enforcement or execution, is that under the 2004 UN Convention on Jurisdictional Immunity of States and their Property (Articles 18-19), as well as under national legislation that deals with state immunity in some states (e.g. Section 13(2)(b) of the UK State Immunity Act 1978), immunity from enforcement applies only in the context of judicial proceedings. For that reason, some argue that if a measure is just a purely executive measure, it is not even covered by the international law relating to immunity at all.

However, even if the specific rule of immunity from enforcement provided for in legislation or in a relevant treaty does not apply, because that rule is confined to immunity in the context of judicial proceedings, this does not preclude a broader principle of customary international law being applicable to such a situation. The work of the International Law Commission (ILC), which led to the UN Convention on Jurisdictional Immunity of State and their Property is relevant. In the commentary of the ILC on the Articles on which the Convention was based, the ILC spoke of measures of constraint by authorities of one state against another, not just judicial authorities, but more generally. The ILC was of the view that it follows from the principle that no state can exercise its sovereign power over another sovereign state, "that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another State and its property". This statement would seem to apply to any coercive action taken by a state, including by its executive or legislative branches, even in the absence of judicial proceedings.

If one takes the view that immunity of states is something that is derived from sovereign equality, and that is the view that the International Court of Justice took in *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece Intervening*) (Judgment, ICJ Reports 2012, p. 99, p. 123, paragraph 57), then it is no less a violation of that sovereign equality when those acts are taken not in connection with judicial proceedings, than when they are taken in connection with judicial proceedings. It is as much an interference with that equality and an impairment of that equality. Thus, one may take the view that, in principle, the law of sovereign immunity applies and imposes obligations with respect to the interference with assets.

The next question is whether within that set of rules, an exception applies. There is a standard exception under international law as to whether the property is in use, or intended for use, for commercial purposes.

In relation to property that is not intended for use for commercial purposes, as may be the case with central bank assets, one question that has arisen is whether there is an exception which is not found in any treaty or in any national legislation that

says this immunity does not apply to measures of constraint in connection with the enforcement of judgments of international tribunals. There have been discussions, for example, with regard to the enforcement of judgments of the European Court of Human Rights, particularly with regard to potential decisions of that Court with regard to compensation in the inter-state cases between Ukraine and Russia. Would there be an exception to immunity that follows just from the fact that restrictive measures may be said to be enforcement of those decisions by international tribunals. State practice on this issue is extremely limited, though not non-existent, because there were proceedings at the International Court of Justice back in the 1950s, the Monetary Gold case, where the Court was considering the legality of a measure of enforcement which had been taken by the UK (with the support of some other states) to enforce the Court's own previous judgment in an earlier case. And though the Court did not reach a decision, because the case was ruled to be inadmissible on other grounds, the states concerned (at least some of them) proceeded on the assumption that it was lawful to seize the assets of Albania simply because it was said to be an enforcement of the Court's previous judgment. Thus, there is some state practice, but there is nothing that is definitive or conclusive.

Seizure of assets as countermeasures

If interference with the assets of a foreign state constitutes a violation of the immunity (from enforcement) which ought to have been accorded to that state, because the rule applies and no exception exists, the next question is to what extent that seizure of assets (and not merely the immobilisation) may be justified as a countermeasure. Recall that countermeasures are acts which would be unlawful except that they are carried out in response to a prior unlawful act. However, for an act to be a valid countermeasure, it would need to comply with a set of conditions set out in the law of state responsibility as captured in the ILC's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.

Since countermeasures must respond to a prior breach, consideration must first be given to what is the breach of international law that would be relevant. In the context of Russia and Ukraine, are the breaches those relating to substantive rules of international law, e.g. in connection with the use of force, international humanitarian law or human rights law? Or is the relevant breach one which relates to the remedial obligation to make reparations for the substantive breaches of international law? The identification of the breach is important since countermeasures must stop when the breach stops. If, for example, the use of force were to stop today, would the entitlement to take countermeasures also stop? It could be argued that because the relevant breach is actually the breach of the obligation to make reparations, the breach justifying the countermeasure does not cease until reparation is made.

Then we have the tricky question of reversibility of countermeasures, which has been a big consideration in the context of asset seizure. The argument that has sometimes been made is that if assets are seized as opposed to just frozen, that is not a measure which can be justified as a countermeasure because it is not reversible.

The very first consideration is to think about what the reversibility requirement relates to. Does it mean that the suspension of the state's obligations can be reversed? Or does it mean that the actual effect of the measure taken can be reversed? There is an argument to make that the countermeasure is a suspension of respect for immunity and that can be reversed, even if not all the effects of suspending respect for immunity can be reversed. In the example of a trade measure that allows for imposition of higher tariffs in breach of obligations under international law, what is the reversal in question? Is it just going back to the tariff rates that were imposed before the higher tariffs were implemented, or does reversal require paying back the tariffs that were collected at the time when the higher tariffs were imposed? That is something that has to be considered in discussions about reversibility. One argument that is made is that it is the suspension of the obligation that must be reversed, not the actual effect and it does not mean everything has to be paid back.

However, leaving aside that conceptual question of what must be reversed, it seems, in any case, that if the seizure of assets is about seizing cash or fungible assets, it is indeed possible, in principle, to pay it back or to set up structures by which it is possible actually to return those assets. However, if other property is seized and sold, that may be impossible. Thus, in so far as the debate is about cash or similar assets, there does not seem to be a principled reason to think that the reversibility criterion should pose a legal problem.

Going beyond the case of a state taking countermeasures in response to breaches of an obligation by the other state owed to the state taking the countermeasure, the question is whether other states, who are not the states directly affected by the breach, may take countermeasures. In the Russia - Ukraine example, where there are breaches of obligations towards Ukraine, can other states take those countermeasures?

In international law, there are obligations that are described as obligations *erga omnes*, it means that all states are entitled to respond in some way to the violations of those obligations. That is certainly the case for an act of aggression and may be the case for human rights violations. Can a response include the taking of countermeasures by other states? Back in 2021, the International Law Commission took a very cautious view of that question and the ILC, in Article 54 of those articles, spoke about the right of a state to take measures which are not unlawful,

leaving open the question of what "not unlawful" means. Does "not unlawful" just mean "not in breach of primary rules" or does it mean "not unlawful because it is a countermeasure"? The ILC said state practice was embryonic in that regard. There is much more practice today that suggests that the taking of countermeasures by states that are not the directly affected state in response to a violation of obligations *erga omnes* is in fact possible. This issue of who can take countermeasures is an issue that applies not just in relation to asset seizure but to the initial immobilisation itself. Everything said concerning state immunity would apply just as much to the freezing of the assets as they would apply to the seizure of the assets. ■

The Law of Sanctions

1 SESSION

Ms **Emer Finnegan**
Director-General of the Legal Service, Council of the European Union[1]

MS EMER FINNEGAN

EU restrictive measures and international law

The relationship between EU restrictive measures and international law is a very important and complex one. The judgments of the Court of Justice and the General Court in the Venezuela cases are highly instructive in this regard.

In 2017, the Council adopted restrictive measures in light of the deteriorating situation in Venezuela about democracy, the rule of law, and human rights. Venezuela lodged an application for annulment, which was initially dismissed by the General Court as inadmissible (T-65/18). However, the Court of Justice annulled the judgment of the General Court (C-872/19 P) and referred the case back to the General Court for judgment on the merits (T-65/18 RENV).

Two sets of questions were raised essentially: first, relating to the admissibility of actions for annulment brought by third states before the EU Courts, and second, relating to the compatibility of restrictive measures with international law.

The judgment on appeal of the Court of Justice of 2021 (C-872/19 P) analysed for the first time whether a third state should be regarded as a legal person within the meaning of Article 263(4) TFEU and could bring an action in front of the Court, outside the framework of an existing agreement and of anti-dumping measures. The Court considered, in the light of the principle of effective judicial protection and of the rule of law, that third states should have standing to bring proceedings as a legal person within the meaning of Article 263(4) TFEU, where the other conditions laid down in that provision were satisfied. According to the Court, such a legal person is as likely as any other legal person/entity to have its rights/interests adversely affected by an EU legal act and should therefore be entitled to seek its annulment. The Court made an autonomous interpretation of Article 263 TFEU. It did not rely on international law considerations. Rather, the Court stated that the obligation of the Union to ensure respect for the rule of law cannot be made subject to a condition of reciprocity as regards relations with the EU and third states. This has been criticised as being at odds with the approach taken by the Court regarding the possibility to rely on the WTO agreements, where reciprocity considerations were accepted by the Court as valid. One of the possible reasons for such a difference of approach can be found in the general context: the judgment of the Court coincides in time with important judgments that the Court gave with respect to the rule of law by Member States. By stressing the importance of judicial review of EU acts, the Court was also stating the importance of the respect for the rule of law by Union institutions.

In the light of the Venezuela judgment, third states targeted by restrictive measures adopted by the EU have standing to contest the validity of measures of general application (for example import/export restrictions, prohibitions on providing services). Even if such measures are imposed on EU operators, the Court considers that they amount to prohibiting a third state from carrying out such transactions with EU operators. This can be distinguished from the situation of emanations of the state, which are expressly covered by asset freezes or other measures and have standing to challenge individual measures which directly concern them.

1 Ms Finnegan has indicated that she was speaking in her personal capacity

The 2023 judgment delivered by the General Court on the merits (T-65/18 RENV) raised other questions. They relate firstly to the competence of the Council to adopt "unilateral coercive measures", secondly to the compatibility of those measures with WTO obligations, thirdly to the legal nature of EU restrictive measures, and finally to the allegedly extraterritorial application of EU restrictive measures.

First, the General Court recalled that, under Articles 29 TEU and 215 TFEU, the Council is competent to adopt autonomous restrictive measures – i.e. restrictive measures adopted without a prior resolution of the United Nations Security Council (UNSC) forming the basis of such measures, confirming well-established case law. It stressed that Venezuela had not established the existence of an international custom requiring authorisation from the UNSC prior to the adoption by the Council of restrictive measures and reinforced the rationale of EU restrictive measures as a tool for promoting democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, and respect for the principles of the United Nations Charter and international law, which the Union is required to do under Article 3(5) TEU. The confirmation is welcome in light of the increased reliance on autonomous restrictive measures that the EU and other partners have adopted in recent years, in particular in response to the Russian war of aggression against Ukraine.

Secondly, as for the compatibility of the contested measures with WTO obligations, the General Court dismissed Venezuela's arguments based on an alleged violation of those obligations on the ground that, in accordance with well-established case law, in principle, the EU Courts may not review the legality of EU legal acts in the light of these obligations, save under conditions that were not fulfilled in this case. In this regard, the GATT and the GATS both contain clauses allowing parties to take actions which they consider necessary for their essential security interests in times of war or other emergency in international relations. While there is no relevant case law of the WTO Appellate Body on the interpretation of that clause, there are two panel reports of WTO which suggest a broad interpretation of the essential security clause. In this respect, it should be recalled that, in the *Rosneft* case (C-72/15), the Court of Justice also referred to the "essential security interests" article of the EU-Russia Partnership Agreement when rejecting Rosneft's argument that certain restrictive measures adopted by the Council violated that Agreement.

The third question that was addressed by the General Court is whether EU restrictive measures should be regarded as countermeasures. The basic concept is that countermeasures are measures which would otherwise be contrary to international obligations, and that may be taken by an 'injured state' against a state responsible for an internationally wrongful act, in order to induce that state to comply with its international law obligations. On this point, the General Court followed a fairly formalistic approach, noting that the contested acts did not refer to Venezuela's infringement of international law and that they did not refer to the temporary non-performance by the Union of an international obligation towards Venezuela. The General Court inferred from those two elements that these acts did not constitute countermeasures.

It is however to be noted that the Council acts imposing restrictive measures concerning Russia do specifically refer to Russia's infringements of international law. Does that reference mean that those EU measures constitute countermeasures? This is not the position that has been taken but it remains to be seen what approach the EU Courts will take if that argument is raised before them. In principle, EU restrictive measures are designed to be consistent with the international obligations of the EU. However, Russia has challenged the EU's flight ban and the closure of EU airspace before the International Civil Aviation Organisation (ICAO). It will be for the EU Member States to defend these measures, given that the EU is not a member of the ICAO, and it remains to be seen what justification they will defend in the interest of the EU before the ICAO Council, and, if the procedure ever goes that far, before the International Court of Justice.

The last point concerns the allegation that the adoption by the Council of restrictive measures having effects on the territory of third states involves the exercise of extraterritorial jurisdiction in violation of international law. This allegation was rightly dismissed by the General Court in the Venezuela judgment. While the very purpose of EU restrictive measures is to have an impact on the third country in question, restrictive measures that were at issue (prohibition on certain exports and on the provision of certain related services) applied only to persons and situations falling within the jurisdiction of Member States *rationae loci* and *rationae personae*. While EU restrictive measures have an extraterritorial effect, insofar as they seek to influence the conduct of a third state and have an impact thereon, those measures do not lead to an unlawful extraterritorial application of EU law.

This is also the case for recently adopted anti-circumvention measures. Those measures consist, on the one hand, of measures of general application, such as a general prohibition on participating in activities, the object or effect of which is to circumvent the other prohibitions laid down in those acts. This prohibition applies within the normal jurisdictional limits for EU restrictive measures. The anti-circumvention measures consist, on the other hand, of individual measures, such as asset freezes and travel bans for persons facilitating or engaging in the circumvention of EU restrictive measures concerning Russia (or otherwise significantly frustrating those measures). Admittedly, the Council may, on the basis of that criterion, list non-EU nationals,

living outside the EU and exercising their activities outside the EU, in the same way as it can list such persons on the basis of any of the other existing listing criteria. However, while by doing so, the EU may exercise jurisdiction which potentially interferes with the jurisdiction of a third state (for example, that of the nationality or establishment of the listed person or entity), it does not amount to an exercise of jurisdiction contrary to international law, given the type of measures imposed, which are limited to the freezing of assets held in the EU territory and the prohibition of entry into the EU territory. Therefore, the nexus with the territorial title of jurisdiction is clear and direct. This reasoning is in line with the case law recognising a broad territorial jurisdiction of the Union beyond the area of restrictive measures, as it did in the *Air Transport Association of America* case (C-366/10), concerning the ETS Directive.

To conclude, the discussion on restrictive measures and international law obligations is very complex, notably because of the different types of measures applied. The Court has recognized standing for third states in cases where even EU economic operators may not necessarily have one. However, the bar for finding that the Council has exceeded its broad discretion under EU law when adopting restrictive measures is high. Prospects for the Court to condemn such measures as inconsistent with international law remain relatively slim. This is partly due to the impossibility of invoking the illegality of EU measures in light of WTO agreements, sometimes due to the security exemptions which may be contained in bilateral agreements between the EU and the third country in question, but mainly because such measures are actually designed to be consistent with international law. It remains to be seen how case law will evolve in this regard. From an EU law perspective, restrictive measures adopted by the EU need to comply with international law, but they are also contributing to its development. As suggested by the legal literature [(Régis Bismuth)], "restrictive measures constitute a legal laboratory in which the limits of international law are tested and some of its changes take shape".[2] ■

2 Régis Bismuth, « Les nouvelles frontières des sanctions européennes et les zones grises du droit international » in Revue européenne du droit, Numéro 5, Printemps 2023 (Traduction libre)

The Law of Sanctions

Mr **Martin Smolek**
Director-General for Legal and Consular Affairs,
Ministry of Foreign Affairs of the Czech Republic

1
SESSION


MR MARTIN SMOLEK

Individual sanctions and national measures

The first remark, about the scope of implementation of individual sanctions at national level, is inspired by the judgement T-282/22 *Mazepin*. In this case, Finnish authorities froze resources and economic assets of two companies after it was found that they were owned or controlled by listed person. The General Court found that only personal funds should be subject to sanctions. Such assets clearly do not include companies, entities linked or associated with the sanctioned persons.

This conclusion is problematic for several reasons. First, under Article 2(1) of Regulation 269/2014 all funds and economic resources belonging, held by or controlled by listed person shall be frozen. Second, while the General Court is only aiming at the assets of the sanctioned person, the regulation itself clearly aims at property of the sanctioned person but also at the property of different natural and legal persons which is also held, controlled or belonging to the sanctioned person.

If the General Court assertion is accepted, this would have a huge impact on the implementation of restrictive measures at national level, limiting drastically the effectiveness of the sanctions and allowing very easy circumvention, for example by putting these assets in Trust Funds. However, this General Court judgment has been appealed, and this appeal is pending. There are preliminary rulings pending on those issues (C-84/24: what the exact link between sanctioned and person and associated person shall look like).

With that, the question of legal remedy of legal protection of associated persons is very much linked. If funds of companies associated with the sanctioned person are frozen, is this freezing a direct consequence of the sanction imposed on the person? Regarding the legal protection of these associated persons, they do not have *locus standi* in front of an EU Court, for two reasons. First, as the contested regulatory act would require implementing measures, national authorities must do the assessment. Second, the associated person would only be affected by such a measure after the intervention of a national authority. Legal protection must therefore take place in front of national courts. Currently, there is no direct action from associated persons but there are several preliminary rulings stemming from national courts.

The second remark is inspired by the very recent difficult search for unanimity to extend the so-called Russian sanctions lists. The question arises whether Member States themselves can establish such sanctions lists, on a purely national level.

This could, on a temporary basis, cover cases of persons on whom the Council of the EU as a whole was not able to agree. Some Member States have already introduced such national individual sanctions lists (France, Netherlands, Latvia, Estonia, Czech Republic). Such an approach is compatible with EU law. The list itself is unproblematic because of parallel competences of the EU and Member States within CFSP but this may affect internal market freedoms, most obviously the free movement of capital and the freedom of establishment. However, regarding the freezing of funds, freedom of establishment and freedom of capital allow for exceptions in case of threat of public security (Articles 52 and 65 TFEU). As regards the travel ban, several provisions also make exceptions for public security (Articles 45 and 73 TFEU, Schengen borders code and Schengen visa code). A reference can also be made to autonomous antiterrorist measures. In that case, a measure must be taken at a national level, which becomes the basis of an action at Union level. The Court of Justice has had several opportunities to assess such mechanism for anti-terrorists' sanctions and has never questioned the compatibility of such a mechanism with EU law and internal market freedoms. ■

The Law of Sanctions

1 SESSION

QUESTIONS AND ANSWERS

What can the EU do against the threat or application of secondary sanctions made by certain non-EU states?

Ms Finnegan said that, in the first place, it is for the Commission to decide which measures the EU may adopt. She mentioned the existence of the Anti-Coercion Act, highlighting that it was adopted several years ago and is considered innovative. She expressed uncertainty about whether the Commission plans to propose a finding of economic commercial coercion. She clarified that the Act is a trade measure adopted on the basis of Article 207 TFEU. It establishes a two-stage procedure: first, a proposal from the Commission for a potential finding by the Council of the existence of economic coercion. If such a finding is made, the Commission then suggests appropriate measures and those measures are subject to the comitology procedure.

With regard to sanctions litigation initiated by third countries, which rights can they invoke before the CJUE? Can third countries invoke fundamental rights (enshrined in the EU charter)? Assuming that RT France was an emanation of the Russian state, would it still be able to rely on EU human rights?

Prof. Mastroianni explained that in the *RT France* judgment, the General Court concluded that being an emanation of the state or controlled by the state is not sufficient for an entity to be considered as the state itself. He emphasised that any subject controlled by a state retains its independence as an autonomous legal entity which can initiate proceedings before the Court of Justice of the EU. Therefore, the General Court did not extend the reasoning to consider that RT France, a French broadcaster controlled by Russian authorities, could be considered an emanation of the state. Instead, the General Court followed a line of reasoning that seemed more compatible with the principle of access to justice.

Ms Finnegan noted that there is established case law, such as Bank Melli Iran and the Central Bank of Iran cases. Such governmental organisations and state bodies are entitled to the protection of their fundamental rights, to the extent that these rights are compatible with their statute as legal persons. This includes procedural fundamental rights, such as the right to be heard, and the right to an effective remedy, but also the right to property in the case of Bank Melli Iran and Central Bank of Iran.

In the *Venezuela Case*, Venezuela claimed that it should have been heard before the measures in question were adopted in respect of its conduct. The Court found that Venezuela had no such right, relying on the classic case-law in relation to measures of general application. The Court made the comment that, if the Council were obliged to hear Venezuela before adopting the restrictive measures in question, this would amount to an obligation on the Council to enter into diplomatic negotiations with the third country in question and that that could not be seen as a prerequisite to the Council exercising its discretion to impose restrictive measures. Therefore, the right to be heard beforehand was not applicable. However, the right of Venezuela to engage in the litigation itself and to an effective judicial remedy was confirmed by the Court very clearly. The Court carried out a detailed assessment of the factual basis on which the Council has relied when imposing the restrictive measures. In the *RT France* Case, the Court looked extremely closely as well at the elements of evidence which were produced, their probative value, their credibility and so on, so that they were satisfied that the facts were materially accurate.

On the applicability of the "clean hands" doctrine whereby essentially a claimant may be barred due to its own illegal conduct in relation to those claims in the field of sanction law, should a state that has breached the UN Charter be allowed to take advantage of remedies provided for under international law, including under sectorial international agreements?

Prof. Akande explained that the question concerned whether a state having breached obligations under international law,

specifically in the UN Charter, can be permitted to rely on rights under a treaty.

He acknowledged the existence of the "clean hands" doctrine but expressed scepticism about using it to analyse the same question in the context of countermeasures. Using the "clean hands" doctrine, the suggestion would be: "you are not able to rely on your rights because you have violated the obligations", which effectively puts one in the same argumentative territory of countermeasures.

Prof. Akande emphasised that countermeasures require very specific conditions to be fulfilled, which entails that one could use depriving a state of its rights through the application of the "clean hands" doctrine as a way of bypassing these conditions. Therefore, he expressed some doubts about whether such use can be recommended.

You can have direct standing before the General Court on the basis that you are designated as being associated. But for entities owned, held or controlled, is there an issue with the fact that there is only a guidance on their definition and how is their right of access to justice ensured in such a case?

Mr Smolek indicated that there are no clear common criteria for assessing whether a person controls or is controlled by, owned by, or associated with a sanctioned person. He noted that several preliminary rulings have attempted to define the nature of such relationships. Regarding legal remedies, he pointed out that these entities can always demonstrate that there is no link or that there is no longer a link with the sanctioned persons, ensuring that their rights are properly observed in that regard.

Article 52 of the EU Charter foresees proportionality as a separate criterion for determining whether a breach of fundamental right is justified. How is proportionality assessed on its own in the case of restrictive measures?

Prof. Mastroianni explained that the EU Courts first verify whether a measure is provided by law and whether it is aimed at pursuing a legitimate objective as provided in the treaties (Article 21 TEU). Only after these initial assessments is the proportionality of the measure evaluated, in light of the impact on fundamental rights and the alternative measures that the Council could have taken.

Ms Finnegan pointed out that the Council is very cognisant of the fact that it is important to have a sufficient factual basis for the listing and that it will be the subject of an intense review by the EU Courts, despite the broad discretion which the Council has in terms of the shaping of the sanctions regime and responding to the particular situation in the third country which the restrictive measures are intended to target.

The last package of sanctions is targeting non-Russian entities, especially Chinese entities. Could this be a kind of secondary sanctions from the EU and could this mean that the EU doctrine, that extraterritoriality might be against public international law, has evolved?

Ms Finnegan underlined that a key issue for the Council is the effectiveness of restrictive measures, pointing out that these measures take various forms - some are of general application, some are of individual application. She noted that the criteria have been slightly extended to align better with the political and factual realities. Initially, the listing criteria focused on individuals and entities directly responsible for the aggression. Over time, the criteria were expanded to tackle circumvention of these measures, ensuring or promoting as much as possible their effectiveness. The circumvention of restrictive measures is a significant issue. Therefore, a criterion has been included in the individual measures regulation. That criterion provides for the freezing of assets of natural or legal persons facilitating infringements or significantly frustrating the provisions concerning circumvention. This does not necessarily only catch Russian companies or nationals. It can also catch individuals and entities in other countries who are falling within the scope of this criterion. Some cases relating to this criterion are already emerging. There are also other measures that include export restrictions on certain companies listed in another annex, representing a sectoral rather than a measure of individual application, a measure of less intensity, but which nevertheless has an impact. There are couple of pending cases in relation to these companies as well. These companies are not necessarily (all) Russian. The companies are identified after a factual investigation and are placed in the list, because it is deemed that this is a necessary measure to ensure the effectiveness of the intended impact, which is partly to degrade the ability of Russia to pursue the war of aggression. An additional element has now been introduced to the restrictive measures regime, which is the possibility to include a third country itself in an annex and name it as a country responsible for circumvention of these measures. This was subject to extensive discussions when it was introduced. There is a procedure set out for such a determination to be made, but at the moment that annex is empty. No third state has been identified in this regard, but this measure was designed to provide all necessary tools that could be further useful at the disposal of the institutions involved.

Is the obligation to provide reparations an erga omnes obligation?

Prof. Akande asserted that, in his view, it is the case where reparations are sought in relation to breaches of *erga omnes* obligations. This conclusion, he explained, flows clearly from the logic of the ILC's articles on state responsibility and indicates that states are entitled to invoke the responsibility of a third state concerning obligations *erga omnes*. States, by invoking this responsibility, can also claim reparations on behalf of, or in the interest of the third state. If states can invoke that responsibility and claim reparations on behalf of the third state, this implies that the wrongdoing state also bears the obligation to make reparations, which can be enforced by other states as well. Consequently, Prof. Akande affirmed that the context demonstrates this to be an obligation *erga omnes*.

Member States can also adopt sanctions and it was also said that there is a parallel competence between the EU and Member States. How should this competence by exercised by Member States?

Mr Smolek explained that the extent of EU competence in implementing restrictive measures depends on the level at which it is considered. The competence could be seen as exhausted by merely implementing a kind of restrictive measure. If considered at the level of a special situation like the war of aggression by Russia, it would be accurate to argue that the EU has used its competence, thereby restricting Member States from adopting their own measures.

However, when considering the use of EU competence regarding individuals, Member States remain free to list an individual until the EU does so, due to the parallel nature of competences under the CFSP. A pertinent question then arises is whether Member States must remove an individual from their own list once the EU has listed them. In the Czech Republic, the system is complementary to the EU system, meaning that once an individual is on the EU list, this individual can no longer remain on the national list. Another question is whether it could still be possible to keep the person on the list using a different type of sanctions than those used under EU law. These are very relevant questions.

Ms Finnegan noted that the issue is indeed complex, as it arises in various ways: can Member States introduce measures on top of a restrictive measures regime which is in force? Can they introduce national measures before any regime has been implemented by the EU, or if the EU ceases to apply restrictive measures, what is the margin of manoeuvre then for the national authorities?

Each scenario requires a nuanced analysis of the specific measures at hand. For instance, arms embargoes, most of which are only contained in CFSP decisions, allow Member States greater latitude while still being bound by CFSP measures.

Regarding entry into the territory, there is a certain margin for national provisions in relation to entry bans to the territory of a Member State which can be enforced. It is possible to coordinate actions with the Schengen Information System (SIS) Regulation, which allows for the entry of listed persons into the SIS. However, when considering measures that impact internal market freedoms, the free movement of capital and so on, the compatibility of national measures with EU law obligations becomes a more challenging issue. These questions merit careful consideration in the future. ■

Keynote Speech

Mr **Michael McGrath**
Commissioner for Democracy, Justice, the Rule of Law and Consumer Protection, European Commission

MR MICHAEL McGRATH

Since the beginning of the mandate, I have experienced the critical role of the Legal Service for the work of the Commission and the essential cooperation between the Directorate-General for Justice and Consumers and the Legal Service. Across several files, our services work together closely within our respective areas of competence to deliver the legislative and policy initiatives that build or reinforce our Union of Law. Legal professionals - from lawyers to judges - are the gatekeepers and defenders of our justice systems, at the frontline of the justice systems of Member States and of the Union's area of freedom, security and justice. While our legislation aims to ensure equality, fairness and justice, it is down to legal practitioners to apply and uphold the spirit of the law in practice and for academics, civil society organisations and non-governmental organisations in the field of law to inform of and support citizens in their rights.

This is why there is such value in a conference like today's. By bringing together expertise from across the Member States, the most pressing legal questions facing practitioners can be discussed thoroughly and addressed effectively. This open cooperation could not be more timely than in the current geopolitical moment. It is in light of the unprecedented challenges Europe is now facing, that legal professionals and Union law have shown once again their critical role – from the rule of law and arbitration to sanctions violations and enforcement through criminal law to accountability for the crime of aggression.

Beginning with the topic of this morning's session - sanctions - in the field of criminal justice, the last Commission mandate delivered a landmark legislative milestone, the adoption of the Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures, which is currently in the implementation phase. Restrictive measures show how "it is possible to harness the market power of the Union for the pursuit of its foreign policy without compromising on respect for fundamental rights and the Rule of Law." To this end, the Directive represents "an important step towards more homogeneity in the implementation of sanctions", and in this, the Commission has shown itself to have a role to play not only as a guardian but also architect and custodian of EU restrictive measures. These are roles that I would support wholeheartedly during my mandate. The Commission's long-standing resolve to support Ukraine and its people and to combat Russian aggression through restrictive measures and prosecuting their violation remains unshaken.

In this area, legal professionals play a very important role as they advise clients across industries from insurance to logistics, on how to navigate complex sanction regimes, ensure compliance, and also avoid violations. As I stated during my own hearing, I will take forward the work of the Freeze and Seize Task Force and I will explore all possible avenues to ensure the effective

enforcement of our sanctions by means of criminal law. In that context, I look forward to hosting the next meeting of the Freeze and Seize Task Force next week in Brussels. Sanctions enforcement is also about upholding the international rules-based order. This is an aim which has underpinned several initiatives that the Commission led - or in which the Commission was involved - over the last few years, and all of these initiatives have raised new legal challenges requiring the input of specialist stakeholders such as yourselves.

The new geopolitical situation calls for new legal solutions, which in turn required the Commission and the Union itself to rethink its role and even play a new one. Just to name one key example here. DG JUST, the Legal Service, and the European External Action Service have been participating in the work of the Core Group to set up a Special Tribunal to ensure accountability to adjudicate the crime of aggression committed by Russia against Ukraine. They have made important contributions that allowed to work on a draft instrument establishing the Tribunal to advance successfully. The EU's contribution to the Core Group offered a new role for it to play internationally, the restoration of the international legal order of which we are all proponents and, indeed, defenders.
Regarding this afternoon's session on arbitration, it is worth mentioning the close relationship between EU law, arbitration and the principle of the rule of law.

As held by the Court of Justice, notably in the *PL Holdings* judgment, Member States cannot decide to remove disputes which may concern the application or interpretation of EU law from the jurisdiction of their own courts, and therefore from the system of judicial remedies required by EU law. This is because such a decision would prevent those disputes from being resolved in a manner that guarantees the full effectiveness of EU law. For this reason, an arbitration clause preventing EU courts from ruling on an issue which is intrinsically connected with EU law would put into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of EU law. Such an arbitration clause would therefore be incompatible with the principle of sincere cooperation and would have an adverse effect on the autonomy of EU law. This important relationship between upholding the rule of law in the EU and the law of arbitration is a prime example of the kind of insights into Union law that emerge through the Court's case law, and the legal questions and challenges that this may involve. And it is exactly meetings of key stakeholders – such as today's conference that leads to discussions and taking on such questions and challenges.

It is through your dialogue and your work that our Union continues to be firmly rooted in respect for its fundamental values. ■


MS LORNA ARMATI

EU law and Arbitration

Ms **Martina Polasek**
Secretary-General, International Centre for the Settlement of Investment Disputes (ICSID), World Bank Group

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SESSION


MS MARTINA POLASEK

Arbitration in the International Centre for the Settlement of Investment Disputes

Many might have heard of ICSID in connection with intra-EU arbitrations, and whether they can be subject to arbitration proceedings. But ICSID is much more than just intra-EU. This contribution will give an overview of what it is, how it contributes to economic development and the rule of law, and the significance of ICSID not only for EU investors but also for EU Member States.

First, it is important to remind of the purpose of ICSID and why it was created almost exactly 60 years ago. ICSID was established as an institution within the World Bank Group that provides investors and states with a facility to resolve their investment disputes. This could be either through arbitration, conciliation or mediation. But the gist is that there is always an investor on one side and a state or a state agency on the other side. This gives both investors and states the confidence that their dispute will be heard efficiently and fairly in an independent institution within the World Bank Group, and that, as a result, this will have a positive effect on states' investment climates and impact investment decisions positively. In a way, it is a risk-mitigation system. Many investors assess whether they have adequate access to justice when they invest in a particular country. The ultimate goal is really to promote international investment.

This is a system that was created by states through a multilateral instrument, the ICSID Convention, and European states were very much part of that negotiation process in the 1960s. It is a unique instrument with very particular features. It provides for a self-contained system and it is independent from domestic laws and domestic Courts' interference in the process. The Convention contains provisions from the filing of the request for arbitration until the very end of the process, with its own enforcement provisions. The seat of arbitration does not have any legal significance - there is no *lex arbitri* and there is no need to resort to domestic Courts for set-aside proceedings or to the New York Convention for recognition and enforcement proceedings. Instead, there are certain limited post-award remedies in the Convention, and it has its own simplified enforcement mechanism.

It is also a system that carefully considers the interests of both investors and of states, and that is key to party confidence, especially as, most of the time, investors are the claimants and states are the respondents. For example, there are certain jurisdictional requirements that must be met: there is a screening process by ICSID before a case is registered and the Convention specifies that the state preserves its right to immunity from execution. ICSID has always sought to maintain that balance of interests, including in its most recent rule amendments in 2022, where ICSID introduced innovative provisions that were important to stakeholders, including states. This is a system that was especially designed for disputes between investors and states. That is why many investors and states prefer ICSID proceedings before other options.

States recognise the benefits of this system. There are 158 Member States and ICSID's membership continues to grow. All Member States of the EU, except Poland, are members of ICSID and while the EU cannot be a member of the ICSID Convention, it

does have access to ICSID proceedings through ICSID's Additional Facility Rules.

Although a state is a Contracting Party to the ICSID Convention, this does not mean that it consents to use ICSID in all the individual cases. A special, separate consent to arbitration, conciliation or mediation is needed and that can be done either in a contract between the state and the investor or in investment laws and treaties. Indeed, many treaties do refer to ICSID. The ICSID Convention does not dictate anything about the substantive protections and treatment of investments. That is entirely up to the states in their treaties in accordance with their investment policies or the parties in a particular contract. States can also restrict the scope of their consent. They can carve out a particular industry or particular state measures, or they can decide that the investor must first exhaust local remedies. That is a possibility mentioned in the Convention itself. But once the parties have consented to arbitration, the ICSID Convention stipulates that neither party can withdraw unilaterally. That is one of the core principles. And if one party objects to jurisdiction, then the arbitral tribunal that deals with the case (not ICSID) has the power to decide that matter, including whether there was a valid arbitration agreement.

If the tribunal decides in favour of its jurisdiction or on the merits, and a party is unhappy with the outcome, it can file an annulment proceeding based on certain grounds. That annulment is heard by a committee composed of three persons designated to the panel of arbitrators which is a panel to which Member States of ICSID designate the arbitrators. This committee has the power to annul fully or partially the award. This review includes whether the tribunal manifestly exceeded its powers, by holding that it had jurisdiction when, in fact, it did not.

Finally, the enforcement mechanism is an important part of this system. Under the Convention, the domestic Courts of the 158 Member States must enforce an ICSID award as a final judgment of their own Courts and each ICSID Member State has an obligation to recognise and enforce an award, so a party may enforce an award in any of those states. And unlike the New York Convention, the ICSID Convention does not provide any ground to refuse enforcement of the award. In fact, the drafters of the Convention considered including a public policy exception to refuse enforcement, but they decided against it.

As for the EU investors and EU Member States, ICSID has now over 1000 cases and almost half of them have been filed by EU investors. So, over 500 cases by EU investors and about 25% of those have been against EU Member States. The rest, almost 380 cases, were filed against non-EU states. It is fair to say that this system is very much used by EU investors, and it is important to them. Second, EU Member States have been respondents in about 18% of all cases and the majority of those were intra-EU cases (69%). If one removes all the cases registered before *Achmea*, there have been 38 intra-EU cases registered after March 2018.

Regarding the industries involved, 50% of the cases involved electric power and other energy, and 83% of those concerned renewable energy. So, over 50 cases were renewable energy source cases. It is also interesting to look at the number of cases that arise from some type of incentive scheme, which are relevant to questions of unlawful state aid in the EU context. For example, there have been a number of cases that concern an incentive scheme that Spain put in place in 2007 to attract investments in the renewable energy sector. This scheme was subsequently changed, and this led to many cases under the Energy Charter Treaty. Roughly 43% of the intra-EU cases have been based on some type of incentive scheme.

There have now been about 100 concluded intra-EU cases. Roughly half of them ended in an award that upheld claims in favour of the claimant, although a few did not lead to damages. 34 damages awards in favour of the claimant were rendered after the *Achmea* judgment. There also have been cases dismissing jurisdiction, although only two ICSID tribunals have done so on the basis of an intra-EU objection advanced by the Member State.

The total damages awarded in all intra-EU cases amount to roughly USD 3.7 billion, which is about 37% of the amounts claimed and that percentage is slightly higher in the cases based on incentive schemes (there, it rose to about 44%, corresponding to USD 2.1 billion). Finally, almost all awards that awarded damages to the investor in intra-EU cases have been subject to annulment proceedings. 35 cases have been submitted to annulment so far and from the 24 decided annulment proceedings, one annulled the award, but that was not on the basis of an intra-EU objection, but on the basis that the tribunal was not properly constituted. The large majority of awards have been upheld by ICSID annulment committees, even though the intra-EU objection was raised.

There are still 29 intra-EU cases pending and 10 annulment applications pending. So far, there are only two tribunals, and no ICSID annulment committee, that have upheld the intra-EU objection. And there will, no doubt, be more decisions on this matter to come.

It appears that enforcement of an intra-EU ICSID award will not be possible in the EU, but there are enforcement proceedings of ICSID awards in non-EU jurisdictions. At least 15 ICSID awards are pending enforcement proceedings, and it remains to be seen whether these will lead to a successful execution of the EU Member State's assets. It also remains to be seen whether there will be new intra-EU cases, given these developments. One thing is certain: ICSID's work is more important than ever to address global problems, including for EU investors and EU Member States. ■

EU law and Arbitration

Professor **Tamara Ćapeta**
Advocate-General, Court of Justice of the European Union

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SESSION

PROFESSOR TAMARA ĆAPETA

Arbitration viewed from the Court of Justice – sports arbitration

The main focus of this presentation is on sports arbitration, thus a particular type of arbitration. The question of reviewability of the awards of CAS (the Court of Arbitration for Sport, with its seat in Lausanne) is currently pending before the Court of Justice in Case C-600/23 *RFC Seraing* v. *FIFA, URBSFA* and *UEFA*. The solution to be applied in relation to CAS and its awards within the system of FIFA, or similar systems such as the one of the ISU (International Skating Union), might require a different approach than the one applicable to the review of commercial arbitral awards.

When individuals or companies decide to entrust their dispute to an arbitral tribunal, they exclude the participation of ordinary Courts. At the same time, in the adjudication of such disputes, arbitral tribunals may be invited to apply rules of EU law. The Court of Justice accepted this possibility and recognised the importance of commercial arbitration since its early case law. Nevertheless, from relatively early on, in the *Nordsee* case (1982), the Court distinguished arbitrations from ordinary Courts or tribunals, in one very important aspect. Unlike ordinary Courts, arbitral tribunals cannot enter into direct conversation about the interpretation of EU law with the Court of Justice via the preliminary ruling procedure. That means that it may happen that arbitral tribunals apply EU law 'incorrectly', which, in turn, means that the subjects of EU law might be deprived of their EU-based rights.

This is in contradiction with the requirement of effective judicial protection, guaranteed by the Treaties (Article 19 TEU) to its subjects. In short, this right implies that a person who considers that its EU-based rights were breached must have the possibility to turn to an independent Court which has the power to refer questions of interpretation of EU law to the Court of Justice.

The compromise solution - which balances the interest of securing an effective arbitration process and the EU concept of effective judicial protection - was to allow for only a limited type of judicial review of commercial arbitration awards. In *EcoSwiss* (1999), the Court considered that judicial review of such awards must be possible but may be limited only to issues of public policy.

In practice, that means that a party that has lost a dispute before an arbitral tribunal may refuse to implement its obligation under such an award on the ground that it is contrary to EU public policy. In such a situation, the other party would have to ask for the enforcement of the arbitral award before an ordinary Court and the only way in which the losing party may prevent such enforcement is if this party successfully relies on public policy reasons. This solution is in conformity with the New York Convention. Accepting such a limited form of judicial review is possible because, by entering into an arbitral agreement, parties willingly decide to exclude ordinary Courts and, with it, also a possibility of referring to the Court of Justice.

The pending case, *Seraing*, places before the Court the question whether the same rules as developed in relation to commercial arbitration can be accepted also in relation to sports arbitration. In that particular case, the question arises in relation to the

FIFA system. There are two important differences between commercial arbitration and sports arbitration, as the one at issue in the *Seraing* case, which call for a different solution.

First, the system as established by the FIFA Statute does not allow the parties to a dispute, in the case at issue a football club and FIFA, to choose freely between arbitration or the ordinary Courts system. Article 59 of the FIFA Statute prohibits recourse to ordinary Courts. Appeals of the decisions of the internal FIFA dispute resolution system may only be introduced before the Court of Arbitration for Sport (CAS). Thus, CAS jurisdiction is mandatory and not voluntary as in the case of commercial arbitrations.

Second, the system established under the FIFA rules is self-sufficient in terms of enforcement of CAS awards. FIFA can impose the CAS award on a football club or a player, without any recourse to a Court, by preventing the club or a player from participating in the games it organises. Given its monopoly in the world of football, this leaves the clubs and players with no remedies against FIFA rules, even if they are confirmed by CAS, which they consider to be in breach of EU law.

This second characteristic of sports arbitration might require the existence of a direct access to the Member States' Courts against FIFA rules, notwithstanding the CAS awards that considered them compatible with FIFA rules. That is so, because the question of the compatibility of FIFA rules will not be raised in the enforcement proceedings, as there is no need for FIFA to initiate them.

The first characteristic - the mandatory nature of sports arbitration - might have an influence on the acceptance of only limited review, confined to public policy issues, which was accepted in relation to commercial arbitration. As the jurisdiction of CAS was not chosen voluntarily by the parties, such limited review cannot be based on the justification that a party to a dispute accepted it by opting for the arbitration agreement. It might thus be necessary to allow for full review of the awards adopted by mandatory arbitrations.

This might be seen as contrary to the New York Convention which allows for the refusal of recognition and enforcement of arbitral awards only if they are contrary to public policy (Article V.2(b)). However, the New York Convention is not a barrier for full review if it does not apply to mandatory arbitrations at all. That is a possible interpretation of Article II of that Convention.

The possible adoption of a different solution in relation to mandatory sports arbitration will not affect the law as it applies to commercial arbitrations. The existence of only limited review confined to issues of EU public policy will not be modified. There is, therefore, no fear that the Court might close the possibility of recourse to arbitration in intra-EU commercial disputes. Nevertheless, the question of the definition of EU public policy remains open in that regard. What is and what is not EU public policy has not yet been fully clarified in the EU legal order. ■

EU law and Arbitration

Professor **Juan Fernández-Armesto**
Arbitrator, President of the Spanish Arbitration Club (2017-2020)

2 SESSION

PROFESSOR JUAN FERNÁNDEZ-ARMESTO

Commercial arbitration and European law, in the light of personal experiences

The *Constitución de Cádiz*, the liberal constitution enacted in 1812, which, alas, was never applied, embodies for Spaniards the values of liberalism – the rule of law, division of powers, citizens' rights – core European values.

Article 280 of the *Constitución de Cádiz* states that "No Spaniard can be deprived of the right to adjudicate his disputes through arbitrators, chosen by both parties" – citizens are entitled to have their disputes adjudicated not through state Courts, but rather by freely chosen arbitrators. For the *Constitución de Cádiz* arbitration is a basic citizens' right; this mandate is not unique – it is also echoed in the 1793 French Constitution. In present times, when the idea of Europe is under so many threats, it is important to remember that the very essence of Europe is the right of its citizens to enjoy their life in liberty – and that since time immemorial, Europeans enjoy the right to escape from state Courts and have their disputes settled by arbitrators of their preference.

Arbitration is also a fundamental requirement for the single market, since, without commercial arbitration, there is no level playing field. An entrepreneur in one Member State will prefer to choose a seller or provider from his home country because (all other factors being equal), any dispute will be adjudicated in the well-known realm of their own state Courts. A provider established in another Member State is always at a disadvantage: it must choose between requiring that disputes be adjudicated in its own home Courts, an alternative that the counterparty will dislike, or submit to the counterparty's Courts – an alien legal and linguistic environment. The disadvantage disappears if the entrepreneur and supplier agree to commercial arbitration - the level playing field is restored. International commercial arbitration represents the only neutral adjudication arena for intra-European trade. In the absence of Europe-wide commercial Courts, intra-EU commercial arbitration is *a conditio sine qua non* for an efficient single market.

This being so, an innocent bystander would assume that the European institutions have developed a policy of clear and outspoken support for commercial arbitration. Unfortunately, that is not the case: the very word "arbitration" conjures tensions within EU institutions, especially within the Court of Justice; the European entrepreneurs' right to withdraw their disputes from the Courts of EU member states, and have them adjudicated in a private arena, is viewed with suspicion. The negative reactions often arise in consumer, sports or investment arbitrations, and often cannot be extended to commercial arbitration. But not everyone makes a clear distinction between different types of arbitration and there is an acute risk that the backlash against specific types of arbitration will eventually also undermine the social acceptance of commercial arbitration.

Turning to the application of EU law by arbitrators, it is a fact that arbitrators routinely apply foreign laws. Parties sign contracts, subject them to a certain legal system and the arbitrators then apply that law to adjudicate the dispute. Arbitrators are not specialists in the relevant legal system – but parties argue their case, submit evidence, sometimes marshal reports by legal

experts. On this basis, arbitrators establish the rules of domestic law, as interpreted by domestic Courts, and apply them to the proven facts. If the dispute touches upon public order, arbitrators are doubly cautious – if contrary to public order, the award will be annulled or will be unenforceable.

All this is a straightforward, routine activity. There is no speciality as regards EU law – whether the basis are directives incorporated into domestic law or regulations with direct application; arbitrators will apply EU law as interpreted by the Court of Justice and national Courts.

Two instances where Prof. Fernández-Armesto was arbitrator and where application of domestic law gave rise to difficulties affected EU law.

The first case involved an arbitration between two gardening contractors regularly participating in tenders with the public sector; they signed an agreement, stating that whoever won a tender would give a 50% participation to the loser. The contract was null and void, for Prof. Fernández-Armesto as it contravened EU competition law, but the majority of arbitrators held the contract valid and awarded damages to the party that had failed to comply. The application of European competition law, however, was not thwarted: if the award indeed was contrary to EU competition law, it would be contrary to European public order, and as such, if impugned, it would be set aside by the Court of Justice in the place of arbitration; the breach of European public order would also hinder enforcement under the New York Convention in other jurisdictions.

The second one is the famous Greek submarine saga which resulted in successive awards. The facts relevant for the first award, which are now in the public domain, are complex but can be summarised as follows: a German shipyard agreed to buy Hellenic Shipyards and build a flotilla of submarines for the Hellenic Navy, and then with the support of the Hellenic Republic resold the Yard and the construction contract to a French/Lebanese shipbuilding group. The contract, subject to Greek law and with Athens as the place of arbitration, was signed between the Hellenic Republic, the German shipyard as seller, the French/Lebanese shipbuilding group as buyer and Hellenic Shipyards itself. The sale had a major stumbling block: at the turn of the century – many years before these transactions – when Hellenic Shipyards was still a state-owned company, the Hellenic Republic had provided illegal state aid and the European Commission had adopted a decision, ordering the Hellenic Republic to recover from Hellenic Shipyards EUR 540 million of illegal state aid. In the contract for the sale of the Yard, the Hellenic Republic then assumed a contractual obligation to "take all necessary actions to secure the closing of the file and the final settlement" of the EU State aid procedure.

In the commercial arbitration, the buyer of the Yard argued that the Hellenic Republic was responsible for mishandling the EU state aid issue and requested to be compensated. There was an evident point of friction between EU State aid law and Greek contractual law – between the jurisdiction of the arbitral tribunal and the competence of the European Commission. The arbitral tribunal was very conscious of its own jurisdictional limitations, it expressly declared that the only entity authorised to decide upon the existence of State aid and its consequences was the European Commission, and that the tribunal's competence was limited to determining if a breach of the contractual obligation assumed by the Hellenic Republic in the contract had occurred. The tribunal, acting only within the scope of its jurisdiction, found for the buyer of the Yard and decided that the Hellenic Republic had indeed failed to abide by its contractual obligation – but in the end did not award any damages. The award was issued in Athens and reviewed by the Greek Courts, up to its Supreme Court which confirmed the award's main findings, including the decision regarding State aid – if it had breached European public policy, the award would have been set aside.

Concluding on *Nordsee*, arbitrators appreciate that the Court of Justice of the EU has given them the right to access the *juge d'appui* and ask the latter to submit a request for a preliminary ruling to the Court of Justice. In practice, this mechanism has never been applied, because it is too complex, difficult, lengthy and costly. In addition, the need for clarification is exceptional, as most EU law issues, relevant for solving a contractual dispute, have already been sorted out by the European Commission, the Courts and by commentators. ■

MR TIM MAXIAN RUSCHE

EU law and Arbitration

Ms **Fabienne Schaller**
Former President in the International Commercial Chamber of the Paris Court of Appeal (ICCP-CA)

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SESSION


MS FABIENNE SCHALLER

Investment and commercial arbitration from the perspective of a national judge

Being a national judge in the European Union is not only an honour, but also a responsibility. The national judge is in an uncomfortable place, but also in a position that allows him to decide on EU law in an innovative manner.

Three well-known cases, *Achmea*, *PL Holdings* and *Komstroy,* were brought up in the Paris Court of Appeal in two cases of 19 April 2022 (*Poland v. Strabag* and *Poland v. Slot*). In both judgments, after long discussions, the Paris Court of Appeal confirmed the annulment, as the arbitration clause of the Bilateral Investment Treaty (BIT) was incompatible with EU law, as Poland had become a Member State of the EU in the meantime.

According to these judgments, the annulment of the award does not deprive the party of access to a judge, but only of the possibility of submitting the case to an arbitrator, which was already deemed not to be in breach of the European Convention on Human Rights. Interestingly, these cases were brought at a time when the European Commission had initiated an infringement procedure against Poland for non-compliance with the rule of law. This was used by lawyers of one party to explain that, as Polish judges were not sufficiently reliable and able to uphold mutual trust, the primacy of EU law was not applied in the same way across the EU and that, as a consequence, the arbitral award had to be upheld. The Court reiterated the primacy of Union law and the legal consequences for the EU judge. The rule laid down in *Achmea* and *PL Holdings* is clear and obliges the judge to declare the annulment of all clauses of such a treaty incompatible with Articles 267 and 344 of the TFEU, whether unilateral or bilateral. Any attempt at circumvention is null, void and liable to sanctions.

In the judgment *Poland v. Strabag*, the Court held that the tribunal had wrongly declared itself competent because the arbitration clause in the BIT was incompatible with EU law. The Court rejected the argument of the Austrian company, which had attempted to circumvent the BIT by signing an *ad hoc* arbitration agreement which would have been concluded between the parties independently of the BIT and which would have brought the dispute within the ambit of commercial arbitration. It was pleaded that it was an arbitration based on the autonomy of the parties and not on the BIT. The Court was asked to validate the arbitration clause that was in principle compatible with EU law as it could be examined by a national judge who could request a preliminary ruling. The Court dismissed this argument, pointing out that the consent was based on the BIT and that the agreement signed between the parties was a procedural attempt to escape the application of EU law.

In the judgment *Poland v. Slot*, the Court annulled the award considering the extinction of the EU intra-EU BITs. This case is interesting because the European Commission had intervened as *amicus curiae* in annulment proceedings. It shows that arbitrators have a possibility to communicate with the European Commission even if the arbitration tribunal does not have the right to refer preliminary questions.
The judge in charge of controlling arbitration is not only

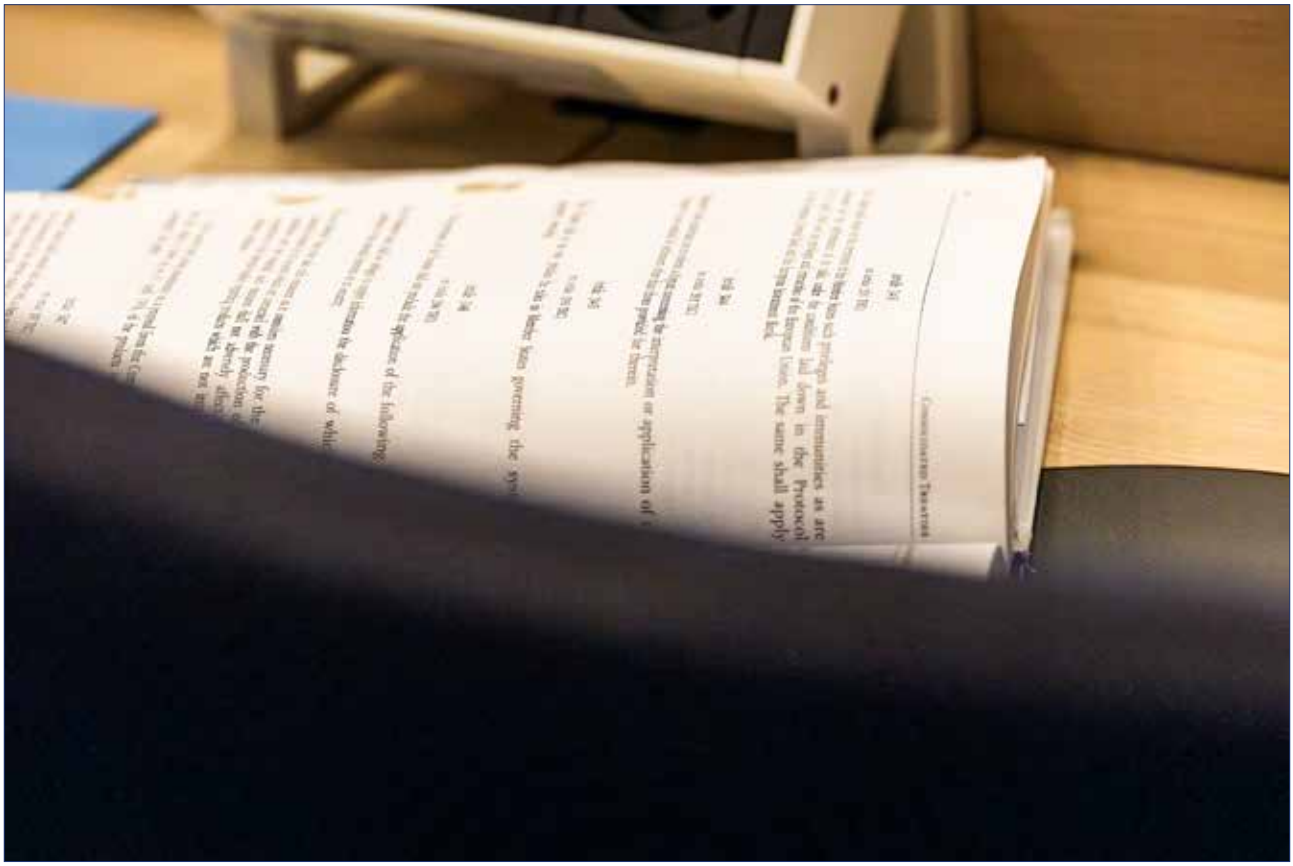
in charge of controlling investment arbitration, but also commercial arbitration awards. The grounds based on violation of international public policy are the main ones the judges have to deal with. The approach to this topic has evolved a lot regarding French jurisprudence - the supervision of national Courts has gone from a minimalist to a maximalist approach. French case law has evolved with regard to its obligation to apply EU law and public policy derived from EU law in a time-critical manner.

On 29 October 2024, the Paris Court of Appeal handed down a ruling in the *Søstrene Grene* case concerning exequatur. Following *EcoSwiss*, the judgment states that Article 101 TFEU is a fundamental provision that is indispensable for the performance of tasks entrusted to the Union and for the functioning of the internal market and may be regarded as a provision of international public policy in the sense of the New York Convention of 10 June 1958. In doing so, it brings together the New York Convention, national law and EU law. It means that, as laid down by the Court of Justice, national Courts must apply EU law when reviewing litigation while the party alleging breach must establish the existence of serious, specific and corroborated evidence. In the case at hand, the Paris Court of Appeal considered that the contested clauses (pushback, ban on opening internet sites) did not constitute anti-competitive behaviours and could not be the basis an annulment or a non-recognition decision. The Court did not validate the appeal.

In the end, judging is a balancing act, and the national judge has to assess substantive elements without reviewing merits and checking whether or not there has been a breach of public policy. Critics of the French position called it a *"schizophrenia à la Molière"* or international public policy *"à la carte"*.

As for the cooperation between national Courts and the European Commission, there is currently a dispute between the Romanian Minister of Environment, Waters and Forests and the Austrian company OMV following the acquisition of the former Romanian state company Petrom, about an award that ordered the Ministry to pay Petrom over EUR 31 million. The International Commercial Chamber of the Paris Court of Appeal was asked to annul the award, since its enforcement would constitute an unlawful State aid (Article 107 TFEU) and would violate international public policy. In this case, the European Commission has been asked whether it would like to intervene as amicus curiae [the reply of the Commission was pending at the time of the conference].

As a conclusion, the national judge in France is an actor of EU law, the International Chamber of the Court of Appeal of Paris is fully integrated in this process of applying EU law and contributing to its development. ■



EU law and Arbitration

Ms **Kerstin Norman**
Judge, Svea Court of Appeal's civil division and Patent and Market Court of Appeal

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SESSION


MS KERSTIN NORMAN

Investment and commercial arbitration from the perspective of a national judge

SCC (Stockholm Chamber of Commerce) Arbitration Institute, founded in 1917, has for many decades played an important role in international commercial arbitration and investor state arbitration. The Institute played a special role in resolving East-West disputes. Every year, it resolves nearly 200 disputes between parties from 40 to 50 different nations. The Court of Appeal in Stockholm has the jurisdiction to review an arbitral award when a recourse is made to the Court on the invalidity or setting aside of the award and around 20 cases are brought before the Court each year. Most of the cases concern international disputes, often between state-owned companies in the oil and gas industry and large international companies and states. In recent years, the Court of Appeal also had to review a relatively large number of cases concerning arbitration under investment treaties. It had to apply the principles of the *Achmea* judgment and the following judgments from the Court of Justice of the EU.

When discussing arbitration and EU law, one of the main issues is the notion of public policy and the question of standard of review by the Court of the seat. The Swedish Supreme Court has provided clarity on the standard of review in two precedents in 2015 and in 2018 and both concern public policy and mandatory competition law.

In its judgment from 2015, the Supreme Court ruled on the validity of an arbitral award in the light of public policy considerations in relation to Article 102 TFEU. This judgment touches upon the extent to which the Court is obliged to conduct a reassessment of the arbitral tribunal's application of competition law principles. For the Supreme Court, the Court must always exercise a certain degree of substantive review. The review should generally only concern legal issues and therefore be based on the tribunal's assessment of the evidence of the case. Where competition law cannot be considered sufficiently clear, mandatory EU competition law principles, according to the Swedish Supreme Court, necessitate a broader assessment of the tribunal's findings. That might even include a reference for a preliminary ruling from the EU Court of Justice.

In the Supreme Court judgment from 2018, the situation – was different from that in the judgment from 2015. Here, the question of competition law was not at all examined by the arbitral tribunal because the ground was never raised by the parties. The Supreme Court clarified then that in a situation where an arbitral tribunal has not made any assessment that can be reviewed, the Court must make its own independent assessment. The Supreme Court stated that the examination must be more concrete and far reaching than is usually the case when applying provisions of public policy. However, the Supreme Court also concluded that the review should be limited to the extent possible without defeating the purpose of the review.

In accordance with the Supreme Court rulings, the Court of Appeal in Stockholm found in a decision from 2022 that

it had an obligation to clarify the parties' position through questions and even to inquire into the specific circumstances that, according to the claimant, meant that the parties' agreement was in breach of competition law. However, the Court of Appeal found that its review was set by the circumstances that the parties had evoked, and that the *ex officio* obligation could not extend any further than that.

The standard of review established by the Swedish Supreme Court could be challenging both for the Court of the seat and for the parties, especially in the case where the question of competition law is raised for the first time during the post award stage. The Supreme Court's judgments must be read in a way that gives the Court of the seat a mandate to strike a fair balance between the interests at stake, and that is the interest to safeguard the integrity of the arbitration process and at the same time uphold mandatory EU principles in a reasonable way.

Finally, some views on preliminary references from the point of view of the Court of Appeal: many years ago, the European Commission initiated an infringement case against Sweden. The reason was that Swedish Courts did not make references for preliminary rulings when they should. Swedish Courts are now doing much better. However, the natural starting point for the national judge should be to take a very restrictive stance in relation to preliminary rulings. For the parties, the cost both in time and money to extend the process to Luxembourg is huge. When the Court decides to make a reference to the Court of Justice it is never an easy decision for the Court. The most difficult question is usually whether there is a real need to get a position on that unclear issue when the Court has finally to rule on the case.

Often the question on making a reference is raised by one of the parties, but when a reference is made, it is not unusual that the question was initiated by the Court itself. In the Court of Appeal, preparing a request for a preliminary ruling is really a team effort involving several judges and law clerks. The parties are also always given the opportunity to provide comments on the questions that are referred to the Court of Justice.

In recent years, the Court of Appeal in Stockholm made several references to the Court of Justice. Recently, the Court of Appeal made a request in the field of arbitration. The question referred concerned the interpretation of the Council Regulation from 2014 on restrictive measures regarding Russia and touches upon the question to what extent the provisions on restrictive measures limit the possibilities for settling disputes in private arbitration proceedings. This is how there could be a link between sanctions and arbitration as well. ■

EU law and Arbitration

Professor **George A Bermann**
Walter Gellhorn Professor of Law and Director of the Center for International Commercial and Investment Arbitration Law, Columbia Law School

2 SESSION

PROFESSOR GEORGE A BERMANN

An outsider's perspective

Some decades ago, EU law and arbitration were two ships passing through the night. This is no longer the case. "You can no longer teach EU law without mentioning arbitration, which I have done for 30 years. Also, you can no longer teach arbitration law without mentioning the European Union, which I also have done for 30 years." It is important to discuss how the EU attitude towards international arbitration is perceived from outside the EU. Two salient features come across outside as problematic and have very concrete repercussions.

The first one is public policy. The implementation of public policy in the Court of Justice of the EU seems to be different from the way it is approached in certain other jurisdictions. Based on the *EcoSwiss* case, EU competition law and EU consumer law are EU public policy fields, and the question is how many more fields will be characterised as public policy. Instead, in the US, entire fields are not treated as public policy *"en bloc"*, it is the norms, of varying degrees of importance, of that field that are at stake. An American judge would ask herself or himself how important those norms are and how seriously they have been challenged by the decision that was taken. In other words, there is a certain degree of relativity in the approach to public policy, different from the European approach. And on the question of the scope of review, it does not go without saying that just because the matter is a matter of public policy, the Court should substitute its judgment for the judgment of the arbitral tribunal, although that is a widely held view. Public policy can be deployed very differently, there is not only one way to do so.

In this context, a judgment of the Court of Justice (C-700/20) *London Steam-Ship Owners' Mutual Insurance Association Limited v. Kingdom of Spain*, is striking: the Court of Justice decided that an award should be denied enforcement, although otherwise unproblematic, because the tribunal did not respect the principle of *lis pendens* in Brussels II Regulation. The question arises: Has *lis pendens* become a matter of public policy?

The public policy question is here to stay and there is a need to be very serious about how it is deployed. It is a defence to enforcement under the New York Convention, so it is available, (unquestionably not under the ICSID Convention).

The second issue is the autonomy of the EU legal order that is often presented as of constitutional dimension. It can be suspected that it is a public policy principle but the implications of the autonomy of the EU legal order being considered a matter of public policy, if it is, are not known.

According to *Achmea*, the autonomy of the EU legal order – or lack thereof - is rooted in the fact that investor-state tribunals cannot make preliminary references to the Court of Justice and the inability to do so is a threat to the integrity of EU law. It is challenging to find another jurisdiction in the world for which the autonomy of a legal order demanded that only the Courts of that jurisdiction can be trusted to apply the law of that jurisdiction. Most jurisdictions in the world would be honoured and gratified to have their laws applied by Courts of other countries and are ready to accept that the law can be misapplied. It creates

a sense of confusion that a legal system would have its autonomy threatened by the fact that its highest Court cannot review the decisions of Courts or other jurisdictions on its law. In the same way, it is not clear why investor-state arbitration is a threat in this regard, but commercial arbitration is not. Commercial arbitrators interpret and apply EU law without being able to make preliminary references to the Court of Justice. It is exactly the same scenario; they too interpret and apply EU law but escape the criticism. The European Union is just much more worried about investor-state arbitration than it is about commercial arbitration.

This reminds of the CETA Opinion of the Court of Justice which concluded that it was unacceptable for a BIT tribunal to interpret and apply EU law. The Court of Justice said that ISDS tribunals under CETA are only going to apply CETA. However, it is difficult to see how commercial tribunals are any different - they are applying the contract or the treaty. It can be considered that there is a result-oriented reasoning at work in *Achmea*. It is intriguing that the European Union in the interest and name of autonomy would tell an American Court that it should violate its international treaty obligations out of deference to the EU. The question is what would happen to the US autonomy and to its autonomy to respect its international treaty obligations and to refrain from showing deference to the interests of another legal entity. This is problematic as well.

Finally, none of the intra-EU awards, brought for enforcement before US Courts has been annulled. However, for the *Stelik* dispute, the award was annulled in Europe after it had been enforced in the US. There is pending now before the US Court the question of whether that enforcement needs to be rescinded on account of a subsequent annulment. The result is to be seen. It is worth mentioning one last case where an annulled award has been brought for enforcement in the US and an intra-EU award that was fully annulled by an EU Member State Court. A US Court will now be called upon for the first time to decide to what extent the fact that an award was annulled on intra-EU grounds should alter the assumption, based on prior cases, that those awards are enforceable. It is very likely that the American position by contrast to the French or German ones, is that an award having been annulled, is presumptively not enforceable unless the annulment is invalid, unless the annulment violates public policy. That is the *Pemex* case where an annulled award was nevertheless enforced on public policy grounds because the annulment was worse than the award.

As a conclusion, there is an echo-chamber in the European Union, and this intervention aims at breaking this pattern. ■

EU law and Arbitration

QUESTIONS AND ANSWERS

2 SESSION

Given that investment arbitration also requires the agreement of the parties, is the difference with commercial arbitration just the fact that the framework within which that agreement is provided for is a treaty framework, because you do have to have the agreement of the parties? Even for commercial arbitration, the only reason why it is possible is because the law of the state also allows it. So, what is the essential difference between the two?

Prof. Ćapeta presented her perspective on what sets types of arbitration apart. The key distinguishing factor, she argued, is whether the arbitration is voluntary. Once both parties choose arbitration voluntarily, many mandatory aspects of the legal system can be excluded, except for public policy principles. This differentiation applies to sports arbitration and commercial arbitration, where parties agree to resolve disputes outside the standard legal framework, either before or after a dispute arises. Prof. Ćapeta also discussed the *Achmea* case, suggesting it can be seen in this light. She noted that states signed investment treaties to attract foreign investment, acknowledging that investors might not trust their Courts. While EU countries enter into such treaties with non-EU States, within the EU it is unacceptable for a state to claim its Courts are not independent enough to judge disputes impartially, especially those arising from state measures affecting investments.

Prof. Ćapeta emphasised that the *Achmea* ruling is about restoring trust in national Courts among EU Member States, as mutual trust is crucial for the EU legal order to function. She mentioned that countries like Slovakia and Romania, which had BITs signed before joining the EU, needed a way out of these agreements. The long sunset clauses made it impractical to wait for their natural expiration, given the need for mutual trust within the EU. Therefore, the solution had to go beyond international law and consider the constitutional necessity of restoring trust in the EU's legal order. **Prof. Ćapeta** further noted that although consensus was that *Achmea* was result-oriented, it was not because the EU had a problem with investment dispute, therefore she did not give international law-based solutions at the moment.

On the other hand, **Prof. Bermann** commented that the Court of Justice, in its *Achmea* judgment, explained that commercial arbitration is not affected, because it is based on contract, not treaty. He questioned why this distinction should matter and focused on the mutual trust rationale behind *Achmea*. He pointed out that while *Achmea's* stated problem was the inability to make preliminary references, this issue applies to both commercial and investment arbitration. Therefore, Prof. Bermann saw no substantial difference between the two types of arbitration in this context.

Do you think that the Court of Justice should reconsider Nordsee and give the possibility to arbitral tribunals to submit preliminary questions which would actually solve problems at their genesis and not at the enforcement stage, with all the problems that we see?

Prof. Ćapeta did not believe that the current system could effectively handle preliminary references in arbitration. She explained that, under the existing framework, preliminary references are integrated into the national appeals system, leading to the last instance Court which is then obligated to refer. If arbitrators were also required to make referrals, the Courts would be inundated with too many cases. Thus, she did not see the current scheme working without some adjustments.

Prof. Bermann proposed specialised judicial tribunals, perhaps specifically for investment cases, with the jurisdiction to manage preliminary references. He argued that this approach could have addressed the problem as outlined by the Court of Justice in the *Achmea* case, which framed it as a preliminary reference issue. Prof. Bermann acknowledged that while this solution

could potentially work if it were indeed a preliminary reference problem, its effectiveness would depend on the Courts' ability to manage an increased caseload. He considered this a separate but important consideration.

Who is to determine in the European Union legal order how broad or narrow this notion of public policy is? What should be the standard of review?

Prof. Ćapeta noted that the determination of public policy should not merely protect the rights of parties within a dispute but should instead ensure the broader functioning of the market or other societal systems. She suggested that the notion of public policy might initially manifest strongly in areas like competition law, because agreements affecting market operations can have broader societal impacts. Prof. Ćapeta was clear that while the Court of Justice would ultimately decide what constitutes important policy matters in the EU, this decision would be informed by inputs from various institutions, Member States and individuals. She added that public policy will likely be decided on a case-by-case basis like proposed by Prof. Bermann.

Prof. Bermann expanded on this, acknowledging that while the EU has the right to structure its internal organisation as it sees fit, there have been concerns about the impact on international treaty obligations and the reactions from countries like New Zealand, Australia, Switzerland, the United Kingdom and the United States. He reflected that better foresight and earlier action from the European Commission regarding intra-EU BITs might have avoided some current complexities.

Ms Norman highlighted that the scope of what falls under public policy within EU law and the appropriate standard of review will be major topics of discussion in the coming years. She emphasised the need for differentiated standards of review depending on the specific domain of public policy being addressed. She also noted that many questions remain unanswered and will require ongoing deliberation.

How will or should the consequences of EU restrictive measures be treated in international arbitration disputes – both in commercial arbitrations and in investment arbitrations. Will they be benefiting from exemptions of public policy? Is it EU public order? Is it international public order?

Prof. Bermann explained that the issue of sanctions is significant and pertinent, as he is currently involved in a case against a Russian entity that is on the sanctions list of several jurisdictions. He mentioned that he is consulting with legal counsel to advise the tribunal to determine whether the tribunal can proceed safely with this arbitration under these circumstances. He asserted that arbitration cannot avoid the impact of sanctions and that his case is not an isolated one; depending on the situation, the threat of sanctions may prevent an arbitration from continuing.

Prof. Fernández-Armesto confirmed that sanctions almost certainly give rise to instances of investment arbitrations, emphasising that there are numerous precedents. He pointed out that sanctions are not a new phenomenon, and mentioned the examples of Saudi Arabia and Qatar, which resulted in a number of investment treaty arbitrations. Thus, he noted that sanctions present substantial work for arbitrators.

In Micula, we have a BIT based award and a decision of the Commission that considered this award or the payment resulting from the award was an illegal State aid, and the General Court confirmed that. The Member State concerned is obliged to recover the State aid within the EU, but the case is pending in several other jurisdictions in the world. So, imagine if the award is executed and enforced in the United States while at the same time the Member State concerned has to recover the state aid here. How do you see the situation?

Ms Polasek followed up on a question regarding the Micula award, noting that it is not the only ICSID award that is being enforced. She mentioned that at least 15 ICSID awards are pending enforcement, having undergone annulment proceedings, the equivalent of set-aside proceedings at ICSID, and the committee members upheld those awards. These awards are now final and binding, obliging ICSID Convention Member States to comply with them and their Courts to enforce them, as stipulated in the Convention.

She emphasised the need for a solution, although she did not specify what that solution might be. She welcomed the discussion of alternative remedies to resolve these disputes, suggesting that mediation in investor-state cases could be a possibility. She cited the precedent of the *Vattenfall v. Germany* case, which was settled, as evidence that mediation could work.

Ms Polasek also proposed finding a way to address cases currently in a precarious situation due to being executed in non-ICSID Member States. She raised questions about what would happen if states needed to recoup money from investors with assets in the EU and what would occur if such assets were not available. Ms Polasek concluded that this situation requires urgent attention.

One element which has not been touched upon today is the plan for a multilateral investment Court in the context of UNCITRAL. What would be your views on these efforts?

Ms Polasek provided an explanation for those unfamiliar with the current discussions surrounding investor-state dispute settlement reforms. She noted that at the United Nations Commission on International Trade Law (UNCITRAL), a working group is actively examining the modification of ISDS mechanisms. One of the key proposals includes the establishment of a standing body which could operate at either the first or second tier of the dispute resolution process.

She emphasised that the International Center for Settlement of Investment Disputes (ICSID) does not express an opinion on whether such a standing body would be advisable, as long as its Member States desire it and have thoroughly considered all the implications. ICSID is ready to support the creation of such a body and is participating as an observer in the UNCITRAL working group, contributing to the discussion. However, she highlighted that any move to introduce an appeal mechanism would necessitate modifying the ICSID Convention which currently does not allow for appeals, although there are theories suggesting it might be possible under public international law.

Ms Polasek raised the hypothetical scenario of appealing an award that affirmed jurisdiction based on an intra-EU BIT. She speculated that the outcome could significantly hinge on the individuals appointed to the appellate panel, given the variety of opinions among judges in international Courts and tribunals. She mentioned that many of the lawyers involved in these rulings have extensive public international law backgrounds, which is a key qualification criterion for a standing or appellate body. Drawing on the example of the International Court of Justice, she noted the potential for varied judicial opinions on many matters. ■

Closing Remarks

Mr **Clemens Ladenburger**
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MR CLEMENS LADENBURGER

It could be initially thought that these two areas of laws chosen for this conference are like "two ships passing in the night", so different they are in character. Sanctions, restrictive measures, are part of the special administrative law of the EU, even with recent developments that have criminal law ramifications. They are amongst the sharpest swords of EU law and, by definition, they entail severe interferences in private autonomy and in fundamental rights. Arbitration is a classic emanation of private autonomy, it is a field of private law, especially the commercial arbitration.

Then the question arises, what the points of contact are? At a closer look, both areas of law entail big commercial transactions. Sanctions cases are about oil and gas, submarines, helicopter parts and the like. Those are commercial transactions that may be caught by sanctions regimes, and they are typically those types of transactions for which commercial arbitration is being used. On such matters, contracts are made and sanctions come in, then litigation is bound to arise. There is not much need for imagination to anticipate that the EU itself and its Member States may need to defend acts of implementation of EU sanctions law in investor state dispute settlement.

The recent practice shows two recent preliminary reference cases that have come to the Court of Justice, where questions of interpretation of EU sanction law regimes and questions related to arbitration come up at the same time. The first case is Case C-802/24 from the Svea Court of Appeal and it raises a question of interpretation: to what extent a given norm in one of the regulations on restrictive measures of 2014 forms part of public policy or "*ordre public*"? It also entails an equally fascinating question about the interpretation of a typical feature of sanctions regimes, the ominous "no claims clause": how far do the prohibitions in the "no claims clause" really go? It is again linked to at least Swedish arbitration laws, because it seems that, under Swedish civil law, arbitration is excluded where parties could not, as a matter of principle, engage into settlement. So that raises the question whether a "no claims clause" also prohibits any settlement in any voluntary fulfilment of an obligation. The second case is from the French Cour de Cassation, C-842/24, called *DNO Yemen*. This is about the UN and EU sanctions this time and again it raises the question to what extent provisions from that sanctions regime form part of the public policy. These two cases show that both areas of law – sanctions and arbitration - have numerous points of contact.

Beyond that, two common themes are worth mentioning. The first is balancing fundamental rights with essential general interests pursued by the EU or Member States. It is a classic. While the EU wields this very sharp sword and pursues its imperative public policy interests, sanctions still need to respect fundamental rights. There is an impressive list of various fundamental rights that have already been examined by the EU Courts, in relation to the EU sanctions regimes, not least freedom of speech, but also procedural fundamental rights, the right to effective judicial protection. It is the same from a perspective of international human rights law. Before starting to think if there is a need to bring in countermeasures, the question is first to assess whether a sanction measure may intrinsically be legal under international law and that leads to international human rights law.

The right of private persons to engage in commercial or private arbitration has been a core fundamental right at least since the

19th century. It is a fundamental emanation of the freedom to conduct business and of private autonomy. There is a fundamental rights position that protects the possibility for two persons to engage into commercial arbitration and therefore also to rule out by common accord the competence of ordinary Courts. That leads to a type of balancing which is what the interpretation of public policy is all about, namely the balancing between this fundamental right of two contracting parties and the mandatory regulatory interests of a state or a legal system like the EU. The EU legal system wishes also to protect the internal market, thus other fundamental rights of other persons, which may be invoked before the ordinary Courts, as required by the fundamental right of judicial protection.

In sports arbitration, a different balancing may be necessary. In this context, there is a weaker party. There is a mandatory arbitration and the sportswoman or man, or the sports club has no choice but to get into the system of arbitration. The *EcoSwiss* line of cases is in itself an expression of a balancing between the fundamental rights of those who have concluded arbitration and effective judicial protection. And here, there could be a third possible explanation for the *Achmea* case law, beyond those mentioned in the debate, and yet another possibility to explain why arbitral tribunals cannot ask preliminary questions to the Court of Justice. One of the differences is that in the case of commercial arbitration, there are fundamental rights behind, the fundamental rights of the two private parties to agree to resort to arbitration. The EU legal order must respect these rights and has to live with the consequence, namely that the arbitrators cannot ask preliminary questions to the Court of Justice. That leads to the technique of upholding public policy and the fundamental norms of the EU. That is different for investor-state dispute settlement: a Member State does not have any fundamental right to invoke. When the Member State created investor-state dispute arbitration by a treaty with another Member State, then EU law may find that that is a problem for the basic features of autonomy of EU legal order and EU law can forbid that without impinging on fundamental rights. There is a real difference between the two situations.

Coming back to *Achmea*, this decision was delivered one week after the *Juízes Portugueses* case, where the Court of Justice laid down that Member States have to provide effective judicial protection in the field covered by the EU law. It has to be kept in mind that, in *Achmea*, the Court of Justice says that, within the EU, the ordinary Courts of the Member States are mandatorily competent, and Member States are prohibited from excluding by treaty their competence because of the need for mutual trust between Member States and between Courts. However, the trade-off is one week earlier, and it is that EU law, Article 19 TEU, expects these ordinary Courts to be independent and to ensure effective judicial protection. So, it is impossible to have one without the other. The same trade-off also means that the expectation is also for efficient national Courts in the Member States to pass judgment in an acceptable timeframe. That is also the flip side of *Achmea* and that shows again that there are fundamental rights, including the fundamental rights of investors, at stake. And that needs to be balanced here.

The second common thread that can be identified is reconciling openness and autonomy. Our EU legal system is marked by the fundamental principle of its autonomy. Autonomy serves to protect the EU fundamental values. At the same time the EU legal system needs to be an open system, open to the world, to international law, to national laws, to international arbitration. The *Kadi I* judgment of the Court of Justice was nothing else than an exercise of reconciling the autonomy of EU law and a fundamental point, which is effective judicial protection, with the functioning of the UN Security Council sanctions regime. At the time, *Kadi I* was a revolution for the international law community, but it also gave impetus to reform the UN Security Council's own sanction regime. The Venezuela case shows that third countries have legal standing in the EU legal order. EU law is open to litigants who are third states. It is not by resorting to international law arguments that the Court reached that result. It is because of own autonomous notions of what would be judicial protection in the EU legal order that Venezuela was granted standing. In a sense, the Venezuela judgment stands for "openness through autonomy".

The discussion about arbitration is also about reconciling openness and autonomy. Much about the outside perception of our concepts is about that. The EU legal order has to be based on our principle of autonomy, and it has to be open, open to foreign investments, to the international investment arbitration, ISDS being, as explained, open to use by the EU itself. Trade agreements with third countries are stipulating investor-state dispute settlement and EU investors are keen on using it in their relations with the world for extra-EU BITs. This is fine but not for EU internal agreements. Then again, a balancing of openness and autonomy arises. This is also the case in the area of sports arbitration. What is at stake in cases such as the one pending in the Court (*Seraing*) is the openness to an international sports association or a worldwide sports system with a Tribunal Arbitral du Sport in Lausanne. This has to be balanced with the requirements of our EU law autonomy.

As for the "*ordre public*" notion or public policy, it raises questions in particular: is not any concrete assessment of public policy in a case arising out of arbitration, not in itself often an exercise of reconciling openness with autonomy? Arbitrators are open to foreign law. It is openness to foreign law, balanced with important precepts of one's own legal system. There is this balancing element perhaps inherent also in how the notion of public policy in cases arising out of arbitration is applied.

But now it is time to stop the balancing, the reconciling and to close today's conference. ■

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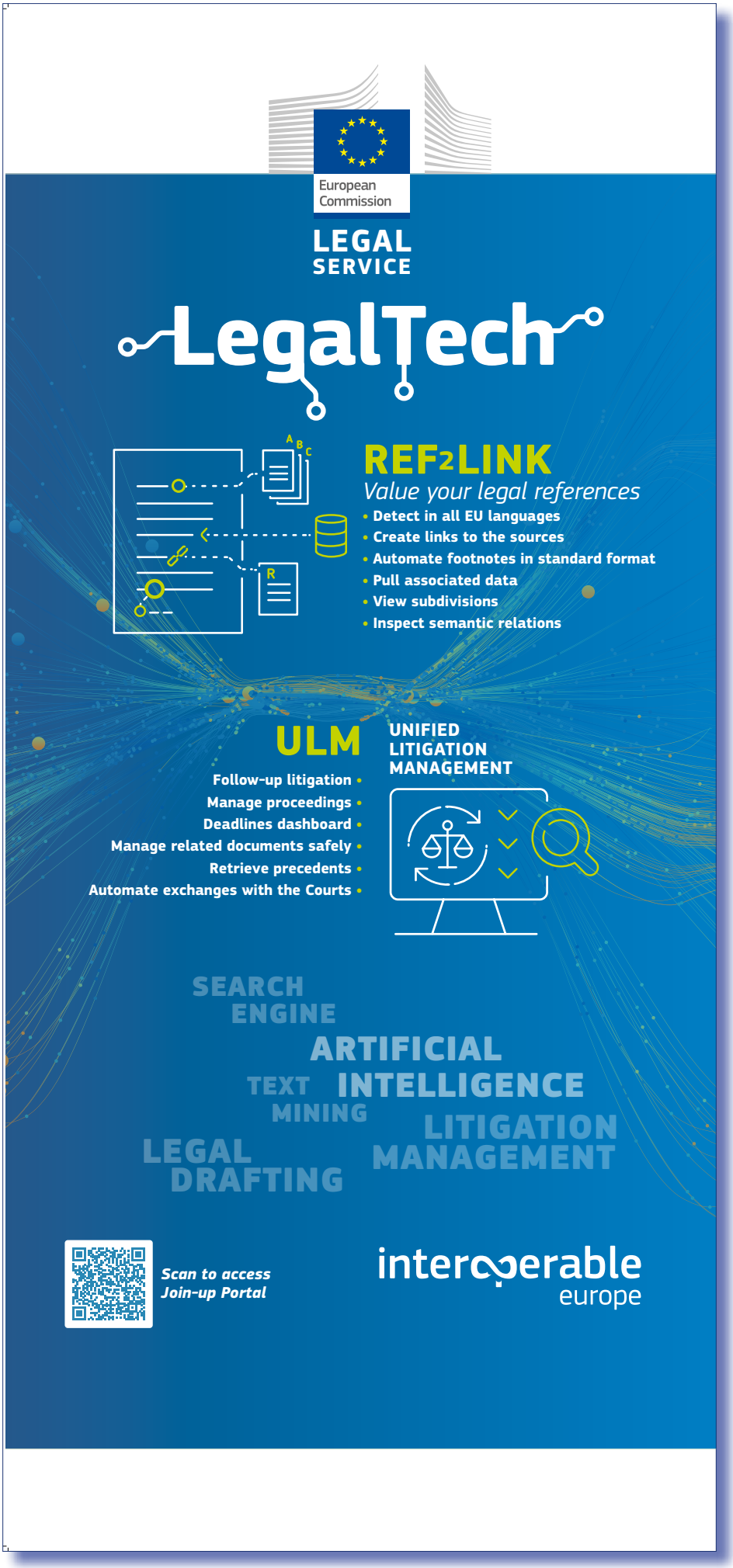
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